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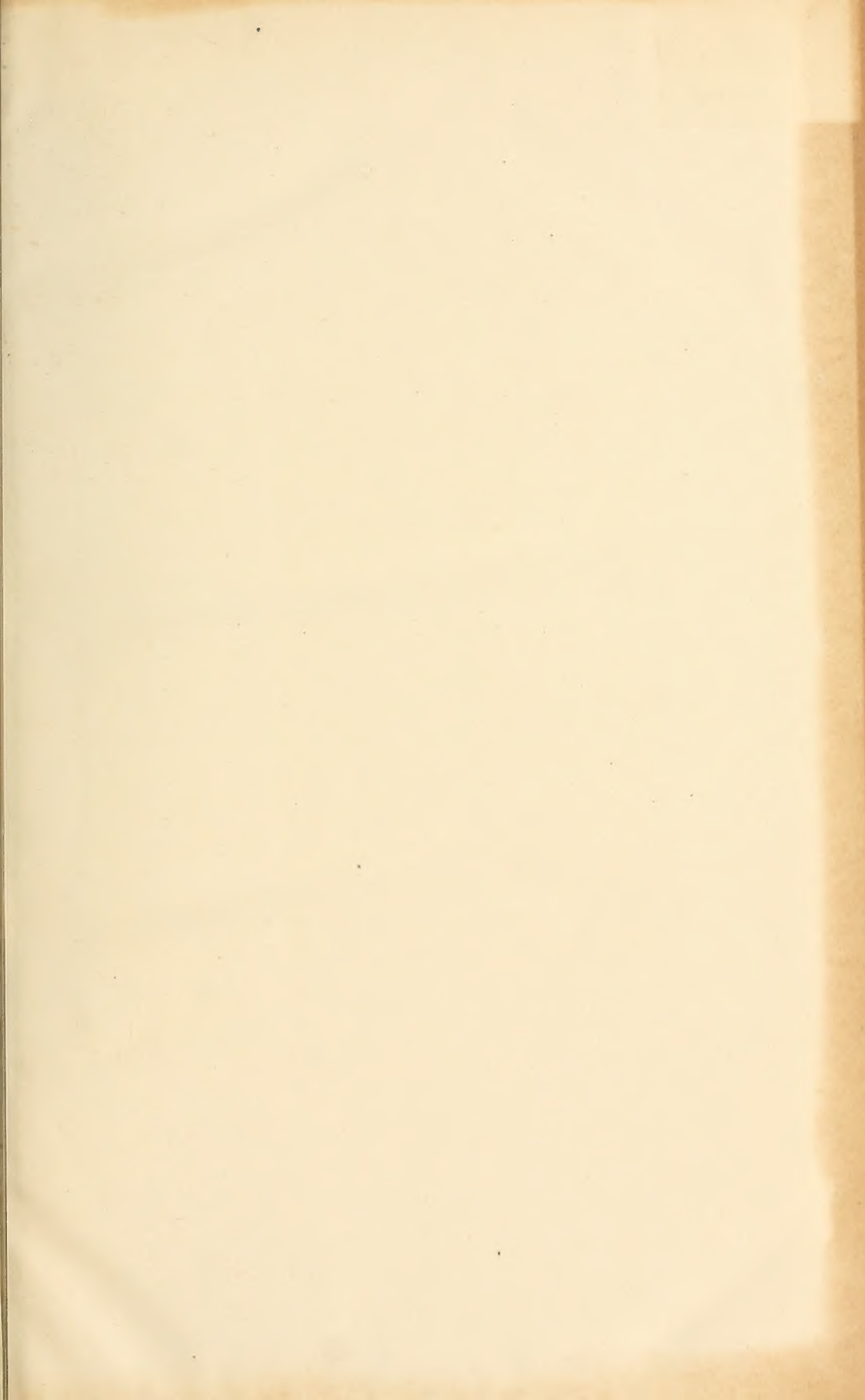


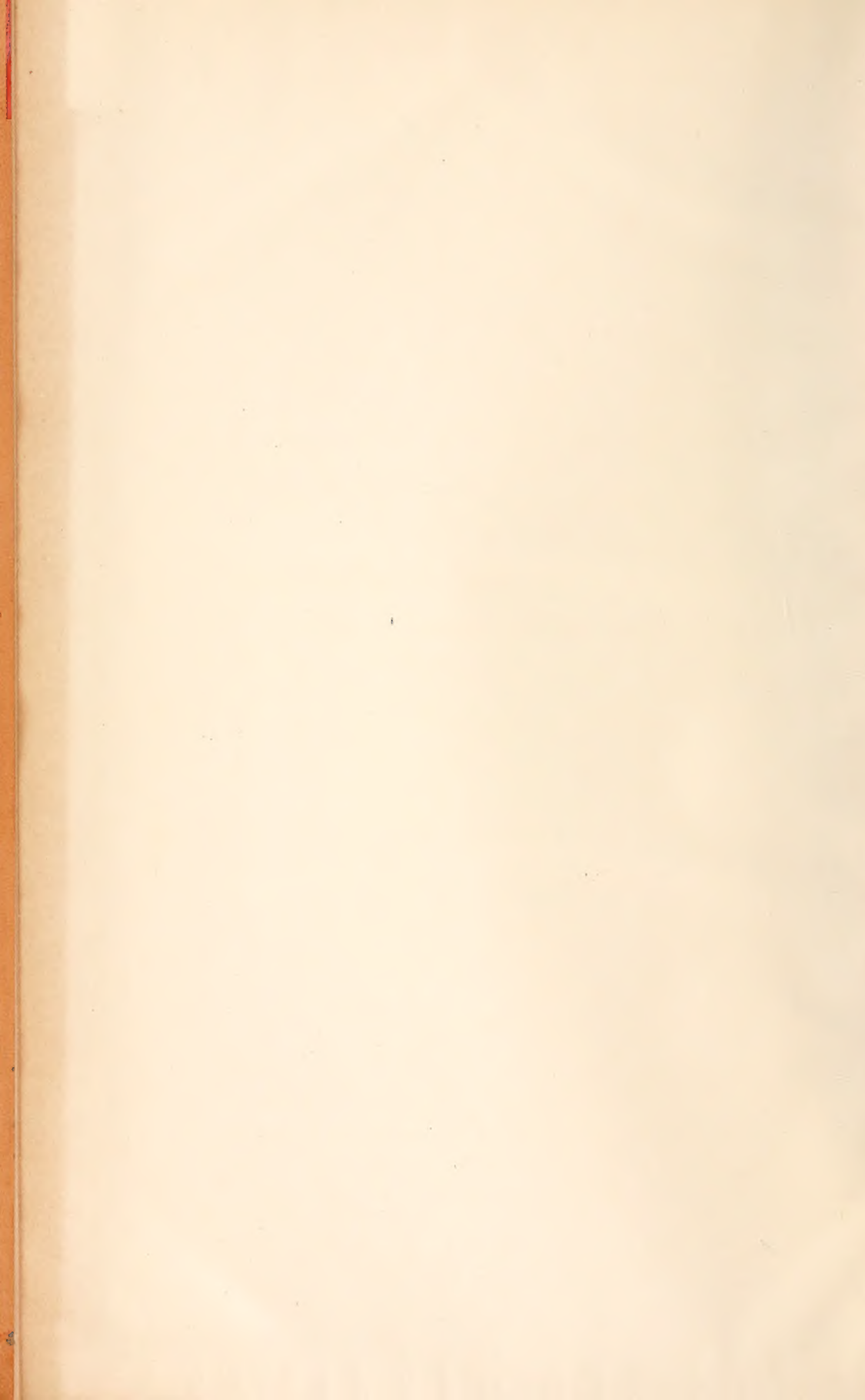
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COMMON PLEAS

The Hon. Lord Chief Justice of the King's Bench
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THE
ENGLISH REPORTS

VOLUME CXLI

COMMON PLEAS

XIX

CONTAINING

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COMMON BENCH REPORTS. New Series. CASES
ARGUED and DETERMINED in the COURT of
COMMON PLEAS, and in the EXCHEQUER
CHAMBER, from Michaelmas Term, 1858, to
Hilary Vacation, 1859. By JOHN SCOTT, Esq.,
of the Inner Temple, Barrister-at-Law. Vol. V.
London, 1859.

[1] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, IN
MICHAELMAS TERM, IN THE TWENTY-SECOND YEAR OF THE REIGN OF
VICTORIA.

The judges who usually sat in banc in this term, were,—Cockburn, C. J.,
Williams, J., Crowder, J., and Byles, J.

MEMORANDA.

In Hilary Vacation, 1858, the Right Hon. Lord Cranworth resigned the Great
Seal, which was afterwards delivered to Sir Frederick Thesiger, Knight, one of Her
Majesty's Counsel learned in the Law, who was thereupon created a peer, by the title
of Baron Chelmsford, of Chelmsford, in the county of Essex.

Sir Richard Bethell, Knight, resigned his office of Her Majesty's Attorney-General,
and was succeeded therein by Sir Fitzroy Kelly, Knight.

[2] Sir Henry Singer Keating, Knight, resigned his office of Her Majesty's Solicitor-
General, and was succeeded therein by Hugh M'Calmont Cairns, Esq., one of Her
Majesty's Counsel learned in the Law, who shortly afterwards received the honor of
knighthood.

In Easter Term, David Power, Esq., of Lincoln's Inn, was appointed one of Her
Majesty's Counsel learned in the Law.

In Trinity Term, the Hon. Sir John Taylor Coleridge, Knight, resigned his office
of a Judge of the Court of Queen's Bench. He was succeeded by Hugh Hill, Esq.,
one of Her Majesty's Counsel learned in the Law, who was first called to the degree
of the coif, upon which occasion he gave rings with the motto "Nil nisi cruce." He
shortly afterwards received the honor of knighthood.

[3] REGISTRATION APPEALS. (Under 6 & 7 Vict. c. 18.)

MICHAELMAS TERM, 1858.

TOWN AND COUNTY OF HAVERFORDWEST.

THOMAS ROGERS, *Appellant*, JOSHUA HARVEY AND OTHERS, *Respondents*.
Nov. 11th, 1858.

[S. C. K. & G. 169 ; 28 L. J. C. P. 17 ; 5 Jur. N. S. 199 ; 7 W. R. 17.]

A., the sole lessee of a mill, took his three sons, B., C., and D., into partnership with
him in the business of paper-makers. The mill was occupied by the four jointly ;

C. P. XIX.—1

and they all resided upon the premises. The rent was charged to the partnership account, in which the four shared equally (the receipts, however, being given in the name of A. alone); and the four were rated, and the rates were paid out of the partnership funds: Held, that B., C., and D. occupied "as tenants," within the 27th section of the 2 W. 4, c. 45.

At a court held for the revision of the lists of voters for the town and county of the town of Haverfordwest, Job Harvey, Jesse Harvey, and Joshua Harvey, duly claimed to be inserted in the list of 10l. occupiers for the parish of St. Martin. In each of their respective claims, the nature of their qualification was described as "one undivided fourth part of house and mills."

The house and mills in respect of which the claims were made consisted of one building jointly occupied for many years by the claimants and their father Benjamin Harvey, under the following circumstances:—

John Evans, the owner in fee of the premises, granted a lease of them to Thomas Lloyd for ninety-nine years, terminable on the dropping of two lives, at a yearly rent of 350l., payable at the usual quarter-days, with a covenant by the lessee against under-letting without the licence in writing of the lessor, and a proviso for re-entry on breach of any of the [4] covenants. After this lease was granted, about the year 1830, Benjamin Harvey came into occupation of the premises by permission of Lloyd, and paid the same rent of 350l. to John Evans; and, on the 23rd of November, 1836, Thomas Lloyd, with the consent in writing of John Evans, leased to Benjamin Harvey for ninety-nine years from the 29th of September then last past, terminable on the dropping of the same two lives, at the rent of 350l. per annum, payable at the four usual quarter-days, with a like covenant against under-letting and proviso for re-entry; and the rent continued to be paid by Benjamin Harvey to Evans, as before.

In 1842, the claimants entered into partnership with their father in the business of paper-makers. There was no deed of partnership, or agreement in writing. They all four built another mill at their joint expense, and carried on business at the two mills. An account was regularly kept of the receipts and expenditure; and once a year,—at first in December, and afterwards in April,—they balanced accounts of receipts and expenditure; and the profits, after deduction of the expenditure, were divided equally between the four. The rent, though payable quarterly, was only paid twice a year,—in the Spring and July, when Mr. Evans was at Haverfordwest on other business. He received the rent due at those times himself at the mill. Entries were made in a page of the partnership book; the page being headed "John Evans, Esq.," and the items entered thus,—Paid rent, so much, with the date; and to each entry Mr. Evans put his signature on the receipt of the amount paid. These payments of rent were carried regularly to the account of expenditure, and were deducted annually from the gross profits, along with the other items of expenditure.

The four partners lived together in the house, and [5] the household expenses were carried to the partnership account.

Up to Midsummer, 1857, the business had been carried on in the name of Benjamin Harvey alone. At that time, the firm appeared publicly as "Harvey & Sons;" and the licence from the Excise was granted to the four. The rent continued to be paid in the same manner as before. Evans became aware of the existence of the partnership some time previous to 1851; and Lloyd was aware of it from the first, in 1842.

From Midsummer, 1857, the four were rated for the premises; and all the necessary rates had been paid.

The premises were of more than the clear yearly value of 40l.

In support of the objection it was urged that the claimants did not occupy as tenants, as required by the 27th section of the 2 W. 4, c. 45.

On the part of the claimants, it was argued that they were either joint-tenants with Benjamin Harvey, or were his under-tenants: and the cases of *Ree v. Duns Tew*, 1 Burr. C. S. 398, *Ree v. Seamer*, 6 T. R. 554, and *Ree v. Tonbridge (Inhabitants)*, 6 B. & C. 88, 9 D. & R. 128, were cited.

The revising-barrister decided in favour of the franchise, that the claimants occupied as tenants, and inserted their names in the list.

The question for the opinion of the court was, whether the relation of landlord and tenant was created between the claimants and any one by the above facts, so as to entitle them to votes under the 2 W. 4, c. 45, s. 27. If the court should be of

opinion in the negative, the register was to be amended, by striking out the names of the three claimants from the above list. The three claims were consolidated.

Welsby, for the appellant. The claimants neither [6] occupied as joint-tenants with their father Benjamin Harvey, nor as tenants under him. It appears from the statement of the case, that Benjamin Harvey, in November, 1836, took an assignment of a lease of the premises in question from Lloyd, the lessee, and paid rent to the owner of the fee, Evans; that he afterwards took his three sons, the respondents, into partnership; and that the four carried on business at and lived upon the premises. It is clear that the respondents never became joint-tenants with their father under Evans: nor is there any statement in the case that Evans was aware that the three sons lived upon the premises, or in any sense occupied them. The mere fact of the claimants being rated in respect of their occupation is not sufficient: to entitle them to be registered, they must be in the occupation of the premises "as owners or tenants" within the 27th section of the 2 W. 4, c. 45: *Heath, App., Haynes, Resp.*, 3 C. B. (N. S.) 389, 1 K. & G. 99. [Williams, J. The claimants clearly did not occupy as tenants of Evans. Power, for the respondents, intimated that he should contend that the claimants were under-tenants to Benjamin Harvey, the father.] There is no express tenancy: nor are there any facts stated from which such tenancy can be implied. On the contrary, the circumstance of their occupying the premises as partners, tends rather to rebut the inference of a tenancy. The court called on—

Power, Q. C., for the respondents. The claimants occupy the premises jointly with their father, as tenants to him: the rent is paid by the four in equal proportions, as well as the rates. Each, in point of fact, is the occupier of an undivided fourth of the premises. [Cockburn, C. J. To whom do the claimants pay rent?] To the father. Each pays a fourth, though the father [7] is responsible to Evans, the landlord, for the whole. [Crowder, J. What remedy would Benjamin Harvey have for the rent?] A remedy by action, probably: but that is immaterial. It is enough under the 2 W. 4, c. 45, s. 27, that there is a tenancy. At all events, the father would have a remedy in equity for the rent. [Cockburn, C. J. Is not the occupation by the sons altogether permissive? Would they have any right to consider themselves tenants, if the business ceased to be carried on upon the premises?] So long as they occupied and paid rent, they would be tenants. That this would be a sufficient tenancy to satisfy the statute 13 & 14 Car. 2, c. 12, is clear from the cases of *Rex v. The Inhabitants of Duns Tew*, Burr. S. C. 398, *The King v. The Inhabitants of Seacroft*, 2 M. & Selw. 472, and *The King v. The Inhabitants of St. John, Glastonbury*, 1 B. & Ald. 481. In the former of these cases, the facts, which it is almost impossible to distinguish from the present case, were these:—Richard Guffkins, the pauper, was born in Sandford; and afterwards, together with John Goodwin, his father-in-law, rented a bargain at Duns Tew, at 81l. a year, as partners, and lived there twelve years. In 1747, they belong about to leave Duns Tew, John Goodwin alone went to Mr. Keek's agent, at Little Tew, and took a farm at 52l. a year, for four years. After such taking, and before the farm was entered upon, Guffkins inquired of Goodwin whether he depended upon his going with him to Little Tew; to which Goodwin replied that he did, for he could not go on without him. Goodwin and Guffkins removed from Duns Tew to Little Tew with their whole joint stock, to the value of more than 100l., and managed the farm together for seven years, both of them residing thereon. Keek gave his receipts for rent to Goodwin only, and once, when Keek was obliged to distrain, the distress was made upon the stock which [8] Keek supposed to be Goodwin's only, and Goodwin alone gave a bill of sale of the stock, and Guffkins then stood by, without interposing. At the expiration of seven years, Guffkins went off from the farm, and Goodwin took the whole stock, allowing Guffkins 62l. for his moiety thereof. Two justices having made an order for the removal of Guffkins and his family from Little Tew to Duns Tew, which was confirmed by the sessions, a special case was stated for the opinion of the court of King's Bench; and, after time taken to consider, Denison, J., in giving the judgment of the court, said: "We are all of us of opinion that Guffkins gained a settlement in Little Tew, upon the state of this case; for, we consider him (being taken in partner by Goodwin) as having an interest in the farm, at least as a tenant at will to Goodwin of the moiety of a farm worth 52l. per annum for the whole of it, and consequently his moiety above 10l. per annum. Therefore, we are of opinion that Guffkins is within 13 & 14 Car. 2, c. 12, and gained a settlement at Little Tew." The case of *The King v. The Inhabitants of Duns Tew*

was acted upon in *The King v. The Inhabitants of Seamer*, 6 T. R. 554, where A. agreed with B., on B.'s taking a farm of C. of the yearly value of 120l., to become joint partner with B. in the stock and farm, but there was no agreement between A. & C.; and it was held that A., who lived with B. on the farm more than forty days, thereby gained a settlement,—Lord Kenyon observing, that, “whether the pauper were considered as a joint-tenant with his brother, or as under-tenant, he equally gained a settlement.” These cases are commented upon in Elliott on Registration, 2nd edit. 209, where it is said: “Where the owner of a house wishes to create a joint-tenancy between himself and partners, the usual form is for him to demise to a trustee, who then demises to the firm, by which means a joint-[9]-tenancy is created between them, and all the partners occupy with equal rights over the whole house. But it would rather appear that without such a form, where the owner or lessee of a house, &c., does any act which in point of law amounts to a demise of an undivided moiety thereof to another person, which gives such other person an equal right with himself over the whole, they become tenants in common of the house, &c.: and, unless the house, &c. be of the value of 20l. neither of them can vote. Where John and Thomas Yates, brothers, agreed to be joint proprietors of a farm and the stock upon it, each contributing his share of the capital, &c.: the farm was taken by Thomas alone, but each was equally liable, as between themselves, to the rent and outgoings, and entitled to a moiety of the profits: the court held that John as well as Thomas thereby gained a settlement: John was either a joint-tenant with him, or under-tenant to him of a moiety, and in either case gained a settlement: *Per v. Seamer*, 6 T. R. 554. So, where a man and his father-in-law jointly rented a farm in Duns Tew: the father then took a farm in his own name in Little Tew, but both removed to it, and stocked and managed it jointly, and resided upon it four years: the court held that the son-in-law as well as the father-in-law thereby gained a settlement in Little Tew; although he did not join with his father-in-law in taking the farm from the landlord, he was partner with him, and must be deemed as tenant at will of a moiety of the farm: *Per v. Duns Tew*, Burr. S. C. 398.” [Cockburn, C. J. The words of the 13 & 14 Car. 2, c. 12, s. 1, are, “coming to settle:” it has been assumed that that means that the party must come and settle as tenant. But here we have an act of parliament introducing the word as a condition,—“shall occupy as owner or tenant.”] In what character do these persons occupy [10] if not as tenants? [Byles, J. *The King v. The Inhabitants of Seacroft*, 2 M. & Selw. 472, does not shew that, to satisfy the 13 & 14 Car. 2, c. 12, the occupation must be as tenant. Welsby. *The King v. The Inhabitants of St. Mary, Newington*, 5 B. & Ad. 540, decides precisely the other way: there, a curate licensed by the bishop at a yearly salary, according to the 57 G. 3, c. 99, resided in the rectory-house, which was assigned to him pursuant to the same statute, and was above the value of 10l. a year, for more than forty days before the passing of the 59 G. 3, c. 50: and it was held, that this was a “coming to settle” within the statute 13 & 14 Car. 2, c. 12, and that a settlement was gained thereby.] In order to bring the case within the 27th section of the Reform Act, it is not necessary to make out the precise nature of the tenancy. Such a tenancy as would suffice to the acquisition of a settlement under the 13 & 14 Car. 2, c. 12, is surely enough to entitle the party to the exercise of the franchise under the Reform Act.

Welsby, in reply. Undoubtedly Mr. Justice Denison, in *The King v. The Inhabitants of Duns Tew*, and Lord Kenyon, in *The King v. The Inhabitants of Seamer*, held, though upon the words of a statute differing from those of the statute now under consideration, that, under circumstances not materially differing from the present, a tenancy was created. But, since the case of *The King v. The Inhabitants of St. Mary, Newington*, 5 B. & Ad. 540, those cases can no longer be considered to be law. The judgment of the court in *The King v. The Inhabitants of Duns Tew* is founded upon a case which did not warrant the decision. Denison, J., says: “A tenancy at will is sufficient to gain a settlement. So it was determined in 1 Sir J. Stra. 502, between the parishes of Cranly and St. Mary, Guildford, on 9 & 10 [11] W. 3, c. 11. The reason of that case will govern this: for, there, a certificate-man agreed with the lessee of a mill, that he should occupy the mill, and pay 12l. per annum: and there was no under-lease or assignment; but, in pursuance of that agreement, the certificate-man occupied the mill two years together, and paid the rent: and it was holden, that if this was not an absolute lease for a year (as Mr. Justice Eyre said it was, the rent being reserved as a rent for a year), yet it was undoubtedly a lease at will, which is sufficient

to gain a settlement." In *Heath, App., Haynes, Resp.*, ante, vol. iii. p. 389, 1 K. & G. 99, it was held, that, to entitle a party to be registered in respect of an occupation as tenant, under the 27th section of the Reform Act, there must be a contract of tenancy. What contract is there here? If the three sons are tenants at will, of what are they tenants? and under whom? and what rent is reserved? It cannot be said that there is a demise to the partnership; for, that includes Benjamin Harvey himself. [Byles, J. Suppose A., seised in fee, demises to himself and B., what is the result?] As to A.'s share, the demise would be inoperative.

COCKBURN, C. J. I am of opinion that the decision of the revising-barrister in this case was right. The cases referred to, of *The King v. The Inhabitants of Duns Tew*, Burr. S. C. 398, and *The King v. The Inhabitants of Seamer*, 6 T. R. 554, seem to me to be authorities in point; because, though the terms of the statute upon which those decisions depended and those of the statute now in question are not identically the same, still it is plain that the court were there considering whether the relation of tenant existed; it being assumed, that, in order to gain a settlement under the 13 & 14 Car. 2, c. 12, the occupation must be as tenant. It is unnecessary for us to consider whether or not the reasoning upon which [12] those cases proceeded was well founded: we must assume the decisions to be correct: and I see no reason why more strictness should be required in defining what constitutes a tenancy for the purpose of the electoral franchise under the Reform Act, than was required for the purpose of establishing a settlement under the 13 & 14 Car. 2, c. 12. I am by no means desirous of being understood as intimating any doubt as to the propriety of those two decisions; the view thrown out by my Brother Byles is perhaps enough to explain them. The facts of the present case are these:—Benjamin Harvey, being assignee of the lease of the premises in question, and entering into partnership with his three sons, demises the premises to the partnership at will in undivided shares: and, though true it is that a man cannot become tenant to himself, so that his share would merge in the rest, I see no reason why the demise should not enure for the benefit of the others; and then the three sons (the claimants) would be tenants in common, and all (the value being sufficient) entitled to be registered as tenants within the 27th section of the Reform Act. Whether, therefore, we deal with this case upon principle or upon authority, it appears to me that the claimants are entitled to be registered in respect of an occupation as tenants within the statute.

WILLIAMS, J. I am of the same opinion. The short facts of the case are these:—Benjamin Harvey, being either under-lessee or assignee of a mill and premises, takes his three sons into partnership. It is a necessary part of their business as partners that they should have the occupation in common of the mill. The question is what is the position of the sons when thus put into possession of the premises as partners. I was at first disposed to think that Benjamin Harvey was alone the [13] tenant, and that his three sons and partners had a sort of permissive occupation under him. If that had been so, it is clear that they would not have acquired the franchise, there being no relation of landlord and tenant, which is requisite for that purpose. But, when I find that the court of King's Bench in two cases the circumstances of which were almost identical entertained a different view, I have no hesitation in abandoning my first impression. In the former of those two cases, —*The King v. The Inhabitants of Duns Tew*, —Goodwin was originally the sole tenant of the farm. One Guffkins was afterwards taken into partnership by Goodwin, and they jointly occupied the farm with their common stock: and the very question arose there which is raised here, viz. whether both could be considered as tenants: and the court of King's Bench, after taking time to consider, held that Guffkins did occupy as tenant, having an interest as such in the farm, at the least as tenant at will to Goodwin of an undivided moiety. Applying the reasoning of that case to the circumstances of the present, I think it is impossible to avoid coming to the conclusion that the three sons of Benjamin Harvey had an interest in the mill and premises in question at the lowest as tenants at will to their father. The case of *The King v. The Inhabitants of Duns Tew* was recognised and acted upon in *The King v. The Inhabitants of Seamer*, 6 T. R. 554; and I think we cannot do wrong in following it. The result is that we hold that the conclusion to which the revising-barrister came was right.

CROWDER, J. I was at first inclined to think that the facts found by the revising-barrister in this case did not shew a tenancy in the claimants; but, upon further consideration, I am unable to avoid arriving at [14] the conclusion at which the rest of

the court have arrived, upon the authority of the two cases of *The King v. The Inhabitants of Duns Tew* and *The King v. The Inhabitants of Seamer*. The first is in its circumstances not to be distinguished from the present. It is true that in both those cases the question arose as to the settlement of a pauper: and the contention here is, that, under the statute 13 & 14 Car. 2, c. 12, it was not necessary to the gaining of a settlement that there should be a tenancy. It is needless to discuss that upon the present occasion, because it is quite clear, that, in the case of *The King v. The Inhabitants of Duns Tew*, both court and counsel assumed it to be necessary to the acquisition of a settlement that a tenancy should exist. There, an individual took a farm, and afterwards associated another with him in the occupation, as a partner; and the question was whether the person thus introduced acquired the character of a tenant. The question here is, whether the introduction by Benjamin Harvey of his three sons into the joint-occupation with him of the mill constituted them tenants. It seems to me to be utterly impossible to hold that it did not, without overruling the two cases I have referred to. It was clearly the intention of the parties that the three sons should be jointly and equally liable to the rent with the father: and it is found as a fact that the rent was regularly paid out of the partnership funds. There was, therefore, a tenancy of some sort; and, the value being sufficient to confer the franchise upon each of the partners under the 27th section of the Reform Act, the claimants were entitled to be registered, and consequently the decision of the revising-barrister was correct, and must be affirmed.

BYLES, J. I also am of opinion that the decision of the revising-barrister was right: and I found my opinion [15] upon the two cases of *The King v. The Inhabitants of Duns Tew* and *The King v. The Inhabitants of Seamer*, and especially the former. It is clear, I think, that it was not necessary for the court there to decide that a tenancy was requisite to the acquisition of a settlement under the statute 13 & 14 Car. 2, c. 12. The court, however, assumed that it was necessary. That was the ratio decidendi. The result of the transaction between Benjamin Harvey and the claimants here is, that there was a sub-demise of the premises to the three sons as partners and tenants in common of undivided shares with their father. The decision of the revising-barrister must be affirmed.

Power, for the respondents, asked for costs.

COCKBURN, C. J. (after conferring with the rest of the court). Where the decision in favour of the respondent supports the franchise, it has been usual to allow him his costs, unless it be a case of reasonable doubt,—*De Boinville, App., Arnold, Resp.*, ante, vol. i. p. 22; *Clark, App., The Overseers of St. Mary, Bury St. Edmunds, Resp.*, ante, vol. i. p. 23. In this case we are all of opinion that the respondents should have their costs.

Appeal dismissed, with costs.

[16] COUNTY OF BUCKINGHAM.

THOMAS HENRY COOPER, *Appellant*, ARTHUR ASHFIELD, *Respondent*.
Nov. 16th, 1858.

[S. C. K. & G. 200; 28 L. J. C. P. 35; 5 Jur. N. S. 293.]

A. and fifty other persons became entitled by purchase from certain land-tax commissioners, under the provisions of the 42 G. 3, c. 116, each to a fifty-first part of 105l. 8s. 11d. of land-tax as a fee-farm rent, 104l. 11s. 4d. of which was charged upon land belonging to one Lee, and the remainder (17s. 7d.) upon land belonging to one Rush. In the fourth column of the list of voters, the name of Lee only was inserted as the owner of the property out of which the fee-farm rent issued, no mention being made therein of that of Rush:—Held, that, the amount of land-tax assessed upon Lee's land being sufficient to confer a right of voting upon each of the claimants, the description of the property out of which it issued was sufficient.—Semble, that the qualification was well described as a "fee-farm rent," without stating the proportion payable to the individual claimant, or alleging it to be an undivided part: but that, at all events, the misdescription, if any, was one which the revising-barrister had power to amend, under the 6 & 7 Vict. c. 18, s. 40.

At the court held before, &c., to revise the lists of voters for the county of

Buckingham, at, &c., Thomas Henry Cooper objected to the name of Arthur Ashfield being retained on the list of voters for the parish of Hartwell, Aylesbury.

The name of Arthur Ashfield was inserted in the list of voters for the parish of Hardwell, in the following form :—

Ashfield, Arthur.	Bath. Freehold fee-farm rent out of houses and lands.	John Lee, Esq., Hartwell.
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The facts of the case were as follows :—On the 26th of October, 1805, Scrope Barnard and William Rickford, two of the commissioners appointed for the purposes of the act intitled “An act for consolidating the provisions of the several acts passed for the redemption and sale of the land-tax into one act, and for making further provision for the redemption and sale thereof, and for removing doubts respecting the right of persons claiming to vote at elections for knights of the shire and other members to serve in parliament in respect of messuages, lands, or tenements, the land-tax upon which shall have been redeemed or purchased” (42 G. 3, c. 116), for the county of Buckingham, contracted and agreed with William Lloyd and fifty other persons therein named, by a certain contract under their hands and seals, duly recorded in the office of the clerk of the [17] peace for the said county (an examined and certified copy of which was annexed to and was to be taken as part of the case), for the sale to them, in equal shares, as tenants in common, of 105l. 8s. 11d. land-tax, as a fee-farm rent, being the land-tax charged upon divers messuages, houses, buildings, lands, tenements, and hereditaments, with their appurtenances, in the said parish of Hartwell, in the said county of Buckingham, belonging to the Rev. Sir G. Lee, Bart., which said several premises were severally assessed in the assessment made for the said parish of Hartwell for the year 1805, at the gross sum of 104l. 11s. 4d., and also upon a certain other messuage, with the appurtenances, situate and being in the said parish of Hartwell, belonging to the Rev. John Rush, clerk, which last-mentioned premises were assessed in the same assessment at the sum of 17s. 7d., making in the whole the amount of the above sum of 105l. 8s. 11d., the consideration for such contract, agreement, and sale being 3866l. 7s., capital stock in the 3l. per cent. Consolidated and Reduced Bank Annuities, or one of them, to be transferred to the commissioners for the reduction of the national debt at the Bank of England, in certain yearly proportions.

By divers mesne assignments, and ultimately by an indenture bearing date the 23rd of July, 1823, Arthur Ashfield became possessed in fee of the share or interest of the said William Lloyd, one of the parties mentioned in the said contract, in the said fee-farm rent created thereby as above stated.

The Rev. John Rush mentioned in the original contract was the rector of the parish of Hartwell; and, on his death, the hereditaments upon which the sum of 17s. 7d., part of the above fee-farm rent was charged, became vested in his successor, the Rev. Charles Lowndes, who is now, as such rector, the owner of the said hereditaments.

[18] It was objected that one fee-farm rent alone was created by the contract above mentioned, under the operation of the statute 42 G. 3, c. 116, equal to the land-tax redeemed; that, as the respective purchasers held as tenants in common, each was only entitled to his undivided share in that one fee-farm rent; and that the nature of the qualification was consequently erroneously entered in the third column. It was also objected that the fourth column ought to have contained the names of both the owners of the properties on which such fee-farm rent was charged; and that the revising-barrister had no power to alter the description of the nature of the qualification in the third column, by prefixing thereto the words “one undivided fifty-oneth* part of and in a,” or to insert the name of the present owner of the property originally belonging to the Rev. John Rush.

The revising-barrister held that the description of the nature of the qualification in the third column was erroneous, and that he had the power to prefix thereto the words “one undivided fifty-oneth part of and in a,” which he accordingly did. He also held, that it was unnecessary to insert the names of both the owners of the pro-

perties upon which the said fee-farm rent was charged, in the fourth column: and that, if necessary, he had no power to do so. He therefore refused to insert the name of the present owner of the property formerly belonging to Mr. Rush, in the fourth column.

The validity of nineteen other votes being involved in the principal decision, they were consolidated with the principal case.

Appended to the case was a certified copy of the contract for the redemption of the land-tax, inrolled with the clerk of the peace for the county of Bucks, which was as follows:—

“Know all men, that we, Scrope Bernard, Esq., and [19] William Rickford, Esq., two of the commissioners appointed for the purposes of an act intituled, &c. (42 G. 3, c. 116), for the county of Buckingham, do hereby certify that we have contracted and agreed with William Lloyd, of Aston, in the county of Salop, Esq. (and fifty other persons), for the sale to them, in equal shares, as tenants in common, of 105l. 8s. 11d. land-tax, as a fee-farm rent, being the land-tax charged upon the capital messuage or mansion-house, offices, stables, and other outbuildings, courts, yards, gardens, orchards, pleasure-grounds, lawns, shrubberies, plantations, nurseries, arable, meadow, pasture, coppice, and wood, grounds, lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell, in the county of Buckingham, belonging to the Rev. Sir George Lee, Bart., now in the occupation of William Blake, Esq., and which premises are assessed in the assessment made for the parish of Hartwell for the year 1805, as follows, viz. Sir G. Lee, Bart., proprietor, W. Blake, Esq., occupier, 14l. 19s. 7d. sum assessed: and upon the messuage, with the outhouses, closes, or grounds, inclosed lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of William Watkins, the elder, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, William Watkins, sen., occupier, 25l. 17s. sum assessed; and upon the messuage, with the outhouses, closes, or grounds, inclosed lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of Joseph Monk, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, Joseph Monk, occupier, 28l. 15s. 9d. sum assessed; and upon the outbuildings, [20] closes, or grounds, inclosed lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of William Hayward, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, William Hayward, occupier, 19l. 16s. 6d. sum assessed; and upon the outbuildings, closes, or grounds, inclosed lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of Benjamin Todd, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, Benjamin Todd, occupier, 15l. 2s. 6d. sum assessed; and also upon the messuage, with the outbuildings, yards, gardens, and other appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the Rev. John Rush, clerk, in the occupation of the said Sir G. Lee, Bart., which last-mentioned premises are assessed in the same assessment as follows, viz. Rev. Mr. Rush, proprietor, Sir G. Lee, Bart., occupier, 17s. 7d. sum assessed,—making in the whole the amount of the above sum of 105l. 8s. 11d.

“The consideration is declared to be 3866l. 7s., capital stock in 3l. per cent. Consolidated and Reduced Bank Annuities, or one of them, to be transferred to the commissioners for the reduction of the national debt at the Bank of England, in the following proportions, and at the following times, viz. 966l. 11s. 9d. stock on or before the 1st of November, 1805, 966l. 11s. 9d. stock on or before the 1st of February, 1806, 966l. 11s. 9d. stock on or before the 1st of May, 1806, and 966l. 11s. 6d. stock on or before the 1st of August, 1806, with interest to be paid at the time of the second and each subsequent instalments to the cashier or cashiers of the governor and company of the Bank of England, equal [21] to the amount of the land-tax purchased, deducting therefrom a sum bearing the same proportion to such land-tax as the amount of stock transferred before the time of each payment bears to the whole amount of stock agreed to be transferred on such contract.”

Joshua Williams, for the appellant. The description of the respondent's qualifica-

tion is incorrect: it should have been "one undivided fifty-first part of and in a freehold fee-farm rent out of houses and lands." In Littleton, § 314, it is laid down, that, "if there be two tenants in common of certain land in fee, and they give this land to a man in tail, or let it to one for term of life, rendering to them yearly a certain rent, and a pound of pepper, and a hawk or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distrain for this, and the tenant maketh rescous,—in this case, as to the rent and pound of pepper, they shall have two assizes, and as to the hawk or horse but one assize. And the reason why they shall have two assizes as to the rent and pound of pepper, is this,—inasmuch as they were tenants in common in several titles, and when they made a gift in tail or lease for life, saving to them the reversion, and rendering to them a certain rent, &c., such reservation is incident to their reversion; and for that their reversion is in common, and by several titles, as their possession was before, the rent and other things, which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And, inasmuch as the reversion is to them in common by several titles, it behoveth that the rent and the pound of pepper, which may be severed, be to them in common and by several titles. And of this they shall have two assizes, [22] and each of them in his assize shall make his plaint of the moitie of the rent, and of the moitie of the pound of pepper. But of the hawk or of the horse, which cannot be severed, they shall have but one assize, for, a man cannot make a plaint in an assize of the moietie of a hawk, nor of the moietie of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in gross by divers titles, &c." The same law is laid down in Viner's Abridgment, Joint-tenants (U. a.), pl. 4, and in Bacon's Abridgment, Joint-tenants (K.). And the same rule equally holds in actions of debt and covenant: per Lord Holt, C. J., in *Mildmay v. Lovelace*, Carth. 289, who says, that, "if tenants in common sever in debt, &c., they must not each of them make his demand of such a certain sum, which amounts to a moiety, but the demand must be de una medietate of the whole rent," &c. In *Iris v. Watson*, 5 M. & W. 255, it was held that a rent-charge may be divided by will, or by deed operating under the statute of uses, so as to make the tenant liable, without attornment, to several distresses, by the devisees or cestuis que use. But it has never yet been decided that tenants in common have a right to distrain for undivided shares of a rent-charge under a common-law grant. The statute 4 Ann. c. 16, s. 27, gives to one joint-tenant or tenant in common, and his personal representatives, an action of account against the other as bailiff for receiving more than his share: but, if all these were separate rent-charges, there would be no such remedy. [Williams, J. Does not the description here, as it originally stood, sufficiently describe the "nature of the qualification?"] The authorities, it is submitted, shew that it does not. In the case of a county vote,—between which and that of a borough vote a distinction is drawn by Cresswell, J., in this respect, in *Daniell, App.*, [23] *Camplin, Resp.*, 7 M. & G. 167, 8 Scott, N. R. 999, 1 Lutw. 264, a correct statement of the nature of the qualification is essential: and the power of amendment reserved to the revising-barrister by the 6 & 7 Vict. c. 18, s. 40, is merely "for the purpose of more clearly and accurately defining" the qualification, not to change the description of it. [Williams, J. Certain persons are entitled to a rent-charge: the respondent claims to be one of them. Can any human being doubt that he means to say that he has a qualification in the nature of a fee-farm rent issuing out of houses and lands?] The next objection clearly is a fatal one. By the contract made with the commissioners under the authority of the statute 42 G. 3, c. 116, a fee-farm rent is created which is charged upon two several properties: and in the fourth column the name of one owner only is inserted. Now, the heading of the fourth column in the form given in the Schedule A. No. 3, directs, that, "if the qualification consist of a rent charge, then the names of the owners of the property out of which such rent is issuing, or some of them," shall be stated. The obvious meaning of that is, that, where the claim is made in respect of a rent charged upon property belonging to several owners, then it shall be sufficient to state the names of some of them; not that, where the rent is issuing out of several properties, it shall be sufficient to name the owner of one of them. That clearly would not give the information which the statute requires shall be given. Some or one of the owners of each of the several properties out of which the rent-charge issues, if it be charged upon several, must be given.

Overend, Q. C., for the respondent. [Williams, J. We are all of opinion that there is nothing in the first point. As to the other point, the difficulty I feel is this, —The [24] act of parliament requires the party claiming the franchise to give such a description of the nature of his qualification as will enable third persons to investigate it. A person wishing to inquire into the sufficiency of the claim here, might go to Mr. Lee, and, finding that so far as concerned his property, the qualification was insufficient, would have a right to conclude that his investigation was at an end, and would make his objection accordingly: and, when he appeared before the revising-barrister to support his objection, he would be met by another rent-charge issuing out of some other property.] All that the statute requires, is, that substantial notice shall be conveyed as to the nature of the qualification upon which the claim to be registered is founded. The inquiry here would be satisfied by an inspection of the contract, to which access may be had at the places where by the 164th section of the 42 G. 3, c. 116, they are required to be registered. [Crowder, J. If your argument be correct, it would seem to be enough to make a reference to the deed.] The contract is entire: it creates one entire rent-charge issuing out of the whole property owned by several persons. It is enough if such information is given by the claimant as will suffice to put an objector in communication with any one of the persons who are interested in the whole property charged. The word "owners" in the schedule means owners in the largest and most liberal sense. The property here the name of the owner of which is omitted, is charged with only 17s. 7d. per annum: and there is more than enough to give each of the claimants 40s. a year out of the land of the person named. [Williams, J. *West, App., Robson, Resp.*, 3 C. B. (N. S.) 422, shews that the charge may be apportioned.]

Joshua Williams, in reply. [Williams, J. The sole question is, whether the claimant has the qualification [25] he has described.] It is submitted that he has not. The rent-charge is issuing out of the whole and every part of the land upon which it is charged. If the court sanction apportionments otherwise than as between lands in different counties, as was done in *West, App., Robson, Resp.*, it will give rise to very inconvenient questions in many cases. In the case referred to, the apportionment was inevitable: but that is totally different from a case where the whole lands charged lie in one county. [Williams, J. Does any part of the rent-charge which constitutes the claimant's qualification issue out of Lowndes's land? Are they not separate assignments of each?] If so, the claim should have been for several rent-charges. [Williams, J. We can only decide the point which is submitted to us.]

WILLIAMS, J. (a). I am of opinion that the decision of the revising barrister was right, and must be affirmed. As to the first objection, viz. the alleged misdescription of the qualification in the third column of the list, the ground of complaint is, that, instead of describing the qualification as "freehold fee-farm rent out of houses and lands," the party should have called it "one undivided fifty-oneth part of and in a freehold fee-farm rent out of houses and lands." I doubt very much whether the description as it stands does not comply with the statute, inasmuch as I conceive that all that is required is, that substantial information shall be given as to the nature of the voter's qualification: and, when it is stated that the vote is claimed in respect of a freehold fee-farm rent issuing out of houses and lands, I think that is enough. But I am clearly of opinion that the revising-barrister had power to amend, if amendment was necessary, and that the amendment which he made disposed of the [26] question. The statute plainly intended, that, where the description in the third column avers a particular qualification, so that there is no doubt as to what is meant, but there is a slight inaccuracy or the absence of some particularity which is not of the substance of the thing, the revising-barrister was to have power to amend it so as to make the description perfect. As to the other objection, it occurred to me at first that it would be difficult to get over it: for, though I agree to a certain extent with the argument which has been urged by the learned counsel, I think, that, when the act of parliament says, that, "if the qualification consists of a rent-charge," it shall be sufficient to state "the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property," it means some of the owners of the whole property out of which the rent is issuing: and not that, where the claim is in respect of a rent-charge issuing out of several properties, it shall be enough to name

(a) Cockburn, C. J., was absent on account of indisposition.

the owner of one of the several properties. But, passing that by, another question is raised. It is said that the public have a right to demand that the qualification of the claimant shall specify the property in respect of which he claims the franchise, so that a person may ascertain by means of the description what the property is in respect of which the franchise is claimed, and see whether or not it is a proper case for an objection; whereas, if it be sufficient to name only one portion of the property in respect of which the franchise is claimed, a party relying on the insufficiency of the part named to found a claim to the franchise, may be induced to object, and, when he comes before the revising-barrister, he may be met by an additional qualification which he could not have anticipated, and therefore could not have inquired about. I do not think that this is answered by the suggestion of Mr. [27] Overend that an inquiry would lead to an inspection of the deed by which the rent-charge is created. I think the party ought to be able to ascertain without referring to the deed whether the property is or is not sufficient to confer the franchise. But the short answer to the objection is this:—You may, and I think ought to, assume that the claimant has no right to go out of the description which he has given in the fourth column. Taking that to be so, it appears that Mr. Lee, of Hartwell, whose name appears in the fourth column, has property which is subject to a rent-charge to the amount of 104l. 11s. 4d. per annum, of which the claimant is entitled to one undivided fifty-first part. Therefore it seems to me that the claimant is entitled to say before the revising-barrister, “I claim to be inserted in the list of voters in respect of a rent-charge of the required amount issuing out of the lands which I have described.” He has named the property out of which issues a rent-charge of sufficient amount to confer upon him the franchise. If it had been necessary, in order to make up a sufficient amount, to have recourse to the rent-charge issuing out of the lands of Mr. Lowndes, I think the objection would have been fatal. It seems to me that it is a fallacy to treat this as if it were the case of an entire rent-charge issuing out of the whole and every portion of the lands in question. Here is a public act of parliament enabling the commissioners of the land-tax to sell the burthen which is imposed upon the land. There are two modes by which this may be effected, the owner may redeem the tax assessed upon his land, or the commissioners may, as was done here, sell and assign it to a stranger. The commissioners here have assigned to the claimant and his associates the two burthens imposed upon two separate properties. That on the lands of Mr. Lee amounts to 104l. 11s. 4d., of which the claimant is [28] entitled to one fifty-first part, and that is enough to confer on him a vote. I therefore think the revising-barrister was right in holding that it was not necessary to insert the name of Mr. Lowndes in the fourth column.

CROWDER, J. I am of opinion that the decision of the revising-barrister upon both the points which were before him was correct. As to the first, it was objected that the nature of the qualification was improperly described in the third column of the list as “freehold fee-farm rent, issuing out of houses and lands.” Looking to the statement of facts, it appears that the claimant has a fee-farm rent exceeding the value of 40s. per annum issuing out of freehold houses and lands. I think the description is sufficient without any amendment. But, if an amendment was necessary, I think the revising-barrister had a right to amend the description. By the proposed amendment, he would not be altering the nature of the qualification, because the claimant equally claims and has a fee-farm rent issuing out of the lands, whether it be an entire rent payable to himself, or a rent payable to him as one of fifty one claimants. The other objection related to the fourth column. It is alleged, that, as there are two owners of the property out of which the rent charges issue, the names of both should have been mentioned. I do not think it necessary to give any opinion as to how that would have stood if the rent charge issuing out of the land of Mr. Lee did not give a sufficient amount to entitle each of the fifty one purchasers to 40s. a year. If it had been necessary to determine that, I should have desired time for deliberation. But I agree with my Brother Williams that it sufficiently appears that there is a statutory rent-charge to the amount of 104l. 11s. 4d. issuing out of Mr. Lee’s land: and, as the claimant, as one of the fifty-one purchasers under the statute, is en [29] titled to 40s. a year thereout, he is clearly entitled to be registered in respect of it, and that there was no necessity for the insertion of the name of Mr. Lowndes. I therefore think the decision of the revising barrister was right, and must be affirmed.

BYLES, J. With regard to the first objection, I should have thought the description good enough as it stood; but, at all events, it amounts only to an inaccuracy of description, which was amendable by the barrister under either the 42nd or the 101st section of the 6 & 7 Vict. c. 18. As to the second objection, viz. that the land out of which the rent-charge is issuing, is not properly described, —I cannot help thinking that what my Brother Williams has pointed out is the true effect of the transaction as set forth in the case, viz. that there are two rent-charges, —one for 104l. 11s. 4d. issuing out of lands of Mr. Lee,—and another for 17s. 7d. charged upon the land of Mr. Lowndes; and, if that be so, the description here is the only one that would be accurate. But, if that be not so, then arises the question what is the meaning of “owners” in the schedule to the act. It is not necessary to pronounce any opinion upon that: but I must confess I should require time for consideration before I should be disposed to cut down the meaning of “owners” to “owners of undivided property.” It would be a highly inconvenient construction: for, it might be impossible to obtain the names of the owners of every property included in the charge. Upon the whole, I think the description of the rent-charge in the third column was correct; and, for the reasons pointed out by my Brother Williams, that the description in the fourth column was also correct.

Decision affirmed, with costs.

[30] COUNTY OF HUNTINGDON.

HENRY HOWITT, *Appellant*, EDWARD STEPHENS, *Respondent*. DAVID BRITTAIN, *Appellant*, JOSEPH WILCOCKS, *Respondent*. Nov. 16th, 1858.

[S. C. K. & G. 183; 28 L. J. C. P. 105; 5 Jur. N. S. 123; 7 W. R. 55. See *Ford v. Boon*, 1871, L. R. 7 C. P. 157; *Sherwin v. Whyman*, 1873, L. R. 9 C. P. 249.]

In a list of claimants for a county, A.'s qualification was described in the third column as “50l. occupier,” and in the fourth column the property was described as being situate in “Cambridge Road.”—Held, a sufficient description: but that, at all events, if insufficient, it was amendable under the 40th section of the 6 & 7 Vict. c. 18.

At a court held on the 6th of October, 1858, for the revision of the lists of voters in the election of knights of the shire for the county of Huntingdon, the name of Henry Howitt was duly objected to. His name appeared on the list of claimants for the parish of St. Neots, as follows:—

No.	Christian name and surname of each voter at full length.	Place of abode.	Nature of Qualification.	Street, lane, or other like place in this parish (or township) and number of house (if any) where the property is situate, or name of the property, if known by any, or name of the occupying tenant, or if the qualification consists of a rent-charge, then the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property.
1957	Howitt, Henry.	St. Neots.	50l. Occupier.	Cambridge Road.

It appeared that Henry Howitt had occupied for a sufficient time prior to the 31st of July last a farm on the Cambridge Road, in the parish of St. Neots, for which he was *bonâ fide* liable to a yearly rent of not less than 50l.

It was objected that the qualification as stated in the third column was insufficient in law to entitle Henry Howitt to vote: and the revising-barrister held that the objection was valid.

[31] The revising-barrister was then applied to on the part of the voter to amend the qualification, by striking out “50l.,” and inserting in lieu thereof “farm, as,” so

that the qualification, as amended, would stand thus, "Farm, as occupier." The revising-barrister held, that, under the 40th section of the 6 & 7 Vict. c. 18, to which he was referred, he had no power to do so; and he expunged the name from the list.

If the court should be of opinion that the qualification as stated in the list was sufficient, the name was to be re-inserted in the list: or, if the court should be of opinion that the revising-barrister had power to amend the qualification, then the third column was to be amended as above stated.

At the same court the name of David Brittain was also duly objected to; and his name appeared on the list of claimants for the parish of Eynesbury, as follows:—

No.	Christian name, &c.	Place of abode.	Nature of Qualification.	Street, &c., where property situate, &c.
537	Brittain, David.	Eynesbury.	50l. Occupier.	Eynesbury Field.

Edward Stephens was the objector to Henry Howitt's name, and Joseph Wilcox was the objector to the name of David Brittain: and, the cases being the same in all respects, they were consolidated.

Stephenson (with whom was Kinglake, Serjt.), for the appellant. The description in the list "50l. occupier" was sufficient; or, if not, the revising-barrister ought to have amended it, under the power conferred upon him by the 40th section of the 6 & 7 Vict. c. 18. The 20th section of the Reform Act, 2 W. 4, c. 45, enacts "that every male person of full age, and not subject to any legal incapacity, who shall be entitled, either as [32] lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 10l. over and above all rents and charges payable out of or in respect of the same, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 50l. over and above all rents and charges payable out of or in respect of the same, or who shall occupy as tenant any lands or tenements for which he shall be bonâ fide liable to a yearly rent or not less than 50l., shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for the county, or for the riding, parts, or division of the county, in which such lands or tenements shall be respectively situate: Provided always that no person, being only a sub-lessee, or the assignee of any under-lessee, shall have a right to vote in such election, in respect of any such term of sixty years or twenty years as aforesaid, unless he shall be in the actual occupation of the premises" [Byles, J. What is the objection to the description of the qualification?] The objection is that the claim is not stated to be in respect of the occupation of lands or tenements. The description, however, as it stands, could only refer to an occupation of lands or tenements: it could not mean an occupation of a rent-charge. In *Judson, App.*, *Lockett, Resp.*, 2 C. B. 197, 1 Lutw. Reg. Cas. 490, this court held that the description of the qualification need not adhere rigidly to the words of the 27th section of the Reform Act. Besides, the description is aided by that of the local situation of the [33] property given in the fourth column. At all events, this was a mere inaccuracy of description, which was amendable under the 40th section of the 6 & 7 Vict. c. 18.

Grant, for the respondent. The objection resolves itself into a question of fact, upon which the revising-barrister's exercise of discretion is final (*Wood, App.*, *The Overseers of Willesden, Resp.*, 2 C. B. 15, 1 Lutw. Reg. Cas. 314), or it is a matter of law upon which he has ruled correctly. The qualification as stated is clearly insufficient. The legislature did not by the Registration Act, 6 & 7 Vict. c. 18, intend to require a less strict description of the qualification in respect of a party claims to be registered, than was before required under Sched. (H.), No. 3, of the Reform Act. The 38th section of that act requires a list of claimants to vote for the county, to be

made out according to the form numbered 3 in Sched. (H.): and there in the third column, under the heading "Nature of qualification," we find "50 acres of land, as occupier," and in the fourth column, under the heading "street, &c., where the property is situate," we find "Highfield farm:" so that, upon the whole, there is a complete description of the property and of its local situation: giving the means of inquiry where necessary. That is wanting in the present case. The description here would be equally applicable if the claimant had been an occupier to the value of 50l. a year under several landlords: and that clearly would be an insufficiency of description which the revising-barrister would have no power to amend: *Barlett, App., Gibbs, Resp.*, 7 Scott, N. R. 609, 5 Man. & G. 81, 1 Lutw. Reg. Cas. 73; *Daniel, App., Camplin, Resp.*, 8 Scott, N. R. 999, 7 M. & G. 167, 1 Lutw. Reg. Cas. 264. The different uses of the third and fourth columns in the schedules are [34] pointed out by the court in *Hitchins, App., Brown, Resp.*, 2 C. B. 25, 1 Lutw. Reg. Cas. 328, -the fourth being an exposition or more particular description of the qualification the nature of which is stated generally in the third column. Here, the fourth column does not rectify the vagueness of the third. [Williams, J. The decision in *Barlett, App., Gibbs, Resp.*, proceeded upon the ground that there was a total omission of part of the qualification.] There is the like omission here. [Williams, J. The question is, whether it is a misdescription or a partial omission. If the revising-barrister sees that the party meant truly to describe the nature of his qualification, and has by mistake or inadvertence failed to do so, he may amend the description.] There is no mistake here. The real question is, has the claimant given such a description of the nature of his qualification as to enable parties interested in the inquiry to ascertain its sufficiency? In *Onions, App., Bowdler, Resp.* 5 C. B. 65, 2 Lutw. Reg. Cas. 59, it was held that the 6 & 7 Vict. c. 18, s. 40, impowers the revising-barrister to insert the qualification of a voter in the list, where it has been wholly omitted, or to amend the description where it is insufficiently stated: but it does not authorize him to amend a qualification imperfectly stated, by adding a new qualification. There, in a list of borough voters, the qualification of the appellant was described in the third column as "house in succession," and, in the fourth, to be situate in "Butcher Row." It appeared that the qualification in truth consisted of the successive occupation b. the party of two houses, one in Butcher Row, the other in Coleham, in the same borough: and the revising-barrister was called upon to amend the description by adding an s to the word "house" in the third column, and inserting "Coleham," in the fourth: which he declined to do: and it [35] was held that the proposed amendment was not one which it was competent to the revising-barrister to make. [Williams, J. The decision there was in accordance with that of *Barlett, App., Gibbs, Resp.* The court say that it was not a case of omission, but a false description of the qualification. Can there be a doubt as to what the party meant here?] That may be so: but the statute requires that the description shall be sufficient to give the means of inquiry. Wilde, C. J., in *Onions, App., Bowdler, Resp.*, says, "The Reform Act having conferred the right of voting in respect of the occupation of premises of a certain value, and occupied in a certain character, it was reasonable that those who are interested in preserving the purity of the register, should have the means of ascertaining, by inquiry, whether the premises are of sufficient value, and the nature of the occupation such, as to entitle the party to exercise the franchise." [Crowder, J. In no case where an amendment is necessary can it be said that the means of inquiry are given. This is a mere mistake: there is nothing to induce the court to believe otherwise. Byles, J. The revising-barrister finds as a fact that the appellant "had occupied for a sufficient time prior to the 31st of July last a farm on the Cambridge Road, in the parish of St. Neots, for which he was bona fide liable to a yearly rent of not less than 50l."]

Stephenson, in reply. All the cases cited have reference to borough votes. The case of *Daniel, App., Camplin, Resp.*, 8 Scott, N. R. 999, 7 M. & G. 167, 1 Lutw. Reg. Cas. 264, points out the distinction between county and borough qualifications. The question reserved here is a question of law, whether "50l. occupier" is a sufficient description of a qualification under the 20th section of the Reform Act. [Byles, J. The [36] objection seems to have been, not that there was nothing to identify the property, but that it was an illegal and insufficient statement of a qualification.] The revising-barrister has followed the words of the 40th section of the 6 & 7 Vict. c. 18.

WILLIAMS, J. I am of opinion that the revising-barrister was wrong in the view which he took in this case, and that the claim of the appellant ought to have been

allowed. Looking at the terms in which he has stated the case, he appears to have proceeded upon the earlier part of the 40th section of the 6 & 7 Vict. c. 18, by which he is directed to expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote. He appears to have considered that the qualification as stated was insufficient to entitle the claimant to vote. I am of opinion that he was mistaken in the conclusion to which he came. It seems to me to be impossible to doubt that the claimant meant to point to a qualification under what is commonly called Lord Chandos's clause, the 20th section of the Reform Act. I feel bound to say that I think it would be very mischievous if the revising-barrister were permitted to hold that the claimant is bound to describe the qualification in respect of which he claims to be registered in the terms which a lawyer would use; and that, in my opinion, it is sufficient if he describes it so that a man of ordinary sense could not mistake his meaning. Here it is, I think, impossible to doubt that the claimant means to say that he is entitled to be registered in respect of that sort of qualification which a man has who occupies lands or tenements as tenant at a rent of 50l. per annum. The language of the 20th section of the 2 W. 4, c. 45, is, I think, strong to shew that the legislature did not intend that the description of the quali-[37]-fication should go further than was necessary to convey to the mind of any person of good sense what was the nature of the qualification in respect of which the claimant claimed to be entitled to a vote. The example given in the schedule is, "50 acres of land as occupier," not saying that the occupation is in the character of tenant, or that the amount of the rent is 50l. per annum; but it is such a description as points to that clause. But, assuming that there is in the present case sufficient to point to what is a legal qualification, and therefore that the case does not fall within the first part of the 40th section, there is an insufficiency in the description of the qualification of by no means a trifling character. The appellant claims, with reference to the 20th section of the Reform Act, in respect of a qualification as a 50l. occupier in Cambridge Road; he does not say whether he is an occupier of lands or tenements. I take it to be the same thing as if he had said that he claimed as "occupier of a tenement," without saying what tenement. But it appears to me, that, when such point arose, the duty of the revising-barrister also arose with reference to another part of the 40th section. He then had to consider whether the nature or description of the qualification was insufficiently described for the purpose of being identified. Upon this he has not exercised any discretion. If he thought the description sufficient for the purpose of identification, there was an end of the objection: but, if he thought it insufficient for the purpose of identification, he ought upon the materials before him to have amended by inserting the proper description of the qualification. Several cases have been cited on behalf of the respondent; but I do not think that any of them apply here. The distinction which they establish is this, that the 40th section of the 6 & 7 Vict. c. 18, applies only to cases where there has been an inaccura-[38]-rate or insufficient description of the claim relied on, and not to cases where there is a total omission to state some part of the description of the qualification which is an essential foundation of the claim. It is impossible, I think, in the present case, to doubt that the claimant meant to describe the whole of the property in respect of which he claimed to be registered. He did not, by asking the revising-barrister to amend, seek to add a qualification, but he sought to give a more complete and accurate description of the qualification which was before insufficiently stated. I think the case was a proper one for amendment under the 40th section, and that the decision of the revising-barrister was wrong, and must be reversed.

CROWDER, J. I am entirely of the same opinion. The description of the qualification in the third column, "50l. occupier," could not reasonably give rise to a doubt as to the nature of the qualification intended to be relied on: it clearly indicated a claim to be registered under the 20th section of the Reform Act. The revising-barrister seems to have thought the description insufficient in law, and therefore that he was bound to expunge the name from the list. I agree with my Brother Williams, in thinking that he was wrong. The propriety of the description seems to have been made a matter of inquiry before the revising-barrister, and he appears to have come to the conclusion that the party claimed in respect of the occupation as tenant at 50l. a year of a farm in the Cambridge Road. He was called upon to amend by inserting the true description of the qualification in respect of which the claim evidently was

made. I think he was clearly wrong in refusing to make the amendment asked : and consequently his decision must be reversed.

BYLES, J. I also think that the decision of the re-[39]-vising-barrister in this case was wrong. I must confess I was unable from the first to entertain much doubt upon the matter. I read the third and fourth columns together ; and, so read, the claim stands thus,—“My qualification is as an occupier” (which, *ex vi termini*, means an occupier of real property), “and I claim in respect of an occupation at the yearly rent of 50l. ; and the property in respect of the occupation of which I claim, is situate in the Cambridge Road.” That clearly points to a claim under the 2 W. 4, c. 45, s. 20. And I must own I think it states all that the statute requires. It is not necessary to state whether the qualification consists of an occupation of a house or of land. The value of the property and its situation are given. I must confess I think the description well enough as it stood. “50l. occupier” has been frequent in claims, and for years has been kept also in the lists. At all events, if the description was insufficient, it was aidable by amendment.

Appeal allowed, without costs.

[40] BOROUGH OF NEW WINDSOR.

ANDREW HEARTLEY AND OTHERS, *Appellants*, WILLIAM HENRY BANKS, *Respondent*.
Nov. 11th, 1858.

[S. C. K. & G. 219 ; 28 L. J. C. P. 144 ; 5 Jur. N. S. 492 ; 7 W. R. 342. Distinguished, *Fryer v. Bodenham*, 1869, L. R. 4 C. P. 533, 535, 537. Referred to, *Durant v. Kennett*, 1869, L. R. 5 C. P. 277. See *Hadfield's case*, 1873, L. R. 8 C. P. 311.]

The military or poor knights of Windsor have not such an “office,” or such an interest in the houses occupied by them, as to entitle them to be registered for the borough, under the 2 W. 4, c. 45, s. 27.

At a court held for the revision of the lists of voters for the borough of New Windsor, William Henry Banks objected to the name of Andrew Heartley being retained on the list of voters.

The facts of the case were as follows :—The name on the register stood thus,—

Heartley, Andrew.	Lower Ward,	House.	Lower Ward.
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Andrew Heartley, occupied a house as one of the Military Knights of Windsor. He claimed under an appointment which is hereunto annexed, as follows :—

“Victoria Regina.

“Victoria by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the Faith, and sovereign of the most noble order of the Garter, To our right trusty and well-beloved, the Honorable and Very Reverend Lewis Hobart, clerk, doctor of divinity, dean, and to our right trusty and well-beloved the canons of our free collegiate chapel of St. George, within our Castle of Windsor, greeting : Whereas it hath been made to appear to us that Captain Andrew Heartley is a fit object of our Royal charity : In consideration thereof, We do by these presents give and bestow upon you the said Captain Andrew Heartley the place of one of our Military Knights of Windsor, now vacant by the death of Captain Charles Langford, lately one of our Military Knights there, with the same rooms, foundation, and [41] house that the said Captain Charles Langford enjoyed, Together with all rights, privileges, profits, and emoluments unto the said place of Military Knights any ways appertaining and belonging, in as full and ample mode as the said Captain Charles Langford held and enjoyed the same : And, although he is a married man, yet, We, being duly informed of the rules of our said most noble order, do hereby dispense with them in this case : And accordingly we will and require you the said dean and canons the said Captain Andrew Heartley to swear and install into the place of Military Knight aforesaid within our said Castle of Windsor, To possess and hold the same during the

term of his good and statutable deportment therein. (Given at our court at Windsor Castle under sign-manual and the seal of our most noble order of the Garter, this 14th day of November, in the year of our Lord 1840, and in the fourth year of our reign.

“By the Sovereign’s command,

“R. OXFORD, C. G.”

The governor produced a book which contains the governing regulations of the charity. These were as follows:—

“The statutes of the Military Knights of Windsor.

“30th August, anno primo Elizabeth. The Queen, minding the continuance of the foundation erected by King Edward the Third, and as near as might be the performance of the intent of Her progenitors, and advancement of the most noble order of the Garter, and especially of the knowledge given Her of the last mind and will of Her father, King Henry the Eighth to make a special foundation and continuance of thirteen poor men decayed in wars and such like service of the realm, to be called Thirteen Knights of Windsor, and kept there in succession, and having also set forth and expressed therein certain orders and rules for their [42] better government, and declared how and in what manner the profits of certain lands, of the yearly value of 600l., given and assigned by Her father to the dean and canons and their successors, should be employed for the maintenance of these poor knights and otherwise according to his mind and will, She lastly declared Her pleasure that the dean and canons and their successors should for ever cause the said orders and rules to be observed and kept, which are these that follow,—

“1. First. We do establish thirteen poor knights, whereof one to be governor of all the residue, by such order as followeth. The same thirteen to be taken of gentlemen brought to necessity, such as have spent their times in the service of the wars, garrisons, or other service of the Prince, having but little or nothing whereon to live; to be continually chosen by Us and Our heirs and successors.

“2. Item. We ordain that the governor and knights shall be chosen of men unmarried, and shall continue, except in special case where it shall please Us, the Sovereign, and the heirs and successors of Us, the Sovereign Kings of this realm, to dispense with any person to the contrary: Provided, nevertheless, if any of them will marry, he may do so, losing his place at the day of his marriage.

“3. Item. We ordain that no man defamed and convicted of heresy, treason, felony, or any notable crime, shall be admitted to any room of the said thirteen knights; and, if any so admitted be afterwards convicted of any such crime, he shall be expelled out of that company, and lose his room.

“4. Item. The same thirteen knights to have yearly for their liveries each of them one gown of four yards of the colour of red, and a mantle of blue or purple cloth of five yards at 6s. 8d. the yard.

[43] “5. Item. The cross of St. George in a scutcheon embroidered without the garter, to be set upon the left shoulder of their mantles.

“6. Item. The charges of the cloth, and of the lining, making, and embroidering, to be paid by the dean and chapter out of the revenue of that foundation and endowment given for that and other causes.

“7. Item. The said thirteen knights to come together before noon and after noon daily at all the divine service said within the college, in their ordinary apparel, and to continue to the end of the same service, without a reasonable let, to be allowed by the governor.

“8. Item. The said thirteen knights shall keep their lodgings appointed unto them, and their table together in their common hall appointed, and to have their provisions made by their common purse, except for any reasonable cause any of them be licensed to the contrary by the dean or his deputy, and that license to endure not above twenty days in no year, except it be for sickness only.

“9. Item. The said thirteen knights shall not haunt the town, the alehouses, the taverns, nor call any woman into their lodgings, without it be upon a reasonable cause, and that with the license of the dean or his deputy.

“10. And, further, We will that twelve of the said knights shall be obedient to the thirteenth appointed for the governor; and all thirteen shall be obedient to the dean and chapter in the observation of these statutes for the good order of themselves.

“11. Item. The said thirteen knights shall be placed within the church where

the dean and canons shall think best, to hear the Divine service together, where they shall least trouble the ministers of the church.

[44] "12. Item. They shall be present at the service to be done quarterly for the memory of the patrons and founders of the said college, and specially of Our said dear father and Us, and have for every of them at each time 20d., and the governor 2s. The said service shall be used at the four quarters of the year, every Sunday next before the quarter-day, that is to say, the Sunday next before the feast of the Annunciation of our Blessed Lady, the Sunday before the Nativity of St. John the Baptist, the Sunday before the feast of St. Michael the Archangel, and the Sunday before the Nativity of our Lord God.

"13. Item. If any of the twelve knights do not obey the governor in the observation of these statutes, he shall sustain for every time of such disobedience such forfeiture as the dean and chapter shall put on him. The governor shall make report of all such disobedience and other offences committed by any of the said knights, to the dean and chapter; and, if the offence be such as shall seem to them to require such punishment, they shall, besides a pain arbitrary, give a warning to the offender, causing the same to be registered; and he that shall so twice be warned by them shall immediately upon the third offence be expelled for ever out of that company. And, if the governor disobey the dean and chapter in the observation of the said statutes, upon such warning by them, he shall receive like punishment as the other twelve.

"14. Item. The penalties of such as are punished by the dean and chapter for not observing of these statutes shall be employed, by the discretion of the dean and chapter, upon any of the ministers or choristers of the church where they think best.

"15. When it shall please God that We or Our successors, Kings of this realm, shall repair to the Castle of Windsor, the said thirteen knights shall stand before [45] their doors in their apparel, to do their obedience unto Us there at the coming and going away.

"16. Item. Yearly, at the keeping of the feast of St. George, they shall stand likewise in their apparel before their doors at the coming and going out of the Lieutenant and of the other knights of the order chosen for the keeping of that feast.

"17. Item. When any feast of St. George is kept within the Castle of Windsor, the governor and knights at the dinner shall sit together in their apparel as aforesaid at one table, and have allowance of meat and drink at the charges of Us, Our heirs and successors.

"18. Item. The said thirteen knights shall daily in their prayers pray for Us, the Sovereign, Our heirs and successors, and for the companions of our said order of the Garter.

"19. Item. The said thirteen knights shall all lie within their lodgings provided for them; and, if any of them shall lie without their said lodgings and the college without the licence of the dean or his deputy, he shall lose for every time 12d.

"20. Item. If any of the poor knights, after his admission into that room, shall have lands or revenues fall unto him to the yearly value of 20l. or upwards, he shall immediately upon the coming of such lands or revenues unto him be removed and put from his said room of a poor knight, and another such as aforesaid taken into his place.

"21. Item. The said poor knights (excepting cause of sickness) shall be every day present in the college at church at Divine service as is aforesaid, and receive there for a daily distribution of 12d. by the day, to be paid them monthly if it may be, or at least in such sort as the other ministers of the chapel be paid: and he that shall be absent from the church one day, without leave of the dean or his deputy, shall lose his distribution of 12d. aforesaid.

"[46] 22. Item. The governor shall keep a book, and therein note as well the absence of every knight from the church as other faults committed by them punishable by these statutes, whereof he shall deliver one to the dean or his deputy and another to the steward or him that payeth the poor knights, who by order of the dean or his deputy shall default at the time of their pay such sums as are set upon any of the said knights for penalties as aforesaid.

"23. Item. The dean or his deputy shall once in the year at least appoint a day and hour at which the poor knights shall be warned to be present, unto whom the said dean or his deputy, or one of the canons to be appointed by the dean, or, in his absence, by his deputy, shall read these statutes: and, if any of the knights, being

warned, shall be absent from that reading, without licence of the said dean or his deputy, he shall lose for every time of such absence 6s. 8d.

"24. Item. The poor knights so chosen as is aforesaid, and every of them, before he take any commodity of his room, shall give a corporal oath before the dean, or his deputy, to be faithful and true to Us and to Our heirs and successors, kings of this realm, and that he or they for the time of their tarrying there shall truly observe these statutes and ordinances so far as the same concerneth them, or such other as shall be hereafter made by Us or Our heirs and successors, touching the good order of that company, upon the pains contained in the said statutes.

"25. Item. Notwithstanding the article before expressed, prescribing the aforesaid number to be chosen of gentlemen which we do most allow, yet, considering that, before the perfection of these orders, We be advertised that the more part of them now chosen and admitted be not certainly known gentlemen, were received into the same order as men well reported for their honesty, and thought meet to be relieved for their [47] poverty, We are pleased to dispense with all such as are presently placed being not gentlemen born, and hereafter mean in that point not to have any admitted contrary to the said order."

At a chapter held at Whitehall, the 14th of January, anno 12 Car. 2, it was decreed that the five alms knights added by King Charles the First should be subject to the same rules and government under which the other thirteen were established by Queen Elizabeth's foundation, and make equal partakers of the same privileges, and have the like habit assigned them.

"June 18th, 1817.

"Present, the Hon. and Rev. the Dean, the Rev. Dr. Cookson, the Rev. Mr. Morthey, the Rev. Dr. Heath, the Rev. Mr. Champagne, the Rev. the Provost of Eton, and the Rev. Mr. Proby.

"Whereas, much inconvenience and mischief have at various times arisen from the poor knights letting or lending their houses to improper persons or for improper purposes, and there being reason to believe that the orders of chapter which have been made at sundry times to prevent those abuses are not generally known to them, they are hereby informed, by direction of the chapter, that repeated orders are entered in the chapter book strictly requiring that none of the above-named poor knights shall let or lend their houses, in the whole or in part, to any person or persons, without the consent of the dean and chapter being first had and obtained; and they are further informed that there are similar orders injoining that no persons or goods shall be received into the college for the purpose of depriving creditors of their due, or of eluding justice in any respect: and these injunctions are enforced by penalties, the infliction of which stands recorded."

After reading the foregoing, each Military Knight takes the following oath, in obedience thereto:—

[48] "You shall swear truly to observe the statutes and ordinances that concern the government of the Military Knights, or such other as shall hereafter be made by Her Majesty and Her successors, touching the good order of the said company, so far as you are or shall be concerned in them, and the contents of this book. So help you God."

The knights are obliged to reside one month in every quarter, and cannot let or alter [change?] their houses without the permission of the board of works. The Crown does the repairs. They (the knights) are required to live and sleep in the houses. They have various duties to perform as Military Knights. By the statute, they forfeit their places on becoming possessed of property to the amount of 20l. a year.

The revising-barrister decided that Andrew Heartley did not occupy the house in question as owner or tenant, and struck the name out of the list of voters.

The names of five other persons were struck off the list upon the same grounds; and their cases were consolidated with the principal case.

Warren, Q. C. (with whom was Poland), for the appellants. The appellants in this case occupied their several houses as "owners" within the 27th section of Reform Act. By the terms of his appointment, each knight has a freehold for life, an interest of an uncertain duration: he is to hold his office or place of military knight "during the term of his statutable deportment therein:" Co. Litt. 42 a.; Conyns's Digest,

Estate (E. 1): *Beelson, App., Burton, Resp.*, 12 C. B. 647, 2 Lutw. Reg. Cas. 225. The definition of a "place" or "office" is to be found in *The Queen v. Charritie*, 13 Q. B. 447: and in Cruise's Digest, vol. iii., tit. xxv., Offices, s. 27, it is said, that, "if an office be granted to a man quamdiu se bene gesserit, the grantee has an [49] estate for life. For, as nothing but misconduct can determine his interest, no one can prefix a shorter time than his life, since it must be by his own act, which the law will not presume, that his estate can determine." [Cockburn, C. J. If you put this on the ground of its being an "office," it may give rise to some difficulty. It may be nominally an office created for the purpose of a charity.] The circumstance of a compulsory residence is immaterial: *Walcot v. Botfield*, Kay, 534; *Dunne v. Dunne*, 7 De Gex, M'N., & G. 207. [Cockburn, C. J. The question seems to be, whether this is a mere eleemosynary foundation, or whether the knights have duties to perform.] The origin and nature of the institution of the Military Knights of Windsor will be found in the case of *The Attorneys-General v. The Dean and Canons of Windsor*, 24 Beavan, 679. Their position is a peculiar, but a highly honourable one. The knight must be a gentleman born. [Crowder, J. The appointment recites that the appointee is "a fit object of our Royal charity."] The knights have certain duties to perform; and to each a house is allotted, from which no person has any arbitrary power to remove him. In *Simpson, App., Wilkinson, Resp.*, 8 Scott, N. R. 814, 7 M. & G. 50, 1 Lutw. Reg. Cas. 168, an appointment of a somewhat similar character was held to confer the franchise. The case found that Burleigh Hospital is a freehold building, divided into rooms, each of which is of the annual value of 4l., and is separately inhabited by a bedesman, appointed under certain rules. Each bedesman keeps the key of his own room, and the successor of each deceased bedesman occupies the same room as did his predecessor. No charter, deed, or other document relating to the foundation could be discovered. The ordinances referred to certain feoffees and their heirs, but none were known. By these rules, which bore date the [50] 20th of August, 1597, it was, amongst other things, provided that none was to be admitted who was leprous, a drunkard, adulterer, &c., and that any one so afflicted or guilty of any of the offences specified, should be displaced: but there was no instance on record of a bedesman having ever been displaced. The bedesmen having claimed to be entitled to vote for the county in respect of their several interests, the barrister decided that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character, and that they were respectively entitled to a separate freehold estate in their rooms respectively: and this court held that his conclusion was right in point of law, and warranted by the facts. Maule, J., there says: "These bedesmen are not, like the claimants in the last case, *Davis, App., Waddington, Resp.*, 8 Scott, N. R. 807, 7 M. & G. 37, 1 Lutw. Reg. Cas. 157,—liable to arbitrary amotion, and therefore they have such an estate as to entitle them to vote." This case is plainly distinguishable from that of *Faulkner, App., The Overseers of Upper Boddington, Resp.*, ante, vol. iii., p. 412, 1 K. & G. 132. There, pursuant to the trusts of two wills, certain lands in Northamptonshire were purchased in 1776, and vested in trustees upon trust to apply the rents and profits, amongst other charitable purposes, to and amongst certain persons described as "the six bedesmen of Daventry," as to whose origin there was no evidence. The persons thus described had received 50s. a year each for the last twenty years; but they had all been appointed since the passing of the Reform Act, by resolution of the bailiffs and burgesses of Daventry, in whom the appointment had from very early times been vested, and who were also trustees under the above-mentioned wills: and it was held, that the parties so appointed had not an estate which came to them by promotion to an office within [51] the meaning of the 2 W. 4, c. 45, s. 18, and therefore were not entitled to be registered. In giving judgment, Cockburn, C. J., says: "There is nothing on the face of this case to shew, and we cannot assume, that there are any duties attached to the appointment which would constitute it an office." And Willes, J., says: "However the matter may be stated to raise an inference that these persons may in some former time have been appointed to some office in an antient hospital, the only conclusion one can possibly arrive at upon the statement of this case is, that they exist now solely for the purpose of receiving their yearly stipend under the trusts of the wills referred to." [Cockburn, C. J. Does the newly-appointed knight always succeed to the house of the deceased knight?] By the terms of the grant here, Captain Heartley took the house which had been occupied by Captain Langford, the deceased knight. [Cockburn, C. J. That does not answer the inquiry:

it may have been the least eligible of the residences.] This is not like the case of *Clark, App., The Overseers of St. Mary, Bury St. Edmund's, Resp.*, ante, vol. i., p. 23, 1 K. & G. 90, where the occupation was clearly in the character of servant. [Cockburn, C. J. Does it appear that these persons ever claimed a right to vote for the county before the passing of the Reform Act?] It does not. [Cockburn, C. J. If they are now entitled to vote for the borough as owners, they would have been entitled before the Reform Act to vote for the county.] They might not have chosen to exercise their right.

Power, Q. C. (with whom was Murray,) for the respondent. It is not disputed that a grant for an uncertain time operates as a grant for life. The simple question here is, whether the occupation of their houses by these poor knights is an occupation "as owner or tenant" within the 27th section of the Reform Act. [52] It has been held in a series of cases, that, if the occupation be compulsory, for the purpose of better enabling the party to perform services, it is not such an occupation as will confer the franchise: *Dobson, App., Jones, Resp.*, 5 M. & G. 112, 8 Scott, N. R. 80, 1 Lutw. Reg. Cas. 105, *Clark, App., The Overseers of St. Mary, Bury St. Edmund's, Resp.*, ante, vol. i., p. 23, 1 K. & G. 90. Here, the knights have a mere permissive occupation under the dean and canons of Windsor, in whom is vested the freehold. [Crowder, J. If your argument is correct, the Crown could not grant the office with the rooms.] The dean and chapter hold the property in trust for such persons as the Crown may direct. Whether the legal estate is in them or in the Crown, is immaterial: it clearly is not in the knights. The case of *Heath, App., Haynes, Resp.*, ante, vol. iii., p. 389, 1 K. & G. 99, is precisely in point. There, the inmates of the Earl of Leicester's Hospital,—a charity regulated by a private act of parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10l., of which he had the exclusive use. The appointment was for life, subject to removal for breach of any of the rules. The inmates were rated in respect of their several occupations: and it was held that they did not occupy "as owners or tenants" within the 27th sections of the Reform Act, and therefore were not entitled to be registered. "It is not enough," says Cockburn, C. J., "to shew a beneficial occupation, unless it be an occupation as owner or in the legal relation of tenant to a landlord. Now, it is clear, and indeed it is conceded, that these parties do not occupy as owners,—the ownership of the property being ex concessis in the corporation aggregate. Then, do they occupy as tenants? It appears to me that they do not. There is nothing in the circumstances under which their occupation arises which creates either [53] expressly or by implication the legal relation of landlord and tenant. The corporation, as it seems to me, occupies in the persons of its several members. If any individual member of the body were improperly interfered with in his occupation, his only remedy would be by an application to the court of Chancery, to have the charity administered according to the will of the founder." The occupation here is precisely of the character of that described by Tindal, C. J., in *Hughes, App., The Overseers of Chatham, Resp.*, 7 Scott, N. R. 581, 5 M. & G. 54, 1 Lutw. Reg. Cas. 51, and *Dobson, App., Jones, Resp.*, 8 Scott, N. R. 80, 5 M. & G. 112, 1 Lutw. Reg. Cas. 105,—where "the officers or servants are required to occupy the premises with a view to the more efficient performance of the duties or services imposed upon them." Here, the duties or services, slight as they are, require the residence of the knights in the houses allotted to them. [Cockburn, C. J. Is it not matter of discipline rather than substantial service? Williams, J. Suppose the church discipline acts required the dean to reside at the deanery during a given period of the year, would that alter the character of his estate?] Here, the legal ownership is in the dean and chapter of Windsor. [Cockburn, C. J. I see no evidence of that.] The whole tends to that conclusion. This is an appointment to an office; and, for the more convenient discharge of the duties and receipt of alms, the party is allowed to occupy the house. [Cockburn, C. J. Is there any authority for saying that a freehold interest held in conjunction with a right to a participation in a charitable institution gives a vote? The amount of service performed here, is practically nil.] That has not been decided.

Warren, in reply. The circumstance that the institution is in some degree of an eleemosynary character [54] does not invalidate the vote: *Simpson, App., Wilkinson, Resp.*, 8 Scott, N. R. 814, 7 M. & G. 59, 1 Lutw. Reg. Cas. 168. [Willes, J. It appears from the statement of that case that the warden and bedesmen were dealing with the property as owners.] Here, each knight has the exclusive occupation of his

house. [Williams, J. By what assurance or deed do you contend the fee is vested in the knights?] It is enough to say that their appointment vests in them an equitable right. [Willes, J. I apprehend the crown could no more convey an equitable estate in land under the seal of the order of the Garter, than it could a legal estate.] This, it is submitted, is a grant of a "place" or "office," with the house or rooms and emoluments belonging thereto: and that confers such an interest as entitles the parties to the franchise under the 27th section of the Reform Act.

Cur. adv. vult.

COCKBURN, C. J., on a subsequent day delivered the judgment of the court:—

This case was argued before my Brothers Williams, Crowder, and Willes, and myself. After full consideration, we are of opinion that the decision of the revising-barrister is right and must be affirmed: not that we adopt the view which was pressed upon us by the counsel for the respondent, and which seems to have been the impression of the revising-barrister, namely, that the occupation of the claimants was for the purpose of services to be rendered by them in their character of military knights. We do not find that there are any services which the claimants are bound to perform, to which their occupation of the houses in respect of which they claim to vote can be considered as subservient. The duties or obligations to which the military knights are bound, are either matters of discipline or [55] of religious observance, with the single obligation to stand at the door of their abodes to do obeisance to the sovereign returning to or leaving Windsor Castle,—a mere mark of respect or homage which cannot be considered as an act of service: and a similar mark of respect to be shewn to the governor and knights of the order of St. George, on a particular occasion.

But, although this ground of exception to the right to vote may fail, there remains to be considered the important question whether there is any occupation as owner or tenant, to entitle the occupants to vote.

It is not pretended that there is any occupation in the character of tenants: and the question is reduced to whether there is an occupation as owners. We are of opinion that there is not.

The case first submitted to us by the learned counsel for the appellant, was, that the appointment of military knight of Windsor was a freehold office, and that, the occupation of a house being annexed to it by the grant of the founder, the party holding the office had an estate for life in such house. But we are clearly of opinion that the appointment of military knight is not in any sense of the term an office. An office necessarily implies that there is some duty to be performed. Here, as we have pointed out, there are no duties which can be considered as incidental to an office. Religious observances, and manifestations of respect, by the recipients of a charity to their benefactors, cannot be held to be services which constitute an office. We must not suffer ourselves to be led away by names, however dignified or high-sounding. Although the persons deriving benefit from this royal and noble foundation, are designated by the honourable title of military knights, there is nothing whatever of knightly service connected with the institution, which is one of a purely eleemosynary character. It purports [56] to be so by the very terms of the appointment of the object of the royal bounty: and the whole scope and object of the institution, as well as the terms and conditions on which the advantages of the royal bounty are to be enjoyed, all clearly establish the same thing. It is plain that the charitable support of men who have fallen into poverty and decay in the military service of the realm, was the primary and main purpose of the institution, and that, for that purpose, the pecuniary and other advantages incidental to the appointment were annexed to it; while, with a view to its half collegiate and half monastic character, peculiar obligations and observances were imposed. Looking to the substance of the thing, not to the name by which it has been dignified, it is plain that this is a charity,—a royal and noble charity, it is true, but still a charity, and nothing more.

The case for the appellant assumed, however, another form. It was said that the claimants, being appointed during good behaviour, have a freehold interest, and, being entitled to the benefit of the charity, and, as part of it, to the occupation of their respective houses, have, as *cestui que trusts*, equitable freeholds in these houses.

It seems to us unnecessary to decide whether the claimants have a freehold interest or not. There being no office or franchise taken by them, a question of some nicety and difficulty would arise, if it were necessary to determine whether, as against the Crown, a person appointed to be a recipient of the benefits of this charity could

maintain an absolute and indefeasible right dum bene se gesserit. But, whether the interest of these parties in the benefits of the charity be a freehold interest or not, we are of opinion that there is no such estate or interest in these houses as can properly be deemed an ownership. The legal estate is [57] plainly in the dean and canons of Windsor; and, though they may be bound to allow the knights to occupy these houses, yet it appears that the dean and canons have power and authority to impose such restrictions on the enjoyment as to divest the occupation of the character of ownership. The knights cannot let their houses, in the whole or in part, nor even receive inmates or guests therein, except with the assent and sanction of the Dean and Canons. The language, too, of the grant, and of the statutes of the institution, speaks of the houses or rooms of the knights (for, both terms are used,) in language inconsistent with the idea of ownership. Their residences are termed rooms or lodgings; and in one place the occupation is termed a "commodity." The knights are placed under the control and authority of the dean and canons, and are moreover subjected to a number of minute regulations which shew that this institution is altogether of an eleemosynary character, and that the occupation of their residences was subordinate to the general objects and purposes of the charity.

It appears to us, that, if we were to hold that the occupation of a residence as part of the benefits of such a charity was an occupation as owner, we must say that any occupation of a separate residence in an almshouse, where the appointment by the grant of the founder is during good behaviour, would be a freehold occupation as owner, and, consequently, if of sufficient value, would give a right to vote,—a conclusion to which we are certainly not prepared to come.

The case of *Simpson, App., Wilkinson, Resp.*, 7 M. & G. 50, 8 Scott, N. R. 814, 1 Lutw. Reg. Cas. 168, which was pressed on us in the argument, is a very different case from the present. In that case, no trustees were to be found. The recipients of the charity had the direct and uncontrolled management of the property in [58] their own hands: and the only question raised in the case was, whether the revising-barrister was right in presuming a legal commencement of the estate of the bedesmen by the royal licence, prior to the passing of the 39 Eliz. c. 5. There is nothing in the authority of that case which precludes us from fully considering in this whether the occupation of their houses by the military knights is an occupation as owners. We are of opinion that the characteristics of ownership are wanting, that the occupation is only as subordinate to the purposes of a charity, and subject to the immediate control of the superiors of the institution; and that it is not therefore an occupation as "owners," so as to satisfy the requirements of the 27th section of the Reform Act. The appeal must, therefore, be dismissed, and the decision of the revising-barrister affirmed, but without costs.

Judgment accordingly.

End of the Registration Cases.

[59] CHAMBERS AND OTHERS v. MASON. 1858.

[S. C. 28 L. J. C. P. 10; 5 Jur. N. S. 148. Referred to, *Chown v. Parrott*, 1863, 14 C. B. N. S. 81.]

Where a cause is compromised by the counsel and attorneys, in court, in the presence of the client, and after conference had with him with a view to an arrangement, and the client do not dissent, and the terms of the compromise have been embodied in an order of Nisi Prius, subsequently made a rule of court, the arrangement will not be disturbed, upon a suggestion by the client, that, though present when it was made, he did not understand what was going on.

This was an action for an alleged wrongful diversion of water from certain reservoirs of the plaintiffs.

The cause came on for trial before Martin, B., at the last Spring Assizes for the county of York, when a compromise was effected between the counsel for the respective parties, which was afterwards embodied in the following order of Nisi Prius.

"At the assizes holden at the Castle of York in and for the county of York, on Saturday, the 6th day of March, 1858, before the Hon. Sir Samuel Martin, Knight,

and John Barnard Byles, Esq., Serjt. at Law, two of Her Majesty's justices assigned to take the next assizes according to the statute :—

Chambers and Others v. Mason.—It is ordered by the court, by and with the consent of the parties, their counsel and attorneys, that a verdict shall be entered for the plaintiff for 1s. damages, each party paying their own costs, and the defendant consenting to an order for a writ of injunction : And it is further ordered that the actions of *Chambers and Others v. Richard Mason*, and *Chambers and Others v. Jonathan Mason*, the pleas pleaded in these actions shall be withdrawn, and the plaintiffs shall be at liberty to sign judgment in each of these actions, without costs : And it is likewise ordered that Mr. John Greenwood shall pay 100l. to Andrew Mason, or to his attorney, on his behalf, within one calendar month from the 17th day of March instant : And it is ordered that no further action shall be brought by any of the before-mentioned person or persons against any other or others of them in respect of any matter prior to this date : Mr. William [60] Paget, the attorney for Richard and Jonathan Mason, and Mr. Thomas Brown, the attorney for Mr. John Greenwood, on their behalfs respectively consenting to this order : And lastly it is ordered that this order shall be made a rule of the court of Common Pleas, at the instance of either of the parties, if the said court shall see fit.

“By the court.

“BELL, associate.”

Mellish, in Easter Term last, obtained a rule calling upon the plaintiffs to shew cause why the verdict entered on the trial of this cause, an order of Nisi Prius made in this cause on Saturday, the 6th of March last, another order made in this cause on the 30th of March last, the judgment signed in this cause, the injunction issued in pursuance of the last-mentioned order, and all proceedings (if any) upon the said judgment, should not respectively be set aside, and a new trial be had, on the ground that this cause was compromised without the consent or authority of the defendant. The rule was founded upon the affidavits of the defendant, Andrew Mason, and of Henry Robinson, his new attorney.

The defendant deposed as follows :—“1. This action has been brought to try the rights of the several parties thereto over certain commonable lands, and of the plaintiffs to certain water. 2. Mr. W. Paget, of Skipton, in the county of York, was my attorney in this action, and Mr. T. Brown, of Skipton, was the attorney for the plaintiffs. Mr. A. and Mr. C. were my counsel, and Mr. H. and Mr. J. were, as I have been informed and believe, counsel for the plaintiffs. 3. The action was entered for trial at the last York Assizes for the county of York, and was to have been tried by a special jury. 4. My brother, John Mason, was plaintiff in another action which was then pending, wherein [61] John Greenwood was the defendant, which said last-mentioned action had reference to a certain watercourse which the defendant John Greenwood had not permitted to flow in a manner in which he had covenanted or agreed with my said brother John. The said last-mentioned action was also to have been tried at the said assizes. 5. Some alteration had previously been made in the entry of the said two several causes, of the particulars of which I am ignorant, and by which the cause in which my said brother John was plaintiff, and which was a common-jury cause, was set down for trial immediately before the said cause in which I was defendant. 6. I and my said brother John have paid or caused to be paid to the said Mr. Paget various sums, amounting altogether to the sum of 53l., on account of the costs, charges, and expenses, of the said actions. 7. About the hour of six o'clock in the afternoon of the 17th of March last, the said common jury cause was about to come on for trial, when the said Mr. Paget came to me and my said brother John in the Nisi Prius court at York aforesaid, and said a proposition had been made to give me and my said brother John 50l., and each side to pay his own expenses. I and my said brother both replied that we would not agree to that ; and the said Mr. Paget then left us. I immediately afterwards saw the said Mr. Paget and certain counsellors whom I believe to have been the said Mr. H., Mr. A., Mr. C., and Mr. J., putting their heads together as if in conference. Mr. Paget then came to me and my said brother John, and said, —‘They will give 100l., and pay it down in a month, each party to pay his own costs.’ Thereupon, both I and my said brother John told the said Mr. Paget that we would not agree to any such terms. My said brother John

said,—‘We will either lose the horse or win the saddle;’ and I said to the said Mr. Paget that I would not agree to the terms [62] proposed, and that we would have the actions tried. My brother William Mason was present on both occasions when the said Mr. Paget came to me and my said brother John to communicate the said offers. 8. A few minutes afterwards the said Mr. A. and Mr. Paget with him came to me and my said brother John in court, and said ‘Come this way,’ and I and my said brother John followed him and Mr. Paget out of court. The said Mr. A. said to me and my said brother John,—my said brother William being also present,—that we had better take the 100l. which had been offered as a settlement. Both I and my said brother John most positively refused to accept the sum offered, but said, that, if the parties on the other side would pay 100l. and all expenses which had been incurred on both sides since the commencement of the differences between the parties to both actions; we would agree to accept that sum, but we would not settle on any other terms: and we therefore desired the said Mr. Paget to go and have the said causes tried. He and Mr. A. then left us, and we went towards the witness-box, believing and expecting that the said causes would be tried; but we only saw that the jury were sworn, and heard something which we did not understand; and the business of the court for the day was ended, and the people moved out of court: and I and my said brother John went out at the same time, believing and being under the impression that the trial of the said causes had been adjourned until the next day. 9. In consequence of something which we had heard in the course of the evening of the said 17th of March as to the said causes having been settled, I and my said brother John, about 7 o’clock on the morning following went to the lodgings of the said Mr. Paget, to inquire what had been done. Whilst waiting to see him, we learned that he had gone in a cab to the railway-station. I [63] and my said brother John ran to the station to stop him. I found the said Mr. Paget in a railway-carriage just as the train was about to start, and asked him what he meant by going home, and told him that we wanted to know what was going to be done about trying the actions, as we were determined to have them tried. He said,—‘I’ve done what I could. You (meaning myself and my said brother John) must go to Mr. A., and he will tell you all about it.’ 10. I and my said brother John shortly afterwards went to the court, and, in consequence of what we heard from persons about the court as to what had passed during the previous evening respecting the said actions, I and my said brother John returned home on the same day, viz. the 18th of March, and the following day we went to the office of the said Mr. Paget, and both I and my said brother John blamed him much for leaving us in the way in which he had left us. He said he would not be blamed for what had been done: he would write to Mr. A., because Mr. A. had taken it upon his own shoulders, and settled the actions without authority either from us or him. My said brother William was present, and heard this conversation. 11. I was unable to get any information from the said Mr. Paget, or from anybody else, as to the precise terms upon which the said actions or either of them had been settled; and I then employed my present attorney, Mr. Henry Robinson, to act for me in this action.”

The affidavit of Mr. Robinson was as follows:—“1. On the 20th of March last, I wrote and sent to Mr. W. Paget, the late attorney for the defendant in this action a letter, in the words and figures following:—

“*Andrew Mason ats. Chambers and Others.*

““Special jury.

““Dear Sir,—The defendant called upon me this morning, and was in a complete state of ignorance as [64] to the manner in which the case had been disposed of. He fears, from what he hears, that it has been settled by some compromise quite unauthorised by him; and he was very much astonished to find that the action was not to be tried. Have the goodness to inform me on his behalf why the action was not disposed of in the ordinary way, and at the same time state any other particulars calculated to inform me and him how the matter stands. Until I have time to confer with him after I shall have received your reply, you will of course take no further steps in the action.’

“2. In reply I received through the general post a letter from the said W. Paget in the words and figures following:—‘Dear Sir,—Masons’ actions. These parties

were in court when the actions were settled by counsel; and they have since been fully informed as to the terms: and, if they are not satisfied, I am sorry for it. I will hand over the papers to any other person, on payment of my bill. Of course, I shall not move further in the matter after seeing your letter.' 3. On the 24th of March last, I wrote and sent to the said W. Paget a letter in the words and figures following:—'Dear Sir,—Masons' actions. I am in receipt of your favour of the 22nd instant. I assure you the parties for whom you acted are utterly and entirely ignorant of the terms of the arrangement; and I will, therefore, thank you to furnish me with copies of agreements or rules of court or other documents by which the arrangement was effected. To prevent any objection on your part, I will pay your charges for such copies, on having same forwarded to me. If, as my clients assert, the arrangements were made, not only without their authority, but against their express direction, I don't think you can insist upon retaining the papers, &c., until your bill of costs is paid: but, when I have seen the copies desired, I can the better determine what [65] should be done.' 4. In reply to such last-mentioned letter, I received from the said W. Paget a letter in the words and figures following:—'Dear Sir,—Masons' actions. As these parties have determined to change their attorney, I do not see why I should deviate from the usual rule, until my bill be paid.' 5. On the 27th of March, I wrote and sent to the said W. Paget a letter in the words and figures following:—'Dear Sir,—*Andrew Mason ats. Chambers and Others.* Special jury. I am in receipt of your favour of the 25th instant, and regret that you have declined to furnish the information desired. Have the goodness to inform me whether you gave counsel in this case authority to compromise on the terms concluded upon, or any other authority to compromise, and, if any, what were the terms you authorised him to accept. Did you personally consent to any compromise? I think you will not deny that the defendant is entitled to have full information upon these points.' 6. In reply to the last-mentioned letter, I received from the said W. Paget a letter in the words and figures following:—'Dear Sir,—Masons' actions. I must decline answering any questions at present in these actions until payment of my bills, and an order to change attorneys be made.' 7. On the 20th of March last, I wrote and sent to Mr. Brown, the attorney for the plaintiffs in this action, a letter in the words and figures following:—'Dear Sir,—*Andrew Mason ats. Chambers and Others.* Special jury. The defendant has consulted me with reference to this action, in consequence of his being dissatisfied with Mr. Paget or his counsel, or both, for having assented to some compromise, not only without his authority, but against his express directions. I have written to Mr. Paget on the subject, and for an explanation. You will please to consider that I am now the attorney for the defendant, and that for the reasons [66] stated above, he will refuse to carry into effect the arrangement made either by Mr. Paget or counsel, or both, under the circumstances.' 8. In reply to the last-mentioned letter, I received from the said T. Brown a letter in the words and figures following:—'Dear Sir,—*Chambers and Others v. A. Mason. Greenwood ats. J. Mason.* I have received your communication in these several matters, under date the 20th March inst. At present, I understand Mr. Paget to be the attorney for both the above Masons, although they have applied to you, questioning his conduct as their attorney. So far as I am able to judge, the arrangement of these actions in open court was to the advantage of Mr. Paget's clients, and was made with their assent: but it is for him, and not me, to explain his conduct. I, on behalf of my clients in both actions, was ready to try these causes, and had every confidence that the verdicts would have been recorded in favour of my several clients. And I shall certainly proceed to enforce the order of *Nisi Prius* in the first-named action.' 9. On the 24th of March last, I wrote and sent to the said T. Brown a letter in the words and figures following:—'Dear Sir,—*A. Mason ats. Chambers and Others.* I beg to acknowledge the receipt of your favour of the 22nd instant. As I am instructed, the arrangement, whatever it was,—and as to which I and my client are ignorant,—was entirely without his authority: and I shall take the earliest opportunity of bringing the conduct of the parties before the court. I shall, of course, oppose any application you may make to enforce compliance with the terms which have been agreed upon.' 10. I have not received any reply to such last-mentioned letter."

Hugh Hill, Q. C., and T. Jones, on a subsequent day, shewed cause, upon the affidavits of Thomas Brown, [67] the attorney for the plaintiffs, and of Mr. William

Paget, the attorney for the Masons. The former deposed as follows:—1. The plaintiffs are tenants and occupiers, under a lease from John Greenwood, the owner, of a cotton mill in Embsay, called Whittfield Syke, otherwise Embsay High Mill, together with divers reservoirs, mill-ponds, and streams of water appurtenant thereto, and used and occupied therewith and also together with other hereditaments adjoining or near to the said mill. 2. I have known the said Whittfield Syke Mill forty years. It was erected, as I have been informed and believe, more than sixty years ago, and has from that time been used as a cotton mill, worked solely by water-power until about fifteen years ago. Since, then, steam power has been added, and the said mill has been worked partly by steam and partly by water-power; and the water supplying power to the said cotton mill flowed to it over certain commonable lands. 3. This action was brought against the defendant, and similar actions were at the same time brought against his brother, Richard Mason, and his nephew, Jonathan Mason, for repeated wilful trespasses in breaking down and damaging the dams of the plaintiffs' mill-ponds, and diverting, obstructing, and preventing the flow of the streams of water to the said mill, to recover damages for the injuries done, and to restrain the several defendants from the repetition of similar injuries. 4. This action was entered for trial at the last York Assizes for the county of York, and was to be tried by a special jury, who were required to view the locus in quo at the instance of the plaintiffs. A number of the special jurors made such view previously to the day fixed for the trial, accompanied by the under-sheriff's assistant, and attended by a person appointed as shewer for the plaintiffs and by another person appointed on behalf of the defendant as his [68] shewer: and I, as attorney for the plaintiffs, paid the under-sheriff his charges for the expenses of such view, besides the costs and expenses of the plaintiffs' and defendant's shewers. I prepared and delivered briefs to two counsel, Mr. H. and Mr. J., and subpoenaed and took to York sixteen witnesses on behalf of the plaintiffs in this cause, for the purpose and with the full intent of having this cause tried: and I was fully persuaded that the plaintiffs were entitled to and would obtain a verdict against the defendant: and I did not by any means seek to have this action compromised. 5. The plaintiffs' landlord, the said John Greenwood, was sued by the defendant's brother, John Mason, in an action for breach of covenant in not permitting water to flow through a recent drain wrongfully diverting a stream of water from its natural course in a close the property of John Greenwood into a close the property of John Mason, and also into another close the joint property of the defendant Andrew Mason and his brother the said Richard Mason, which action was entered for trial at the said assizes, to be tried by a common jury. I was the attorney for the said John Greenwood, and delivered briefs to Mr. H. and Mr. J. in that action, and had witnesses attending the said assizes on behalf of the said John Greenwood in support of his defence; and the last-named cause came on for trial at the said assizes in its regular course as a common jury cause, on Saturday, the 13th of March, when, as the said John Greenwood was proved not to have made the covenant charged against him, the court gave the said John Mason leave to amend his declaration, by charging a breach of agreement, instead of a breach of covenant, and directed that the cause should stand over, and be tried immediately before this special jury cause, which was fixed for trial on the Wednesday following. 6. In the afternoon of Wednesday, the 17th [69] of March, I was in attendance in court with all the plaintiffs' witnesses, and also with the witnesses for the said John Greenwood in the said action at the suit of John Mason, when the last-mentioned cause was called on for trial; and, while the names of the jury were being called, something was said by the counsel for John Mason, and by his attorney, addressed to me and to my counsel, proposing a settlement of that action: and, as it appeared to me (and I was so advised by counsel) that the plaintiff John Mason must of necessity be non-suited or a verdict pass against him in that action, and as his counsel and attorney mentioned that there were or might be several other causes of action against the plaintiffs in this action and against the said John Greenwood by John Mason and Andrew Mason and others of the family, I with my counsel objected to compromise the said common jury cause unless the special jury cause and all other pending actions and all causes of action then existing between the parties or any of them were also satisfactorily arranged; and on this basis an arrangement was made in court between the counsel and attorneys on both sides,—a juror was withdrawn in the action between John Mason and John Greenwood, each party to bear his own costs, the said John Greenwood agreeing to execute a deed of covenant, so far as concerned his own and his servants' acts only, to

permit the water to flow from his close through the before-mentioned drain to the close of the said John Mason and the close of Richard and Andrew Mason, and that the said John Mason should convey the water from his close (after supplying his cattle) by another drain, in a certain line pointed out on the plan or map then produced, into the original channel from which it had been diverted, so that other parties situated lower down on the stream, who were entitled to the [70] flow of its entire waters, might have no cause of action against either John Mason or John Greenwood : and that John Greenwood should pay John Mason 8l. for the cost of such last-mentioned drain : and the purport of these terms was embodied in an order of court, by consent. Mr. Paget, the attorney for John Mason, was present during this negotiation, and sanctioned the whole arrangement, having, as I understood, the approval of his client John Mason. The terms of arrangement of the special jury cause and all other actions and causes of action then existing between all or any of the parties, were openly canvassed between the counsel and attorneys on both sides : and the only question in difference was, the amount to be paid by Mr. Greenwood, the plaintiffs' landlord, to Andrew Mason. There was no objection made by Mr. Paget or his counsel during the negotiation, that any right or interest of the defendant Andrew Mason, or of his brother Richard, or his nephew Jonathan, was damaged in any way by the plaintiffs' user of their cotton-mill and the ponds and watercourses supplying the same with water : but the right of the plaintiffs to the use of those ponds and watercourses was admitted ; and it was agreed that a verdict should be entered for the plaintiffs for nominal damages, and that the plaintiffs should not claim any costs : that the defendant and his brother Richard and his nephew Jonathan should be restrained from committing further trespasses, by injunction. On the question of what sum should be paid by the said John Greenwood, the sum of 100l. was ultimately offered by me on behalf of Mr. Greenwood ; when Mr. Paget and his counsel Mr. A. retired to confer with their clients ; and, on their return, Mr. A. said the parties had authorized him to make an arrangement for them, and he agreed to accept the 100l. offered, which should be paid within a month to Andrew Mason, or his attorney ; [71] and the counsel wrote down a minute of the terms of arrangement, which was signed by Mr. H., counsel for the plaintiffs, and by me for Mr. Greenwood, as his attorney, and was signed also by Mr. A., counsel for the defendant, and by Mr. Paget as defendant's attorney and as attorney for the other parties to be included in the arrangement ; which minute was, I believe, handed to Mr. Bell, the associate ; and the special jury in this cause were then called and sworn, and gave a verdict according to the arrangement. 7. At the time when these arrangements were made, I did not know, believe, or suspect, nor did the said plaintiffs, or the said John Greenwood, or any of them, know that such arrangements were unauthorized by the defendant Andrew Mason, or by the said John Mason, or by the said Richard and Jonathan Mason, or any of them ; but, because Mr. A. stated positively that he had seen the parties personally, and that they had expressly authorized him to make an arrangement for them, I then believed, and I still believe, that the defendant Andrew Mason and the said John Mason authorized the said Mr. A. to make the said arrangements and to compromise the said action for them : and, if I had doubted about the actual consent and authority of the said Andrew Mason and John Mason, I should have refused my consent to the said arrangements : and I would not under any circumstances, as Mr. Greenwood's attorney, have consented to arrange one of the said actions, without having the other arranged also ; for, Mr. Greenwood having in his lease to the plaintiffs in this cause covenanted to them for peaceable enjoyment, was substantially interested in the issue of this cause. 8. On or about the 21st of March last, I received a letter from Mr. H. Robinson, dated the 20th of March, to the purport stated in the affidavit of the said H. Robinson sworn in this cause on, &c., and I replied thereto, by [72] letter dated the 22nd of March last, to the effect stated in the same affidavit ; and I also received another letter from the said H. Robinson, dated the 24th of March, as stated in the same affidavit, to which last letter I made no reply, because I did not consider the said H. Robinson to be then the attorney for the said Andrew Mason in this cause, the said Andrew Mason never having given me any notice in writing under his hand that he had changed or intended to change his attorney Mr. Paget for Mr. Robinson. 9. The *Nisi Prius* rule made at the assizes pursuant to the arrangement aforesaid required the sum of 100l. to be paid by Mr. Greenwood within a month to Andrew Mason or his attorney ; and on the 16th of April instant, the time having nearly expired, and the said Andrew Mason not having changed his attorney on the

record, I, as Mr. Greenwood's attorney, caused the sum of 100l. to be tendered to the said Mr. Paget as the attorney of the said Andrew Mason, in compliance with the said rule; and the said Mr. Paget accepted and received the same as the attorney of the said Andrew Mason.

Mr. Paget's affidavit was as follows:—"1. I was the attorney for John Mason, brother to the above-named defendant, and instructed by him to commence an action at law against one John Greenwood for diverting a certain stream of water from running in a covered drain from a close of land marked C. on the plan on the deed of conveyance of such close of land on the sale thereof by the said John Mason to the said John Greenwood, in which conveyance I was informed by the said John Mason that the said John Greenwood had covenanted to permit and suffer the water from such close so sold to the said John Greenwood to flow in the covered drain to a certain other close of the said John Mason, as also shewn on the plan on the said deed of conveyance: and I commenced such action, [73] which came on for trial at the last assizes for the county of York on Saturday the 13th of March; and, on the production of the conveyance deed by the said John Greenwood, it was found that the same had not been executed by him; and the judge ordered the jury to be discharged, and gave the plaintiff leave to amend the declaration, and the said John Greenwood his pleas; and the cause was to come on for trial at a certain time as will be hereafter explained. 2. I was also attorney for the above-named defendant, and also attorney for his brother Richard Mason and his nephew Jonathan Mason, against whom actions had been commenced by the above-named plaintiffs for damage and injury done by the above named defendant and his brother Richard and his nephew Jonathan to certain reservoirs on Embsay Moor, which reservoirs had been there for forty years. Issue was joined in all the three last-mentioned actions, but notice of trial was given only in the action commenced against the above-named defendant Andrew Mason, and which cause was entered as a special jury cause (at the instance of the plaintiffs) for the last assizes for the county of York; and, at the time that leave was given for the amendment of the pleadings in the action *Mason v. Greenwood*, it was arranged that the trial thereof (which was a common jury cause) should take place immediately before the special jury action between the said plaintiffs and the defendant Andrew Mason. 3. The counsel for the above-named John Mason and Andrew Mason, in the before-named actions, were, Mr. A. and Mr. C. 4. The pleadings in the action of *Mason v. Greenwood* were amended; but I was advised by counsel, that, inasmuch as the deed of conveyance had not been executed, and on account of the peculiar wording of the covenant in such deed, there would be a verdict against the plaintiff; and, on a consultation in the action commenced [74] by the above-named plaintiff against the above-named defendant, his counsel were of opinion that the case was beset with so many difficulties that there was great fear that a verdict would pass against the defendant in that action; and they strongly recommended a compromise. This information I duly conveyed to the said John Mason and Andrew Mason. 4. The cause of *Mason v. Greenwood* again came on for trial on the 17th of March, when the plaintiff's counsel again recommended a settlement of all the actions, and spoke to the counsel on the part of the plaintiffs upon the subject; and Mr. Greenwood then proposed to give 50l., and each party pay their own costs in all the actions. I went out of court to see the defendant and his brothers, who refused to take the 50l., but would take 100l. and costs. I went again into court, and informed the counsel for the said John Mason and Andrew Mason. Mr. Greenwood by his counsel then proposed to pay 100l., without any costs, and a paper was prepared to this effect by the counsel on both sides, and I was sent out of court again to see the defendant and his brothers on the terms of the said settlement; but they refused to accept the 100l. without the costs. I returned into court and informed Mr. A., who said he would see the parties himself, and he went out of court for that purpose, and I soon afterwards followed him, and found counsel Mr. A., and all the parties together, and heard what passed between them. After I went out of court, Mr. A. told the parties, that, in the action of *Mason v. Greenwood*, there was sure to be a verdict against the plaintiffs, and he would have costs to pay to the defendant; and he was not sure of a verdict in the special jury cause; and, if he could get 100l. without the Masons having anything to pay the above-named plaintiffs or Mr. Greenwood, he considered that would be a good settlement. They then said they would accept [75] the 100l., but would have the costs of the defendant's defence at York, at the assizes held in March, 1857, when

he had been prosecuted for breaking down the banks of the reservoirs of the plaintiffs' mill. Mr. A. then said to them he very much doubted whether Mr. Greenwood would consent to this, but he would do his best for them. Mr. A. then left me and the parties together. I then went into court, when I found that counsel had arranged the case of *Mason v. Greenwood*, upon the terms that a juror should be withdrawn, that Mr. Greenwood should execute the deed on its terms securing the plaintiff in that action the use of the water to his close of land, each party paying their own costs, and Mr. Greenwood also paying to John Mason the sum of 8l. to make a diversion of the drain so as to allow all parties interested in the stream to have the use of the water; and that in the above mentioned action a verdict was to be given for the plaintiff for 1s. damages, the injunction to be granted as prayed for, and that all other proceedings should be arranged as mentioned in the order of *Nisi Prius*. 5. The defendant Andrew Mason, and his brothers, John Mason, Richard Mason, and William Mason, and his nephew Jonathan Mason, were all in court at the time the arrangement was made; and I mentioned to William Mason, the brother of the defendant, on leaving the court, the particulars of the settlement of the said actions. I left York by the second train the following morning; and at the York railway-station John Mason came to me as the train was about to start, and requested me to return and have the cases tried; when I informed him that the causes had been settled, and, if they were not satisfied, they might see Mr. A., who would tell them all about it. 6. On the 22nd of March, the defendant and his brother John Mason called at my office at Skipton, and said he was not [76] satisfied with the arrangement come to at York as to the settlement of this action, and said that he had seen Mr. A. at York, who informed him that I had settled the actions: and I then asked the defendant,—‘Did you see counsel yourself?’ and the defendant replied ‘No; but my brother William saw him.’ I then said,—‘Send for your brother William.’ 7. William Mason, the brother of the defendant, was then immediately afterwards brought to my office by the defendant; when I asked him if he had seen Mr. A. at York; and William Mason then said he had seen him, and informed him that his brothers were not satisfied with the arrangements made; and the said William Mason then said that Mr. A. informed him (W. Mason) that the settlement which had been come to was the best that could be made for them. 8. The defendant Andrew Mason then said he would be satisfied with the payment of the 100l., but he must have his costs, or he would upset the arrangement. 9. I did not then say that counsel had settled the said actions without the consent of either the said defendant or myself; for, on the settlement of the action against the defendant Andrew Mason, and after the counsel for the plaintiff and defendant had signed a memorandum of the terms of such settlement, I and Mr. Brown, the attorney for the plaintiffs, each signed the same memorandum, and it was then handed to Mr. Bell, the associate. 10. On the 15th of April instant, not having heard anything further from Mr. Robinson, the present attorney for the defendant, and as the time for paying the 100l. would expire the following day, I made arrangements with Mr. Brown, the attorney for the plaintiffs and the said John Greenwood, to receive the same; and I then wrote by post to Mr. Robinson a letter, as follows:—‘Dear Sir,—Masons’ actions. As these parties have not proceeded to change their attorney, and [77] pay my bill of costs, I have arranged to receive the 100l., as agreed upon by the counsel at York. The money will be paid to-morrow; and the parties may then take such steps as they think proper. I intend now to carry out the terms of the order of *Nisi Prius*.’ 11. After the said letter was posted, I was served with a notice that a summons would be served on me the following day for changing the attorney in this action. 12. On the 16th of April instant, I received from Mr. Brown, the attorney for the plaintiffs and John Greenwood, the sum of 100l., pursuant to the arrangement made at York, and was served with a summons the same day to change the attorney. 13. I am satisfied that the arrangement made at York was greatly to the benefit and advantage of the said John Mason, Andrew Mason, and their brother Richard Mason and their nephew Jonathan Mason, because, if the case of *Mason v. Greenwood* had been tried, and a verdict had passed for the defendant, or the plaintiff had been nonsuited,—which I was strongly advised would be the result of that action,—the said John Mason would not only have had to pay the said John Greenwood’s costs, but the lands of the plaintiff and his said brothers would have been greatly injured and deteriorated in value on account of the loss of the said stream of water thereto, which by the arrangement the said parties secured; and in the action of the said

Andrew Mason there was a probability of a verdict passing against him : and, if such had been the case, from the defendant's statement to me I am of opinion that the jury would have given the plaintiffs substantial damages for the injuries they had received from the defendant."

It is evident from the affidavits that the whole matter was so left to the discretion of the counsel and attorney as to justify them in doing as they did. The party who now complains of the arrangement was pre-[78]-sent, and expressed no disapprobation or dissent. It is not now suggested that the compromise was other than that which he himself agreed to, except as to the costs of the York prosecution, which had nothing to do with the matter in hand : and it would be manifestly contrary to justice and good faith to permit that arrangement to be departed from. The cases bearing upon the power and authority of counsel to effect compromises on behalf of their clients have recently undergone a great deal of discussion in *Swinfen v. Swinfen*, 18 C. B. 485, 1 C. B. (N. S.) 364, in this court, and afterwards before the Master of the Rolls (24 Beavan, 549), and, on appeal, before the Lords Justices (27 Law J., Ch. 491), but with no very definite result. In *Thomas v. Heves*, 2 C. & M. 519, the court of Exchequer refused to enter into the question, Bayley, B., suggesting that they did not consider themselves at liberty to set aside an order of *Nisi Prius* deliberately entered into by counsel. Here, the court is asked to set aside an agreement made between the counsel and attorneys on both sides, the clients being present, knowing what was passing, and making no objection. [Willes, J. We only deal with the rule of court, not with the agreement : *Wade v. Simeon* 1 C. B. 610.] In *Wade v. Simeon* there were special equitable grounds for the interference of the court to rescind the rule and vary the agreement. There are none here. [Byles, J. Suppose an attorney brings or defends an action without authority.] Where an attorney brings an action, professing to have authority to do so, though he has not, the court nevertheless will not stay the proceedings. [Willes, J., referred to *Robson v. Eaton*, 1 T. R. 62. If a defendant has not been served with process, he is not prejudiced by an attorney's appearance for him : but, if he has been served, it is otherwise.] In *Filmer v. Delber*, 3 Taunt. 486, where a motion was made to set [79] aside an order of *Nisi Prius* by which the cause had been referred to a barrister, on an affidavit by the defendant, stating that she had expressly desired her attorney not to consent to any rule of reference, Sir James Mansfield said : "Here is an express agreement to refer, properly entered into by counsel and attorney. It is now said that they had no authority to enter into that agreement ; if so, the defendant's remedy is by action against her attorney. There would be no end to these applications if the court were to interfere : such interference would lead to collusion : when the party did not like the prospects of the reference, he would say that he had never given his attorney authority to refer." [Crowder, J. *Filmer v. Delber* is recognized in *Flaviell v. The Eastern Counties Railway Company*, 2 Exch. 344. *Mole v. Smith*, 1 Jac. & W. 673, *Furnival v. Bogle*, 4 Russ. 142, and *In re Hobler*, 8 Beavan, 101, also shew with what tenacity the courts adhere to arrangements made by counsel assuming to act on behalf of their clients.

Shee, Serjt., and Mellish, in support of the rule. The substantial rights of the litigant parties are concluded by the arrangement here made. In this respect the present case differs from all those referred to. No reasonable inference can be drawn from the affidavits that either counsel or attorney had any express authority to do as they assumed to do : and no implied authority arises from their retainer or employment. The Master of the Rolls (Sir J. Romilly), who enters very fully into the matter, and goes even further than Crowder, J., did, in his very elaborate judgment in *Swinfen v. Swinfen*, ante, vol. i., p. 364, expressly puts it upon the ordinary ground of agency. "The case," he says (24 Beavan, 557) "is rested, first, upon this question of principle—whether an attorney or solicitor employed by a client [80] is at liberty to compromise the subject-matter of the suit, without the express authority of the client ; and, secondly, the case is put upon the practice which the court adopts in such cases. I do not understand how, upon the principles by which the relation of principal and agent is governed, the argument can be supported. An agent has full authority to do everything that is within the scope of his authority express or implied. What is the authority which is vested in an attorney in these cases ? He is employed to conduct a suit for a client ; but I apprehend it to be perfectly clear that a compromise does not come within the term 'conduct of a suit,' and that a compromise is not within the meaning of the words 'management of a cause.' Upon

what principle, then, can it be said that an attorney has an implied authority to compromise the subject-matter, of a suit which he is employed to conduct? How far does it reach? Does such implied authority extend so far as to enable him to sell the subject-matter of the suit? Yet, in point of fact, a compromise is nothing more than a sale between the parties upon certain terms. Would it have been possible for Mr. Simpson, Mrs. Swinfen's attorney, to have sold his client's rights in the suit to a mere stranger for an annuity of 1000*l.* a year? It is obvious that this would not lie within the scope of his authority, if the purchaser were a stranger. Then, can it be said that it is within the scope of his authority, if he sold to the defendant in the suit? It appears to me, that, upon ordinary first principles, it cannot be so treated. I should no more consider the attorney I employ to conduct a suit authorised to dispose of the property sought to be recovered or defended, than I should expect that a person employed to take horses to a particular place to feed, or to break them in, would have an authority to sell or exchange them; or that a coachman employed [81] to drive a carriage would have authority to exchange it. Unless there be some rule applicable to attorneys different from that which prevails in other cases of principal and agent, it appears to me to be impossible to say that an attorney has, without the direct authority of his client, an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause, which is the matter that he is employed to do." And, after referring to *Elworthy v. Bird*, 2 Sim. & Stu. 372, Tamlyn, 38, *Thomas v. Hewes*, 2 C. & M. 519, *Furnival v. Bogle*, 4 Russ. 142, and *In re Hobler*, 8 Beavan, 101, and to the cases of infants and married women, his Honor adds: "I myself have no doubt whatever, both on principle and authority, that the employment of an attorney does not entitle him to sell the subject-matter of the suit either to a stranger or to the opposing party, without an authority for that purpose; and that, so far from its being productive of injurious consequences that he should not possess that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice. For myself, I should in that case be indisposed to allow any case of importance to be taken before me by consent, without being satisfied by evidence that the client himself had been communicated with on the subject. Since I have been upon the Bench, I have always assumed that the client has been communicated with, and that what is proposed is done with his sanction and knowledge. My opinion is, that, unless this were so, the functions of this court in matters of consent would be paralyzed. It would be too great an abuse of authority for an attorney to say that he has a right to dispose of the property of his client in a particular way, when, if he had communicated to him all the facts, the result would have been different, and yet that the [82] other side are at liberty to say that they are entitled to insist on such an agreement, and that the party is bound by it." That opinion is confirmed by the decision of the Lords Justices on appeal. Formerly it seems to have been thought that there was something sacred in arrangements made at Nisi Prius. [Willes, J. I must confess I still entertain that superstition.] In no case has a compromise made without the client's consent been enforced in a court of law: the courts have always studiously avoided a direct decision. It is important that the principles laid down in the judgment of Crowder, J., in this court, and by the Master of the Rolls and the Lords Justices, in *Swinfen v. Swinfen*, should be rigidly acted upon. *Bodington v. Harris*, 1 Bingh. 187, and *Biddle v. Dowse*, 6 B. & C. 255, 9 D. & R. 404, were also referred to.

Cur. adv. vult.

WILLES, J. This case was argued in the course of the last Easter Term, before my Brothers Crowder and Byles and myself. In the unavoidable absence of my Brother Crowder, I proceed to deliver his judgment:—

This was an application to set aside an order of Nisi Prius, and all proceedings thereon, upon the ground that the cause was compromised without the consent or authority of the defendant.

Looking at the affidavits on both sides, there is no doubt that the arrangement upon which the order of Nisi Prius was drawn up, was entered into between the counsel and attorneys while the defendant was actually present in court, and expressed no dissent therefrom. It is true that he and his brother have sworn, that, although present, they did not understand what was going on; and, when a juror was withdrawn, according to the terms of the arrangement, they thought [83] the cause was only postponed. But we

think it would be extremely dangerous for the court to act upon such statements,—the truth of which it would be almost impossible to ascertain (*a*).

There had been a conference between the defendant and his counsel and attorney just before, outside the court, as to terms of compromise which had been proposed by the plaintiff, and rejected by the defendant. The last words, however, uttered by the counsel on leaving his client to return into court, as sworn by the attorney, were, that “he would do his best for him;” to which no dissent was expressed. I have no doubt that the learned counsel did the best he could in the arrangement which was made, and which we are not justified, on these affidavits, in disturbing.

As no blame whatever attaches to the plaintiff, or his attorney or counsel, I think the rule must be discharged with costs.

For my Brother Byles and myself, I have to add that we also are prepared to give judgment for discharging the rule with costs,—upon the ground that according to the opinions expressed by the majority of the court in *Swinfen v. Swinfen*, 18 C. B. 485, and 1 C. B. (N. S.) 364, the authority of counsel to make the compromise ought not to be inquired into in this proceeding between the parties.

Rule discharged, with costs.

[84] REEVE v. PALMER. June 25th, 1858.

[S. C. 28 L. J. C. P. 168; 5 Jur. N. S. 916; 7 W. R. 325. Referred to, *Wilkinson v. Verity*, 1871, L. R. 6 C. P. 211.]

It is no answer for an attorney, when sued in detinue for a deed which has been intrusted to him by a client, to say simply that he has lost it.

Detinue for title-deeds, with a count for money received. To the first count the defendant pleaded, amongst other pleas, non detinet, and that the deeds were not the plaintiff's; and to the second never indebted and a set-off.

The cause was tried before Cockburn, C. J., at the last Spring Assizes at Cambridge. The facts were as follows:—The defendant was an attorney at Cambridge. The deeds in respect of which the action was brought had been left in the defendant's custody as attorney for the plaintiff. At the trial, there was only one deed in contest between the parties, the rest having been delivered up to the plaintiff after the commencement of the action. There was no evidence as to what had become of the missing deed, or how it was lost, except that the defendant stated that he had not seen it since the date of its execution in 1853. When the demand was made in 1857, the defendant claimed a certain sum for costs, which the plaintiff paid under protest.

The jury returned a verdict for the plaintiff on the second count, with 85l. damages, and for the defendant upon the first count, the jury leaving it in doubt whether the loss of the deed occurred before or after the demand.

David Keane, for the plaintiff, in Easter Term last, obtained a rule calling upon the defendant to shew cause why a verdict should not be entered for the plaintiff on the issues on the first count, for 15l. damages, pursuant to leave reserved to him at the trial, on the grounds, —first, that the defendant, as the immediate bailee of the deed, was answerable in detinue though [85] he had lost the deed, —secondly, that the plaintiff was entitled to the verdict on the finding of the jury, as there was no evidence to shew that the loss was before the demand, and that the defendant ought to have shewn that to entitle him to the verdict. He referred to the Year Books 12 E. 4, fo. 12, and 10 H. 7, fo. 7, pl. 7, and to the case of *Jones v. Doule*, 9 M. & W. 19.

Wells, Serjt., for the defendant, also obtained a rule nisi for a new trial, on the ground that the verdict was against evidence.

Wells, Serjt., and Couch, shewed cause against the plaintiff's rule. It may fairly be collected from the evidence that the deed was lost before the making of the demand.

(*a*) In *Swinfen v. Swinfen*, 24 Beavan, 559, the Master of the Rolls says: “Upon the question of acquiescence, I go this length,—that, if a client be present in court, and stand by and see his solicitor enter into terms of an agreement, and makes no objection whatever to it, he is not at liberty afterwards to repudiate it.”

The question is, whether detainee will under the circumstances lie. It is submitted that it will not. In *Southcot's case*, 4 Co. Rep. 83 b., it was resolved, that, "if A. accepts goods of B. to keep them as he would keep his own proper goods, there, if the goods are stolen, he shall not answer for them." In the note (A.) to that case, it is said: "That a general bailment and a bailment to be safely kept is all one was denied to be law by the whole court, ex relat. m^ri Bunb., note 3rd edit. 2 Ld. Raym. *Coggs v. Bernard*, 911: vide Jones on Bailments, 41, 83, in *Kettle v. Bromsall*, Willes, 121, Willes, C. J., in delivering the judgment of the court, observed, that, according to *Southcot's case*, the case of *Coggs v. Bernard* and several other cases, if the goods were delivered to be kept safely, though the defendant had been robbed of them, detainee will lie against him; for, he must take his remedy against the thief or the hundred, as he can. But, if the goods were delivered to the defendant to take care of them as his own proper goods, &c., if he be robbed of them, that is a good plea." An attorney is not bound to keep a client's deeds safer than his own goods. [Keane [86] referred to *The North-Western Railway Company v. Sharp*, 10 Exch. 451, where it was held that it is the duty of an attorney to keep his clients' papers in a reasonable manner. Cockburn, C. J. The question here is not whether the attorney is liable for the negligent loss of the deed: but whether detainee will lie.] In 1 Chitty on Pleading, 7th edit. 138, it is said that detainee does not lie against a bailee, if before demand he lose them by accident (Bro. Detinue de Biens, pl. 1, 33, 40): though, if he wrongfully deliver the goods to another he will continue liable: Bro. Detinue de Biens, pl. 1, 33, 40, and pl. 2, 34. If the party has not the means of answering the demand, he is not liable in detainee. There is this important distinction between trover and detainee, that, where the plaintiff complains of the non-delivery of the thing on demand, he must shew that the defendant had it in his power to comply with the demand. In 2 Williams on Executors, 5th edit. p. 1565, it is said, that, "although, at the common law, an action of trover upon a conversion of the testator dies with him, yet, if the goods, &c. taken away continue still in specie in the hands of the executor or administrator of the wrong-doer, replevin or detainee will lie against such executor or administrator to recover them back; or trover, laying the conversion to have been by the executor: or, in case they are sold, an action for money had and received to recover their value." The finding of the jury in that case would be that the executor had assets. It is upon that principle that the case of *Jones v. Dowle*, 9 M. & W. 19, proceeds. Even in trover, to constitute a refusal to deliver up the article a conversion, the party must have it in his possession or under his control at the time of the demand: *Smith v. Young*, 1 Camph. 440: *Ferrall v. Robinson*, 2 C. M. & R. 495. In Fitzherbert's Natura Brevium, 138 A. it is said: "A writ of detainee lieth in case where a man delivereth goods or chattels unto another [87] to keep, and afterwards he will not deliver them back again: then he shall have an action of detainee of those goods and chattels." In *Gledstone v. Hewitt*, 1 C. & J. 565, 570, Bayley, B., says: "The nature of the action of detainee is, that the detainer is the gist of the action. The plaintiff must make out that he was entitled to the delivery of the article, and that the defendant wrongfully detained it." In Viner's Abridgment, Detinue (D. 5), pl. 54, it is laid down that it is a good plea in detainee, "that, after the delivery, the horse was sick of divers infirmities, as botts, glanders, &c., by which he died at K. before request made by the plaintiff to re-bail him,"—citing Brooke's Abridgment, Detinue de Biens, pl. 42, who cites 21 E. 4, fo. 55. "Contra, if he had not said that it was before request: for, if it had been after request, this had been the folly of the defendant: note the diversity:" pl. 55, ibid. In Comyns's Digest, Detinue (D.), it is said that detainee "does not lie, if the goods never were detained by the fault of the plaintiff: as, if the defendant finds goods, and before demand loses them by accident:" semb. Bro. Detinue de Biens, pl. 1, 33, 40. Here, the deed was rightfully in the defendant's possession: and he can only be liable if he wrongfully detains it after demand. "No right of action," says Dr. Story, in his Law of Bailments, § 107, "accrues in any case against the bailee, unless there has been some wrongful conversion or some loss by gross ignorance on his part, until after a demand made upon him, and a refusal by him to re-deliver the deposit. A demand and refusal is ordinarily evidence of a conversion, unless the circumstances constitute a just excuse, or a justification of the refusal." A demand is necessary, and must be alleged: *Kettle v. Bromsall*, Willes, 118. And *Clements v. Flight*, 16 M. & W. 42, shews that the detention must be adverse. It is not denied that the defendant may

be [88] chargeable by force of the bailment, as is said in 10 H. 7, fo. 7, pl. 7; but not in this form.

D. Keane (with whom was O'Malley, Q. C.), in support of the rule. The jury found that the deed was lost. Under the old law, the declaration must of necessity have disclosed how the deed or the chattel got into the hands of the defendant. Here, the defendant received the deed as attorney for the plaintiff: and the case of *The North-Western Railway Company v. Sharp*, 10 Exch. 341, shews the nature of the attorney's duty with respect to a client's papers,—it shews that his duty in respect of them is more extensive than that of an ordinary bailee; he is bound not only to keep them safely, but to keep them reasonably well arranged; and so the distinction taken in *Kettle v. Bromsall*, Willes, 118, is in the plaintiff's favour. The Chief Justice there says, that, “according to *Southcot's case*, 4 Co. Rep. 83, 84, the case of *Coggs v. Bernard*, 2 Ld. Raym. 909, Com. Rep. 133, Salk. 26, and several other cases, if the goods were delivered, to be kept safely, though the defendant had been robbed of them, detainee will lie against him; for, he must take his remedy against the thief or the hundred, as he can: but, if the goods were delivered to the defendant to take care of them as his own proper goods, &c., if he be robbed of them, that is a good plea.” The liability for the detention arises from the fact of the defendant being bound to have the goods in his possession. Parke, B., in *Jones v. Dowle*, 9 M. & W. 19, says,—“The evidence of the detention is, that the defendant does not return the chattel, when demanded.” A distinction is taken between the case of goods coming to the hands of the defendant by finding and by bailment. 27 H. 8, fo. 13, pl. 35. “Note, that Fitzherbert put a diversity where one comes to the possession of goods by bailment and [89] where by finding; for, where one comes to the possession by bailment, there he is chargeable by force of the bailment, and, if he bail them over, or they are taken out of his possession, yet he is chargeable to his bailor by force of the bailment; but it is otherwise where one comes to the goods by finding, for there he is only chargeable by reason of the possession, and if he be out of the possession lawfully before he who has the right has brought his action, he is not chargeable. Quod Shelley concessit.” The same distinction is found in *The Attorney-General v. Sir W. Capel*, M. 10 H. 7, fo. 7, pl. 14. A similar distinction is found in the Year Book of M. 12 E. 4, fo. 12, pl. 2, where Brian, C. J., says: “If I bail goods to a man to keep, there, into whose soever hands the goods may come, he is chargeable to me; so it is of a finding, &c.: but, if he to whom the goods are bailed bail the goods to another, this second bailee is chargeable only during the possession, &c., for, if he bail over, he is discharged, &c.: and so there is a diversity between a possession mediate and immediate.” [Cockburn, C. J. Your contention is, that it is the duty of an attorney to keep the deeds of his client safely, and that the losing them, without more, necessarily implies a loss by carelessness; and that, if he desires to exonerate himself, he must shew circumstances which amount to an excuse!] Precisely so. But, further, it is submitted, that, assuming a demand to be necessary before the loss, there was nothing to shew here that the deed was lost before demand. [Cockburn, C. J. There was evidence that it had not been seen since its date. I think we must assume the loss to have taken place before the demand.] That question should have been left to the jury. All they found was, that the deed was lost.

O'Malley and D. Keane shewed cause against the [90] defendant's rule, and Wells, Serjt., and Couch, were heard in support of it, when terms were agreed to.

COCKBURN, C. J. I am of opinion that the plaintiff is entitled to have a verdict entered for him upon the first count, for nominal damages. It must be taken on the finding of the jury, coupled with the facts, that the deed for the recovery of which this action of detainee is brought, was a deed which was in the care and keeping of the defendant as attorney for and on behalf of his client, the plaintiff, and consequently that it was his duty to take ordinary care of it. The jury have found that he lost it: and I am of opinion that that must be taken to mean, in the absence of any explanation, that he lost it for want of that due and proper care, which it was his duty to apply to the keeping of it, unless it is qualified by circumstances shewing that the loss of the deed could not have been prevented by the application of ordinary care. Being bound by his position in relation to his client to take ordinary care of a deed intrusted to him, he is clearly liable for the consequences resulting from the absence and want of that ordinary care. The question is, whether detainee will lie under the circumstances. It has been held from a very early time, that, where a

chattel has been bailed to a person, it does not lie in his mouth to set up his own wrongful act in answer to an action of detinue, though the chattel has ceased to be in his possession at the time of the demand. The same principle applies where the chattel has ceased, by an act of omission on his part, to continue in his possession or custody. It cannot be permitted to the bailee, though he has done no act to dispossess himself of the article, to defend himself on the ground that he has kept it so carelessly and negligently that he no longer is in a condition to restore it to the bailor. The same principle [91] which would estop him from setting up his wrongful act, would equally estop him from setting up his negligence. Therefore I think the verdict should be entered for the plaintiff on the first count, though for nominal damages only, in accordance with the agreement come to by the parties on the discussion of the defendant's rule.

WILLIAMS, J. I am of the same opinion. All the authorities, from the most ancient time, shew that it is no answer to an action of detinue, when a demand is made for the re-delivery of the chattel, to say that the defendant is unable to comply with the demand by reason of his own breach of duty. In the present case, the deed which is the subject of the demand in the first count was delivered to the defendant under circumstances which made it his duty to use ordinary care that it should be forthcoming when wanted. By the defendant's omission to perform that duty, the deed was not forthcoming when demanded. It clearly is no answer for the defendant to say he has lost it. The rule must be made absolute to enter the verdict for the plaintiff.

WILLES, J., concurring,
Plaintiff's rule absolute.

Defendant's rule discharged.

Feb. 7th, 1859. —The defendant appealed against this decision, and the case came on for argument in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Martin, B., Bramwell, B., Watson, B., and Hill, J.

Couch was heard on behalf of the appellant, the defendant.

David Keane, for the respondent, was not called upon.

[92] POLLOCK, C. B. For the reasons assigned in the judgment of the court below, I am of opinion that that judgment ought to be affirmed.

CROMPTON, J. There are two answers to the objection urged on the part of the defendant, that, if the plaintiff intended to rely upon any breach of bailment, it ought to have been stated in the declaration. The first is, that, on an allegation of a general bailment, all the matter is now open to the plaintiff, if even it were not so before the Common Law Procedure Acts. The question is raised upon the facts, not upon the pleadings. The second answer is, that the objection is one merely of pleading; and that, if it had been taken at the trial, the judge would, if necessary, have amended the declaration. No good, however, would have resulted from taking such an objection there, for this was a clear case of bailment. According to the old law, where there was a bailment, the defendant could not set up that he had lost the chattel. There was abundant *prima facie* evidence that the defendant lost the deed by his own wrongful act.

BRAMWELL, B. If there had been anything more important in dispute here than a mere question of costs, I should have liked to look into it a little more before deciding it. If the defendant has by his own default become dispossessed of or lost the deed, it may be that he may be considered as having wrongfully detained it. I am not prepared to say that there was sufficient evidence of negligence on the part of the defendant. All that appears is, that the deed was deposited with him by his client, and that it is lost. I must confess I have not information enough about the matter to say whether the judgment of the court below was right or not.

[93] WATSON, B. I am of opinion that the judgment of the court of Common Pleas ought to be affirmed. Neither the bailment nor the finding is traversable in this form of action: *Gledstan v. Hewitt*, 1 C. & J. 565. In detinue on a special bailment for safe custody, the authorities shew that the bailee is liable if the deed is lost.

HILL, J. It is conceded that detinue will lie against one who has parted with a deed which has been intrusted to him for safe custody. I am utterly at a loss to discover any difference between the case of an attorney who has lost a deed intrusted to him for safe custody, without any explanation as to the circumstances under which it was lost, and an attorney who has voluntarily parted with the deed to a third

person. In Comyns's Digest, Pleader (2 X. 12), speaking of this form of action, where the deed has been lost, the Chief Baron says,—"If detainee be for charters, the verdict must find some damages if the charters be lost,"—citing *Fisher v. ———*, Saville, 29. I think the judgment of the court below should be affirmed.

Judgment affirmed.

[94] GOLDSMID v. HAMPTON. June 25th, 1858.

[S. C. 27 L. J. C. P. 286; 4 Jur. N. S. 1108. See *Middleton v. Andrews*, 1888, 21 L. R. Ir. 417. Not applied, *Murphy v. Grady*, [1904] 2 I. R. 595.]

The 5 & 6 W. 4, c. 41, s. 1,—reciting, that, by the 6 G. 4, c. 6, s. 125, it was enacted that "any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue and give that act and the special matter in evidence," and that "securities and instruments made void by virtue of the recited act are sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given, and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice,"— repeals the recited act, and then proceeds to enact that "nevertheless every note, bill, or mortgage which if this act had not been passed would by virtue of the recited act have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration," and the said act "shall have the same force and effect which it would have had if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such act had provided that any such note, bill, or mortgage should be deemed, and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."—The 202nd section of the 12 & 13 Vict. c. 106, re-enacts in substantially the same terms the 125th section of the 6 G. 4, c. 16:—Semble, that the same construction must be put upon the 202nd section of the 12 & 13 Vict. c. 106, as the legislature had by the 5 & 6 W. 4, c. 41, put upon the 125th section of the 6 G. 4, c. 16.—But, held, that that section does not apply to a bill accepted by the bankrupt in blank before, but not dated or drawn until after, the allowance of his certificate.

This was an action by the indorsee against the acceptor of a bill of exchange. The declaration stated that B. C. Jones, on the 21st of December, 1857, by his bill of exchange, now over due, directed to the defendant, required the defendant to pay to the order of the said B. C. Jones, 37l., one month after date; and the defendant accepted the same; and the said B. C. Jones indorsed the same to the plaintiff; but the defendant did not pay the same: and the plaintiff claimed 40l.

Second plea,—that, before the drawing and accepting of the said bill of exchange, the defendant was indebted to divers persons in divers large sums of money, and, amongst others, was indebted to the said B. C. Jones in a certain sum of money, to wit, 37l.; that, afterwards, and whilst he was so indebted as aforesaid, and before the drawing and accepting of the said bill, he the defendant became and was a bankrupt within the true intent and meaning of the statutes [95] then in force concerning bankrupts, and was duly adjudicated a bankrupt, and that, before the time for the allowance of the defendant's certificate of conformity under the said statutes, and before the same had been granted to him, the bill of exchange in the declaration mentioned was, in pursuance of a certain unlawful agreement between the defendant and the said B. C. Jones, drawn and accepted as therein alleged, and the said bill of exchange was drawn and accepted and delivered to the said B. C. Jones, and received by him, for securing the payment of the said sum of money so due from the defendant to the said B. C. Jones, as aforesaid, and which said sum of money was so due from the said defendant at the time of the said bankruptcy, as a consideration, and for the purpose and with intent to persuade the said B. C. Jones to forbear opposing the allowance of the defendant's said certificate under the said statutes; and the said

B. C. Jones, had at all times aforesaid power and right to oppose the granting of the said certificate to the defendant; and the said B. C. Jones, in pursuance of the said agreement, and in consideration of having received the said bill as aforesaid, did not oppose the granting of the said certificate to the defendant. The plea then averred, that the plaintiff had notice of the premises before and at the time the said bill was indorsed to him as aforesaid, that the said bill of exchange was indorsed to the plaintiff after it was due and payable, and that there never was any value or consideration for the indorsement of the said bill of exchange to the plaintiff, who always held and now holds the said bill without any value or consideration for the payment of the same.

Third plea,—“and for a third plea the defendant, according to the form of the statute in such case made and provided [12 & 13 Vict. c. 106, ss. 202, 204], says that he did not promise as alleged.”

[96] Demurrer to the third plea, alleging for ground of demurrer, “that the sections upon which that plea is founded have no application to the case of an indorsee for value.” Joinder.

Second replication to the second and third pleas,—That the said bill was indorsed to the plaintiff *bonâ fide* and for full value before the said bill became due, and was dated, drawn, and so indorsed after the defendant had obtained his certificate of conformity under his said bankruptcy; the plaintiff, at the time of the alleged indorsement to him, having no knowledge or notice whatever that the defendant had become bankrupt, or of any fact or circumstance tending to render the said bill of exchange, or the alleged indorsement to himself, either void or voidable.

Demurrer, alleging for ground “that the 202nd section of the Bankrupt Law Consolidation Act, 1849, declares that any such contract or security as is therein mentioned shall be void.” Joinder.

Trevelyan, in support of the demurrer. The declaration is by the indorsee against the acceptor of a bill of exchange. The second plea sets up a defence founded upon the 202nd section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, which enacts “that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt’s certificate, or to forbear to petition for the recall of the same, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue and give this act and the special matter in evi- [97] -dence.” The question is whether this makes the security absolutely void, so as to be incapable of being put in suit by a *bonâ fide* holder for value and without notice, or whether it merely prevents its being enforced as between the immediate parties. The effect of a repealed statute upon the construction of a subsequent statute *in pari materiâ*, is touched upon by Lord Justice Knight Bruce, in *Ex parte Copeland*, 2 De Gex, M’N., & G. 914, where, referring to the 5 G. 2, c. 30, he says: “Although it has been repealed, still, upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former act. Lord Mansfield, in the case of *The King v. Lordale*, 1 Burr. 447, thus lays down the rule,—‘Where there are different statutes *in pari materiâ*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.’” The 125th section of the 6 G. 4, c. 16, was in terms the same as the 202nd section of the 12 & 13 Vict. c. 106 (a); but that was repealed by the 5 & 6

(a) The 125th section of the 6 G. 4, c. 16, was, with some alteration, a re-enactment of the 11th section of the 5 G. 2, c. 30. The words of the last-mentioned section were, “that every bond, bill, note, contract, agreement, or other security whatsoever, to be made or given by any bankrupt, or by any other person, unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt’s discharge, as a consideration, or to the intent to persuade him, her, or them to consent to or sign any such allowance or certificate, shall be wholly void and of no effect; and the moneys thereby secured or agreed to be paid shall not be recovered or recoverable; and the party sued on such bond, bill, note, contract, or agreement shall and may plead the

W. 4, c. 41. That act is intituled "An act to amend the law relating to securities given for considerations arising out of gaming, usurious, and certain other illegal transactions." It recites certain acts against gaming and usury, and the Irish bankrupt [98] act of 11 & 12 G. 3, c. 8, and then it recites, that, by the 6 G. 4, c. 16, s. 125, it was enacted "that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue, and give that act and the special matter in evidence;" it then goes on to recite, that, "whereas securities and instruments made void by virtue of the several herein-before recited acts are sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given, and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice;" and, for remedy thereof, enacts "that so much of those acts as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but, nevertheless, every note, bill, or mortgage which if this act had not been passed would, by virtue of the said several lastly herein-before-men-[99]-tioned acts, or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several acts shall have the same force and effect which they would respectively have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such acts had respectively provided that every such note, bill, or mortgage should be deemed or taken to have been made, drawn, accepted, given, or executed for an illegal consideration." Now, when the recent act professed to consolidate all the laws relating to bankrupts, it must have intended to incorporate this provision therewith, and to avoid securities given under circumstances like these only to the extent to which they are avoided by the 5 & 6 W. 4, c. 41, s. 1. The authorities upon the subject of the avoidance of securities are summed up in the judgment of Rolfe, B., in *Bryan v. Child*, 5 Exch. 368, 19 Law J., Exch. 264, where it was held that the 137th section of the 12 & 13 Vict. c. 106, which declares that a judge's order, made by consent, given by a trader defendant in any personal action, unless filed as thereby required, and the judgment and execution thereon, shall be "null and void to all intents and purposes whatever," does not avoid such order, &c., as against the trader himself, but only as against his assignees if he afterwards become bankrupt. That learned judge says: "I am prepared both on principle and on authority to confine the operation of the 137th section as protecting creditors only, and not as affecting the rights of parties claiming under persons who give such instruments. The statutes respecting ecclesiastical leases have been already referred to. Nothing can be stronger than the words there used, for, all leases not authorized by them are declared to be utterly void and of none effect, to all intents, constructions, and [100] purposes, any law, usage, and custom to the contrary anywise notwithstanding. Still the courts very early said that the leases were not void against the persons who made them, but merely against their successors, for whose benefit the statute was intended. The 3 G. 4, c. 39, on which this part of the 12 & 13 Vict. c. 106, is founded, gave rise to discussions of a like nature with the present. Its title is, 'for preventing frauds upon creditors by secret warrants of attorney to confess judgment,' and it begins with this preamble, — 'Whereas injustice is frequently done to creditors by secret warrants of attorney to confess judgment for securing the payment of money, whereby persons in a state of insolvency are enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants of attorney have the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of their creditors:' it then enacts, that, 'if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment

general issue, and give this act and the special matter in evidence, anything herein contained, or any law, custom, or usage, to the contrary notwithstanding."

in His Majesty's court of King's Bench, &c., or such a true copy, &c., in case given to confess judgment in any other court, shall within twenty-one days after the execution of such warrant of attorney be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments in the court of King's Bench.' The 2nd section enacts, that, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who gave it, under which he shall be duly found and declared bankrupt, unless the warrant of attorney [101] shall have been filed within twenty-one days from the execution thereof, or judgment shall have been signed or execution issued on it within that period, such warrant of attorney and judgment and execution thereon shall be deemed 'fraudulent and void against the assignees under the commission,' and the assignees shall be entitled to recover back the moneys levied. The 3rd section extends the enactment to cognovits. Then, the 4th enacts, that, 'if such warrant of attorney or cognovit shall be given, subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or cognovit actionem shall be written, before the time when the same, or a copy thereof, respectively, shall be filed, otherwise such warrant of attorney or cognovit actionem shall be null and void to all intents and purposes.' By the first, therefore, of these sections, the warrant of attorney or cognovit was void against the assignees, but, by the second, if the defeasance were not written pursuant to the statute, it was void to all intents and purposes. In *Morris v. Mellin*, 6 B. & C. 446, 9 D. & R. 503,—the first case after the statute,—the question was, whether the assignee of an insolvent could set aside as void a judgment founded on a warrant of attorney where the defeasance was not written on the same paper or parchment. A majority of the court of Queen's Bench, consisting of Lord Tenterden, Bayley, J., and Littledale, J., held that the statute did not apply to the assignees of an insolvent, because the 4th section must be read in conjunction with the 2nd, and construed only to mean assignees of a bankrupt. Mr. Justice Holroyd dissented, and, I own, with great appearance of justice, as there was a marked distinction in the language of the two sections, and it was somewhat strange to say that 'void to all intents' only meant as against assignees of bankrupts, [102] when the limited language had been previously used: but this was the opinion of the majority of the court. Then followed the case of *Bennett v. Daniel*, 10 B. & C. 500, 5 M. & R. 444, in which my Brother Parke, then sitting in the Queen's Bench, dissented from the view of the majority of that court, who held that a warrant of attorney without a proper defeasance could not be set aside as between the parties; but still he expressly said, that, if he had found in the statute that it was only meant for the protection of the assignees of bankrupts, he should have held differently, for, he concurred in the principle upon which the cases as to ecclesiastical leases had been decided. The decision of the majority prevailed: and in *Davis v. Eglton*, 7 Bingh. 154, 4 M. & P. 820, Tindal, C. J., considered the matter as settled. Although, therefore, you find in a statute the strong words 'null and void to all intents and purposes,' and even when more limited language is used in another section, yet, where the object of the statute is clearly limited, the general words may be cut down and narrowed." Even under the usury acts, the words of which were extremely strong, the courts evidently struggled to get out of them. In *Parr v. Eliason*, 1 East, 92, a bill of exchange payable to A. or order, which was legal in its inception, was by him indorsed to B. for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to B.'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: and it was held, that the indorsement of A. to B. on an usurious account did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury, 12 Ann. st. 2, c. 16: and that B.'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against A., though, as between A. and B., the security [103] was void. Lord Kenyon said: "Where the bill itself in its original formation is given for an usurious consideration, the words of the statute of Anne are peremptory that the assurance shall be void: and the construction which has been put upon the statute has gone far enough, in saying that it shall be avoided even in the hands of an innocent indorsee without notice. But no case has gone the length now contended for, nor do the words of the statute require it. Here, the bill was fair and legal in its concoction, and therefore no advantage can be taken of what happened afterwards

against bona fide holders. The defendants stand clothed with the rights of the party from whom they received the bill in payment, and must therefore be taken to be holders for a valuable consideration, without notice." 2 The plea and replication taken together do not shew that the bill in question was a security given to induce a creditor to forbear to oppose the allowance of the certificate: it never became a security until after the certificate was obtained: it was dated and drawn after the allowance of the certificate. [Willes, J. The promise was before the allowance, the performance after.] The contract may be void; but the security is perfectly valid in the hands of a bona fide holder. In *Rex v. Hart*, 6 C. & P. 106, it was held that a blank acceptance was neither a "bill of exchange" nor an "order for the payment of money" nor a "security for money." [Crowder, J. That is confirmed by a later case, —*Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549.] 3. Another question arises, viz. whether the replication is a good answer to the third plea as well as to the second. If the court should think it no answer as to the third plea, it is submitted that it may be taken distributively: *Blagrove v. The Bristol Waterworks Company*, 1 Hurlst. & N. 369. [Willes, J. A demurrer is not divisible: [104] you must ask leave to amend by striking out the words "and last."] The third plea is clearly a bad one. [Willes, J. Bad on special demurrer only; not a void plea.]

Prentice, contra. *Wicks v. Argent*, 16 M. & W. 817, shews that the third plea is well pleaded. [Trevelyan abandoned the objection to the third plea, and elected to amend his replication, by confining it to the second plea.] The second plea is a good answer to the action. A bill or note given in consideration of forbearance to oppose the discharge of an insolvent, though void in the hands of the party himself, was under the old insolvent acts held not to be so in the hands of an innocent holder for value: *Lucas v. Winton*, 2 Campb. 443; *Simpson v. Pogson*, 3 D. & R. 567; *Rogers v. Kingston*, 2 Bingh. 441, 10 J. B. Moore, 97; *Northam v. Latouche*, 4 C. & P. 140; *Murray v. Reeves*, 8 B. & C. 421, 2 M. & R. 423; *Horn v. Ion*, 4 B. & Ad. 78, 1 N. & M. 627; *Hills v. Milson*, 8 Exch. 751. But those cases have no application here. In *Shillito v. Theed*, 5 M. & P. 303, 7 Bingh. 405, a security given for a bet upon a horse-race, which security was by the 16 Car. 2, c. 7, s. 3, declared to be "utterly void and of none effect," was held not to be available in the hands of a bona fide holder for value and without notice. The like was held in *Bowyer v. Bampton*, 2 Stra. 1155, upon the earlier statute of 9 Ann. c. 14, s. 1, where the words were "void to all intents and purposes whatsoever." [Williams, J. In the gaming cases, the courts have held that the drawer or indorsee might be sued by an innocent holder, though the bill was void as against the acceptor,—upon the principle "that the words of a statute are not to be construed so as to extend beyond the mischief contemplated by the act, where such construction would be injurious to the interest of third persons:" [105] *Edwards v. Duck*, 4 B. & Ald. 212. All these cases were before the 5 & 6 W. 4, c. 41, which in plain and explicit terms declares what is the legal construction of words such as are used in the clause now in question. Crowder, J. It would seem that the framer of the act had overlooked the 5 & 6 W. 4, c. 41, and adopted the old objectionable language.] It may well have been done designedly. The legislature may have thought it right to go back to the law as it before stood. The construction contended for on the other side would deprive the bankrupt of the protection which the statute intended to give him. [Crowder, J. How do you get over the other point,—as to this instrument not being a "security" at the time of the allowance of the certificate?] If this wholesome provision of the statute could be evaded by such a trick as that, it might as well be repealed altogether. The agreement was before the allowance, and the document was handed over before, though it did not become a complete instrument until the drawer put his name to it. [Willes, J. It has been held, that, where an insolvent had given a blank acceptance, which was not filled up until after he had obtained his discharge, he was liable to be afterwards sued upon it.]

Trevelyan, in reply. However the court may be disposed to deal with the construction of the 202nd section, the second point has received no answer. This was clearly not a "security" given by the bankrupt to induce the creditor to forbear to oppose the allowance of his certificate. In *Lewis v. Chase*, 1 P. Wms. 620, Lord Chancellor Parker refused to relieve a bankrupt against a bond which he had given to a creditor in consideration of his withdrawing a petition against the allowance of the bankrupt's certificate (a).

(a) But see *Sumner v. Brady*, 1 H. Bl. 647.

[106] COCKBURN, C. J. I am of opinion that our judgment must be for the plaintiff. If the bill in question had fallen within the terms of the 202nd section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106,—which enacts “that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt’s certificate, or to forbear to petition for the recall of the same, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence,”—I should have felt bound (although I should have done so with great reluctance) to express a clear opinion that the plea was good and the action barred, because the legislature has by the statute 5 & 6 W. 4, c. 41, s. 1, expressly declared that the same words in the 125th section of the 6 G. 4, c. 16, made the security void in the hands of a bona fide holder or assignee for a valuable consideration, without notice of the original consideration for which the security was given; and that statute then goes on to mitigate that by repealing the former enactment, and by providing, that, “nevertheless, every note, bill, or mortgage which, if this act had not been passed, would, by virtue of the recited act, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed, for an illegal consideration,” and that the recited act “shall have the same force and effect which it would have had, if, instead of enacting that every such note, bill, or mortgage should be absolutely void,” such act had “provided that every such note, bill, or mortgage should be deemed and taken [107] to have been made, drawn, accepted, given, or executed for an illegal consideration:” and then comes a proviso “that nothing herein contained shall prejudice or affect any note, bill, or mortgage which would have been good and valid if this act had not been passed.” The legislature, therefore, has distinctly declared what is the construction of the words in the new act, and what is the course to be pursued to give them any other effect; and, by the new act, instead of following up that view of the case, again enact that the security shall be void in the hands of a bona fide indorsee for value and without notice. It seems to me that we are bound to put upon the 202nd section of the 12 & 13 Vict. c. 106, the same construction that the legislature by the 5 & 6 W. 4, c. 41, has declared that the same words in the 6 G. 4, c. 16, s. 125, were intended to bear (a). It, however, becomes unnecessary to decide that on the present occasion, inasmuch as I do not think the case falls within the 202nd section, because that section applies only to securities given before the allowance of the certificate, and the record shews that this was a security given after the allowance. If the mere acceptance constituted a security, the case would I think have fallen within the 202nd section of the statute: but the case referred to by my Brother Crowder in the course of the argument,—*Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549,—is [108] a distinct authority that it is not a “security” until a drawer’s name has been attached to it, for that a “security” means an instrument which is capable of being put in suit. At the time of the allowance of the bankrupt’s certificate in this case, the bill declared on was an inchoate instrument, and not a security. It is impossible, therefore, to say that it can fall within the 202nd section. The replication raises the question whether the 204th section applies. But that section does not say that the contract shall be void: it only says “that no bankrupt, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made after the issuing of the fiat or filing of the petition for adjudication of bankruptcy: and, if any bankrupt be sued upon any such contract, promise, or agreement, he may plead the general issue, and give this act and the special matter in evidence.” If it had not been for the 202nd section, I should have felt some difficulty in saying that

(a) Section 270 enacts “that, if any creditor of a bankrupt shall obtain any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose or for consenting to the allowance of the certificate of such bankrupt, or to forbear to petition for the recall of the same, every such creditor so offending shall forfeit and lose for every such offence the treble value or amount of such money, goods, chattels, or security so obtained (as the case may be).”

the 204th section, the words of which are so general, did not make the bill unavailable in the hands of a bona fide holder for value. But, looking at the 202nd section, and seeing that the legislature have in that section expressly said that the instrument shall be void, and having refrained from saying so in s. 204, they may very well have meant that it shall be void only as between the immediate parties.

CROWDER, J. I also think the plaintiff is entitled to judgment. The language of the 202nd section of the 12 & 13 Vict. c. 106, is a mere re-enactment of that of the 125th section of the 6 G. 4, c. 16. It is impossible to come to the conclusion that the words of the former [109] mean something different from what those of the latter meant. The legislature have by the 5 & 6 W. 4, c. 41, shewn what was the meaning of the word "void" in the 6 G. 4, c. 16, s. 125: and by that act they proposed to remedy the mischief which they conceived to rise from the provision in the former act; and they professed to mitigate the evil by enacting that the former enactment should have "the same force and effect which it would have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such act had provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration." It is said that we are to take the 5 & 6 W. 4, c. 41, s. 1, and apply it to the 202nd section of the 12 & 13 Vict. c. 106. I think it is impossible to do that. The legislature having declared that the meaning of the word "void" in the 6 G. 4, c. 16, s. 125, is void to all intents and purposes into whose hands soever it might come, I think the same word in the 12 & 13 Vict. c. 106, s. 202, must receive the same construction. For these reasons, I think the defendant would have been entitled to judgment if the bill in question had been brought within the terms of the last-mentioned section. I, however, agree with my Lord Chief Justice in thinking that it is not; for, the statute avoids the security where it is given "as a consideration or with intent to persuade the creditor to forbear opposing, or to consent to the allowance of the bankrupt's certificate, or to forbear to petition for the recall of the same." Now, taking the replication and the plea together, it appears that this acceptance was given to the creditor before the allowance of the bankrupt's certificate, but that the drawing took place after. Unless, therefore, a blank acceptance can be said to be a "security," this transaction does not fall within the 202nd section of [110] the 12 & 13 Vict. c. 106. The case of *Stoessiger v. The South Eastern Railway Company*, to which I referred, seems to be precisely in point. There, C., being indebted to G. in more than 10l., framed a document, directed to himself, ordering himself, three months after date "to pay to my order" the amount. The document had the stamp proper for a bill of exchange of that amount and length of time, and was in all respects like a bill of exchange, except that there was no drawer's name. C. wrote on it his acceptance, and caused it to be forwarded in a parcel directed to G., by a common carrier, in order that G. might add his name as drawer: and it was held that the document was not a bill, order, note, or security for payment of money. In construing the 202nd section, we must look at the time when the document is handed over: and at that time it clearly was no security at all. As to the 204th section, I must own, that, but for the 202nd, I should have had great difficulty in saying that this case did not fall within it. But, the legislature having clearly defined the meaning of the words used in the 202nd section, and having adopted a different form of expression in the 204th section, I think we are bound to assume that they intended something different, and did not by the last-mentioned section mean to make the security void. There will, therefore, be judgment for the defendant on the demurrer to the third plea, and for the plaintiff on the demurrer to the second plea, the plaintiff amending his replication by confining it to the second plea.

WILLES, J., concurring,
Judgment accordingly.

[111] PIDDINGTON v. THE SOUTH EASTERN RAILWAY COMPANY.
June 21st, 1858.

[S. C. 27 L. J. C. P. 295; 4 Jur. N. S. 953. See *Great Western Railway v. Sutton*, 1869, L. R. 4 H. L. 242.]

A railway company by their act of incorporation were empowered to fix the sum to be charged by them in respect of the carriage of small parcels (not exceeding

100 lbs. each) "as to them should seem proper:" but that provision was not to extend to "articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which might be sent upon the railway at the same time."—By a subsequent act it was provided "that the charges by that act authorized to be made for the carriage of goods, &c., by the company, should be at all times charged equally to all persons, and after the same rate, in respect of all goods of a like description and conveyed on the same portion of the line: and that no reduction or advance should be made either directly or indirectly in favour of or against any particular company or person:" Held, that the company were restricted to a reasonable charge, and were not justified in making an increased charge in respect of the conveyance of "packed parcels," the jury having negatived that they incurred any additional risk or expense in the carriage thereof.

This was an action for money had and received. Plea never indebted, upon which issue was joined.

By the particulars of demand it appeared that the action was brought to recover a sum of 95l. 13s. 3d. for overcharges alleged to have been made by the defendants and paid to them by the plaintiff for the carriage of goods upon their railway, from the 1st of August to the 30th of November, 1857, inclusive.

The cause was tried before Williams, J., at the second sitting at Westminster in Easter Term last, when the following facts appeared in evidence:—The plaintiff had, since the year 1849, carried on the business of a carrier under the name of the Continental Parcels Agency, and was in the habit of sending a large number of parcels addressed to different persons, packed together in hampers, by the defendants' railway. Down to the year 1855, these parcels had been paid for separately, whether packed or not. In that year an agreement was entered into between the plaintiff and the company, under which they agreed to carry the plaintiff's parcels for 10s. per cwt. This agreement was to be determinable at a month's notice; and in January, 1857, it was accordingly put an end to by the plaintiff. In August, 1857, the company published a new scale of charges, by which it was amongst other things provided that parcels tied together or packed in wrappers or hampers should be charged double rates. [112] The plaintiff paid these charges under protest, and now sought to recover back the amount of the excess.

For the defendants it was contended that the company had power, under the 133rd section (a) of the 6 W. 4, c. lxxv., to charge what they pleased for small parcels.

For the plaintiff it was insisted that the charge was an illegal one, although the company professed to make it upon all persons alike; and reliance was placed upon the 17th section of the 2 Vict. c. xlii.(b).

The learned judge, reserving the point, left it to the jury to say whether there

(a) Which enacts "that it shall be lawful for the said company from time to time to make such orders for fixing and by such orders to fix the sum to be charged by the said company in respect of small parcels (not exceeding 100 lbs. weight each) as to them shall seem proper: Provided always that the provision hereinbefore contained shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which may be sent upon the railway at the same time.

(b) Which enacts "that the said recited acts [6 W. 4, c. lxxv., and 7 W. 4 & 1 Vict. c. 93], or either of them authorized to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam-power or carriage to be supplied by the said company, shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favor of or against any particular company or person travelling upon or using the same portion of the said railway."

was any additional risk or [113] expense incurred by the company from the packing of the parcels in the way stated. The jury found there was none : and a verdict was accordingly directed to be entered for the plaintiff for the sum claimed : leave being reserved to the defendants to move to enter the verdict for them, if the court should be of opinion that the double charge was justified by the 6 W. 4, c. lxxv., s. 133, and 2 Vict. c. xlii., s. 17, or either of them.

Hugh Hill, Q. C., on a subsequent day in the same term, obtained a rule nisi to enter a verdict for the defendants, on the ground, that, under the provisions of the 6 W. 4, c. lxxv. and 2 Vict. c. xlii., the defendants were entitled to charge for packed parcels double the sums charged for parcels not packed.

Lush, Q. C., and J. Brown, now shewed cause. At the trial two classes of goods were in question,—packed parcels exceeding 100lbs. weight each, and packed parcels not exceeding that weight ; but the rule is limited to the latter. It is contended, on the part of the company, that the 133rd section of the 6 W. 4, c. lxxv., impowers them to charge what they please for the carriage of small parcels, as they are called, however unreasonable the charge may be. Assuming that to be so,—though Alderson, B. in *Crouch v. The Great Northern Railway Company*, 11 Exch. 742, 752, intimated a strong opinion that in the construction of a similar enactment in the 13 & 14 Vict. c. lxi., s. 14, it was to be read as if the word “reasonable” were inserted therein,—at all events the difficulty is got over by the 17th section of the 2 Vict. c. xlii., which compels the company to charge equally to all persons in respect of goods of a like description and conveyed or propelled by a like carriage or engine passing on the same portion of the line. “Description” there means descrip-[114]-tion for the purpose of carriage : it cannot mean reference to the contents of the parcel. In *Crouch v. The Great Northern Railway Company*, Pollock, C. B., says : “In disposing of the rule, it may be convenient to refer to the grounds on which it was granted. The first is, ‘that, under the 13 & 14 Vict. c. lxi., s. 14, the defendants are entitled to charge such charges as they thought fit for their parcels, their respective weight being under 500lbs., provided they charged all parties equally : and the jury should have been so directed.’ Upon that point it is not necessary, in order to dispose of the rule, that we should give any judgment. The second ground is, ‘that, whether or no they were so entitled, they were entitled to charge extra for packed parcels ; and the judge should have so told the jury.’ I am of opinion that the judge ought not to have so told the jury : and that, whether or no the defendants were entitled to charge extra for packed parcels is, in my opinion, a question of fact, and not of law. It is not every difference in the articles carried which will warrant a difference in the rate of charge. No doubt, there are some goods which it may be more inconvenient or more expensive to carry, and as to which the carrier might well say that he would not carry them at the same price as other goods ; but, if there be a difference, that is fit to be submitted to the jury. It seems to me, that, in principle, there is no difference between a packed parcel and an inclosure : but, supposing that there is, it ought to be submitted to the jury, as a matter of fact, whether the difference is such as to justify an increased rate of charge. I think that the learned judge would have been wrong in point of law, if he had told the jury that the defendants were entitled to charge extra for packed parcels.” [Byles, J. You will say that the additional charge for packed parcels is the same as if the company were to choose to [115] announce that they will charge double for all parcels packed in blue paper.] Just so. [Williams, J. If we sustain the opinion thrown out by Alderson, B., in *Crouch v. The Great Northern Railway Company*, 11 Exch. 752, that the word “reasonable” must be imported into the clause, until Mr. Petersdorff convinces me to the contrary, I incline to think the double charge here is unreasonable. But, if that learned judge be wrong, then the question arises, whether the 17th section of the 2 Vict. c. xlii. applies to prohibit this inequality of charge. Are these goods “of a like description ?” They are, for carrying purposes, of a like description : the conveyance of them is not attended with any additional risk or expense to the company. [Willes, J. The word “reasonable” is found in s. 129 of the 6 W. 4, c. lxxv., with reference to goods other than small parcels.] The ordinary carriers, before the establishment of railways, never made any difference between packed parcels and others. [Williams, J. That was proved.] The additional charge for packed parcels was held to be an infraction of a similar provision, in *Parker v. The Great Western Railway Company*, 11 C. B. 545 : and *Crouch v. The Great Northern Railway Company*, 9 Exch. 556, shews that the company

is not at liberty to make any distinction as to the charge for conveying small parcels between carriers and the rest of the public. The dictum of Alderson, B., in 11 Exch. 752, is the only authority upon the subject of the reasonableness of the charge for small parcels: but, if there be any ambiguity in the language of their acts, the construction must be in favor of the public, and against the company, — *Parker v. The Great Western Railway Company*, 7 Scott, N. R. 835, 870, 7 M. & G. 253, 288; *Barrett v. The Stockton and Darlington Railway Company*, 8 Scott, N. R. 641. It has been suggested that the proviso in the 133rd [116] section of the 6 W. 4, c. lxxv., cannot apply to packed parcels at all. [Williams, J. The true meaning of that is, that the article is to be weighed and charged in bulk, though put into separate bags or packages (a).]

Petersdorff, in support of the rule. No case has yet decided that railway companies are restrained from charging what they please for the carriage of small parcels. In all the cases, it has been shewn that there has been an inequality of charge as between the plaintiff and the rest of the public or some other individual. In the present case, it is not suggested that a higher rate is charged to the plaintiff than to others or to the general public: but the facts raise the abstract proposition, as to what is the power conferred upon this company by the 133rd section of the 6 W. 4, c. lxxv. It appears, that, in 1855, there was an agreement between the plaintiff and the company, under which the former paid them 10s. per cwt. for packed parcels, which was something more than three times the amount charged for a parcel of the same weight. Before that time, the plaintiff had been in the habit of paying the usual parcels rate. This agreement was a recognition by the plaintiff that there was some benefit to him from the system of packing parcels. There was nothing to shew that any distinction was made between the plaintiff and other persons: and on the face of their announcement in the bills, it did not appear that any such difference was made. In the case of *Crouch v. The Great Northern Railway Company*, 11 Exch. 742, there was evidence of undue preference. The 133d section of the 6 W. 4, c. lxxv., authorizes the company to make any charge they think proper for small parcels, and it enables them to draw a distinction between different kinds of [117] parcels. [Williams, J. You need not trouble yourself as to the application of the 133rd section, if there be no other impediment than the proviso. Do you contend that the company are not restricted to a reasonable charge?] It is submitted that the equality clause (s. 137) has no application to small parcels at all, and that s. 133 in terms impowers the company to charge what they please: *Barendse v. The Eastern Counties Railway Company*, ante, vol. iv., p. 63. The 17th section of the 2 Vict. c. xlii., applies only to the tonnage-rate. [Williams, J. It was not in terms put to the jury to say whether the charge was reasonable or not. But, why were they asked whether there were any circumstances to justify the increased charge for packed parcels? Willes, J. The real question is, whether the 133rd section of the 6 W. 4, c. lxxv., gives absolute power to the company to charge what they please for small parcels.] The position of a railway company is not like that of a common carrier. The company may carry, but they are not obliged to do so: and they may select the kind of goods they will carry, — *Johnson v. The Midland Railway Company*, 4 Exch. 367, 6 Railway Cases, 61. "Packed parcels" is a term which is well known in the trade. The company may very well say they will not carry that description of package, except for an increased charge. All the cases cited on the other side are distinguishable from the present.

WILLIAMS, J. I am of opinion that this rule should be discharged. It is unnecessary, in the view we take of this case, to decide whether or not the opinion thrown out by Alderson, B., in *Crouch v. The Great Northern Railway Company*, 11 Exch. 742, that the 14th section of the 13 & 14 Vict. c. lxi. (the language of which is similar to that of the 133rd section of the 6 W. 4, c. lxxv.) was to be read as if the word "reasonable" [118] had been contained therein, is correct. I do not mean to express any dissent from that opinion; but I do not think the present case calls for any expression of opinion upon the point. I may, however, observe that it seems to me to be a strong proposition to say that the 133rd section of the 6 W. 4, c. lxxv., authorizes the company to charge for small parcels not exceeding 100 lbs. weight each whatever sum they please. But, as I have already said, it is unnecessary to consider what is the proper construction of that section, because I think the present case is

(a) See *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77.

governed by the 17th section of the 2 Vict. c. xlii.; which clearly, as it seems to me, applies so as to control the 133rd section of the former act. By the 133rd section of the 6 W. 4, c. lxxv., it appears that the company were authorized to make such charges in respect of small parcels (not exceeding 100 lbs. weight each) as to them should seem proper. Then comes the subsequent enactment, by which it is provided "that the charges by the recited acts or either of them authorized to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam-power or carriage to be supplied to the said company, shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the said railway." The question here is, whether the charges complained of are in violation of that [119] provision. I am of opinion that they are, because, though we cannot go into the details of what the parcels consisted of, I take it they may be looked at as goods; and they are charged for in this way,—If they are contained in separate parcels, they are charged at a certain rate,—and, if collected together in one package, the same goods are charged at double that rate. That clearly is a violation of the statute. I am therefore of opinion, that there being nothing to justify the difference of charge which the company have made, it is an unauthorized charge, and the plaintiff is entitled to recover back the excess.

WILLES, J. I am of the same opinion. I must confess that it was some time before I could understand that such a question as this could be seriously argued: my impression was that it had been clearly settled by decided cases. The question is, whether the company can lawfully charge for parcels which are packed or tied together, double the sum which they would charge for the same parcels if carried separate. If the company are bound to make a reasonable charge, or to charge equally and at the same rate to all persons in respect of goods of a like description, they cannot so charge. The first point put by Mr. Cowling in his argument in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, and commented on by the court, was, whether, where the goods belonged to different persons, the carrier might not fairly make an additional charge for the increased risk, inasmuch as he might in case of loss or damage be subjected to several actions. Although that is a very ingenious argument, I must confess I never could properly appreciate it. It assumes that the defendants will violate their duty as carriers. On the other hand, suppose several actions were brought, the defendants would [120] recover their costs, which generally speaking, are to be assumed to be a complete compensation. Here, the jury found that there was not any increased risk. But, independently of that finding, I must own that I should have thought that the company's risk could not be at all increased by the circumstance of several parcels being put into one package. It may be inconvenient that the company should be subjected to several actions in respect of the loss of one single package. The observations of Lord Wensleydale upon that subject in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, 423, are deserving of attention, as, indeed, was every word that fell from that very learned judge. But it seems to me to be unnecessary to consider that here. I think the jury were quite justified in concluding that the alleged increase of risk from the carriage of packed parcels was altogether illusory. That was a question of fact. The jury have decided it; and no exception has been taken to their finding upon the evidence which was before them. And I must say that I entirely concur in the conclusion arrived at. Then, are the company bound to make reasonable charges? That depends upon the proper construction of the 133rd section of the 6 W. 4, c. lxxv. I think there is very great weight in the observation of Alderson, B., in *Crouch v. The Great Northern Railway Company*, 11 Exch. 742, 752: but it is not necessary for us to express any opinion upon that point, because there is the 17th section of the 2 Vict. c. lxii., which enacts in plain terms that "the charges by the recited acts or either of them authorized to be made for the carriage of any passenger, goods, &c., shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, &c., of a like description," &c.

The circumstance of the goods being packed or [121] tied together does not make them cease to be goods of a like description. I think the company were wholly unjustified in doubling the charge in this way. It is clear upon the whole facts of the case that the increased charge is made for the purpose of preventing people who are likely to send packages of the description in question, viz. carriers, from entering into competition with the company in the conveyance of goods,—a thing which it has over and over again been decided that these companies cannot be permitted to do.

BYLES, J. I am of the same opinion. I certainly laboured under the impression that the question of packed parcels had been settled, not only in this country, but also in America, where there are extensive companies formed for the express purpose of forwarding goods by railway from one end of the continent to the other. The 17th section of the 2 Vict. c. xlii., requires the company to charge alike to those who send single or those who send composite parcels. Here, the defendants charge double for certain packages, though the goods are of a like description, and the jury have found that there is no increased risk or expense incurred by them in the carriage of them. That seems to me to be an express violation of the 17th section.

Rule discharged.

[122] BOTTOMLEY THE YOUNGER v. ROBERT NUTTALL. Nov. 29th, 1858.

[S. C. 28 L. J. C. P. 110; 5 Jur. N. S. 315. Applied, *Keay v. Fenwick*, 1876, 1 C. P. D. 756. Referred to, *Souf v. Jardine*, 1882, 7 App. Cas. 354; *Mears v. Western Canada Pulp and Paper Company*, [1905] 2 Ch. 356.]

One of the members of a foreign firm resident in this country, bought goods on account of the firm, for which he gave his own acceptances. Before the maturity of the bills, the acceptor became bankrupt, and the drawer (or those to whom he had indorsed them) proved for the amount against the acceptor's estate, and received dividends:—Held that the vendor of the goods (to whom the bills had been returned) had done nothing to prejudice his right to have recourse against the other members of the firm for the unpaid balance.—The mere fact of the vendor's dealing with the resident partner, making out the invoices to him individually, and drawing upon him alone though aware that he was a member of a firm, and that the goods were to be shipped for the firm, makes no difference.

This was an action for goods sold and delivered, and for money found due on accounts stated.

The defendant pleaded,—first, never indebted,—secondly, for a further plea to so much of the declaration as related to money payable for goods sold and delivered by the plaintiff to the defendant, that the said goods were sold and delivered by the plaintiff to the defendant jointly with certain other persons who then carried on business in co-partnership with him the defendant, to wit, James Hargreaves Nuttall and Edward Henry Hawke Nash: and that the plaintiff made and drew certain bills of exchange, and directed the same to the said James Hargreaves Nuttall, and thereby respectively required the said James Hargreaves Nuttall to pay to his, the plaintiff's, order, at times which had long since elapsed, several sums of money, amounting in the whole to a large sum, to wit, to the price of all the goods which were so sold as aforesaid: That the said James Hargreaves Nuttall accepted the said bills, and delivered the same to the plaintiff, who then took and received the same for and on account and in payment of the price of the said goods, and the said causes of action in respect thereof: That, afterwards, and before the commencement of this action, the plaintiff indorsed and delivered the said bills of exchange to certain persons, to wit, to persons to the defendant unknown, who thereupon became the holders thereof: That afterwards, and before the commencement of this suit, the said James Hargreaves Nuttall became and was duly declared and adjudged to be a bankrupt within the statutes in force concerning [123] bankrupts, and thereupon the said persons to whom the plaintiff had so as aforesaid indorsed the said bills,—such persons being then the holders thereof respectively,—proved for the amount of the said bills against the estate of the said bankrupt, and received dividends out of the said estate in respect thereof.

Replication to the second plea, except so far as it related to the sum of 251l.

18s. 5d., parcel of the claim to which the said second plea was pleaded,—that the amount of the said bills therein mentioned for which the holders thereof respectively proved against the estate of the said bankrupt as therein mentioned, was 1042l. 13s. 1d., and that the dividends received by the holders of the said bills out of the said estate, in respect thereof, as in the second plea mentioned, amounted to the said excepted sum of 251l. 18s. 5d. and no more: And that, after the amount of the said bills had been so proved against the estate of the said bankrupt, and before the commencement of this suit, the said bills were returned to and taken up by the plaintiff as the indorser thereof, and the plaintiff thereby then, and before and at the time of the commencement of this suit, became and was, and still is, the holder thereof for the unpaid value thereof, and entitled to the amount and value thereof, less the amount of dividends so paid as aforesaid: and the said bills, at the time of the commencement of this suit were, and still are, in the hands of the plaintiff, unpaid and unsatisfied, except as aforesaid.

As to the excepted sum of 251l. 18s. 5d., there was a *nolle prosequi*.

The defendant joined issue upon the plaintiff's replication to the second plea, and also demurred thereto, on the ground that "the second plea shewed a *prima facie* satisfaction of the plaintiff's cause of action, and [124] that the replication afforded no answer to the plea." Joinder (*a*).

The cause came on to be tried at the Spring Assizes for the southern division of the county of Lancaster, in 1857, when a verdict was found for the plaintiff for 2000l. and costs, subject to the opinion of the court on the following case:—

The following is a copy of the particulars of the plaintiff's claim:—

	£	s.	d.
"1854, October 4th, to goods	209	6	1
" December 22nd	3	11	4
1855, January 2nd	412	9	6
" " 4th	235	18	0
" " 5th	184	19	6"

The plaintiff at the time of the transactions in question was, and he still is, a stuff-merchant, carrying on [125] business at Bradford, in the west riding of the county of York, under the firm of Moses Bottomley jun. & Co. The defendant is a merchant now residing near Manchester.

Previously to the 1st of September, 1851, the defendant and one Henry Hargreaves carried on the business of commission-agents and general merchants at Rio de Janeiro, under the name and firm of Hoyle, Hargreaves, & Co.

On the said 1st of September, 1851, the said Henry Hargreaves being dead, a partnership was formed between the defendant and James Hargreaves Nuttall and Edward Henry Hawke Nash mentioned in the second plea, for carrying on the said business, which partnership continued under the style or firm of Hoyle, Hargreaves, & Co., until the 23rd of February, 1855, when it was dissolved.

The articles of the said partnership are dated on the said 1st of September, 1851, and were to be referred to as part of the case.

By those articles, in which James Hargreaves Nuttall is described as of Liverpool,

(*a*) The argument of the demurrer was involved in the argument of the special case.

The plaintiff's points on the demurrer were,—“That the second plea is not a plea in satisfaction, unless the bills of exchange drawn on James Hargreaves Nuttall were duly honoured; that such plea is answered by the replication and *nolle prosequi*, which give the defendant credit for the amount obtained by the holders of the bills from James Hargreaves Nuttall's estate, and shew that the bills were before the action returned to the plaintiff dishonoured and unpaid as to the residue.”

The defendant's points on the demurrer were,—“That the second plea shews that the cause of action declared on was satisfied, and that the replication affords no answer to the plea: and that it is not competent to the plaintiff to sue the defendant for the price of the goods, or any part of it, after taking James Hargreaves Nuttall's acceptances in payment for the goods, and after indorsing those acceptances to third parties, who have proved them against the estate of James Hargreaves Nuttall, and received dividends in respect thereof.”

in the county of Lancaster, merchant, the term of the partnership was to be six years from the date, and the partnership firm was to be Hoyle, Hargreaves, & Co. The partners were to share profit and loss in certain named proportions. The defendant was to be allowed 700*l.* per annum in addition to interest on his capital, so long as he continued the resident partner in the Brazils, for his housekeeping and maintenance, in addition to the rent and taxes of the premises where the business was carried on; and James Hargreaves Nuttall was to be allowed £250*l.* per annum (afterwards increased to 300*l.* per annum) for his travelling and other expenses in England on account of the partnership: and, in case the defendant should return to England, and incur ex-[126]-penses on account of the partnership, he was to be allowed them in the same manner.

By the articles it was further provided, that Mr. Nash was to be allowed 300*l.* per annum, Mr. James Hargreaves Nuttall 700*l.* per annum, with interest on his capital, and the defendant, if he should leave the Brazils, 700*l.* per annum, with interest on his capital. All surplus profits were to accumulate. The partners were not to be engaged in any other business whatever, or to make any purchase of goods out of the usual course of business, or embark in any speculation or adventure on his own separate account; but that provision was not to interfere with the then business in which James Hargreaves Nuttall was then engaged distinct from the partnership.

At the date of the said articles, and until the year 1853, the defendant and Nash were the resident partners at Rio de Janeiro. In that year the defendant left Rio, and came to reside near Manchester, where he resided until on or about the 9th of March, 1855, when he quitted England, and went again to Rio de Janeiro, whence he returned and arrived in this country in the month of July, 1856.

At the date of the said articles, James Hargreaves Nuttall resided at Liverpool, where he had previously carried on the business of a merchant. He has continued to reside at Liverpool ever since; and, besides the business of the partnership, he has continued to carry on the said business of a merchant there on his own account until his bankruptcy, which occurred in March, 1855. James Hargreaves Nuttall, during the continuance of the partnership, transacted the business of the firm in this country. He from time to time sold coffee and other goods sent by the firm to this country for sale; and he procured consignments of goods to be made to the firm, to be disposed of at Rio de [127] Janeiro by the firm as the factors or agents of the consignors. He also purchased goods for the firm, which were sent out by him to Rio de Janeiro to the firm, and were there disposed of by the firm on account and for the benefit of the firm. After the defendant came to reside in England as above mentioned, he assisted the said James Hargreaves Nuttall with his advice, and was generally consulted by the said James Hargreaves Nuttall in respect of the consignments and purchases of goods.

In the commencement of September, 1854, Mr. Nash, the then resident partner of the firm at Rio de Janeiro, advised James Hargreaves Nuttall that worsted and cotton dresses were in good demand. On receipt of this information, James Hargreaves Nuttall consulted the defendant on the course to be pursued: and the defendant recommended the purchase of some cases of such dresses for the firm. In pursuance of such advice, James Hargreaves Nuttall, in October, 1854, purchased from the plaintiff, for 209*l.* 6*s.* 1*d.*, six cases, containing nine hundred worsted and cotton dresses, which, by the directions of James Hargreaves Nuttall, were forwarded by the plaintiff to Southampton, to wait the orders of the said James Hargreaves Nuttall. By the orders of the said James Hargreaves Nuttall, these goods were sent from Southampton by the first steamer to Rio de Janeiro, to the said firm of the defendant there; and the said dresses were at Rio de Janeiro sold at a profit by the firm on the account and for the benefit of the firm.

The price of these dresses, namely, 209*l.* 6*s.* 1*d.*, forms the first item in the particulars of demand.

Mr. Whittaker has since the month of May, 1854, been the plaintiff's agent in Liverpool. Mr. Atkinson, who is dead, was his assistant, and had a share of all the commissions earned for business done in connection [128] with the west riding of Yorkshire, and principally managed such business. The plaintiff was aware that his business in Liverpool was principally managed by Mr. Atkinson, but looked upon him merely as a clerk of Mr. Whittaker. The order for the dresses in October, 1854, was given by James Hargreaves Nuttall to Mr. Atkinson, and forwarded by him as Mr.

Whittaker's assistant to the plaintiff. Mr. Atkinson was at that time aware of the existence of the firm of Hoyle, Hargreaves, & Co., at Rio, and that the goods were purchased by James Hargreaves Nuttall for that firm. He was also aware of the fact that the firm consisted of James Hargreaves Nuttall, the defendant, and the said Edward Henry Hawke Nash.

Before and at the time of such order being given, the plaintiff himself knew that there was a firm carrying on business at Rio de Janeiro under the name of Hoyle, Hargreaves, & Co.; and he knew that James Hargreaves Nuttall was a member of that firm; but, until the 7th of March, 1855, the plaintiff did not know, save as aforesaid, and as hereinafter mentioned, that the defendant was a member of the firm, or that he was resident in England, or that the said James Hargreaves Nuttall had any partner or partners in the said firm. Before and at the time when the said goods were ordered and supplied, in October, 1854, one Hanson assisted the plaintiff as his general manager in his business at Bradford; but he was neither consulted nor interfered about the above-mentioned goods. He was aware of the existence of the firm at Rio; but he did not know who were the partners in it until the month of December, 1854, when James Hargreaves Nuttall purchased some more goods from the plaintiff, as hereinafter mentioned.

The following is a copy of the invoice which was sent in by the plaintiff for the goods so as aforesaid supplied in October, 1854:—

[129] "Bradford, Oct. 4, 1854.

"Mr. J. H. Nuttall, Liverpool.

"Bought of M. Bottomley Jun. & Co.

				£	s.	d.
109	150	6/4 Circassian robes	4/2½	31	11	3
		10 cartoons	3/6	1	15	0
		Tin and wood case	19/6		19	6
110	150	6/4 Circassian robes	4/2½	31	11	3
		10 cartoons	3/6	1	15	0
		Tin and wood cases	19/6		19	6
111	150	6/4 Circassian robes	4/2½	31	11	3
		10 cartoons	3/6	1	15	0
		Tin and wood cases	19/6		19	6
112	150	6/4 Circassian robes	4/2½	31	11	3
		10 cartoons	3/6	1	15	0
		Tin and wood cases	19/6		19	6
113	150	6/4 Circassian robes	4/2½	31	11	3
		10 cartoons	3/6	1	15	0
		Tin and wood cases	19/6		19	6
114	150	6/4 Circassian robes	4/2½	31	11	3
		10 cartoons	3/6	1	15	0
		Tin and wood cases	19/6		19	6
Sample	15	6/4 Circassian robes	4/2½	3	3	1
		Cartoon	3/6		3	6
		Tin and wood cases			5	0
				209	6	1

"To W. & I. Bleaymire, Southampton, on account of J. H. Nuttall, Liverpool, to wait his instructions."

By the terms of the sale of the said dresses, the plaintiff was to draw on James Hargreaves Nuttall for the amount of the invoice, at three months; and accordingly on the 4th of December, 1854, the plaintiff drew on the said James Hargreaves Nuttall a bill for 209l. 6s. 1d., being one of the bills mentioned in the second plea. This bill was accepted by James Hargreaves Nuttall, and was indorsed over by the plaintiff to Messrs. Bottomley & Son, of Halifax. Before this bill became due, James Hargreaves Nuttall became bankrupt: and, the said bill being dishonored, the said indorsees proved the same against James Hargreaves [130] Nuttall's estate, and received a dividend thereon, being part of the sum of 251l. 18s. 5d. mentioned and excepted in the introductory part of the replication to the second plea, and for which a nolle prosequi has been entered. The said bill afterwards, and before this action was commenced, was taken up by the plaintiff.

The other goods mentioned in the particulars of demand (except those supplied on the 22nd of December, 1854, to the amount of 3l. 11s. 4d.) were purchased in December, 1854, and were delivered at the dates mentioned in the particulars. They were purchased and paid for and forwarded to Southampton in the same manner, and on the same terms, and under the same circumstances in all respects, as are hereinbefore mentioned, save and except that James Hargreaves Nuttall told Mr. Hanson, when the order was given, that they were for the Rio firm of Hoyle, Hargreaves, & Co.; and he also told him the names of the partners in that firm. The plaintiff himself also knew that the goods ordered in December were for the Rio firm, and that the name of that firm was Hoyle, Hargreaves, & Co.

[Copies of the invoices of these goods, which were in the same form as that above set forth, were inserted in the case.]

In respect of these goods, a bill for 833l. 7s. was, on the 4th of January, 1855, drawn by the plaintiff on James Hargreaves Nuttall, being the other of the bills mentioned in the second plea. This bill was accepted by James Hargreaves Nuttall, and was indorsed over by the plaintiff to the firm of T. Salt, Sons, & Co. Before this bill became due, James Hargreaves Nuttall became bankrupt; and, the bill being dishonored, the indorsees proved the same against the estate of James Hargreaves Nuttall, and received a dividend thereon, being the residue of the said sum of 251l. 18s. 5d. mentioned and excepted in the introductory part of the [131] second plea, and for which a *nolle prosequi* has been entered. This bill also was returned to and taken up by the plaintiff before this action.

The goods supplied on the 22nd of December, 1854 (value 3l. 11s. 4d.), were fifteen robes sent to James Hargreaves Nuttall as samples, and kept by James Hargreaves Nuttall for his own use. On February 28, 1855, James Hargreaves Nuttall, being in insolvent circumstances, called a meeting of his creditors, which was held at Liverpool on the 7th of March following. This meeting was attended by the plaintiff. After the 28th of February, and before the meeting was held, the plaintiff sent Mr. Hanson to Liverpool to make inquiries; and, on his return, the plaintiff for the first time learned that the defendant and Mr. Nash were partners of James Hargreaves Nuttall, and members of the said firm of Hoyle, Hargreaves, & Co. On or immediately after the same 9th of March, the defendant left this country, and went to Rio de Janeiro, whence he returned to England in July, 1856.

On the 23rd of March, 1855, James Hargreaves Nuttall was adjudicated a bankrupt.

It was agreed that the court might make any amendments in the pleadings which to the court might seem fit; and the court was to draw such inferences or conclusions as a jury ought to have done.

The question for the opinion of the court was,—whether, upon the facts and pleadings, the plaintiff was entitled to recover in this action any and what sum: and the court was to direct how and in what manner the verdict was to be entered, and to dispose of the demurrer at the same time.

Unthank, for the plaintiff (*a*). The short facts are [132] these:—The plaintiff carried on business at Bradford in Yorkshire, having an agent named Whittaker at Liverpool. The defendant was a member of a firm at Rio de Janeiro, one member of which, viz. James Hargreaves Nuttall, resided at Liverpool. James Hargreaves

(*a*) The points marked for argument on the part of the plaintiff, were,—

“1. That the purchases in question were made by James Hargreaves Nuttall for his firm, of which firm the defendant was a member:

“2. That, under the circumstances stated in the case, the plaintiff was entitled to debit the members of the firm with the price of the goods, when he became aware that they were the real principals:

“3. That he is not precluded from so doing by having in the first instance, and in ignorance of the facts, debited James Hargreaves Nuttall with the price of the goods:

“4. That the knowledge that the defendant was a member of the firm, possessed by Mr. Atkinson, the assistant of Mr. Whittaker, the plaintiff's Liverpool agent, through whom the orders were given, is not sufficient to preclude the plaintiff from debiting the defendant, especially as the case negatives the plaintiff's personal knowledge.”

Nuttall bought goods for the firm at Rio, and which were afterwards shipped thither to and sold by the firm, from the plaintiff's agent, Whittaker; and these goods were paid for by the acceptances of James Hargreaves Nuttall, and the invoices were made out in his name, the goods being deliverable to him. The agent at Liverpool at the time of the sale knew that James Hargreaves Nuttall was a member of the Rio firm: but the plaintiff himself was ignorant of that fact. Now, according to the cases of *Paterson v. Gandasequi*, 15 East, 62, *Addison v. Gandassequi*, 4 Taunt. 574, and *Thomson v. Davenport*, 9 B. & C. 78, 4 M. & R. 110, where goods are bought by an agent on account of an unknown and undisclosed principal, the seller, upon afterwards discovering the principal, may recover the price from him, although he may in the first instance have given credit to the agent. [133] [Williams, J. In those cases, the agent had no interest in the transaction except as agent. Cockburn, C. J. This differs from the ordinary case. Here, you treat the agent as principal to a certain extent, and obtain part payment from him as such. Can you afterwards rip up the transaction and say that quoad that part he was principal, but that as to the residue he was agent?'] If the acceptances given by James Hargreaves Nuttall had been returned wholly unpaid, the plaintiff might clearly have resorted to the Rio firm. [Byles, J. The taking the bills from James Hargreaves Nuttall may be consistent with your view: but what do you say to the invoices?'] It does not appear that the plaintiff, when he drew the bills and made out the invoices, had notice that the defendant was a member of the firm. And, if he had, it makes no difference. *Robinson v. Wilkinson*, 3 Price, 538, shews that the plaintiff's rights are unaffected by the circumstance of his having received the bills. There, as here, bills had been drawn upon the ostensible partner; and Wood, B., said,—"This defendant was not known to be a partner when the goods were supplied; but, as soon as his partnership is discovered, the plaintiff sues him. And there is no doubt that in respect of the stores furnished during the period of his partnership he is liable. Then it is contended that the drawing these various bills discharged the defendant. And so it would, if they had been paid; but drawing bills which are afterwards dishonored is no discharge. As far as they were paid, they are a discharge." [Cockburn, C. J. The first question is, to whom was the credit given? That is purely a question of fact; and I for one must protest against this court being converted into a jury. It is most important to keep separate the law and the facts.] The credit clearly was given to the firm. If James Hargreaves Nuttall had gone to the plaintiff himself, and had said, "I am ordering [134] goods for Hoyle, Hargreaves, & Co., of Rio, a firm consisting of myself, Robert Nuttall, and one Nash, and I will pay for them by my own acceptances at three months, and the invoices shall be made out to me," - that would not, without more, have shewn that the credit was given to James Hargreaves Nuttall, to the exclusion of the other two. [Cockburn, C. J. This is not a question of agency; it is the case of a dormant partner.] Precisely so.

The question raised by the demurrer to the replication, is disposed of by a case in this court, of *Maillard v. The Duke of Argyll*, 6 Scott, N. R. 938, 6 M. & G. 40, where it was held that a plea that bills were taken and received by the plaintiff "for and on account" of the debt, and "in payment thereof," did not necessarily import satisfaction. And in *Kemp v. Watt*, 15 M. & W. 672, the word "discharge" was held to carry the matter no further. [Byles, J. In *McDonall v. Bond*, 17 L. J., Q. B. 295, it was held that an averment that a bill of exchange was given "for and on account of and in payment and discharge" of a debt, is not equivalent to an averment that the bill was given in satisfaction of such debt. Wightman, J., says: "It was very properly conceded, that, if the averment amounted only to a delivery 'for and on account of' the debt, the subsequent part of the plea would be immaterial, for, it shewed that the bills so given had not been effectual, and the collateral security which would be a good answer while running, for it would operate as a suspension of the cause of action, would be no answer when it had failed. It is contended, therefore, that the words express not merely a suspension but a satisfaction of the debt: that is, that the words 'in payment and discharge' are equivalent to satisfaction. I cannot attribute this meaning to these words. I always distrust the use of supposed [135] equivalents; and the effect of the two cases referred to is this, -in *Maillard v. The Duke of Argyll*, 6 Scott, N. R. 938, 6 M. & G. 40, 'payment' was considered not equivalent to 'satisfaction'; and in *Emblin v. Dartwell*, 12 M. & W. 830, 'discharge' was decided not to mean 'satisfaction'; for, if the terms of the plea in that case had been

equivalent to satisfaction, the replication would have been good. I agree with both cases: and, whatever may be the exact meaning of 'in payment and discharge,' their legal effect is not equivalent to satisfaction." Williams, J., in *Belshaw v. Bush*, 11 C. B. 191, "for and on account" is said to amount to a conditional payment.] Accord and satisfaction is a well-known form of plea: and there is no reason why it should be departed from. [Byles, J. The plea and replication taken together shew a suspension of the remedy, and that the period of suspension has elapsed.]

Manisty, Q. C. (with whom was Milward), for the defendant (a). Where a person is selling goods to the [136] agent of a foreign firm, knowing that he is buying for foreign principals, and knowing who the principals are, and elects to give exclusive credit to the agent, he cannot afterwards, upon failure of the agent, turn round and charge the principals: and it makes no difference that the agent is also a member of the firm. The inference is, that the seller means to trust the agent or the resident partner. And, further, if the seller of the goods takes a negotiable security from one member of the firm, and, on his bankruptcy, elects to prove against his estate, and to take a dividend, he cannot afterwards proceed against the others. [Crowder, J. Do you find any case, or any dictum, where the agent is also a member of the firm?] None: but it is submitted, that, in principle it makes no difference. That notice to the agent of the seller was notice to the seller himself, is clear from *Story on Agency*, § 140. [Williams, J. I do not understand Mr. Unthank to deny that the plaintiff would be bound by the knowledge of Atkinson.] The fact of the invoices being made out in the name of James Hargreaves Nuttall alone, coupled with the bills being drawn upon him for the price of the goods, is strongly confirmatory of the presumption that the credit was given to him alone. The invoice is a document of great commercial importance. It speaks for itself. It describes as plainly as language can describe it, that the goods are bought by James Hargreaves Nuttall, and by him alone. In *Smyth v. Anderson*, 7 C. B. 21,—where all the cases, including *Thomson v. Davenport*, are commented upon,—A., as agent of B., a merchant residing abroad, bought [137] goods of C. At the time of the purchase, A. did not inform C. who was his principal, but the invoices described the goods as bought "on account of B., per A." C. afterwards drew upon A. for the amount at four and six months, but A. became insolvent before either of the bills arrived at maturity. B., after receiving advice of the purchase, and of the acceptance of the bills by A., made large remittances to A. on account of these and other goods: and A. at the time of his stoppage was considerably indebted to B.: it was held not to be competent to C. to sue B. for the price of the goods. Having once given credit to the party here, the plaintiff could not afterwards shift his claim, and charge the partners abroad: *Leggatt v. Reed*, 1 C. & P. 16. Then, having elected to take bills from one of several principals in payment for the goods, and the amount of those bills having been proved by the indorsees against the estate of the acceptor, the vendor's remedy against the other parties in respect of the original consideration was altogether gone. The general rule, as laid down in *Ford v. Beech*, 11 Q. B. 842, 852, and the authorities there cited, is, that, if a cause of action is once suspended, it is gone for ever. The case of a bill of exchange is an exception

(a) The points marked for argument on the part of the defendant, were,—

"1. That credit was given for the goods in question to James Hargreaves Nuttall:

"2. That the plaintiff, having sold the goods on the terms that he should be paid for them by the acceptances of James Hargreaves Nuttall (the defendant's partner), and having been so paid for the goods, and having indorsed those acceptances to third parties, who have proved them against the estate of James Hargreaves Nuttall, and received dividends in respect thereof out of that estate, the plaintiff cannot now sue the defendant for the price of the goods, or any part thereof:

"3. That the original cause of action (if any) against the Rio firm, has, under the circumstances, been satisfied by James Hargreaves Nuttall's acceptances; and that it is not competent to the plaintiff, after those acceptances have been negotiated and proved, and dividends received in respect of them as aforesaid, to resort to the original cause of action, and to sue one of the partners, in the Rio firm for the price of the goods, or any part thereof:

"4. That the second plea shews that the cause of action declared on was satisfied, and that the replication to that plea affords no answer to it."

to the general rule. Here, the plaintiffs could not have sued James Hargreaves Nuttall upon the bills, and the firm upon the original consideration. The debt upon the bills being proved, the cause of action was gone. *Belshaw v. Bush*, 11 C. B. 191, has no analogy to this case. Could the plaintiff have proved for the bills under James Hargreaves Nuttall's fiat, and then have sued the firm? Clearly not. [Crowder, J. The bankruptcy and certificate of James Hargreaves Nuttall would discharge him: but it would be no discharge of the other two.] It is a joint debt. [Cockburn, C. J. Assume that there was no bankruptcy, but that the bills turned out to be [138] valueless,—could not the plaintiff have sued the firm?] No doubt. But he could not take the double remedy,—treating the debt as a joint debt for one purpose, and as a separate debt for another purpose. It was competent to the plaintiff to resort to the original consideration, upon the dishonour of the bills: but he could not do that and sue upon the bills also. [Williams, J. It is impossible that there can be any rule of law that should so completely shut out all common sense and justice.] Take the common case of an attorney having a lien upon a client's papers: if, upon the bankruptcy of his client, he proves for his debt, his lien is gone. [Williams, J., referred to *Ex parte Gennell*, *In re Boggs*, 3 Mont., D. & De Gex, 198.] In *Ex parte Higgins*, *In re Tyler*, 4 Jurist, N. S. 595, a creditor of a firm consisting of two partners brought an action for the amount of his debt against one only of the partners, and recovered judgment therein: subsequently, both the partners were adjudicated bankrupt: the creditor having sought to prove for the amount of his debt against the joint-estate of the bankrupts,—it was held that the joint-debt of the two partners was extinguished by the judgment which had been obtained against one of them, and the proof was accordingly rejected.

Unthank, in reply, was stopped by the court.

COCKBURN, C. J. I am of opinion that the plaintiff is entitled to judgment. Two questions present themselves for the consideration of the court,—first, whether there is any liability on the part of the defendant in respect of these goods,—secondly, whether, if there ever was any such liability, anything has been done on the part of the plaintiff to divest him of the right to proceed against the defendant. It appears that the goods [139] were ordered by James Hargreaves Nuttall alone, who was resident at Liverpool, but was a member of the firm at Rio de Janeiro, of which the defendant Robert Nuttall was also a member. It occurred to me at first that this was a case of principal and agent in the ordinary way, and that a question might arise as to whether, the plaintiff proceeding against the defendant as an undisclosed principal, —the dealing having in the first instance been with James Hargreaves Nuttall, —it was open to him, after having through the indorsees of the bills of exchange received a portion of the price from James Hargreaves Nuttall, to divide the transaction, and, having so far treated James Hargreaves Nuttall as the principal, afterwards turn round and insist upon his right to charge the now defendant as principal. But, upon looking further at the facts of the case, it appears to me that it is not a case of principal and agent at all, but a pure question of partnership liability. The goods were ordered by James Hargreaves Nuttall, a member of the firm, on account of the firm, and the firm had the benefit of them. It is true that James Hargreaves Nuttall did not in terms order the goods for the firm: but it was known to the person who was acting for the plaintiff that there was this firm, that James Hargreaves Nuttall was a member of it, and that the goods were to be applied to the use and for the benefit of the firm. It is, therefore, the ordinary case of one partner ordering goods for a firm, there being a third person a member of the firm who was not known to the seller as such at the time of the transaction. Under ordinary circumstances, undoubtedly, the unknown partner is liable equally with the person who appears in the transaction, when discovered, and the seller may equally have recourse to him for payment. But it is said that that ordinary rule may become inapplicable, if the seller, having [140] notice of the partnership, chooses, instead of relying upon the firm, to adopt the liability of the particular individual with whom he is dealing. As a proposition of law, that cannot be contested. If the seller refuses to deal with the firm, but elects to deal exclusively with the individual, he cannot afterwards treat the firm as his debtors, and sue one whom he did not mean to trust. That brings it to the real question in this case, which is one simply of fact, viz. whether the credit was given to James Hargreaves Nuttall only, to the exclusion of the firm of which he was a member. In support of the affirmative of that proposition, Mr. Manisty relies upon

two things,—first, that bills for the price of the goods were, pursuant to a stipulation to that effect, drawn upon and accepted by James Hargreaves Nuttall only, —secondly, that the invoices were made out in the name of James Hargreaves Nuttall alone, and not in the name of the firm. These are facts which would have well deserved the attention of a jury, if, as I think it ought to have been, this case had been submitted for the decision of a mercantile jury. However, as the case is now before us, we must deal with the facts as we best can; and I do not think we are justified in holding that these circumstances neutralize and overpower the strong probabilities of the case. One who sells goods to a firm has in the first instance the security of the firm for payment; and, failing that, he has also the security of the separate estates of the individual members of the firm, their separate liabilities having first been discharged. It is not to be assumed, without some cogent evidence, that a man to whom the law has given this double advantage should relinquish a part of it. The fact of the bills for the price of the goods having been drawn upon James Hargreaves Nuttall alone, is not inconsistent with any other view than that of his being solely and [141] exclusively liable. It may very well have been that, as this was a foreign firm, while James Hargreaves Nuttall was known to be resident at Liverpool, bills drawn upon and accepted by him would be more readily negotiable than if drawn upon a firm in Rio de Janeiro. Then, as to the invoices,—one can understand why, as a matter of convenience, these should be made out in the name of James Hargreaves Nuttall alone, instead of in that of the firm, it being part of the arrangement that the goods should go to Southampton, there to await his orders. The facts, therefore, which are relied on by Mr. Manisty do not appear to me to be of such cogency and importance as to outweigh the manifest probabilities of the case, and to induce us to adopt the argument urged on the part of the defendant. This disposes of the first part of the case. Looking at all the facts, I think the only reasonable conclusion we can arrive at is, that credit was not given to James Hargreaves Nuttall exclusively, but that the plaintiff dealt with him as a member of the firm, knowing of the existence of the partnership, and intending to have the security of the firm.

Then comes the second question, which Mr. Manisty has not, I think, argued with the same degree of confidence as he did the first, namely, whether what the plaintiff has done estops him from having recourse to the now defendant Robert Nuttall for the residue of the original demand which has not been satisfied out of the estate of James Hargreaves Nuttall. I asked in vain for an authority for the proposition, that, where an acceptance is given by an individual member of a firm for goods supplied to the firm, and the party giving the acceptance becomes bankrupt, and a portion of the amount is realized from his estate, the drawer is estopped from proceeding against the other members of the firm, or against the partnership estate, for the [142] residue. It appears to me to be contrary to common sense and justice, that, because a portion of the bill has thus been liquidated out of the estate of the acceptor, the drawer is to forego all remedy against the partnership estate for the residue. In the absence of any authority for such a proposition, I am not prepared to give effect to such an argument. It is true, the acceptance operates a suspension of the drawer's remedy until the maturity of the bill; but, the bill being unpaid when it becomes due, the drawer may treat it as waste-paper, and proceed for the original consideration. So, if a portion only of the amount is obtained from the acceptor, whether through payment by himself, or through the medium of a proof in bankruptcy against the acceptor, appears to me to make no difference either in principle or in justice and good sense. I am not disposed, therefore, to establish a precedent, that, under such circumstances as these, the plaintiff's remedy is affected by his receipt of a portion of the price of the goods from the estate of James Hargreaves Nuttall. Upon that ground also, therefore, I am of opinion that the plaintiff is entitled to our judgment.

WILLIAMS, J. I am entirely of the same opinion. As to the first point, it appears that the goods the price of which is sought to be recovered in this action were bought by James Hargreaves Nuttall in the course of conducting the business of a partnership of which the now defendant was a member, and the benefit of which goods was enjoyed by the defendant in common with all the other members of the firm. Now, it is clear, that, according to the ordinary rules of law, although the goods were bought by James Hargreaves Nuttall in his own name, all who were members of the firm at the time, and who consequently shared in the benefit of the transaction entered into by him on their [143] behalf, would be liable. But I quite agree that it was com-

petent to the plaintiff to rely, if he pleased, solely and exclusively upon the credit and responsibility of the partner resident here with whom he dealt. In order, however, to take a case thus out of the ordinary rule of the law of partnership, it must, I apprehend, be shewn most clearly that the seller of the goods did intend to rely solely upon the one partner, to the exclusion of the liability of the rest of the firm. For the reasons given by the Lord Chief Justice, which it is unnecessary to repeat, I do not think it has been satisfactorily made out that the plaintiff did so elect. It is enough to say that the defendant has, upon the facts submitted to us, failed to establish the proposition which he was bound to establish in order to entitle him to judgment.

That being disposed of, it brings it to the ordinary case of a sale of goods to a firm consisting of three members, and a bill taken from one for the price. Much discussion has taken place in numerous cases in modern times as to the effect of giving a bill or note "for and on account" of a debt, as contradistinguished from "in satisfaction and discharge," during the currency of the instrument. For a long time, and down to the case of *Ford v. Beech*, 11 Q. B. 852, it was taken for granted that the taking a bill or note "for and on account of" the debt operated as an exception to the general rule of law that a suspension of the remedy for ever discharged the debt. But the late Mr. Justice Maule, in a very elaborate judgment pronounced by him in a case of *Belshaw v. Bush*, 11 C. B. 191, expresses a strong opinion that the decision of the Exchequer Chamber in *Ford v. Beech*, though right in substance, was wrong as to the principle upon which it proceeded. That very learned judge denies that the doctrine in question was any exception to the rule at all; and so [144] far he dissents from the principle upon which the cases had been supposed to be based. That, however, leaves the main question precisely where it was. I must confess I have always entertained some doubt as to the principle enunciated by the earlier part of the judgment in *Belshaw v. Bush*: but I have no doubt or difficulty whatever in adopting the latter part, where the learned judge lays down the true doctrine upon which this branch of the law is founded, viz. that, in the case of a money demand, if the creditor accepts a bill or note for and on account of the debt, that operates as a conditional payment. In the present case, a bill is taken from one member of a firm for and on account of a debt due from the firm. The destiny of the bill is this,—it gets from the hands of the plaintiff, the drawer, into the hands of an indorsee: the acceptor becoming bankrupt, the indorsee succeeds in obtaining a portion of the amount under the fiat against him; and then the bill is returned to the drawer, who pays the indorsee the difference. Now, the rule of law, as established in all the cases, and summed up by Maule, J., in *Belshaw v. Bush*, is this, that a bill which is given for and on account of a debt, is to be taken as a conditional payment: and the question here is, whether the condition to defeat the payment has or has not happened. If the bill has been returned to the creditor unpaid, without any laches on his part, the condition which was to defeat the payment has happened, and consequently it is no payment. It is obvious that that principle is not to be confined to the case of a total non-payment, but must operate to a partial extent if a portion of the amount of the bill is paid,—it will be a good payment pro tanto. Now, here, the condition has happened as to part: the bill has come back to the hands of the drawer, to whom it was given for and on account of his debt, partially unpaid. There [145] is, therefore, a partial happening of the condition upon which the payment was to be defeated. It operated, consequently, as a part payment only: and I am clearly of opinion that the plaintiff is entitled to maintain his action for the residue.

CROWDER, J. I also am of opinion that the plaintiff is entitled to recover. The main ground upon which the argument to the contrary proceeded, was, that the partner resident here acting as agent for the firm abroad, those principles and those dicta in the books as to the relative position of an agent in this country acting for a foreign principal are applicable to the present case. It seems to me, however, that this being a case of partnership, one of the members of the firm residing in this country and the others at Rio de Janeiro, and not merely a case of principal and agent, those cases have little or no bearing upon the question. In the case of an agent, where an English merchant residing in this country buys goods for a foreign principal, the presumption is that the merchant who sells obtains a considerable benefit by having a person resident here responsible to him for the price of the goods. That is the foundation of the doctrine of *Paterson v. Gandasequi*, 15 East, 62, and *Addison v. Gandasequi*, 4 Taunt. 574, and that class of cases. But this is a

case of partnership, where the ordinary principle of partnership law applies, viz. that, where goods are sold to a firm, every member of it is answerable, whether he be a dormant or an ostensible partner, unless there be some special contract that one or more of them alone shall be answerable. In order to establish that which has been contended for on the part of the defendant, strong and conclusive grounds should have been shewn for believing that there was a special contract to limit the liability to James Hargreaves Nuttall. [146] Now, what are the facts which are relied on for that purpose? They are only two,—first, that bills were drawn upon and accepted by James Hargreaves Nuttall alone for the price of the goods,—secondly, that the invoices were made out in his name alone. I see nothing in these two facts to warrant the inference which is sought to be established, or to induce us, sitting as a jury, to conclude that there was a special contract making James Hargreaves Nuttall exclusively the debtor. With respect to the bills, it is by no means unusual to stipulate for a particular mode of payment; and the plaintiff may well have thought it more convenient to have the acceptances of a merchant known here than those of a firm resident in a remote part of the world. Then, the fact of the invoices being made out in the name of one partner only does not necessarily exclude the liability of the other members of the firm. I must confess I see no very great force in either of the facts relied on by the defendant; and taken together they fail to lead my mind to the conclusion that the credit was given to James Hargreaves Nuttall alone.

As to the rest of the case, the argument on the part of the defendant is, that, assuming that there was no such arrangement as suggested for the English partner to be exclusively responsible for the price of goods supplied, the plaintiff has, by that which passed after the maturity of the bills, estopped himself from proceeding against the present defendant to recover the balance remaining due. Upon that point, I assent entirely to the doctrine laid down by my Brother Williams, that the payment was conditional, and that the event has happened which was to defeat the condition pro tanto,—the rule being equally applicable to a partial as to a total defeat. I therefore think the plaintiff is entitled to recover the amount which remains unpaid.

[147] The same points arise upon the demurrer, and upon that for the same reasons the plaintiff must have judgment.

BYLES, J. I also am of opinion that the plaintiff is entitled to recover. Whether this was a proper question for the court, being rather one of fact than of law, I will not say: but it is clear that Mr. Manisty did wisely in getting it reserved for the court; for, the case finds that the goods were sold and delivered to the defendant and his partners, and received and used by them in their business, and that the bills given in payment were not paid; and, under these circumstances, it would have been a very extraordinary special jury that could have had any hesitation in finding for the plaintiff. I agree that the knowledge of Atkinson must be taken to be the knowledge of the plaintiff. By the terms of the contract, the vendor was intending to sell the goods to the firm, and the goods were delivered to the firm, and the firm (of which the defendant was a member) had the full benefit of them. *Primâ facie*, therefore, the firm ought to pay for them. It was a part of the contract that bills accepted by one member of the firm should be taken as a conditional payment. The fair result of the whole transaction is, that there was to be the joint liability of the whole firm, and in addition the separate liability of one of its members. It is urged that the taking the separate acceptance of the one partner was inconsistent with the joint liability of the three. I do not, however, see any inconsistency in that. As the one partner, James Hargreaves Nuttall, was resident in this country, and the others resided at Rio de Janeiro, the plaintiff may well have thought that it would be more convenient to him to have the acceptances of the former. Nothing was afterwards done which could be said to be incon-[148]sistent with the joint liability of all the members of the firm, unless the circumstance of the invoices being made out and delivered to James Hargreaves Nuttall alone can be said to be so. These probably were delivered by mistake, the man who delivered them having no personal knowledge as to who were the members of the firm. That, however, at the most, only raises a question for the jury. So much, therefore, for the bills, and so much for the invoices. Then it is said that the subsequent course of conduct on the part of the plaintiff was such as to destroy the joint liability. Now, the joint liability has never been dealt with at all. With respect to the separate liability,—the bills accepted by James Hargreaves Nuttall,—it is the first learning that taking a bill for and on account of a debt does

not operate as an absolute discharge of the debt. At the most it is only a conditional payment, which is defeated by the subsequent dishonor of the bill, whether total or partial. The debt not having been paid in this collateral way, the plaintiff was remitted to the joint liability of the firm. Whether, therefore, the question be one of fact or of law, our judgment must equally be in favor of the plaintiff.

Judgment for the plaintiff.

[149] HUTCHINSON AND ANOTHER v. GUION AND OTHERS. July 5th, 1858.

[S. C. 28 L. J. C. P. 63; 4 Jur. N. S. 1149; 6 W. R. 757. See *Blower v. Great Western Railway*, 1872, L. R. 7 C. P. 663.]

Declaration against the defendants, ship-owners, for negligently and carelessly stowing salt-cake, whereby it sustained damage.—Fourth plea, that the damage complained of arose from the salt-cake being delivered by the plaintiffs in bulk and not in casks, and being shipped by the plaintiffs in bulk, and consequently stowed by the defendants in bulk and not in casks, and between and amongst other goods; and that the same was stowed in the manner in which the same was actually stowed, with the knowledge, and by the direction and license of the plaintiffs to the defendants given before and during such stowage, &c.:—Held, that this plea did not amount to an allegation that the negligent stowage of the article took place by the authority of the plaintiffs, and was no answer to the action.—Fifth plea,—that salt-cake was a corrosive and destructive substance, rotting casks and other substances being in contact with it, which the plaintiffs knew, but which the defendants, without any default on their part, did not know, and could not reasonably be expected to know, until after the happening of the damage complained of; that it was the duty of the plaintiffs, before or at the time of the shipment or stowage, to have informed the defendants, and to have used due and reasonable care in ascertaining that the defendants were informed of the corrosive and destructive nature of salt-cake, in order to its proper and safe stowage by them; that the plaintiffs did not so inform the defendants, or ascertain that they were so informed, but, on the contrary, improperly and negligently delivered the salt-cake to the defendants in bulk, and the plaintiffs thereby and otherwise represented to the defendants and induced them to believe, and they did reasonably believe, that the said salt-cake might be placed in contact with casks, &c.; that, under this reasonable belief, and induced as aforesaid, the defendants stowed the said salt-cake in contact with and between and amongst casks of salt-provisions, being, as they reasonably believed, a safe and proper mode of stowing the same; and that afterwards, and without default of the defendants, the said salt-cake corroded, rotted, and destroyed the said casks, and the hoops thereof, and the brine therefrom damaged the salt-cake, and caused the default in the delivery thereof complained of in the declaration.—Replication,—that salt-cake is an article of merchandize well known in trade and commerce, and the nature and properties of which are well known in trade and commerce, and is an article of merchandize commonly carried in ships, and the nature and properties of which is commonly and well known to persons carrying on the trade and business of carriers by water, and that, at the time of the shipment, the defendant well knew that the goods were salt-cake:—Held, that the fifth plea was good, and the replication no answer to it: for, if the defendants' ignorance arose from the wilful misrepresentation of the plaintiffs, such ignorance was justifiable.

The declaration stated that the plaintiffs, theretofore, to wit, on the 7th of August, 1857, caused to be shipped on board a ship called the "Australia," then lying in the port of New York, whereof the defendants were the owners, divers goods and chattels, to wit, salt-cake, then represented to be, and then lying, in good order and well conditioned, to be carried to, and delivered in like good order and well conditioned at, the port of Liverpool, the dangers of the sea excepted, and the said owners not to be accountable for fire, collision, or breakage or leakage, to the plaintiffs, their order, or [150] assigns, upon payment of certain freight for the said goods then agreed upon, such payment to be made immediately on the landing of the said goods, without discount or allowance of credit; and the defendants then received the said goods on

board the said ship upon the terms aforesaid: Averment, that, although all matters and things had been done and had happened, and all time had elapsed, which entitled the plaintiffs to maintain this suit: yet the defendants did not nor would use due and proper care in and about the stowage of the said goods on board the said ship, but, on the contrary, did so negligently and carelessly stow the said goods and the cargo of the said ship on board the said ship, that by reason thereof, and not by reason of any of the aforesaid perils or casualties, the said goods were damaged and injured; and the defendants made default in delivering the said goods in the like good order and well conditioned, as in the said agreement mentioned; and by reason of the premises the plaintiffs suffered great loss and damage, and were deprived of making divers large gains and profits by the sale of the said goods and chattels which they otherwise would have made: To the damage of the plaintiffs of 100l.

Fourth plea,—that the default and damage alleged and complained of arose from the said salt-cake being delivered by the plaintiffs to the defendants in bulk and not in casks, and being shipped by the plaintiffs in bulk, and consequently stowed by the defendants in bulk and not in casks, and between and amongst other goods: and that the same was stowed in bulk and not in casks, and was stowed in the manner in which the same was actually stowed, with the knowledge and by the direction and license of the plaintiffs to the defendants given before and during such stowage and the remaining of the salt-cake on board.

Demurrer to the fourth plea, alleging for cause, [151] “that, if the knowledge and direction and licence in the plea mentioned are pleaded as a part of the original agreement in the declaration mentioned, they form a stipulation consistent with and not varying the undertaking of the defendants in the declaration mentioned: and, if they are pleaded as a knowledge, direction, and licence given by the plaintiffs after the making of the contract in the declaration mentioned, they do not vary the undertaking of the defendants in the declaration mentioned, or excuse its performance.”

Fifth plea,—that the said salt-cake was a corrosive and destructive substance, rotting casks, cask-hoops, and other substances being in contact with it, which the plaintiffs at all times knew, but which the defendants, without any default on their part, did not know, and could not reasonably be expected to know, until after the happening of the damage and other matters complained of: and it was the duty of the plaintiffs before or at the time of the shipment, or before the stowage of the said salt-cake, to have informed the defendants, and to have used due and reasonable care in and about ascertaining that the defendants were informed, of the corrosive and destructive nature of the salt cake, in order to the proper and safe stowage of the same, and the defendants received and stowed the same in the supposition and belief (and relying on the same) that the plaintiffs would so have informed them if the said salt-cake were so destructive and corrosive, or requiring to be stowed apart from other substances: and that the plaintiffs did not at any time so inform the defendants, or take reasonable or any care in and about so informing the defendants, or ascertaining that they were so informed: and the plaintiffs, on the contrary, improperly and negligently delivered the said salt-cake to the defendants in bulk, and not in casks, and the plaintiffs thereby and otherwise represented to [152] the defendants, and caused and induced the defendants to believe and suppose, and they did reasonably believe and suppose, at the time of stowage, and always until after the happening of the said damage and matters complained of, that the said salt-cake might be placed in contact with casks, cask-hoops, and other substances, safely and without danger of corrosion or destruction of such casks, hoops, or other substances, and under this reasonable belief, and induced as aforesaid, the defendants stowed the said salt-cake in contact with and between and amongst casks of salt provisions, being, as the defendants reasonably believed, a safe and proper mode of stowing of the said salt-cake and casks, and afterwards, without default of the defendants, the said salt-cake corroded, rotted, and destroyed the said casks and the hoops of the said casks, and in consequence thereof, and without the defendants' default, certain brine and salt liquor in the said casks flowed out of the said casks amongst the said salt-cake, and washed parts of the same away, and caused the damage and injury complained of, and necessarily caused the default in delivering the said salt-cake in the like good order and well conditioned, as in the declaration complained of.

Replication to the fifth plea,—that the said goods in the declaration and in the said plea mentioned were and are salt-cake, as in the said plea mentioned, and that

salt-cake is an article of merchandize well known in trade and commerce, and the nature and properties of which are well known in trade and commerce; and that salt-cake is an article of merchandize commonly carried in ships, and the nature and properties of which are commonly and well known to persons carrying on the trade and business of carriers in ships and by water; and that, before and at the time of the shipment in the said plea mentioned, the defendants well knew [153] that the said goods in the first part of the replication mentioned were and was salt-cake.

Demurrer to the fifth plea, alleging for cause, "that the facts in the plea alleged do not vary the undertaking of the defendants in the declaration mentioned, or excuse its performance; that the defendants were bound to take notice of the nature and qualities of the goods which they undertook to carry and deliver; that, in the absence of fraud in the plaintiffs, the defendants were bound to deliver the goods according to their undertaking, as in the declaration mentioned; that, in the absence of any concealment by the plaintiffs of the nature of the goods, the defendants were bound to take notice of the qualities of such goods; that the fact of the goods being delivered by the plaintiffs to the defendants in bulk, and not packed, obliged the defendants to take notice of the nature and qualities of the goods, and was equivalent to notice to the defendants of the nature and quality of the goods."

The defendants demurred to the fifth plea, alleging for cause "that the averments therein do not answer the matters alleged in the plea." Joinders.

Brett, for the plaintiffs (a). The question is, whether, if a merchant ship on board a general ship, under a [154] bill of lading in the ordinary form, goods the nature and properties of which are well known in the mercantile world, and the ship-owner accepts them, but, in consequence of their action upon other goods forming part of the cargo, they are delivered at their destination in a damaged state, the ship-owner is absolved from the liability which his contract imposes upon him, because the deleterious nature of the article was known to the shipper, and unknown to the ship-owner. The carrier is bound by his contract to deliver the goods entrusted to him in good order: the only way in which he can relieve himself from that obligation is, by shewing, that, through the fraud of the owner of the goods, the contract never attached, or was rescinded or discharged. The declaration states that the goods were delivered upon a common bill of lading: the averment that they were negligently and carelessly stowed is mere surplusage: all that it was necessary for the plaintiff to prove, in order to sustain the action is, the non-delivery of the goods at their destination in good order. The fourth plea, at the utmost, can only amount to leave and license, and consequently is a bad plea: *Dobson v. Espie*, 2 Hurlst. & N. 79. [Williams, J. The defendants in effect say that the damage was [155] attributable to the plaintiffs' own act. It is like a plea to an action upon a bond for performance of an act, that the performance became impossible by the act of the obligee. [Willes, J. The plaintiffs may be supposed to have said at the time of the delivery of the goods,—"Stow them so and so, but mind we rely upon your undertaking to carry and deliver safely." In

(a) The points marked for argument on the part of the plaintiffs were as follows:—

On the demurrer to the fourth plea,—"That, if the knowledge, direction, and licence in the plea mentioned are pleaded as a part of the original agreement in the declaration mentioned, they form a stipulation consistent with the undertaking of the defendants therein relied on; and, if they are pleaded as had and given after the contract, they do not vary the undertaking of the defendants relied on, or excuse its performance."

On the demurrer to the fifth plea,—"That the facts in the plea mentioned do not vary the undertaking of the defendants in the declaration, or excuse its performance: that the defendants were bound to take notice of the nature and qualities of the goods which they undertook to carry; that, in the absence of fraud in the plaintiffs, the defendants were bound to deliver the goods according to their undertaking; that, in the absence of any concealment by the plaintiffs of the nature of the goods, the defendants were bound to take notice of the qualities of such goods; and that the fact of the goods being in bulk was equivalent to notice of the nature and quality of them."

On the demurrer to the replication to the fifth plea,—"That the facts therein mentioned shew that the defendants were bound to take notice of the nature and qualities of the salt-cake."

Robinson v. Dunsmore, 2 Bor. & P. 416, it was held, that, if A. sends goods by B., who says "I will warrant they shall go safe," B. is liable for any damage sustained by the goods, notwithstanding A. send one of his own servants in B.'s cart to look after them. There was nothing in the contract here to bind the defendants to stow the goods according to the directions of the plaintiffs. *Bourne v. Gatliffe*, 3 M. & G. 643, 3 Scott, N. R. 1, is also an authority to shew that this is a bad plea.

As to the fifth plea,—the allegation of duty is surplusage, where the facts shew a legal duty, and it is useless where they do not: *Brown v. Mallett*, 5 C. B. 599. The fifth plea is in substance this, that salt-cake is of a corrosive and destructive nature, that the plaintiffs knew it, and the defendants did not. [Byles, J. And could not reasonably be expected to know it, and did what they did without default.] Being carriers, the defendants were bound to know the nature and properties of the article. If they were ignorant of them, they were bound to inform themselves. The law casts upon the plaintiffs no duty to convey the information to them. [Willes, J. The plea alleges that the plaintiffs by delivering the salt-cake in bulk, and otherwise, represented to the defendants, and induced them to believe, that they might safely stow it as they did. That is fraud.] That does not amount to an allegation of fraud. [Byles, J. It is enough if the circumstances shew fraud.] In *Tichburne v. White*, 1 Stra. 145, King, C. J., says,—“If a box is delivered generally to a car-[156]-rier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But, if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases I hold the carrier is not liable.” [Williams, J. If that is a material and issuable averment, you probably will not deny that the plea is a good one.] If the plea shews that the defendants' ignorance arose from the wilful misrepresentation of the plaintiffs, their ignorance is justifiable. The non-communication by the plaintiffs of the deleterious qualities of the salt-cake affords the defendants no excuse for their breach of contract to deliver it in good order: *Walker v. Jackson*, 10 M. & W. 161. Parke, B., there says: “I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that, if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary: if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is.” *Baily v. Morrel*, 3 Bulstr. 94, *Stuart v. Crawley*, 2 Stark. N. P. C. 323, and *Breck v. Evans*, 16 East, 244, are to the same effect. It may be conceded, that, if the allegations in the plea amount to fraud, there is no contract: *Gibbon v. Paynton*, 4 Burr. 2298; *Batson v. Donnan*, 4 B. & Ald. 21. This plea is virtually an attempt to extend the doctrine of *Brass v. Maitland*, 6 Ellis & B. 470. There, goods of a dangerous nature were delivered to a ship-owner to be carried, but were so packed as to conceal their real character; and, in consequence of the insufficiency of the packages, other parts of the cargo were injured; and it was held by Lord Campbell and Wightman, J., that the action lay: but Crompton, J., thought otherwise, on the ground that it was the duty of the ship-owner to make inquiries.

[157] Aspland, contra (a). This is an action for negligence by reason of bad

(a) The points marked for argument on the part of the defendants, were as follows:—

On the demurrer to the fourth plea,—“That the fourth plea shews that the acts constituting or occasioning the breach relied on were the plaintiffs' own acts, and that they contributed to and caused the alleged damage; that the same were committed by the plaintiffs' procurement, and by their license, in any of which cases the plaintiffs have no right to sue; and that the plea also sufficiently negatives the negligence in the stowage relied upon as the breach.”

On the demurrer to the fifth plea,—“That the fifth plea in like manner sufficiently negatives the breach, and also shews that the damage arose by the plaintiffs' own default, and by their conduct and representations to the defendants, and by their procurement; and that the plaintiffs, under the circumstances alleged in the plea, were bound to inform the defendants of the destructive and dangerous character of the article shipped.”

On the demurrer to the replication to the fifth plea,—“That the replication is no answer to the fifth plea, for the following, amongst other reasons,—that it does not

stowage: the whole declaration must be read together: *Harris v. Mantle*, 3 T. R. 307. "To be safely and securely carried," means, subject to all implied exceptions: *Ross v. Hill*, 2 C. B. 877. The argument on the other side assumes that the defendants are common carriers. The declaration, however, does not so allege; and the court will not assume it. [Cockburn, C. J. We would amend the declaration in that respect if necessary. Brett referred to *Dale v. Hall*, 1 Wils. 281. Williams, J. There is enough on the declaration to shew that it was the defendants' duty to stow the goods properly.] At all events, the fourth [158] plea is a good answer to the declaration, whatever its legal effect may be. In *Story on Bailments*, § 492 a., the learned author, after having in previous sections laid down the general rule as to the responsibility of carriers, says: "But, although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for, the carrier's implied obligations do not extend to such cases." And in *Kent's Commentaries*, 8th edit., vol. 2, p. 786, the rule is said to be "subject to a reasonable qualification; and, if the owner be guilty of any fraud or imposition in respect to the carrier, as, by concealing the value or nature of the article, or delude him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods." In *Horill v. Stephenson*, 4 C. & P. 469, where the cause of complaint in an action [159] on a charterparty by the freighters against the owner of a vessel was, that a full cargo was not taken in consequence of arrangements in the stowage varying from those contemplated by the charterparty, it was held that the plaintiffs were not entitled to recover, it appearing that one of them, and the broker who managed the business, were present from time to time during the loading, and cognisant of the arrangements, but did not make any objection. So in *Major v. White*, 7 C. & P. 41, it was held, that, if the shipper of goods was warned as to the way in which the goods would be stowed, the consignee cannot maintain any action for damage occasioned by such stowage, even if the stowage were bad.

The fifth plea is clearly good upon the grounds upon which all the judges agree in *Brass v. Maitland*, 6 Ellis & B. 470. There, the first count stated that the plaintiffs were owners of a general ship; that the defendants caused a corrosive substance to be packed in casks and delivered to the plaintiffs as casks of bleaching-powder, to be carried in the ship; that the plaintiffs and their agents were ignorant that bleaching-powder contained a corrosive substance, and the casks outwardly appeared sufficient; but that the casks were insufficient, and the contents so improperly packed that the corrosive contents escaped and destroyed the cargo. The second count stated, that the defendants shipped a dangerous article, knowing it to be such, without notice of its danger; and that the plaintiffs, without knowledge of its dangerous nature, received it, and stowed it in the hold, where it did mischief. The defendants pleaded,--thirdly, to so much of the third count as related to the insufficiency of the packages, that the defendants purchased the goods ready packed, from third persons (named), and were not themselves, or by their servants, guilty of negligence,--[160] fourthly, to the first count, that the persons employed on the ship knew and had the means of judging

state, that, at the time of shipment, the article was well known, or that at that time the defendants knew, or might reasonably be expected to know, its destructive and dangerous nature and properties; and that it admits the conduct and representations of the plaintiffs, and the absence of negligence in the defendants, as stated in the plea."

of the sufficiency of the casks,—tenthly, to the second count, that the master of the ship knew, or had the means of knowing, the dangerous nature of the goods. On demurrer to the pleas, it was held by Lord Campbell, and Wightman, J., that there is an implied undertaking on the part of shippers of goods on board a general ship, that they will not deliver to be carried on the voyage packages of a dangerous nature, which those employed on behalf of the ship-owner may not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice; and that, consequently, both counts were good, and the third plea bad: but that the fourth and tenth pleas (which they construed to amount to an allegation of facts equivalent to notice) were good. Crompton, J., held, that the implied undertaking of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without notice; that, on the first count and third plea, taken together, the defendants appeared to be innocent shippers of goods, dangerous in fact, but without any negligence on their part; and that, therefore, the defendants should have judgment on the third plea. He agreed with the rest of the court that the fourth plea was good, and the second count good; but he construed the tenth plea as not amounting to an allegation of notice, and therefore held it bad. Independently of that, the present falls within that class of cases where it has been held that the plaintiff is precluded from maintaining an action, where his own negligence or misconduct has occasioned or contributed to the injury of which he complains: *Miles v. Cattle*, 6 Bingh. 743, 4 M. & P. 630: *The Great Northern Railway Company, App., Shepherd, Resp.*, 21 Law J., Exch. 286. It was the duty of the plaintiffs to inform the [161] ship-owners of the dangerous nature of the goods; not having done so, the latter are absolved from all responsibility which would otherwise have attached to them.

The replication is altogether irrelevant. It speaks of the knowledge of ship-owners at the time of the replication, not at the time of the delivery of the goods for shipment (a).

Brett, in reply, referred to *Butcher v. The London and South Western Railway Company*, 16 C. B. 13.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court (b):—This was an action against the defendants, ship-owners, for the negligent and improper stowage of the plaintiffs' goods, whereby they sustained damage. The first question arises upon a plea,—the fourth,—which states that the default and damage complained of arose from the goods (salt-cake) being delivered by the plaintiffs to the defendants in bulk and not in casks, and being shipped by the plaintiffs in bulk, and consequently stowed by the defendants in bulk and not in casks, and between and amongst other goods; and that the same was stowed in bulk and not in casks, and was stowed in the manner in which the same was actually stowed, with the knowledge and by the direction and licence of the plaintiffs to the defendants given before and during such stowage and the remaining of the salt-cake on board. To that plea there is a demurrer. There is then a plea founded upon the fact that the plaintiffs knew and that the defendants could [162] not reasonably be expected to know that salt-cake was a corrosive and destructive substance, rotting casks, cask-hoops, and other substances being in contact with it, and that the plaintiffs, in breach of their duty, neglected to inform the defendants of that fact, and that the injury complained of was the consequence of such negligence and breach of duty on the plaintiffs' own part. To this there is a replication which states in substance that salt-cake is an article of merchandize well known in trade and commerce, and the nature and properties of which are well known; that it is commonly carried in ships, and that its nature and properties are commonly and well known to persons carrying on the trade and business of carriers in ships and by water; and that, before and at the time of the shipment, the defendants well knew that the goods consisted of salt-cake. To this there is also a demurrer. There is likewise a demurrer to the fifth plea. The court retains the impression which was produced by the argument, namely, that the fourth plea is no answer to the declaration. The declaration complains of negligent and careless conduct on the part of the defendants in the stowage of the plaintiffs' goods; and the fourth plea in substance

(a) It was agreed that the replication should be amended in this respect.

(b) The argument took place before Cockburn, C. J., Williams, J., Willes, J., and Byles, J.

alleges that the salt-cake was stowed in the manner in which the same was actually stowed, with the knowledge and by the direction and licence of the plaintiffs. If that could be considered as setting up a leave and licence to act with the carelessness and negligence complained of, by reason of any stipulation in the contract between the parties, it might be a good plea: but it is not pleaded in that sense or with that object; and we think it ought to be read according to the plain and obvious meaning of the words, as being no more than a plea that the plaintiffs had authorized the defendants to stow the salt-cake in bulk. That clearly does not amount to an authority to stow it in a careless or negligent manner. The fourth plea, therefore, affords no answer to the action, and consequently the plaintiff must have judgment on the demurrer to that plea. With respect to the fifth plea, and the replication thereto, we are of opinion that the defendants are entitled to judgment, inasmuch as we think that the plea is good, and that the replication is no answer to it. The reason why the replication is no answer to the fifth plea is well explained by Crompton, J., in *Brass v. Maitland*, 6 Ellis & B. 470. We do not think it necessary to say more than that the reasoning of that learned judge there is correct, especially with respect to the sort of persons who receive goods for conveyance on board ships, and who may not have the means of knowing the character of the articles which are delivered to them. This is quite enough to lead the court to the conclusion that the replication to the fifth plea is sufficient. The plaintiffs deliver to the defendants an article which they know to be likely to cause injury to other goods with which it may come in contact, as well as to itself; and they deliver it to the mate of the defendants' vessel without communicating to him the fact that it is of a nature to be likely to cause injury; and injury does result. It is no answer for the plaintiffs to say that the defendants might and ought to have known,—the article being well known in commerce,—that it possessed those deleterious properties. Crompton, J., in the case referred to, goes very fully into the matter, and we do not think it necessary to do more than refer to his judgment. It is enough to say that we entirely concur in the opinion he there expresses, and, founding ourselves upon it, we give judgment for the defendants upon that part of the case.

The result is that we give judgment for the plaintiffs upon the demurrer to the fourth plea, and for the defendants upon the replication and the demurrer to the fifth plea.

Judgment accordingly.

THE PATENT BOTTLE ENVELOPE COMPANY v. SEYMER. July 5th, 1858.

[S. C. 28 L. J. C. P. 22.]

The infringement of any part of a patent process is actionable, if that part is of itself new and useful, so as that it might be the subject-matter of a patent, and is used by the infringer to effect the object proposed by the patentee.—But the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent. —The plaintiffs took out a patent for “Improvements in the manufacture of cases or envelopes for covering bottles,” and in the specification the invention was stated to consist “in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together, so as to form cases or covers to protect bottles from breakage when packed.” It then proceeded,—“For this purpose I take equal lengths of rush, straw, or other suitable material, and confine them at one end within a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame,” &c. —The defendant made bottle envelopes out of similar materials some what differently applied, placing them upon a model of a bottle, or mandril, and fastening the material in a manner somewhat like the plaintiffs' method:—Held, that the use of the mandril, which was admitted to have been long commonly used for producing given forms of pliable materials, was not an infringement of the plaintiffs' patent: for, that the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent.

This was an action for an alleged infringement of a patent for “Improvements in the manufacture of cases or envelopes for covering bottles.”

The defendant pleaded the usual pleas, except want of novelty,—amongst them being one (the fifth) “that the said invention was not an invention for improvements in the manufacture of cases or envelopes for covering bottles,” and another (the sixth) “that the invention described in and by the instrument in writing in the declaration mentioned (the specification) was a different invention from the invention for which the letters-patent were granted.”

The plaintiff took issue upon all the pleas.

The cause was tried before Willes, J., at the Summer Assizes for Surrey in 1857. The nature of the plaintiffs' invention and the manner of its performance were thus described in the specification:—

[165] “This invention consists in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together, so as to form cases or covers to protect bottles from breakage when packed. For this purpose, I take equal lengths of rush, straw, or other suitable material, and confine them at one end within a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame, and its lower part is surrounded by a ring, which is capable of being raised and lowered by the operator. The cap being placed on the mould, and retained by any suitable contrivance, the lengths of rush or straw surrounding the mould or form are then tied tightly near the middle of their length below a movable elastic ring on the mould. The ring surrounding the lower part of the mould is then raised by depressing a treadle, by which the lower ends of the rushes or straws will be turned up over the cord and around the mould or form, where they are again tied tightly round it near the upper part: the cap may then be removed, and the upper ends may, if necessary, be tied near their extremities. The case or cover may then be removed from the mould or form, the elastic ring in being drawn off contracting within a groove on the mould or form, so as to release it from the case or cover; or, in place of forming the cases or envelopes separately, the bottle to be covered may be substituted for the mould or form, and the rush or straw permanently secured thereto.

“Having thus stated the nature of my invention, I will proceed to describe the manner of performing the same.

“The drawing represents a side elevation of a machine combined according to the invention. A.A. is the [166] framing of the machine, at the upper part of which is fixed a rack B. into a step or notch, in which the upper end of the strut C enters when the hollow cap D. is brought into position over the top of the pattern E. as is shewn in the drawing. The cap D. is fixed to the lever F., which is hinged at G., and it will be raised out of the way when desired by the weight and chain H., when the cover or cap D. is required to be lifted off from above the pattern E. The pattern E. is screwed on to the standard I., affixed to the block J.; and it may be remarked, that, in place of a pattern, it will be evident that the parts might be modified, so as to receive a bottle in place of the upper part of the pattern E., and the machine is arranged for having larger or smaller patterns E. introduced. In the pattern E. is formed a groove E. 1, into which an elastic ring of india-rubber or other suitable material K. may contract, as is indicated by red lines in the drawing; but, when in use, the elastic ring K. is expanded, and is moved down to a position on the pattern E. below the groove, as is shewn by black lines, such ring being brought down a distance according to the length of envelope or cover which is intended to be made. L. is a ring carried by a frame, as shewn, and it is capable of being raised by a treadle M., so as to be brought into the position shewn by the red lines, by which the lower ends of the rushes, straws, or suitable material will be raised up into the position shewn in the drawing. In using the machine, the upper ends of the rushes, straws, or other materials are spread round the neck of the pattern E., and in sufficient quantities to cover the larger diameter of the pattern; and this is done when the ring L. is at its lowest position, and the lower ends of the rushes or other materials will cover the exterior of the ring L. The cap D., which has been previously out of the way, is to be brought down, [167] and the strut placed under one of the notches in the rack above, so as to hold the cap D. in position. The elastic ring K. is placed in its position below the notch E. 1, before commencing to make an envelope or case for a bottle. The rushes or other materials used are to be tied in under the ring K. by a string N. The ring L. is then to be raised into the position shewn by red lines, by which the

lower ends of the rushes or materials will be folded upwards, and be held in position, as is indicated by the drawing, for their being further tied in by strings at the points shewn by the dotted lines (1) (1) and (2) (2). The cap D. is then raised out of the way by unstepping the strut, and the upper ends of the rushes or other materials are to be tied tightly in by a string, which will complete the process of making an envelope or case; and the same may be lifted off the pattern E., the elastic ring K. sliding upwards and contracting into the groove E. 1 in the pattern E., as shewn by red lines in the drawing. In thus using rushes, straw, or other suitable materials for making envelopes or cases for bottles, such materials will be in a damp state when the nature of the materials require to be so, as is well understood.

"Having thus described the nature of my said invention, I would have it understood that what I claim is, the combination of mechanism and the making of envelopes for bottles, as herein described."

There had been a previous provisional specification, which described the invention in the following terms:—"This invention consists in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together so as to form cases or covers to protect bottles from breakage when packed. For this purpose, I take equal lengths of rush, straw, or other suitable material, and confine [168] them at one end within a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame, and its lower part is surrounded by a ring, which is capable of being raised and lowered by the operator. The cap being placed on the mould, and retained by any suitable contrivance, the lengths of rush or straw surrounding the mould or form are then tied tightly near the middle of their length below a moveable elastic ring on the mould. The ring surrounding the lower part of the mould is then raised by depressing a treadle, by which the lower ends of the rushes or straw will be turned up over the cord and around the mould or form, when they are again tied tightly around it near the upper part; the cap may then be removed, and the upper ends may, if necessary, be tied near their extremities. The case or cover may then be removed from the mould or form, the elastic ring in being drawn off contracting within a groove on the mould or form, so as to release it from the case or cover; or, in place of forming the cases or envelopes separately, the bottles to be covered may be substituted for the mould or form, and the rush or straw permanently secured thereto."

It appeared that the defendant made bottle envelopes out of materials similar to those used by the plaintiffs, but which were woven together with threads before being put into form,—the straws or rushes forming the weft, and the threads the warp,—so as to constitute a woven fabric. The fabric so made was then cut into proper sizes, and each piece fitted upon a bottle, to give it the proper size and shape, and then the sides or ends of the fabric were sewn together by hand. Each of the articles was then placed upon a model of a bottle, or mandril, and one end fastened and tied so as to give [169] the form of the top of the bottle, and so complete the case or envelope.

On the part of the defendant, it was submitted that there was no evidence of infringement, that the invention described was not properly the subject-matter of a patent, and that the specification was larger than the title of the patent.

For the plaintiffs it was insisted that the invention was well described, and that the specification corresponded with the title, and that the using a material part of the plaintiffs' combination, viz. the mandril, the application of which to the making of the articles in question was new, was an infringement.

The learned judge consulted the plaintiffs, with leave to move.

Bovill, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the plaintiffs, with 40s. damages, "on the ground that the specification was not larger than the grant in the patent, and corresponded with it, and that the facts shewed an infringement of the patent;" or for a new trial, for misdirection, in directing a nonsuit to be entered, and in not leaving the question of infringement to the jury."

M. Chambers, Q. C., and Raymond, shewed cause. The title of the patent is, for "Improvements in the manufacture of cases or envelopes for covering bottles." The specification claims the combination of mechanism therein described, and the making of envelopes for bottles as described. The question is, whether that does not go beyond the title, —whether an improvement of the article embraces the invention of

the mechanism whereby the improvement is achieved. [Cockburn, C. J. Do you not improve the manufacture, when you improve the machinery by which you manufacture?] [170] Taking the whole of the specification together, it clearly exceeds both the title of the letters-patent and the provisional specification. Then, was there any infringement. No doubt the taking a material part of an invention which consists of a new combination, may be an infringement,—*Lister v. Leather, in Error*, 27 Law J., Q. B. 295. But the question here is, has the defendant taken a material part of a thing which the plaintiffs have invented. The only part of the plaintiffs' apparatus common to both processes is, the mould or mandril. That clearly is not new. Its application to a variety of manufactures has for many years been notoriously common. [Cockburn, C. J. It is open to you to contend that the mandril is no part of the mechanism, but merely the thing upon which the mechanism acts.] Suppose we used a bottle, could it be said that that was an infringement?

Bovill, Q. C., Lush, Q. C., and Clark, in support of the rule. The specification sufficiently corresponds with the title of the invention. The title is for "Improvements in the manufacture of cases or envelopes for covering bottles." It is not for the thing made, but for the making. [Cockburn, C. J. The claim is for the mechanism whereby the envelopes are made. Williams, J. It is for the process.] That is, for the process coupled with the machinery. There is no question as to the novelty: the only point reserved is, as to the infringement. Now, it was proved beyond question at the trial that the mechanism was new, and that the article produced was both new and useful. The defendant produces substantially the same result, by taking a part, a material part, of the plaintiffs' invention, viz. the mandril or model. If he had taken a real bottle with a cork in it, it would equally have been an infringement: *De la Rue v. Dickinson*, 3 Jurist, [171] N. S. 841. That the mandril was a material part of the invention is clear; envelopes could not be made without, for any available commercial purpose. [Willes, J. The thing produced was proved to be new; but the part infringed was not new.] It was new in its application, and in its *modus operandi*. In *Haworth v. Harlestone*, 1 N. C. 182, 4 M. & Scott, 720, in case for invading the plaintiff's patent right to certain machinery for drying calicoes, &c., where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery; a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the court refused to set aside the verdict for the plaintiff and enter a nonsuit. In *Craw v. Price*, 4 M. & G. 580, 5 Scott, N. R. 338, and numerous other cases, it has been held that a machine which will produce a better and cheaper article, may be the subject of a patent.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

We are of opinion that this rule ought to be discharged.

The plaintiffs' specification clearly shews that the patent is not for bottle envelopes, but for a mode of making them. Accordingly, it describes such mode as an apparatus for holding and fixing rushes or other like materials upon a bottle or the model of a bottle, and for turning up the ends and fastening them together, so as to form a case or envelope, which can be put on a bottle so as to protect it from injury, and removed, and again used for a similar purpose, similar worn out. [172] In the plaintiffs' method, the rushes or other materials are separate when put into the apparatus, and are kept together by a suture or band applied near the lower part in the course of the process.

The defendant also makes bottle envelopes out of a material similar to that used by the plaintiffs, chiefly straw, but which is woven together with threads before being operated upon,—the straws forming the weft and the threads the warp,—so as to constitute a woven fabric. The fabric so made is cut into proper sizes, and each of the pieces is fitted upon a bottle, to give it the proper size and cylindrical shape, and the sides or ends are sewn together by hand. Each of them is then placed upon a model of a bottle, or mandril, and one end fastened and tied so as to give the form of the top of the bottle, and so complete the case or envelope.

The defendant's method resembles the plaintiffs' in the product, which is not the subject of the patent, and in one other material particular only, viz., the use of the model or mandril: and the question is, whether such use constitutes an infringement of the plaintiffs' patent.

The fact that the model or mandril constitutes part only of the plaintiffs' process, does not of itself affect the question. The infringement of any part of a patent process is actionable, if that part is of itself new and useful, so as that it might be the subject-matter of a patent, and is used by the infringer to effect the object or part of the object proposed by the patentee.

The question, therefore, is, whether the plaintiffs could have taken out a patent simply for applying a model or mandril in the form of a bottle, or indeed a bottle itself, in making envelopes for bottles. We are of opinion that he could not.

The use of a model or mandril for producing given forms of pliable materials, was admitted at the trial, [173] and, indeed, without such admission, is well known, to have been for ages common and usual in various arts. Such use was part of common knowledge, and a model or mandril for purposes similar to that of this patent, an ordinary and well known tool. It is merely in respect of the sort of material to which it is applied, and the form of the utensil produced by it, that the plaintiffs' application of the model possesses any novelty.

The application of a well-known tool to work previously untried materials, or to produce new forms, is not in our opinion the subject-matter of a patent. The observations of the court in giving judgment in the recent case of *Tetley v. Easton*, ante, vol. ii., p. 706, sustain this proposition. Indeed, to hold the contrary, might tend to produce oppressive monopolies in the application of old and well-known implements to new materials, without any further novelty or merit than the discovery of the material, or the form into which it is to be worked. Such a discovery is not, in our opinion, one of a new "manufacture" within the statute of James; and a patent for it alone cannot be maintained.

The rule to enter a verdict for the plaintiffs must, therefore, be discharged.

Rule discharged (a).

[174] THE MARQUIS OF SALISBURY v. THE GREAT NORTHERN RAILWAY COMPANY.
Nov. 19th, 1858.

[S. C. 28 L. J. C. P. 40; 5 Jur. N. S. 70; 7 W. R. 75. Distinguished, *R. v. Wycombe Railway*, 1867, L. R. 2 Q. B. 322. See *Plumstead Board of Works v. British Land Company*, 1874-75, L. R. 10 Q. B. 16, 203. Distinguished, *Micklethwait v. Newley Bridge Company*, 1886, 33 Ch. D. 153. Referred to, *Deronsshire v. Pattinson*, 1887, 20 Q. B. D. 273; *Pryor v. Petre*, [1894] 2 Ch. 16, 22. Followed, *Milkstam Urban District Council v. Gay*, 1902, 18 T. L. R. 359.]

The Great Northern Railway Company, in 1848, purchased of the plaintiff certain freehold land adjoining a turnpike-road to be used partly for the site of their railway and works, and partly for the purpose of diverting a portion of an existing road. Having made a substituted road, the company, with the knowledge of the plaintiff and of the trustees, inclosed and took possession of the portion of the old road which had ceased by the diversion to form part of the turnpike-road. The soil of the road was not noticed in the conveyance, all parties being under the impression that it was vested in the trustees.—By several acts regulating the turnpike-road, the trustees had power from time to time to purchase land for the widening of the road: but there was no evidence that the freehold of the diverted portion of the road had ever been acquired by them:—Held, that the presumption that the soil of the road was in the plaintiff as owner of the adjoining land, was not rebutted by the local turnpike-acts, so as to cast upon the plaintiff the onus of shewing that the soil of the road had not been purchased by the trustees.—Held, also, that the soil of the old road did not pass by the conveyance to the company; and that there was nothing in the General Turnpike Act, 3 G. 4, c. 126, or in the

(a) In the course of the following term, Bovill asked for leave to appeal. He observed, that, if the plaintiffs, treating the question as one of law, appealed without leave of the court, it was possible they might be met by the court of error saying that there was some scintilla of evidence. But Cockburn, C. J. said: I think we ought not to give you leave to appeal, when you admit that we properly dealt with the question as one purely of law, and so disposed of it. I think it would be going too far to give the plaintiffs any facility. We must leave them to their legal rights.

Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, to place the company in the position of trustees of the substituted road, so as to transfer to them the soil of the old road.—Held, also, that the absence of objection on the part of the plaintiff and his agents when the company took and continued in possession of the land in question, did not amount to such a consent on his part as to preclude him from re-entering, by force of the 124th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18.—Semble, that the true effect of the 124th section of the 8 & 9 Vict. c. 18, is not to prevent a claimant from bringing ejectment to establish his title, but merely to authorize the court to stay execution upon the judgment, when obtained.—A portion of the land thus taken by the company was purchased by them from one Pryor. It formed part of a larger plot which was originally waste ground of the manor of H. (of which the plaintiff was lord), lying at the side of the road, but which some years before 1848 had been inclosed and was held as copyhold of the manor. In 1848 it was so held by Pryor, who conveyed it to the company under the powers of the Lands Clauses Consolidation Act, 1845, and subsequently by deed in June, 1856, the plaintiff enfranchised the land so conveyed to the company by Pryor, to hold the same to and to the use of the company:—Held, that, assuming the plaintiff to have power so to grant, the right to the soil of the road did not thereby vest in Pryor.

This was an action of ejectment. By the writ the plaintiff claimed to be entitled to possession of a piece of land near the Wrestlers' Inn, in the parish of Bishop's Hatfield, in the county of Hertford, formerly the site of the old North Road, and commencing at a point nearly opposite the said inn, and extending thence, on the side of the present road, and between it and the Great Northern railway, to a point where it falls into the said railway, and which piece of land contains by estimation sixteen perches.

The defendants appeared and defended for the whole of the land mentioned in the writ.

[175] The cause came on to be heard before Pollock, C. B., at the last Summer Assizes for Surrey, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:—

The Marquis of Salisbury, the plaintiff, is lord of the manor of Hatfield, within the boundaries of which all the lands hereinafter mentioned are situate, and is owner of all the wastes of the manor.

In the year 1846, the Great Northern Railway Company, the defendants, obtained an act of parliament intitled "The Great Northern Railway Act, 1846" (9 & 10 Vict. c. lxxi.), empowering them to make and maintain a railway according to certain plans and sections deposited as therein mentioned. In 1847, they obtained another act intitled "The Great Northern Railway Deviation between London and Grantham Act, 1847" (10 & 11 Vict. c. cclxxxvii.), empowering them to make certain deviations: and the part of their said railway to which this case refers is part of such deviations constructed under the powers of the last-mentioned act. The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), are incorporated with and form part of the said acts.

The plans, sections, and schedules hereinafter mentioned accompanied this case, and were to be referred to as part of it.

The plan or map marked A. and the section marked B. were copies of a portion of the deposited plans and sections of the defendants for the parish of Hatfield, through which the railway was to pass, and the schedule marked C. was a copy of part of the book of reference to and accompanying the said plan and section, and contained by reference to the figures on the said plan and section the names of the owners or reputed owners, lessees or reputed lessees, and occupiers [176] of the lands in or through which the said alterations and deviations were intended to be made in the said parish: which said plan, section, and book of reference had been duly deposited, amongst others, with the clerks of the peace for the counties of Middlesex and Hertford, and were part of the plans, sections, and books of reference mentioned in the said act of 1847. The fields or pieces of land numbered respectively 75 and 79 on the plan, were at this time the freehold property of the plaintiff: the part numbered 47 was the turnpike road hereinafter particularly mentioned.

The defendants requiring portions of the land numbered 75 and 79 on the deposited

plans as above mentioned, purchased and took these portions, as well as other lands of the plaintiff, under the powers of their act. The conveyance from the plaintiff to the defendants of the lands so purchased, bears date the 19th of October, 1848. After reciting that the said plans and sections shewing the said proposed alterations in the line of the said railway, and also the said book of reference to the said plans containing as aforesaid the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of the lands in or through which the said alterations and deviations were intended to be made, had been deposited as aforesaid, the parcels conveyed are thus described "All those the pieces or parcels of land and hereditaments particularly described in the first and second schedules hereunto annexed, and all mines and other minerals under, and all timber and other trees, and all rights, easements, and privileges whatsoever belonging or in anywise appertaining to the said pieces or parcels of land and hereditaments, or any of them, or any part thereof."

In the said first schedule to the said conveyance are [177] described (among others) the pieces or parcels of land following:—

No. on plan hereto and also on company's deposited plans.	Parish.	County.	Lessee.	Occupier.	Quantity.
75	Hatfield.	Hertford.		Harriet Webb.	a. r. p. 2 3 0
79	"	"		Same.	1 2 26

Annexed to the conveyance was a plan as mentioned as aforesaid in the said schedule of which the plan marked D. was a copy.

The defendants required the lands so purchased, not only for their railway and works, but also for the purpose of diverting a part of a certain turnpike-road, being part of the said old North Road. They accordingly constructed their railway in the line shewn in the plan marked E.; and, under the powers vested in them by s. 16 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), diverted the said part of the said turnpike-road into the position shewn on the same plan, carrying the diverted part of the turnpike-road over the railway by a bridge. The effect of this diversion was that some portion of the site of the said part of the said turnpike-road in its old position ceased to form part of the turnpike-road and was stopped up by the defendants, and was discontinued as a public highway. Part of the portion so stopped up is occupied by the defendants' railway; the rest, which adjoins the railway, is the land now claimed by the plaintiff, and is coloured blue, and is marked A. B. C. D. in the plan marked E. Vide post, p. 92.

The said plan marked E. is a plan of this part of the railway and of the adjoining lands after the construction of the railway and the diversion of the road. It shews the land occupied by the railway itself and the course of the turnpike-road as diverted. It also shews, [178] on the west side of the railway, and between it and the new part of the turnpike-road, three pieces of land, one marked A. B. C. D., coloured blue, is a part of the site of the old turnpike road not occupied by the present turnpike-road as already mentioned, and is the land claimed by the plaintiff, and the possession of which is defended by the defendants, in the present action, — another, marked C. D. E. F., and coloured yellow, is part of the land purchased from Mr. Pryor, and afterwards enfranchised by the plaintiff as hereinafter more fully mentioned, — the remainder, marked E. F. G. H., and coloured pink, is part of the land conveyed by the plaintiff to the defendants, as above-mentioned.

The land beyond the piece A. B. C. D., which is coloured green, is and has been since long before the conveyance to the defendants of the land marked pink, the freehold property of the plaintiff.

The pieces of land coloured yellow, were part of a larger plot which was originally waste ground of the manor of Hatfield, lying at the side of the road, and within the boundary of the manor, but which some years before 1848 had been inclosed, and was held as copyhold of the manor. In the year 1848, it was so held by Mr. Pryor who conveyed it to the defendants under the powers of the Lands Clauses Consolidation Act, 1845; and subsequently, by deed dated the 18th of June, 1856, the plaintiff

enfranchised the land so conveyed by Mr. Pryor, to hold the same to and to the use of the defendants.

The defendants purchased the land for the new road of and from the plaintiff, with the exception of a small part thereof coloured yellow on the plan E., which they purchased from the said Mr. Pryor: and, at the time they diverted the said part of the old road, and made the new road, they intended that such new road and the soil and freehold thereof should be given and [179] taken by way of substitution of and in exchange for the soil and freehold of the said part of the said old road, and believed that the same would and did vest in them by reason of such substitution and exchange, and took and retained possession of the said part of the said old road accordingly for the purposes of their said railway and works.

The defendants so diverted the old road as aforesaid between the 26th of July and the 2nd of August, 1849 and at the same time entered upon and took possession of the said piece of land in question for the purposes of their railway and works, and inclosed the same with a post and rail fence, and have continued in such possession and occupation of the same from thence hitherto: and they so entered and took possession, and have continued in such possession and occupation, with the knowledge of the plaintiff and his agents, and of the trustees of the old road: and the plaintiff never to the knowledge of the defendants objected in any way to the continuance of the said possession and occupation of the defendants until July, 1856, when for the first time to the knowledge of the defendants the plaintiff asserted a right to the possession of the said piece of land. The defendants so entered, took possession of, and occupied the said piece of land, believing that they had a right to such possession and occupation, and that the said piece of land, as part of the soil of the said old road, had vested in them by virtue of their said diversion of the said old road, and substitution of the said new road, and of their notices, and book of reference and plans accompanying the same.

The said piece of land, which is within the limits of deviation, is about three hundred yards from the Northern point of the station buildings of the defendants' railway at Hatfield: the sidings of which station long before the claim of the plaintiff extended and still [180] extend by the side of and beyond the said piece of land. The said piece of land is not used by the defendants for any of the purposes of the railway, but was used by them for the purposes of the construction of the railway, and is permanently required for the enlargement of such sidings, and for the purposes of the defendants' said railway and works: and, if the same of right belongs to the plaintiff (which the defendants dispute), they are and will be ready and willing to purchase the same from the plaintiff and pay him compensation for the same, and also to pay to him full compensation for the mesne profits or interest, according to the true intent and meaning of the Lands Clauses Consolidation Act, 1845, whenever the right thereto shall have been finally established by law in favour of the plaintiff, according to the true intent and meaning of the same act.

The part of the road so diverted is part of the turnpike-road described in the following local acts of parliament as the road leading from the place called Galley Corner, adjoining to Enfield Chase, in the parish of South Mims, in the county of Middlesex, and Lemsford Mill in the county of Hertford (being nearly nine miles in length): and by an act passed in the 3 G. 2 (c. 10), for repairing the said road, after reciting that the said road, by reason of many heavy carriages frequently passing through the same, was become very ruinous and dangerous to travellers, especially in the winter season, and that the ordinary course appointed by the laws and statutes of this realm for the repairs of the highways of this kingdom was not sufficient for the speedy and effectual amending the said road without some other provisions were made for that purpose, it was enacted, that, for the better surveying, ordering, repairing, and keeping in repair the road aforesaid, certain persons therein mentioned should be and were [181] thereby nominated and appointed trustees for putting that act in execution: and they, or any five or more of them, or such person or persons as they or any five or more of them should authorize and appoint, should and might erect or cause to be erected a gate or gates, turnpike or turnpikes, and also a toll-house or toll-houses in cross* or on any part or parts of the said road, and should receive and take the tolls and duties therein mentioned: and that the money so to be raised and

* Sic.

collected should be vested in the said trustees, and the same and every part thereof should be paid, applied, disposed of, or assigned to and for the several uses, intents, and purposes, and in such manner as is in the said act mentioned and declared (the reasonable charges expended or to be expended in obtaining that act of parliament and erecting the several turnpikes and toll-houses necessary for collecting the tolls or duties thereby directed to be paid being first deducted); and that it should and might be lawful to and for the surveyor or surveyors of the said turnpike-road, by an order under the hands of the said trustees, or under the hands of any five or more of them, to make or cause to be made causeways, and to cut and make drains through, and to erect arches and bridges of brick, timber, or stone upon, and also to widen any of the narrow parts of the said road by opening, clearing, and laying into the same the grounds of any person or persons lying contiguous thereto (not being a house, park, garden, orchard, planted walk or walks, or avenue to a house), and also to cause ditches or trenches to be made in such manner as the said surveyor or surveyors in their respective places should adjudge necessary, making such reasonable satisfaction to the owner or occupier of such ground which should be laid into the said road, or through which any such drains should be cut, or in which any such arch or arches, bridge or bridges, or causeways, should [182] be made as aforesaid, for the damage which should or might be sustained thereby, as should be assessed and adjudged by the justices of the peace or the major part of them at the next general quarter sessions to be holden for the county wherein the ground so laid into the said road should lie, or through which any such drain or drains, ditch or ditches, should be cut, or on which any such arch or arches, bridge or bridges, or causeways should be made or erected as aforesaid, in case of any difference concerning the same; and that the toll or duty thereby granted and made payable should take place and have continuance only from and after the 1st of June then next for and during the term of twenty-one years. And by another act of parliament made and passed in the 17 G. 2, c. (14), the first-mentioned act (except such clauses, matters, and things as are thereby altered or varied) was continued for a further term of twenty-one years, and additional trustees were appointed: and it was enacted that the right, interest, and property of all and every the turnpikes erected or to be erected by virtue of either of the said acts, should be vested in the said trustees appointed or to be appointed or elected to put the said acts in execution; and they, or any five or more of them, at their public meeting assembled, were thereby authorised and impowered as they should think proper to dispose of the same, and to bring actions, &c.

And by an act the 10 G. 3, c. 71, the said acts, and all the tolls or duties, powers, penalties, forfeitures, exemptions, articles, rules, clauses, matters, and things therein contained (except such as were thereby altered and varied), were continued in force for the further period of twenty-one years.

And, by an act of 18 G. 3 (c. 90), after reciting, that, by reason of the great expense the said trustees [183] had been at in widening the said road, and in purchasing messuages and lands for that purpose, particularly in the town of Hatfield, in the said county of Hertford, where the road was so narrow as to make it difficult and dangerous for two carriages to pass, and, from the great consumption of ballast by reason of the many heavy carriages passing and re-passing thereon, the said road could not be effectually repaired and kept in repair, and the money then due and owing on the credit of the said tolls be re-paid, unless the said tolls were increased and the term of the said acts further continued, it was enacted that the said several acts should be and were continued for a further term of twenty-one years.

By an act of the 49 G. 3, c. xxxiv., after referring to the said acts, it was recited as follows,—“And whereas there is now due and owing upon the credit of the tolls granted by the said acts a considerable sum of money, which, together with the tolls collected, have been duly applied according to the directions of the said acts: but the said road cannot be widened and improved and made completely convenient for travellers passing the same, and be effectually repaired and kept in repair, and the money now due and owing on the credit of the said tolls be re-paid, unless the said tolls are increased and the term of the said acts further continued, and the powers thereof altered and enlarged.” And it was enacted that the said several recited acts, and all and every the clauses, authorities, powers, penalties, forfeitures, and punishments therein contained (except such as relate to exemption from stamp duties, and except such as were thereby altered, varied, or repealed), should be and continue in

full force and effect, and, together with this present act, should be put in execution for the several purposes hereby and thereby intended, for and during the term thereafter [184] mentioned, as fully and effectually in all respects and to all intents and purposes whatsoever as if the same were expressly repeated and re-enacted in the body of the act now in recital: which said term thereby granted should be and was thereby declared to be subject and liable to the payment of all monies then due and owing on the credit of the said recited acts, or which should or might thereafter be borrowed or become due on the credit of the said recited acts and this act, and all interest due and to become due for the same respectively. And it was further enacted that it should be lawful for the said trustees, or any five or more of them, at any meeting (if they should think proper), to order and cause to be built upon any parts of the said road as to them should seem most eligible and expedient, a crane, machine, or engine, with suitable buildings thereto, proper for the weighing of carts, waggons, or carriages conveying any goods, wares, or merchandize whatsoever; and that it should be lawful for the said trustees to let and demise, either with or without the tolls, the weighing cranes, machines, and engines which might be erected by virtue of the said act of the 13 G. 3: * and that, if any money should be agreed or awarded to be paid for any lands, tenements, or hereditaments, purchased, taken, or used by virtue of the powers of the said recited acts and this act, for the purposes thereof, should belong to any corporation, feme covert, infant, lunatic, or person or persons under any other disability or incapacity, such money should, in case the same should amount to the sum of 200l., with all convenient speed be paid into the Bank of England in the name and with the privity of the accountant-general of the high court of Chancery, to be placed to his account, "Ex parte the trustees for executing the said recited acts and this act," to the intent that such money should be applied under the [185] direction and with the approbation of the said court, to be signified by an order made upon a petition to be preferred in a summary way by the person or persons who would have been entitled to the rents and profits of the said lands, tenements, or hereditaments, in the purchase of the land-tax, or discharge of any debt or debts, or such other incumbrance, or part thereof, as the said court should authorize to be paid, affecting the same lands, tenements, or hereditaments, or affecting other lands, tenements or hereditaments standing settled therewith to the same or the like uses, intents, or purposes; or, where such money should not be so applied, then the same should be laid out and invested, under the like direction and approbation of the said court, in the purchase of other, lands, tenements, or hereditaments, which should be conveyed and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner, as the lands, tenements, and hereditaments which should be so purchased, taken, or used as aforesaid, stood settled or limited, or such of them as at the time of making such conveyance and settlement should be existing, undetermined, and capable of taking effect; and, in the meantime and until such purchase should be made, the said money should, by order of the court of Chancery, upon application thereto, be invested by the said accountant-general in his name in the purchase of 3l. per Centum Consolidated or 3l. per Centum Reduced Bank Annuities; and, in the meantime and until the said Bank Annuities should be ordered by the said court to be sold for the purposes aforesaid, the dividends and annual produce of the said Consolidated or Reduced Bank Annuities should from time to time be paid by order of the said court to the person or persons who would for the time being have been entitled to the rents and profits of the [186] lands, tenements, and hereditaments so thereby directed to be purchased, in case such purchase or settlement were made: and that, if any money so agreed or awarded to be paid for any lands, tenements, or hereditaments purchased, taken, or used for the purposes aforesaid, and belonging to any corporation, or to any person or persons under any disability or incapacity as aforesaid, should be less than the sum of 200l., and should amount to the sum of 20l., then and in all such cases the same should, at the option of the person or persons for the time being entitled to the rents and profits of the lands, tenements, or hereditaments so purchased, taken, or used, or of his, her, or their guardian or guardians, committee or committees, in case of infancy or lunacy, to be signified in writing under their respective hands, be paid into the bank in the name and with the privity of the said accountant-general of the high court of Chancery, and be placed to his account as aforesaid, in order to be applied in manner thereinbefore directed, or otherwise the

* [18 G. 3, c. 90.]

same should be paid, at the like option, to two trustees to be nominated by the person or persons making such option, and approved of by five or more of the said trustees (such nomination and approbation to be signified in writing under the hands of the nominating and approving parties), in order that such principal money and the dividends arising thereon might be applied in any manner thereinbefore directed, so far as the case was applicable, without obtaining or being required to obtain the direction and approbation of the court of Chancery; and that, where such money so agreed or awarded to be paid as next before mentioned should be less than 20l., then and in such cases the same should be applied to the use of the person or persons who would for the time being have been entitled to the rents and profits of the lands, tenements, or heredita-[187]-ments so purchased, taken, or used for the purposes of the said recited acts and this act, and in such manner as the said trustees should think fit, or in case of infancy or lunacy, then to his, her, or their guardian or guardians, committee or committees, to and for the use and benefit of such person or persons so entitled respectively; and that, in case the person or persons to whom any sum or sums of money should be awarded for the purchase of any lands, tenements, or hereditaments to be purchased by virtue of the said recited acts and this act, should refuse to accept the same, or should not be able to make a good title to the premises to the satisfaction of the said trustees or any five or more of them, or in case such person or persons to whom such sum or sums of money should be so awarded as aforesaid could not be found, or if the person or persons entitled to such lands, tenements, or hereditaments were not known or discovered, then and in every such case it should and might be lawful to and for the said trustees, or any five or more of them, to order the said sum or sums of money so awarded as aforesaid to be paid into the Bank of England in the name and with the privy of the accountant-general of the court of chancery, to be placed to his account to the credit of the parties interested in the said lands, tenements, or hereditaments (describing them), subject to the order, control, and disposition of the said court of Chancery, which said court of Chancery, on the application of any person or persons making claim to such sum or sums of money, or any part thereof, by motion or petition, should be and was thereby impowered, in a summary way of proceeding, or otherwise as to the same court should seem meet, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the respective estate or estates, title, or [188] interest of the person or persons making claim thereunto, and to make such other order in the premises as to the said court should seem just and reasonable; and the cashier or cashiers of the Bank of England who should receive such sum or sums of money, were thereby required to give a receipt or receipts for such sum or sums of money, mentioning and specifying for what and for whose use the same was received, to such person or persons as should pay any such sum or sums of money into the bank as aforesaid; and that, where any question should arise touching the title of any person to any money to be paid into the Bank of England in the name and with the privy of the accountant-general of the court of Chancery in pursuance of this act, for the purchase of any lands, tenements, or hereditaments, or of any estate, right, or interest in any lands, tenements, or hereditaments to be purchased in pursuance of the said recited acts and this act, or to any Bank Annuities to be purchased with such money, or the dividends or interest of any such Bank Annuities, the person or persons who should have been in possession of such lands, tenements, or hereditaments at the time of such purchase, and all persons claiming under such person or persons, or under the possession of such person or persons, should be deemed and taken to have been lawfully entitled to such lands, tenements, or hereditaments according to such possession, until the contrary should be shewn to the satisfaction of the said court of Chancery, and the dividends or interest of the Bank Annuities to be purchased with such money, and also the capital of such Bank Annuities, should be paid, applied, and disposed of accordingly, unless it should be made appear to the said court that such possession was a wrongful possession, and that some other person or persons was or were lawfully entitled to such lands, tenements, or heredita-[189]ments, or to some estate or interest therein; and that, where, by reason of any disability or incapacity of the person or persons or the corporation entitled to any lands, tenements, or hereditaments to be purchased under the authority of the said recited acts and this act, the purchase-money for the same should be required to be paid into the court of Chancery, and to

be applied in the purchase of other lands, tenements, or hereditaments to be settled to the like uses in pursuance of the said recited acts and this act, it should and might be lawful to and for the said court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of the said recited acts and this act, or so much of such expenses as the said court should deem reasonable, to be paid by the said trustees, or any five or more of them, out of the monies to be received by virtue of the said recited acts and this act, who should from time to time pay such sums of money for such purposes as the said court should direct.

And it was further enacted that the terms granted by the said recited acts should upon the 20th of October, 1809, cease and determine; and that the said acts (subject to the alterations in this act mentioned) and this act should from thenceforth continue and be in force and be executed for and during the term of twenty-one years, and from thence to the end of the next session of parliament.

And by an act of the 1 W. 4, c. lx., after referring to the said acts, and reciting that it was expedient that the term and powers of the said acts should be enlarged, some additional powers granted, and the tolls granted by the said acts increased; and that it would facilitate the execution of the objects before mentioned if the said acts were repealed, and if other powers and provisions were granted and made instead [190] thereof, and were embodied in one act, and reciting that an act was passed in the 5th year of his late Majesty King George the 4th, intituled "an act for enabling justices of the peace for ridings, divisions, or sokes, to act as trustees for repairing and amending turnpike roads," it was enacted that the said recited acts should be and the same were thereby declared to be repealed: and it was further enacted that the act now in recital should be put in execution for and during the term thereafter mentioned for the purpose of repairing and maintaining in repair the said turnpike-road, and that the said recited act passed in the 5th year of the reign of his late Majesty King George the 4th, and all and every the powers and provisions therein contained (except so far as they are repealed or altered by this act), should be as valid and effectual for carrying this act into execution as if they had been repeated and re-enacted in the body of this act: and that all his Majesty's justices of the peace in and for the counties of Middlesex and Hertford, with certain persons therein named, and their successors, being duly qualified according to the provisions and directions of the several acts for regulating turnpike-roads in England, should be and they were thereby appointed trustees for carrying into execution this act: and that it should be lawful for the said trustees to continue all and every or any of the toll gates, toll-bars, and toll-houses, and weighing-machines then standing and being upon the said turnpike-road, or upon the sides thereof, and also to erect or build in lieu thereof, or in addition thereto, upon the said road, or any part thereof, or upon the sides thereof, or any part thereof, when and where and as they shall judge proper, any toll-gates or toll-bars, toll-houses, and weighing-machines, with out-houses and conveniences thereto, and to take in and inclose suitable garden spots for such toll-houses [191] not exceeding one eighth part of a statute acre each, as they should judge proper, and from time to time to alter or to take down and re-build, or to discontinue and remove the same, or any of them, as they the said trustees should think proper; and that the last-mentioned act should continue in force for the term of thirty-one years.

The said Marquis of Salisbury, being afterwards desirous of altering the course of another part of the said turnpike-road, which other part passed through land of the said Marquis, and which said proposed deviation or substituted part of the said road was also intended to pass through and over other land of the said Marquis, he the said Marquis promoted the passing of another act of parliament in the 9th year of the reign of Her present Majesty Queen Victoria for enabling the trustees of the Enfield Chase Road to make the said last-mentioned deviation or alteration of the said turnpike-road, being a deviation or alteration of the said turnpike-road other and different from the said deviation or alteration so made by the defendants; by which last-mentioned act, after the authorising of the last-mentioned deviation and alteration, and after reciting that part of the said road would, after the making of the said deviation or alteration, become unnecessary or useless to the public, it was enacted that such part should cease to be under the control of the said trustees, and should be stopped up and discontinued as a public highway, and should thenceforth vest in the said Marquis, the owner of the adjoining lands, his heirs and assigns for ever; and that the freehold and inheritance of any lands to be purchased by the said trustees for

the purposes of the same deviation of the said road, in case the same should be of freehold tenure, and, in case the same should be of any other tenure, the estate and interest therein, should not (notwithstanding any provisions in any of the acts in force for regulating [192] turnpike-roads in England, by means of any such purchase or any conveyances or assurances made in pursuance thereof, be vested in the said trustees, but such freehold and inheritance, or the estate and interest in such lands, should, notwithstanding such purchase and conveyance or assurance, remain and be vested in the persons in whom the same was invested immediately prior to such purchase by the said trustees, and the said trustees should, by means of such purchase and conveyance or assurance, be entitled to a perpetual right of way in, over, or upon the lands so purchased by them; and if at any time any land purchased by the said trustees under the authority of that act should not be wanted for the purposes thereof, and the road for which the same was purchased should cease to be a highway, then the right of way in or upon the said lands should cease and be extinguished, and the freehold and inheritance, and the said lands in case the same should be of freehold tenure, and the estate and interest in such lands in case the same should be of any other tenure, should be and remain in the persons then entitled to the same, freed and discharged from such right of way.

The court was to have the power to draw all inferences of fact.

The plaintiff contended that he was entitled to the possession of the piece of land coloured blue in the plan marked E., and before the diversion of the road he was owner of the soil, subject to the easement in favour of the public, and that the effect of the diversion was only to extinguish this easement.

The defendants contended,—first, that the soil of the part of the road in question was not vested in the plaintiff,—secondly, that, if vested, the whole or some part thereof passed to the defendants by virtue of their purchase,—thirdly, that if not previously [193] vested in the defendants by their purchase, yet it became vested in them by reason of the deviation and substitution mentioned in the case,—fourthly, that, if the defendants were mistaken as to their right to the land, still the plaintiff was not entitled to the possession thereof, the defendants being ready and willing to pay for the same whenever the plaintiff's title thereto should have been established.

Lush, Q. C. (with whom were Manisty, Q. C., and H. Lloyd), for the plaintiff (*a*). The local acts set out in the case converted the road in question, which was an old parish road, into a turnpike-road. [Byles, J. In general, turnpike-acts have no effect upon the ownership of the soil.] None whatever.

[194] 1. The first point relied upon by the defendants is, that the soil of the part of the turnpike-road in question was not vested in the plaintiff. Now, the case states that he is the owner of the freehold on both sides of the road. The presumption of law, therefore, is, that he is the owner of the soil of the road. Besides, he is lord of the manor, and as such owner of the wastes lying on the sides of the road. The case discloses acts of ownership exercised over the spot by the plaintiff prior to the year 1848. As lord of the manor he granted a strip of land on the side of this

(*a*) The points marked for argument on the part of the plaintiff, were,—

“1. That, at the time of the commencement of this action, he was entitled to the possession of the land claimed, and is now entitled to recover possession thereof:

“2. That, before the diversion of the road, the soil and freehold of this piece of land (subject to the easement in favour of the public) was vested in him either as owner of the adjoining land on both sides or as lord of the manor:

“3. That no part of this piece of land was conveyed to the defendants by the plaintiff, or passed to the defendants by virtue of their purchase deed of the 19th of October, 1848:

“4. That the effect of the diversion of the said road was merely to extinguish the easement to which the public were entitled over this piece of land:

“5. That the plaintiff is not, by his knowledge of certain proceedings of the defendants, as stated in the case, deprived of his right to the possession of the said piece of land:

“6. That this action of ejectment is rightly brought by the plaintiff in order to his finally establishing his right to the said piece of land, and that he is entitled to the judgment of the court, whatever may be the rights of the defendants under the Lands Clauses Consolidation Act, 1845, or otherwise.”

very road to one Pryor, to hold of him as lord of the manor; and the defendants, having acquired Pryor's title, take an enfranchisement from the plaintiff. Unless, therefore, the railway act, or some other act of parliament, or some deed, has divested the soil and freehold of the spot in question out of the plaintiff, he has it still.

2. The next ground of objection is, that, if the land in question ever was vested in the plaintiff, the whole, or some part thereof, passed to and vested in the defendants by virtue of the conveyance to them by the plaintiff. The description of the parcels in the deed, as well as in the schedule and plans, which are referred to, the numbers, and the measurement, all concur in excluding the road in question, which is treated as a totally distinct thing. Indeed, it is manifest that the deed did not contemplate any dealing with the soil of the road, both parties evidently assuming that it was vested in the trustees under the local turnpike acts. Besides, this not being the case of a voluntary bargain, but a compulsory sale under the powers of a railway act, no presumption arises in favour of the purchasers. [Crowder, J. If this had been an ordinary conveyance of two pieces of land intersected by a road, do you deny that it would pass the soil of the road?] By such [195] language as is found in this deed, it is submitted that it would not pass: and, further, it is submitted that the court will be more slow to draw inferences in favour of parties taking land compulsorily, than they would be in an ordinary case of purchase and sale. As to a portion of the road, it may be said that it passed by the grant to Pryor. It is plain, however, that the plaintiff, as lord of the manor, had no intention by that grant to deal with any portion of his rights in the soil of the road.

3. Then, it is said, that, assuming that the old road was not vested in the defendants by their purchase, it became vested in them by reason of the deviation and substitution of the turnpike-road mentioned in the special case. That question turns upon the effect which is to be given to the provisions of the Railway Clauses Consolidation Act, 8 & 9 Viet. c. 20. The 16th section of that act impowers the company, subject to the provisions and restrictions in that and the special act, and any act incorporated therewith, for the purpose of constructing the railway, amongst other things, to divert or alter as well temporarily as permanently, the course of any roads, &c., or raise or sink the level of any such roads, &c., in order the more conveniently to carry the same over or under or by the side of the railway, as they might think proper. The 53rd section enacts, that, "if, in the exercise of the power by this or the special act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage-road, horse-road, tram-road, or railway, either public or private, so as to render it impassable for, or dangerous, or extraordinarily inconvenient to, passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense [196] maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be." The 54th section imposes a penalty on the company if they omit to cause another sufficient road to be made before they interfere with any such existing road. The 55th section enables persons sustaining any special damage from the interruption of a road to maintain an action. And then comes the 56th section, which enacts, that, "if the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be: and, if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the * new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow: and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored, by writing under their hands, consent to an extension of the period, and in such case within such extended period: that is

* In the quarto and octavo editions of the statutes, "a" is inserted here. But, in the folio (which is a facsimile of the thing which now stands for the parliament-roll), the definite article is used.

to say, if the road be a turnpike-road, within six months, and, if the road be not a turnpike-road, within twelve months." Nothing is there said as to the soil of the old road being vested in the company. The very existence of the provisions which will be relied on in the turnpike-acts affords an argument against the company. The material provisions of the General Turnpike-Act, 3 G. 4, c. 126, which bear upon this question are the 83rd, [197] 86th and 88th sections. The 83rd section enacts "that it shall be lawful for the trustees or commissioners of every turnpike-road, and they are hereby fully authorized and empowered, from time to time, to make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management, or of any part or parts thereof, and to divert, shorten, vary, alter, and improve the course or path of any of the said several and respective roads through or over any commons or waste grounds or uncultivated lands, without making satisfaction for the same, and also through or over any private lands, tenements, or hereditaments, tendering and making satisfaction to the owners thereof and persons interested therein for the damage they shall sustain thereby; and it shall and may be lawful for the said trustees or commissioners, and for their surveyor or surveyors and workmen, with or without carriages or cattle, from time to time to enter upon any such commons or waste grounds, or uncultivated lands, private lands, tenements, or hereditaments as aforesaid through or over which the said road, or the widenings and alterations thereof, pass or are intended to pass, and to stake out and make the same in such manner as the said trustees or commissioners shall think necessary or proper, without being thereby subject or liable to be deemed a trespasser or trespassers, or to any fine, penalty, or forfeiture for entering or continuing upon any part or parts of such lands, tenements, and hereditaments respectively for any of the purposes aforesaid." The 84th section enables the trustees or commissioners of any turnpike-road to contract for the purchase of lands, &c. for widening, diverting, altering, and improving the road. The 85th provides for the mode of ascertaining the value of lands required for those purposes, where persons interested neglect or [198] refuse to treat. The 86th section enacts "that every sum of money or recompense to be agreed for or assessed as aforesaid, shall be paid out of any moneys in the hands of the said trustees or commissioners, or out of the tolls granted by the act for making and repairing such turnpike-road, or out of the moneys to be borrowed on the credit thereof, to the party or parties or person or persons entitled thereto, or to their agents, or into the Bank of England, in manner by this act directed (as the case may be); and, upon such payment to such parties or persons, or their agents, or into the Bank of England, and after thirty days' notice thereof given to such parties or persons, or to their agents, or left at their respective usual places of abode, or with the tenant or tenants in possession of such lands, tenements, hereditaments, and premises then such lands, tenements, hereditaments, and premises respectively shall be vested in such trustees or commissioners, and shall and may be taken and used for the purposes of such act: and such lands, and the site of such lands, tenements, hereditaments, and premises, shall be laid into and made part of the road, in such manner as the said trustees or commissioners shall direct, and shall be repaired and kept in repair by such trustees or commissioners, by the same ways and means as any other part of the road under their management is or ought to be kept in repair; and all parties and persons whomsoever shall be divested of all right and title to such lands, tenements, and hereditaments; and, after such new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof as in the judgment of the said trustees or commissioners may thereby become necessary, or * shall and may be stopped up and discontinued as public highways (unless leading over some moor, heath, common, uncultivated land, or waste ground, or [199] to some church, mill, village, town, or place, lands or tenements, to which such new road or roads doth not or do not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals), and shall be vested in and shall and may be sold and conveyed by the said trustees or commissioners, in the manner herein mentioned, for the best price that can be gotten for the same, and the money arising by such sale shall be applied for the purposes of the act for repairing and maintaining such turnpike-road," &c. And the 88th section enacts, "that, when

any turnpike-road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to all the provisions and regulations in any act of parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose lands adjoin thereto, as hereinafter mentioned with regard to pieces of ground not wanted [s. 89]; but, if such old road shall lead to any lands, house, or place which cannot, in the opinion of the said trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorized to order and lay out if they find it necessary, then and in such case the old road shall be sold, but subject to the right of way and passage to such lands, house, or place respectively, according to the antient usage in that respect; and the money arising from such sale in either of the said cases shall be applied towards the purchase of the land where such new road shall be made, or in the same manner as the [200] tolls arising on such road, as the trustees or commissioners thereof shall think fit; and, upon the completion of any contract whereby any part of the old road shall be given in payment for the value of the ground taken for the new road, or upon payment of the price of any part of the old road, the soil of such old road shall become vested in the purchaser thereof and his heirs; but all mines, minerals, and fossils lying under the same shall continue the property of the person or persons who would from time to time have been entitled to the same if such old road had continued." [Cockburn, C. J. It seems clear from these provisions, that, if the trustees of the turnpike-road had diverted this road, the Marquis of Salisbury's right to the soil of the piece which ceased to be part of the road would be gone.] It is for the benefit of the public that this extraordinary power is vested in the trustees. Here, the proceeding is for the benefit of the company. [Williams, J. The legislature in framing highway and turnpike-acts seem to have had no very accurate notion of the rights of the owners of the soil.] The trustees may make the lord of the manor buy his own land. No equivalent powers are given under the railway acts: the companies are compelled to buy even wastes or heaths. There are no words vesting the soil of the old road in the company: and the rights of the owner of the soil cannot be divested without express words.

4. The next question raised is founded upon the 124th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, which "with respect to interests in lands which have by mistake been omitted to be purchased," enacts, that, "if, at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special act, or any act incorporated therewith, they were authorised to purchase, and which shall be permanently [201] required for the purposes of the special act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands, which the promoters of the undertaking shall through mistake or inadvertence have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in undisturbed possession of such lands, provided within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or, in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters of the undertaking thereon and the time of the payment of such purchase-money or compensation by the promoters of the undertaking, so far as such mesne profits or interest may be recoverable in law or equity; and such purchase-money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit." It is unnecessary to inquire whether this is a case within that section or not: it is enough to say that it affords no [202] answer to an action of

ejection. The right of the claimant is disputed by the company. His right must be legally established before that section can come into operation. [Williams, J. If that were not so, the company would be enabled to fight the question at the expense of the claimant.] The point came before this court in *Doe d. Hyde v. The Mayor, &c., of Manchester*, 12 C. B. 474 (a)¹, where the court refused to set aside the writ of habere facias possessionem, but stayed the execution. This objection is probably based upon the case of *Doe d. Armistead v. The North Staffordshire Railway Company*, 16 Q. B. 526. That, however, was a case where the company had given a regular notice to the landowner of their intention to take the land, making the deposit and giving the bond as required by the 8 & 9 Vict. c. 18, s. 85, which gave them a perfect right to enter and take possession of the land. Patteson, J., in giving the judgment of the court, says: "The compulsory clause, s. 85, was acted upon within the three years, and the land rightfully entered upon and taken. The company had exercised their compulsory power under it completely, so far as they were concerned; and, so far as they had need of any such power, the thing was done and finished on their part; for, it is to be observed, that the words of the 123rd section are in the disjunctive, 'for the compulsory purchase or taking;' the ascertaining the amount of compensation after the lands were entered upon and used, and indeed taken, is no exercise of a compulsory power on the part of the company." It is the duty of the owner of the land to take steps to get the amount of compensation assessed. There is therefore no analogy between that case and the present.

[203] G. R. Clarke, contra (a)². 1. Under the local turnpike-acts it is clear that the piece of land in question vested in the trustees. They were by the 3 G. 2, c. 10, impowered to "widen any of the narrow parts of the said road, by opening, clearing, and laying into the same the grounds of any person or persons lying contiguous thereto," making reasonable satisfaction to such person or persons. By the 17 G. 2, c. 14, and 10 G. 3, [204] c. 71, the turnpikes and tolls are vested in them. The 18 G. 3, c. 90, which continues the former acts, and enlarges the powers thereof, describes the road in question as being so narrow as to make it difficult and dangerous for two carriages to pass." The 49 G. 3, c. xxxiv., treats the trustees as being the purchasers of lands, and makes various provisions for the application of the purchase-money where disabilities intervene (a)³. And by the 9 Vict. c. xii.,—an act promoted by the plaintiff for the purpose of stopping up a portion of this highway,—it is by s. 8 provided that the portion so stopped up "shall cease to be under the control of

(a)¹ In equity, 5 De Gex & Smale, 249.

(a)² The points marked for argument on the part of the defendants, were,—

"1. That the soil of the part of the turnpike-road in question was not vested in the plaintiff:

"2. That, if ever vested, the whole or some part thereof passed to and vested in the defendants by virtue of their purchase of land from the plaintiff:

"3. That, if not previously vested in the defendants by their purchase, yet it became vested in them by reason of the deviation and substitution of the turnpike-road mentioned in the special case:

"4. That the facts proved and stated in the special case shew that the defendants entered upon and took possession of the land in question within the limits of deviation according to their compulsory powers, and it is a reasonable inference from the facts stated that they did so with the consent of the plaintiff, and that consequently, even if the soil was vested in the plaintiff, he can only now require the purchase thereof to be completed according to the provisions of the defendants' special act and the general acts incorporated therewith, and cannot take back the land, but can only claim compensation:

"5. That, if the defendants are mistaken in supposing that the land in question vested in them by any of the aforesaid causes, and the court should not consider that it is a reasonable inference from the facts that the plaintiff gave such consent as aforesaid to the defendants' so taking possession of the land, yet still the plaintiff is not entitled to the possession of the land, inasmuch as the defendants are ready and willing, and have expressed their readiness and willingness, to pay for the same according to the provisions of the said acts, whenever the title of the plaintiff thereto shall have been established."

(a)³ All these acts are repealed by the 1 W. 4, c. lx.

the said trustees," and "shall thenceforth vest in the Marquis of Salisbury, the owner of the adjoining lands, his heirs and assigns, for ever," subject to a proviso as to certain rights of way (*b*). If the argument on the part of the plaintiff be well founded, viz. that the plaintiff, as owner of the adjoining land, was already entitled to the soil of the road, that provision was [205] idle. Further, the case states that the conveyance went upon the foundation of the deposited plan, section, and book of reference. In these numbers 75 and 79 are described as being the property of the Marquis of Salisbury: but, as to No. 47, the piece of land in question, the trustees are said to be the "owners or reputed owners." That is *prima facie* evidence against the plaintiff, that he is not the owner of No. 47. He is estopped by his own act from disputing what he has thus admitted.

2. The piece of land in question passed by the conveyance. The deed describes the parcels as consisting of two pieces of land numbered respectively 75 and 79, through which the road in question passes. Under such circumstances, the road itself clearly passes by the conveyance, though no mention is made of it, there being nothing to rebut the ordinary presumption of law "that waste land on the sides, and the soil to the middle of a highway belongs to the owner of the adjoining land:" Per Bayley, J., in *Doe d. Pring v. Pearsey*, 7 B. & C. 304, 9 D. & R. 908: and this presumption holds good, whether he be a freeholder, leaseholder, or copyholder.

3. Assuming that the soil of this road did not pass to the company by the conveyance, nor vest in the trustees under the local acts, it clearly vested in the company under the General Turnpike Act, 3 G. 4, c. 126, coupled with the provisions of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. The argument on the part of the plaintiff does not deal with the clause upon the authority of which the case finds that the road was diverted by the company, viz. the 16th section, which alone gives power to them to divert the course of a turnpike-road. No provision is there made as to what is to be done with the old road: nor is there anything in that act to make the new part of the [206] turn-pike road subject to the same trusts as the old road. But the provisions of the General Turnpike Act are to be taken in conjunction with it: and all the rights which were before in the trustees are now vested in the company, who by virtue of the substitution become either owners or trustees of the old road. In *Allnutt v. Fott*, 1 B. & Ad. 302, trustees under a turnpike-act agreed with the plaintiffs to exchange with them a portion of old road for land required to form part of a new one, pursuant to the 3 G. 4, c. 126, s. 86. The new road having been formed, and an order having been made for stopping up the old one as unnecessary, the trustees by the same order gave up the portion of the old road to the plaintiffs according to agreement: and it was held that the public had acquired a complete right in the new road, and the plaintiffs in the land given in exchange, though no conveyance had been executed on either side. The clause in s. 84 of the act directing a conveyance to the trustees where lands are purchased by them, does not apply where the vendors are persons *sui jure*, and acting in their own right. The cases of *Doe d. Armistead v. The North Staffordshire Railway Company*, 16 Q. B. 526, and *The Marquis of Salisbury v. The Great Northern Railway Company*, 17 Q. B. 840, shew that the company here could not be treated as trespassers. In the course of the argument in the last case, Lord Campbell, addressing the plaintiff's counsel, said: "You allow, that, if the company had entered, the contract would have been complete."

4. The 124th section of the 8 & 9 Vict. c. 18, expressly provides that the company shall not be disturbed or molested in their possession of lands taken under circumstances

(*b*) See the 11th section, which enacts, "that the freehold and inheritance of any lands to be purchased by the said trustees for the purposes of the deviation of the said road hereby authorized, in case the same shall be of freehold tenure, and, in case the same shall be of any other tenure, the estate and interest therein, shall not (notwithstanding any provisions in any of the acts in force for regulating turnpike-roads in England) by means of any such purchase, or any conveyance or assurance made in pursuance thereof, be vested in the said trustees; but such freehold and inheritance, or the estate and interest in such lands, shall, notwithstanding such purchase and conveyance or assurance, remain and be vested in the persons in whom the same was vested immediately prior to such purchase by the said trustees: and the said trustees shall by means of such purchase and conveyance or assurance, be entitled to a perpetual right of way in, over, or upon the lands so purchased by them."

like these. In *Doe d. Hyde v. The Mayor, &c., of Manchester*, 12 C. B. 474, the question was not raised. It is obviously contrary to the [207] spirit of the act to allow an ejectment to be maintained under such circumstances.

5. The defendants are at all events entitled to ask the court to infer from the facts stated in the special case that they were in possession with the license and consent of the plaintiff. In *Doe d. Foley v. Wilson*, 11 East, 56, upon a question whether a jury might presume a license from the lord of a manor to an inclosure from the waste, Lord Ellenborough said: "Though a grant from the lord would not be presumed within twelve or thirteen years, yet the continual view of the steward acting under the same lord for that period, without objection, might be sufficient for the jury to presume a licence." *Doe d. Beck v. Heakin*, 6 Ad. & E. 495, 2 N. & P. 660, is an authority to the same effect. Here, the plaintiff sells the company a piece of land for the purpose of enabling them to divert the road; and he and his steward stand by and see the company putting up fences and dealing with the obsolete portion of the old road, assuming it rightfully to belong to them. It would be manifestly unjust to allow him now to say that their possession is wrongful. Suppose the position of the parties were reversed,—could the company be permitted to say that they had not become the purchasers of the land? [Williams, J. We are all clearly of opinion that we cannot infer such a consent as is necessary to sustain your argument. Neither party knew at the time that the soil of the road was in the plaintiff.]

Lush was heard in reply.

WILLIAMS, J. I am of opinion that our judgment must be for the plaintiff. A great variety of points have been made in the course of this discussion. 1. The first is, as to the title of the Marquis of Salisbury [208] to the piece of land in question. It appears to me to be impossible to doubt, that, *prima facie*, either in the character of owner of the adjacent soil on each side of the road, or as lord of the manor, the marquis was the owner of the soil of the road, unless there be some act of parliament which prevents the ordinary presumption of law from arising. It is insisted on the part of the defendants that that presumption is rebutted by the various local acts of parliament passed for the making, maintaining, repairing, and widening the Great North Road, which are referred to in the case, and to which our attention has been invited in the course of the argument: and it is contended, that, looking at the general scope of those several acts of parliament, it is impossible to escape from the conviction that it was contemplated and intended by the legislature that the soil of the road should absolutely vest in the trustees; or that, at all events, it lies upon the marquis to shew that the piece of land in question was not obtained by the trustees by purchase under the provisions of those acts. It seems to me, however, that there is nothing in this case to vary or control the law as it is laid down by Lord Kenyon in the case of *Darison v. Gill*, 1 East, 69, where he says,—"As to the consent of the trustees of a turnpike-road, the soil was not vested in them, but remained in the persons who were entitled to it before the act passed by which they were appointed. The trustees have only the control of the highways." The ordinary rule of law being that the owner of the adjacent soil is to continue in possession of his common-law rights, and remain proprietor of the soil of the road *usque ad medium filum viae*,—or, if possessed of the land on both sides, of the entire road,—the acts of parliament referred to not in any respect controlling that common-law right, I think it cannot be said that it lies upon the marquis to prove the negative, as is [209] suggested; but that he is entitled to stand upon the ordinary presumption of law arising from the character which he fills. Mr. Clarke further contends upon this point, that the Marquis of Salisbury cannot be said to be the owner of the adjacent soil on both sides of the road, as far as regards that portion next the land which the company bought of Mr. Pryor. But the answer to that is, that, assuming the right to the soil of the road to have been in the marquis before the grant to Pryor, the effect of that grant is not sufficient to take it out of him. It is not necessary to inquire whether in point of strict law it was competent to the marquis to make the grant. Whether he had the power or not, we must look to the intention,—did he or did he not intend to pass to the grantee any rights which he had in the soil of the road? When we find that the piece of land so granted was to be held of the lord as part of the copyhold of the manor, it seems to me to be impossible to say that it was intended to convey anything but the right to the very piece of land granted, the right to the

soil of the adjoining road being left as it was. Upon this ground, therefore, I am of opinion that our decision upon the first point must be in favor of the plaintiff.

2. The second question is, whether the piece of land in question passed to the defendants by the terms of the conveyance of the 19th of October, 1848. It is not disputed by Mr. Lush, that, in the ordinary case, where a man who is the owner of two pieces of land conveys them to a purchaser, if a turnpike-road lies between them, the soil of the road passes by the conveyance, although the conveyance is silent as to its existence, and although the particular measurement of each piece is given, and would exclude the road. The argument on the part of the plaintiff is, that there are particular circumstances in this case which require a different [210] decision, and shew that the road in question did not pass. I consider it to be perfectly clear that the road did not pass by the conveyance. Before the conveyance it is manifest that the company themselves thought that the soil of the road was in the trustees, and not in the plaintiff. The plans and book of reference required by the standing orders in parliament, and set out in the special case, are evidently framed upon that footing; and it seems to me that the conveyance exactly carries out that view of the case. It mentions two pieces of land numbered respectively 75 and 79, and describes their exact contents, and makes no mention whatever of No. 47, either in the conveyance itself, or in the schedule or plan, which by reference are imported into it. Taking the whole together, therefore, it seems to me to be perfectly clear that the three pieces of land thus numbered and described are treated as distinct, and that the effect of the conveyance is to pass two of them only to the company.

3. The next point is, that, under the 8 & 9 Vict. c. 20, coupled with the provisions of the General Turnpike Act, 3 G. 4, c. 126, the effect of the diversion of the old road and the substitution of a new one was, to vest the old road in the defendants. Now, there has been considerable controversy in the course of the discussion, as to whether the power under which the defendants effected the diversion of the road is contained in the 16th or in the 56th section of the 8 & 9 Vict. c. 20. The inclination of my opinion is, that the power was conferred by the 56th section: but it appears to me to be unnecessary to decide that: for, if the power to divert and substitute were exercised under s. 16, I am unable to follow the argument of Mr. Clarke, which, as I understood it, was shortly this,—that the General Turnpike Act (by s. 4) makes that act applicable to all future acts that may be passed for the purpose of making, repairing, widening, or diverting turnpike-roads; and that the statute in question,—the 8 & 9 Vict. c. 20,—is to be considered as one of them, and therefore is to be read in connection with the 3 G. 4, c. 126. I feel great difficulty in seeing how that argument can be sustained: but, if it could be sustained, it only comes to this, that the provisions of the General Turnpike Act, 3 G. 4, c. 126, are to be applied to the 8 & 9 Vict. c. 20, so far as they are applicable to it. Then the clauses which Mr. Clarke insists have the effect of transferring the soil of the old road to the trustees or commissioners, have reference to roads diverted by the trustees or commissioners under the powers of that act. The road in question has not been diverted by the trustees or commissioners. In the case of common highways, the law appears to be that the diversion of the old road does not take away the property in the soil from the proprietor. The first observation which arises upon this part of the argument is, that it would be strange that the legislature should have provided for turnpike-roads, and made no provision as to common highways. I cannot, therefore, think that there is any provision in the act dealing with the question what is to become of the old turnpike-road when a new one has been substituted for it by a railway company. The act of parliament being silent upon the subject, the consequence appears to me to follow, that the right of the owner of the soil remains as it was,—discharged probably of the easement to which it was subject before the diversion. Upon the whole, therefore, I am of opinion that this point also must be decided in favour of the plaintiff.

4. The fourth question arises upon the 124th section of the 8 & 9 Vict. c. 20, the point which was last discussed by Mr. Lush. I cannot deny that the words of the act at first sight seem to be somewhat difficult to [212] reconcile with the notion that ejectment will lie, because it enacts that the railway company are to remain in undisturbed possession, provided that, in case the title is disputed, they pay the amount of certain costs within a given time. It would, therefore, at first sight, seem as if no action could be maintained against the company which would be inconsistent with their right to remain in possession. Upon the whole, however, I think the

proper construction of this section is this,—that it does not mean that ejectment shall not be brought, but that the right shall be tried in an action of trespass, or by an issue, which would be an inconvenient thing in practice: but to authorise the court to interfere, as was done in *Doe d. Hyde v. The Mayor, &c., of Manchester*, 12 C. B. 474, by restraining the execution, and thus giving the company the benefit of this provision in that way, after the right had been decided in the ordinary course by an action of ejectment.

5. The fifth point was founded upon the assumption that this court, as a matter of fact, would come to the conclusion that there had been the consent on the part of the marquis which has been suggested. We have already expressed our opinion upon that, saying that we do not think ourselves justified under the circumstances in implying such assent. That ground therefore also fails.

I have now, I think, gone through all the several points, and am of opinion that the plaintiff is entitled to our judgment upon all of them.

CROWDER, J. I also am of opinion that our judgment should be in favour of the plaintiff. The facts are shortly these:—The plaintiff, being possessed of lands on each side of a turnpike-road, and being also lord of the manor, in the year 1848 sold to the defend[213]-ants, a railway company, two pieces of land particularly set out and described in the conveyance thereof. After having taken possession of the land so sold to them, the company, having occasion to divert an old road, set out a new one, and took possession of the abandoned portion of the old road, and have continued in possession ever since, no complaint having been made on the part of the plaintiff or his agents until the year 1856. The plaintiff now by this action of ejectment seeks to recover that piece of road. It undoubtedly appears to be a case of some hardship, the plaintiff having stood by for so many years, and having seen the company take possession of the land and apply it to the purposes of their railway and works without any objection. All, however, that we can do is, to decide the case according to law upon the various points which have been submitted to us: and, after the best consideration that I can bring to the case, I have come to the conclusion that my Brother Williams has arrived at, viz. that our judgment must be for the plaintiff.

1. The first point made on the part of the defendants is, that the plaintiff never had a right to the piece of land in question. It is conceded that the plaintiff was owner of the freehold on both sides of the road, and also lord of the manor, and that *prima facie* the presumption of law would be that he was also owner of the soil of the road: but it is said that the effect of that presumption is diminished, if not altogether rebutted, by the fact of the road having from time to time been widened under the provisions of the several local acts referred to in the case; and non constat, therefore, that some part at least might not have been purchased by the trustees for that purpose. I entirely agree with my Brother Williams, that, the presumption of law being that the ownership of the soil of the road is in the marquis as owner of the adjoining lands on [214] both sides, it lay upon the defendants to shew that it has been taken out of him. We must assume that the plaintiff's position as owner of the adjoining lands, and as lord of the manor, vested in him the soil of the road at the time of the conveyance in 1848. It is said, that, at all events, as to the portion of land bought by the company of Mr. Pryor, the plaintiff could only be entitled to the soil of one half of the road. The answer to that, however, is clear. The case shews that that piece of land had been taken from one side of the road by the plaintiff, and granted by the plaintiff as copyhold of the manor to Mr. Pryor; distinctly shewing that it was treated as part of the waste of the manor. It seems to me to be impossible to say that by that grant the plaintiff parted with his right to the soil of the road. I therefore think there is no pretence for saying that this portion of the road stands in any different position from the rest, so as to affect in any degree the right of the plaintiff thereto.

2. The second point is one upon which I have entertained some doubt. I was inclined for some time to hold in favour of the defendants, that the conveyance passed the road to them. If that had been clearly so upon the conveyance, whatever was the intention of the parties, effect must have been given to the language of the deed. As to the intention of the parties at the time, that is tolerably clear: the plaintiff did not conceive that he had any right to the soil of the road: he believed that to be in the trustees: and the defendants believed the same, for, in the book of reference accompanying the plans submitted to parliament, they state the trustees of

the road to be the reputed owners of the piece numbered 47. The conveyance refers to and incorporates the schedule and plan, which give the numbers and contents of the parcels, specifying numbers 75 and 79 as the pieces of land intended [215] to be conveyed, and altogether omitting No. 47. It seems to be quite clear, therefore, that all that was intended to pass by the conveyance was the two pieces coloured red. Again, when we look at the language of the conveyance, we find that it is specifically applicable to Nos. 75 and 79, and refers to the book and to the deposited plan. It is clear, therefore, that the conveyance does not deal with the turnpike-road at all.

3. Then, assuming that the road in question did not pass by the conveyance, it is said that the defendants became entitled to it under the provisions of the General Turnpike Act, 3 G. 4, c. 126, and the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 20. The way in which Mr. Clarke puts it is this,—By the 16th section of the 8 & 9 Vict. c. 20, permission is given to the railway company to divert and alter turnpike-roads. Nothing is said in that act as to what is to be done with the antient road; reference must, therefore, be had to the General Turnpike Act. Turning to the provisions of that act, we find that, when the trustees of a turnpike-road, in the exercise of the powers conferred upon them, divert a road, the part that is stopped up vests in them, and they may sell it. Mr. Clarke contends that the railway company in this respect stand in the same situation as the trustees. There are great difficulties in the way of this argument. In the first place, I incline to adopt the view presented by Mr. Lush, that the 16th section gives only general powers to divert and alter, and that the 53rd, 54th, 55th, and 56th sections point out what shall be done in case of such diversion and alteration. It is worthy of notice, that, in these sections, the words are “raise, sink, or use,” or “interfere with;” the word “divert” does not occur: but it is insisted that that must include diverting. I think those sections may fairly be held to be applicable to permanent as well as to temporary ob[216]-structions of roads. Nothing is said as to what is to become of the old road, when a new one is substituted for it. But I think the true construction of the act is, that all that is to be done when a road is diverted or altered in the course of the formation of a railway, is to be found in the provisions above referred to. If that be so, then, as the act is altogether silent as to what is to be done with the old road when a new one is substituted, the result is that the easement before enjoyed by the public over it is taken away, and the right of the owner of the soil must prevail. Assuming the argument of Mr. Clarke to be well founded, to the extent that the power of the company to divert must be regulated by the provisions of the General Turnpike Act, the difficulty is, to make out that the railway company becomes trustees quoad the diverted portion. It is clear that all the provisions of that act have reference exclusively to diversions made by the trustees. Where they, in exercise of the powers conferred upon them, divert a road, the soil of the old road is in terms vested in them, and they have power to sell it. But I do not see any mode of coming to the conclusion that those provisions vest it in the railway company. This third point, therefore, I think, likewise fails.

4. The only remaining point is that which arises upon the 124th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, viz. that, the company having entered upon and taken possession of the land, they shall remain in the undisturbed possession of it, provided they shall purchase and pay for the same within a given time after the owner shall have established his title thereto. It is said that the maintenance of an action of ejectment is inconsistent with the company's remaining in undisturbed possession. But the plaintiff must establish his title: and, how is he to do this unless by an action of ejectment? An [217] action of trespass is not the legitimate course for establishing a title to land. That can only properly be done by an ejectment, which is quite a matter of right. The plaintiff's title being established, the company may remain in undisturbed possession, by means of a motion to stay execution. I therefore think this point also fails, and consequently that our judgment must be for the plaintiff.

5. The next point urged on the part of the defendants is, that, upon the facts stated in the special case, it must be considered that the company took possession of the piece of road in question with the consent of the plaintiff; and, consequently, reference being had to the provisions of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, that the plaintiff is precluded from maintaining this action of ejectment. The answer to this was given by the court during the argument. The consent referred

to there clearly means, the consent given by a seller to a purchaser, and not a consent to be implied from circumstances such as are stated in this special case, viz. that the plaintiff was cognizant of the company exercising acts of ownership over the land in question. The plaintiff at that time did not know that the land belonged to him. He, as well as the company, conceived that it belonged to the trustees of the road. No such inference of consent, therefore, can be drawn from the non-interference of the plaintiff.

BYLES, J. This case has been so fully discussed both at the Bar and by my two learned Brothers, that it is only necessary for me to add that I entirely agree with the reasons they have given for pronouncing judgment in favour of the plaintiff.

Judgment for the plaintiff.

[218] M'KUNE v. JOYNSON. May 22nd, 1858.

[S. C. 28 L. J. C. P. 133; 6 W. R. 658. Referred to, *Rowlands v. Miller*, [1899] 1 Q. B. 743.]

The master of a vessel on the eve of sailing gave one of the seamen an advance note in the following form,—"Ten days after the ship 'Athlone' sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement the sum of 6l., provided the said Reuben Hill shall sail in the said ship from the said port of Liverpool."—The plaintiff, an outfitter, gave the seaman in exchange for the note 3l. 5s. in cash, and 2l. 15s. worth of wearing apparel; but he stated, in answer to a question from the court, that, if he had advanced the whole amount in cash, he would have charged a discount of 7½ per cent. The seaman having sailed with the vessel, —Held by Cockburn, C. J., Williams, J., and Byles, J.,—dissentiente Willes, J., that the condition upon which the holder of the document was entitled to sue the maker was substantially fulfilled by giving the seaman the amount in money and money's worth.

This was an action brought in the Passage Court of Liverpool, upon the following document, commonly called an "advance-note," signed by the defendant, a master mariner:—

"Agreement made at Liverpool this 10th day of March, 1857.

"Ten days after the ship 'Athlone' sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement the sum of 6l., provided the said Reuben Hill shall sail in the said ship from the said port of Liverpool.

"D. S. JOYNSON.

"Payable at Joseph Yeoward's, Water Street."

The declaration, after setting out the agreement, stated that the defendant delivered the same to the said Reuben Hill therein named, that the plaintiff, relying upon the defendant's said promise, did advance 6l. to the said Reuben Hill on the said agreement, that the "Athlone" afterwards sailed from the said port of Liverpool, that Reuben Hill sailed in her, and that the said period of ten days from the sailing of the said ship had elapsed; and alleged for breach non-payment of the 6l.

The defendant pleaded that he did not promise nor did the plaintiff advance the money as alleged.

At the trial, it was admitted that the defendant signed the note, that the "Athlone" sailed from Liverpool, and that Reuben Hill sailed in her: and it was [219] agreed that all amendments necessary to raise the question between the parties should be made.

The plaintiff, who was a tailor and outfitter at Liverpool, was the only witness. He stated that the defendant was master of the ship "Athlone"; that Reuben Hill, who was engaged as carpenter on board that vessel, brought him the document above set out: and that he advanced him upon it 3l. 5s. in cash, and 2l. 15s. worth of wearing apparel. And, in reply to a question put by the learned judge, he said, that, if he had advanced the whole 6l. in cash, he would have charged Hill a discount of 7½ per cent.

On the part of the defendant, reference was made to the statutes 8 & 9 Viet. c. 116, s. 7, 13 & 14 Viet. c. 93, ss. 58, 59, 61, 17 & 18 Viet. c. 104, ss. 168, 169, and

17 & 18 Viet. c. 120, s. 4: and it was submitted that the memorandum in question was not an allotment-note according to the statute, and that, if it were, the plaintiff was not one of the persons described in s. 169; that the plaintiff was not entitled to recover either at common law or under the statute; that the condition was not strictly fulfilled; and that there was no privity between the plaintiff and the defendant. *Gerhard v. Bates*, 2 Ellis & B. 476, was also referred to.

For the plaintiff, it was insisted, that, upon proof of an advance of 6l. to the person named, the law would imply a promise on the part of the defendant to pay the 6l. to the person making the advance; and he likened the agreement in question to an advertisement offering a reward for the apprehension and conviction of a felon,—*England v. Davidson*, 11 Ad. & E. 856, 3 P. & D. 594.

A verdict was taken for the defendant, and leave reserved to the plaintiff to move to enter a verdict for him for 6l., the court to draw such inferences as a jury might have drawn.

[220] Brett, accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiff for 6l., “on the ground that the plaintiff had complied with the condition on the performance of which the defendant had promised to pay whomsoever should perform it.” He submitted, that this document was not an allotment note within the 169th section of the 17 & 18 Viet. c. 104, but a document well known in sea-port towns, and amounted in effect to a conditional agreement with an uncertain person; and that it was enough if the condition was substantially fulfilled, by the sailor getting money or money's worth to the extent of 6l.

John Gray shewed cause. This is a conditional contract. If the plaintiff had advanced 6l. in money to Reuben Hill, the defendant would clearly have had no answer to the action. Instead of money, the seaman gets a large portion of the amount in slops, which the plaintiff chooses to value at 2l. 15s.: and the plaintiff himself admits that he would not have made the entire advance in cash without deducting a most outrageously exorbitant discount,— $7\frac{1}{2}$ per cent. or 1s. 6d. in the pound upon a document which had only ten days to run (*a*). [Cockburn, C. J. Was the plaintiff, if he cashed the note, to run the risk of the seaman going on the voyage and lose the interest of his money too?] It may be: but that does not signify, if such was the condition: there is no contract between the plaintiff and the defendant until that condition has been fulfilled. [Cockburn, C. J. The consequence would be entirely to destroy the usefulness of these notes or agreements.] If the parties be not held strictly to the performance of the condition, there will be no limit to the deduction.

[221] [Byles, J. The man who takes the note may charge 50 per cent.] This deduction which the plaintiff admits he would have made if he had advanced the amount in cash, considerably exceeds 50 per cent. [Byles, J. By the transaction which took place here, the seaman did not, it is true, get an advance of 6l. in cash, but he has got that amount in money and in money's worth. Willes, J. I cannot quite accede to that. The plaintiff, who belongs to a class which has been considered odious since the time of Lord Hardwicke, as one which preys upon a proverbially reckless and improvident class of persons,—admits that his charge for the accommodation is $7\frac{1}{2}$ per cent. Cockburn, C. J. Having his profit (a sufficient one no doubt) upon the clothes, he makes no charge for discount. I do not see what right we have to deal with anything but the evidence which appears upon the learned judge's notes.] Money's worth is not money. The natural inference would be that the plaintiff took care that the profit upon the clothes should cover the interest. [Cockburn, C. J. Is not the reasonable construction of the agreement this,—that whoever shall advance to the seaman 6l. in money or in money's worth shall be the person to whom the sum mentioned in the agreement shall be payable?] All difficulty might have been got over by making the instrument in the form of a promissory note payable to bearer. [Willes, J. Is there any case where the doctrine of equivalents has been applied otherwise than as between the immediate parties themselves? If this had been the ordinary case of a guarantee for an advance of money, would it have sufficed to deliver a horse, or so much less discount?] Clearly not. The condition upon which the defendant's liability is to attach must be strictly performed.

Brett, in support of his rule. The question is, [222] whether the condition upon which the defendant's liability for the payment of the note was to arise has or has not

(a) It did not appear how long before the sailing of the vessel the note passed.

been complied with by the plaintiff's advancing the amount to Reuben Hill partly in money and partly in clothes. The utility of these advance-notes is obvious. The master of a vessel on the point of sailing will not take upon himself the risk of advancing money on account of wages to men upon whom he could not depend for the performance of their contract, and whom he would be unable to find when their services were required. But persons of the plaintiff's class, who abound at the various ports, are content to make advances upon the credit of the master, to enable the men to procure those things which are essential to their comfort during the voyage, inasmuch as they know their haunts. The practice has been found to operate so beneficially that the legislature, in the recent Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, have omitted to make any provision in respect of them, although the former statutes did contain some. The argument on the part of the defendant would preclude the seaman from obtaining the discount of the note even upon the most reasonable terms. In *Gaskill v. Skene*, 14 Q. B. 664, 671, Erle, J., says: "Every one knows from his own private experience, and we do judicially learn in the course of the trials before us, that a larger debt may, by a customary trade allowance, or by deducting discount or otherwise, be discharged by the payment of a smaller sum, and that in common language the account would then be said to be paid." *Hart v. Nash*, 2 C. M. & R. 337, 5 Tyrwh. 955, and *Williams v. Griffiths*, 2 C. M. & R. 45, 5 Tyrwh. 748, shew that a payment to take a case out of the statute of limitations, may be in what is equivalent to money, as well as in money itself. [Williams, J. No doubt, where goods are agreed [223] to be taken as an equivalent for money, that is in point of law as well as of fact a payment.] In *Brown v. Byrne*, 3 Ellis & B. 703, a bill of lading expressed that goods shipped at N. were deliverable at L., to order or assigns, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with 5 per cent. primage, and average accustomed." By the usual custom in the trade at L., three months' interest or discount is deducted from freights payable under bills of lading, on goods coming from certain ports, including N. The assignee of this bill of lading having received the goods, the ship-owner claimed the freight without any deduction, contending that the custom was not binding in law, as contradicting the written contract. The assignee paid the freight less the discount: and, upon a case stating the above facts, the court of Queen's Bench held the custom to be binding, and to control the bill of lading. Here, the captain, on settling with the seaman for his wages on the termination of the voyage, would deduct the 6l. as a payment: it clearly does not lie in his mouth to say that it was not an advance of 6l. to the sailor. Even if the court can see upon the evidence that there was any discount charged upon the advance,—which, it is submitted, they cannot,—it makes no difference.

COCKBURN, C. J. I am of opinion that the rule should be made absolute to enter a verdict for the plaintiff. The action is brought upon a note or agreement made at Liverpool, whereby the defendant undertakes ten days after the ship "Athlone" sails from the port of Liverpool to pay to any person who should advance 6l. to Reuben Hill on that agreement the sum of 6l. provided the said Reuben Hill should sail in the said ship from the port of Liverpool. It appears, that, upon the faith of this contract, and upon the delivery to him [224] by Reuben Hill of this agreement, the plaintiff advanced to Reuben Hill 3l. 5s. in cash and 2l. 15s. worth of wearing apparel. Upon cross-examination, however, it appears that the plaintiff stated, that, if Reuben Hill had not bought clothes of him, but had simply asked him to cash the note for him, he would have charged him a discount of $7\frac{1}{2}$ per cent., or 1s. 6d. in the pound. Now, in the first place, it is important to consider what was the real nature of the transaction between the plaintiff and Reuben Hill. It has been suggested in the course of the argument that the evidence leads to the conclusion, that, in the sum which the plaintiff charged Reuben Hill for the goods, he charged him not merely the price of the goods with a fair profit, but also the discount which he stated that he would have charged if he had given him cash in exchange for the note. I must confess that the evidence as reported to us leads my mind to exactly the opposite conclusion. It would seem that the plaintiff, in consideration of the profit he made on the sale of the goods, was satisfied to take the note in payment: but that, if the note had been brought to him simply for the purpose of being discounted, he would have charged $7\frac{1}{2}$ per cent. It strikes me, upon the evidence, we must take the transaction to have been this,—the sailor, wanting some articles of clothing, comes to the plaintiff and buys of him articles to the amount of 2l. 15s., and the plaintiff takes from him the note, giving him the

balance (3l. 5s.) in cash, thus giving the man cash and goods to the full value of the note. The question is, whether that is a legitimate transaction within the scope of this agreement, so as to entitle the plaintiff to demand from the defendant the sum mentioned in it. Mr. Gray insists that the meaning of the agreement is, that the party seeking to enforce it must shew an advance of the full amount in hard cash, and that the condition [225] upon which the liability of the defendant upon the note or agreement was to arise, was not performed either by a payment to the sailor in goods, or partly in goods and partly in money, or by a payment of the whole sum in money subject to a discount. It is unnecessary to consider the latter case, though I incline to think it is involved in what I am about to say; for, I am clearly of opinion that, where, as here, payment has been accepted partly in cash and partly in an equivalent for cash, the transaction is valid, and the note or agreement enforceable against the donor. Notes of this kind have, as Mr. Brett has very truly observed, been in use for many years, and have been found in practice to be extremely useful. The object is that the sailor shall not receive an advance in cash before the sailing of the ship, which from the known improvident habits of mariners would inevitably be thrown away; but that he shall be enabled, by means of an instrument payable within a short period after the departure of the vessel, to procure articles which are essential to his comfort and well-being on the voyage (*a*). But, if it be decided that the holder of the note cannot enforce it if any part of the amount is advanced in the shape of goods, the whole system of advance-notes which has been found to be practically so useful will at once be annihilated. I cannot think it ever was contemplated that any other construction should be put upon these documents than this,—that whatever amounts to an advance as between the sailor and the outfitter, shall be considered an advance as between the latter and the master. Here there was, as between the sailor and this plaintiff, an advance in money and money's [226] worth to the full amount of the note, and therefore I am of opinion that the plaintiff is entitled to recover upon it. Even in the case of discount, the sailor gets an equivalent for the money; for, in point of fact, the person who takes the note advances the money for it when he gives the amount less the value for the time it has to run. It is true that the sailor would not actually obtain an advance of 6l. in cash; but he would get an equivalent by anticipating the time of its receipt. Confining my judgment, however, to the particular circumstances of the case before us, I am of opinion that we are fairly entitled to put upon this document the construction I have stated: and I think we should be doing incalculable mischief if we were to put any other construction upon it. Doubtless these instruments may at times be used as a means of extortion. But sailors, like other men, must protect themselves in the best way they can. Upon the whole, I am of opinion, that, upon the true construction of this note, the condition on which the defendant's liability was to attach has been performed, and consequently that the plaintiff is entitled to recover.

I am authorised by my brother Williams, who has been obliged to go to Chambers, to say that he concurs in the view which I have endeavoured to present. I regret that we are not unanimous; for, I cannot help entertaining great distrust as to the propriety of my own opinion when I find it is opposed to that of my Brother Willes.

WILLES, J. I also must express my regret that I am unable to assent to the judgment which has just been pronounced by my Lord: but I feel bound to say that I entertain a very clear opinion to the contrary. I think it is assumed without any foundation that the transaction amounted to full payment of the note as [227] between the plaintiff and Reuben Hill. There is no evidence whatever of that beyond the mere statement of the plaintiff that he paid Hill 3l. 5s. in money and 2l. 15s. in goods: the plaintiff does not even state that Hill accepted the goods in satisfaction of that sum. I think that was a question for the jury, and one deserving of grave consideration. It is said that power is reserved to us to draw such inferences as a jury might draw; and the learned counsel in support of the rule has told us that this course is warranted by the act of parliament which regulates the proceedings of the Passage Court of Liverpool. It may be so: but I protest, in the absence of the act, that I am not aware of any power by which the duty of trying such a question is cast upon us:

(a) It is difficult to perceive how this laudable object is attained by giving the man a document which he may immediately convert into cash by paying an exorbitant sum by way of discount to some crimp or slop-seller.

and I think it one which is eminently fitted for the consideration of a jury. Here is a case where a tradesman upon his own shewing obtains from a sailor most exorbitant interest, at least 40 or 50 per cent. (a)¹. I must confess I cannot help thinking that the old prejudice against usury was founded upon sound sense and right feeling: and I think that all money dealings with a sailor should be regarded with the greatest possible watchfulness, and that a case in which such dealing is involved is one which ought not to have been withdrawn from the ordinary constitutional tribunal for the decision of questions of fact. If the matter had rested with me, I should have had no hesitation in discharging the rule, upon the ground that inferences of fact such as are to be drawn here are more proper for a jury,—and especially a Liverpool jury,—than for the court. I think incalculable mischief is likely to arise from our usurping or pretending to exercise a jurisdiction with which the law in its [228] wisdom has not seen fit to invest us. But, assuming it to be satisfactorily made out that the sailor here took the clothes agreeing that as between him and the plaintiff they should represent the sum of 2l. 15s., still I am of opinion that the condition upon the performance of which the plaintiff or any other person who should perform it was to become entitled to receive 6l. from the defendant, has not been performed. I have a particular objection to the doctrine of equivalents: and I object to all legislation which has a tendency to interfere with men's contracts. Our duty is to interpret and to enforce them only. The words of this contract are perfectly plain and intelligible,—“Ten days after the ship ‘Athlone’ sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement the sum of 6l., provided the said Reuben Hill shall sail in the said ship from the said port of Liverpool.” Assume that the 6l. were advanced by the plaintiff to Reuben Hill partly in money and partly in clothes,—that the sailor, who had not the option of receiving the whole sum in money (for, the plaintiff himself states that, if he had cashed the note, he would have deducted 1s. 6d. in the pound for discount), was content to receive 2l. 15s. of it in the shape of clothes,—the question is, whether that is a performance of the condition,—whether an advance of 2l. 15s. in goods is an advance of that amount of money. I must confess I should have thought not. Generally speaking, when a man undertakes to perform one thing, or is to become entitled to something upon the performance of a given condition, he does not satisfy the undertaking or the condition by the performance of a different thing. Thus, if a man were to contract to supply another with so many thousand bricks, or if a guarantee were given to a banker to secure an advance of 1000l., and in the [229] one case, instead of bricks the party tendered hops, and in the other, the banker, instead of money, hands over 1000l. worth of railway scrip, I have yet to learn that that would be a performance or an equivalent for the performance of the contract in the one case or of the condition in the other. Again, in the case of husband and wife, the law in general makes the husband responsible for necessaries supplied to the wife; but, suppose, instead of necessaries, money were advanced, I have yet to learn that the husband could be sued for that (a)². This shews that we cannot properly admit of equivalents. A party is bound by the contract into which he has entered, not by something which somebody may choose to say is equivalent to it, or even better. Assuming it to be equivalent or better, nobody has a right to substitute it. In the present case, I am not satisfied that it was an equivalent that was given. It may be that the master, knowing the rapacity of the persons with whom sailors usually deal, desired that the man should have 6l. in money with which he might go to the most advantageous market for the supply of his wants for the voyage. But, be that as it may, an advance in clothes, or partly in money and partly in clothes, is not in my judgment such an advance as was here contemplated. The possibility of its being equally convenient or advantageous to the sailor, will not alter the legal construction and effect of the document. It is perfectly obvious to my mind that a payment in goods under circumstances like these is not equivalent to an advance in money: and I think it is too much to suppose that the party giving this note was indifferent as to the mode in which the advance was made. I say nothing as to discount: nor do

(a)¹ The evidence afforded no data for ascertaining the rate. It did not appear from the learned judge's notes when the note was given to the plaintiff, or when the ship sailed.

(a)² See *Knox v. Bushell*, ante, vol. iii., p. 334.

I see how the decision of this case is [230] to be governed by those cited. In *Hart v. Nash*, 2 C. M. & R. 337, 5 Tyrwh. 955, there was an express agreement that the hats should be given and received as part payment of the debt. And in *Brown v. Byrne*, 2 Ellis & B. 703, the deduction or discount was incorporated into the terms of the contract by the custom of the particular trade. These cases, therefore, can have nothing to do with the subject under consideration. Upon the plain, broad, and intelligible rule that a man is only bound by the terms of the contract into which he has entered, and not by any vague notion of attributive justice, I am of opinion that this rule ought to be discharged.

BYLES, J. Notwithstanding the unfeigned respect which I at all times feel for the judgment of my learned Brother Willes, I am clearly of opinion that this rule should be made absolute. I think the word "advance" in this document does not necessarily or even *prima facie* mean an advance in money only. The expression used is not "pay," or "lend," or "lend to me through Reuben Hill," nor even "advance in cash:" but it is simply "who shall advance to Reuben Hill on this agreement the sum of 6l." *Prima facie*, that seems to me to import such an advance as shall, as between the sailor and the man who deals with him, be an advance of 6l.: and therefore I think any advance to that amount, whether in money or in money's worth, is an advance within this contract. The document, being addressed to no person in particular, is addressed to all the world. It is addressed not to a banker, but to the class of persons who are in the habit of making advances upon these notes at Liverpool. If the advance is made by way of discount, the sailor must pay something for the use of the money for the time the note has to run. Added to that, the man [231] who advances the money runs the risk of the sailor's not going on the voyage. It therefore seems to me to be a most unreasonable construction of this contract to hold that the person who takes the note must advance the whole 6l. in cash, and not a farthing less. If there be any ambiguity upon the face of it, according to the ordinary rule of construction, the words must be taken most strongly against the person whose engagement is under consideration. I am clearly of opinion, that, upon the true construction of this document if 6l. be advanced either in money or in goods, or partly in money and partly in goods,—I do not say, if the note is accepted in discharge of an existing debt,—the person making the advance satisfies the condition upon which the liability of the maker of the instrument to repay the advance was to arise. I cannot agree with the severe construction which my Brother Willes puts upon the evidence: for, we have it upon the oath of the plaintiff, with nothing to contradict it, that he advanced Reuben Hill on that paper 3l. 5s. in cash and 2l. 15s. worth of wearing-apparel, both of which Reuben Hill received.

WILLES, J. With reference to the last observation of my Brother Byles, I may explain that what I meant to say was this,—that there was nothing in the evidence to shew that the sailor agreed to take the clothes as intrinsically worth 2l. 15s.

Rule absolute.

[232] IN RE MARY EDEN. Nov. 24th, 1858.

[S. C. 28 L. J. C. P. 4.]

By a marriage settlement made in 1844, certain property of the intended wife was conveyed to trustees, upon trust to permit the husband to receive the rents and profits during the coverture, or until the wife should by writing under her hand otherwise direct or appoint, and, from and after such direction or appointment, upon trust for the separate use of the wife. The deed also contained a power of sale, to be exercised "at the request and by the direction (in writing) of the husband and wife." The husband received the rents and profits down to the year 1851, when the wife exercised her power of appointment by directing the trustees to receive the rents, &c., and to apply them to her separate use. In 1852, the husband went to Australia:—Held, not a case for an order to dispense with the husband's concurrence in a deed for the conveyance of the property, under the 3 & 4 W. 4, c. 74, s. 91.

This was an application for an order under the 91st section of the 3 & 4 W. 4, c. 74, to enable Mary Eden to convey certain freehold property at Oxford, to which she was separately entitled, without the concurrence of John Eden, her husband.

The affidavits upon which the motion was founded disclosed the following facts :— The parties were married in 1844, when the property in question was settled upon the following trust,—“from and after the solemnization of the said marriage, to permit the said John Eden and his assigns to receive the rents and profits of the said hereditaments during the coverture of himself and the said Mary Eden, or until the said Mary Eden should by any writing under her hand otherwise direct or appoint : and, from and immediately after such direction or appointment should be made, upon trust, during the remainder of the said coverture, for the separate use of the said Mary Eden ; and, from and after the determination thereof, if the said Mary Eden should survive the said John Eden, upon trust for the heirs, executors, administrators, and assigns of the said Mary Eden ; but, if the said John Eden should survive the said Mary Eden, upon trust for such person or persons, and generally in such manner as the said Mary Eden, notwithstanding her coverture, should by deed or will direct or appoint.” There was also a power of sale contained in the settlement, which was to be exercised by the trustees “at the request and by the direction of the said John Eden and the said Mary Eden [233] during their joint lives, such request and direction to be testified by some writing under the hands and seals of the said John Eden and the said Mary Eden.”

Down to the year 1851, the rents and profits were received by John Eden ; but, in March in that year, Mary Eden, pursuant to the provision for that purpose in the settlement, required the trustees to receive them and to pay and apply them to her sole and separate use ; and they had ever since been so received and applied by the trustees. In December, 1852, John Eden proceeded to Australia. No tidings of him had reached his wife since the 25th of December, 1857, when he was at Geelong. The affidavit of Mary Eden alleged her belief that he had no intention ever to return to this country.

No application had been made to the husband for his concurrence in the conveyance.

Phipson, for the applicant. There is nothing in the 91st section of the statute which requires a preliminary application to the husband for his concurrence in the conveyance, though the practice of the court seems in general to require it : *In re Hester Murphy* (or *Ex parte Murfin*), 5 Scott, N. R. 166, 4 M. & G. 635 ; *In re Sarah Woodcock*, 1 C. B. 437 ; *In re Isabella Grierson Perrin*, 14 C. B. 420 ; *Ex parte Anne Trencry*, ante, vol. i. p. 187. But, it seems, that that step has been dispensed with where the husband has gone out of the jurisdiction of the court under circumstances to warrant the belief that he never intends to return : *In re Anne Kelsey*, 16 C. B. 197 ; *In re Yarnall*, 17 C. B. 189. And here the wife swears that her husband has been in Australia since 1852, that she has not heard of him since the end of 1857, and that she believes he has no intention to return to this country. [Cockburn, C. J. Our power is confined to the ordinary case [234] of a wife's separate property. But here the power of alienation is fettered by a certain condition : it is to be exercised at the request and by the direction of the husband and wife.] The court will not inquire whether or not a good title can be conveyed. The words of the act are very general,—that, if a husband “shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the court, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband, in any case in which his concurrence is required by this act or otherwise.” Here, the husband has no interest in the property either present or future, the wife having under the power contained in the deed made an appointment in favour of herself. [Cockburn, C. J. Does the act apply at all, where the deed expressly stipulates for the concurrence of both ? The husband may have no direct interest in his wife's property : but, at the same time, he may not choose that she should alienate it so as to become a burthen to him. It would be a strong measure for us under such circumstances to give her authority to convey.] Suppose the husband, on being applied to, refuses to concur, as no doubt he will, what is to be the result ? [Williams, J. Why should the court be called upon to make an order to dispense with the husband's concurrence, where he has by express stipulation a control over the property ? You are in effect asking us to alter the terms of the settlement.] The object of the act was to prevent the husband, in the cases provided for, from obstructing the sale of

his wife's property. [Cockburn, C. J. That is in cases where the law renders his concurrence necessary to enable her to do an [235] act which is for her sole and separate benefit. Here, the husband's concurrence is required, not by mere operation of law, but it is matter of express stipulation and bargain. Byles, J. Are you prepared with any authority to meet the difficulty presented by my Lord? No. [Byles, J. Then, the order would do you no good.] The party is willing to take it valeat quantum.

COCKBURN, C. J. I think we ought not to make an order which might induce a purchaser to take a bad title. Unless I could see my way to the conclusion that our order would supersede the necessity of the husband's concurrence, I am not disposed to accede to the application. If any authority can be found to warrant it, the motion may be renewed.

WILLIAMS, J. This is an important question. Where a power is given which is to be exercised only on the joint request of the husband and wife, why should the court give the preference to the wife rather than to the husband?

The rest of the court concurring,

Phipson took nothing (a).

[236] *HARMER v. CORNELIUS*. July 5th, 1858.

[S. C. 28 L. J. C. P. 85; 4 Jur. N. S. 1110; 6 W. R. 749. Observations applied, *Cuckson v. Stones*, 1858, 1 El. & El. 257.]

The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability. — When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.

This was an action against a master for wrongfully dismissing a workman.

The declaration stated, that, in consideration that the plaintiff would, on or before the 20th of December, 1857, go to Manchester, and there enter the defendant's service in the capacity of painter, on the terms that he was to work from eight o'clock in the morning to six o'clock in the evening each day of his the plaintiff's engagement, and that the said defendant should retain him in his service in the capacity aforesaid for more than a month, and would pay him for his said services at the rate of 2l. 10s. per week during the continuance of such service, the defendant promised the plaintiff to perform and fulfil the said terms in all things on the defendant's part to be performed and fulfilled; that the plaintiff, confiding in the defendant's said promise, did, on or before the day aforesaid, go to Manchester aforesaid, and there enter into the defendant's service in the capacity aforesaid, on the day aforesaid, and on the terms aforesaid: and that, though the plaintiff had always been ready and willing to continue in the defendant's service in the capacity aforesaid, and on the terms aforesaid, whereof the defendant had notice, yet that the defendant did not nor would retain the plaintiff in his service for more than a month; but that, on the contrary thereof, before the expiration of the agreed month, and when the plaintiff was so ready and willing, and the defendant had such notice as aforesaid, he the defendant wrongfully discharged the plaintiff from his the defendant's said service, contrary to his said promise, and thence hitherto refused to retain the plaintiff in his the defendant's said service, for the remainder [237] of the said month; by means whereof the plaintiff had lost and been deprived of all the wages, profits, and advantages he would have acquired from the continuance of the service, &c.

The defendant pleaded several pleas, amongst others, secondly, that the plaintiff was not ready and willing, as alleged,—sixthly, that the defendant was induced to make the promise in the declaration mentioned by the false and fraudulent representation of the plaintiff that he was competent to perform the service for which he was engaged, whereas the plaintiff was quite incompetent to perform such service, wherefore the defendant, as soon as he discovered the said fraud and the plaintiff's incompetency, rescinded the contract, and discharged the plaintiff from his said service, without having derived any benefit or advantage therefrom. Issue thereon.

The cause was tried before Williams, J., at the first sitting at Westminster in Easter Term last, when the following facts appeared in evidence:—

(a) The matter was not moved again.

In December, 1857, the defendant, who resided at Manchester, inserted an advertisement in the *Era* newspaper for "two first-rate panorama and scene-painters." The plaintiff sent the following reply,—

"Sir,—In answer to your advertisement in the *Era* newspaper, for two scene-painters, I wish to subscribe my name and that of my friend Mr. Wallis to the list of candidates applying for the situation offered. Inclosed is a bill of a panorama we have lately painted. The salaries we should require would be not less than 2l. 10s. per week each; travelling expenses paid to and fro."

To this the plaintiff received the following answer from the defendant's agent:—

"December 21st, 1857.

"Sir,—In answer to yours, Mr. Cornelius agrees to [238] pay you 2l. 10s. per week, but you must pay your own travelling-expenses, and work from eight o'clock in the morning until six in the evening. In case you don't write by Wednesday, Mr. C. will engage with some one else. If it meets your views, you can come by the earliest train."

The plaintiff then wrote as follows,—

"Sir,—In reply to your letter, I beg to say that we will come down to Manchester on the terms specified in your letter, and pay our own travelling-expenses, if you will engage us for one month certain; but it would not be worth our while to come down for a less period, unless you will pay our fares to Manchester and back."

The defendant's agent again wrote,—

"December 27th, 1857.

"Messrs. Harmer and Wallis,—In reply to yours, I am directed by Mr. Cornelius to inform you that you are engaged, and that the time will be more than a month: hours from eight o'clock in the morning to six o'clock in the evening, and all over-time made to be paid at the rate of 2l. 10s. per week. You must come immediately, or, should you not be here by Tuesday next, the 29th instant, Mr. Cornelius will engage other parties."

To this the plaintiff replied as follows,—

"Sir,—We received your letter, and beg to say we shall be in Manchester, on Tuesday evening. We cannot get away before that time, as we are engaged in painting a transparency for the Prussian ambassador; and we shall get it finished on Monday night."

The plaintiff and his friend accordingly went to Manchester, and were set to work at scene-painting. They were, however, found to be so incompetent, that, at the end of the second day, the defendant discharged them. For this dismissal, the plaintiff and Wallis each brought an action.

[239] On the part of the defendant, it was submitted that he was entitled to a verdict upon the second and sixth issues if the jury were satisfied that the plaintiff was incompetent to do the work for which he was engaged; and that the allegation of fraud was immaterial, for that, whether or not the plaintiff had been guilty of a fraudulent misrepresentation, the defendant was not bound to retain in his employ a workman who was wholly incompetent. It was further submitted that the plaintiff's evidence proved a joint contract with Wallis and himself, - upon which the learned judge said he would amend, if necessary.

The learned judge then asked the jury, whether the plaintiff had been dismissed, or whether he voluntarily left the defendant's employ, whether the plaintiff was incompetent to perform that which he had been engaged to perform,—and whether he had fraudulently represented himself to be competent, knowing himself not to be so: and he told them, that, if the plaintiff did not think himself incompetent, there could be no fraud.

The jury found, that the plaintiff was dismissed, and that he was incompetent, but that there was no fraud on his part.

The learned judge reserved for the court the question whether incompetency alone

was an answer to the action: it being agreed, that, if the court should be of opinion in the negative, a verdict should be entered for the plaintiff for 12l. 10s.

S. Temple, Q. C., accordingly, in Easter Term last, moved to enter a verdict for the defendant on the second and sixth issues, on the grounds urged at the trial; but the court granted the rule only upon the ground that the finding of the jury entitled the defendant to a verdict on those two issues,—saying that the [240] contract was not a joint one with the plaintiff and Wallis, it being a contract to give a particular benefit to each.

Needham, on a subsequent day, shewed cause. No leave was reserved as to the second issue. [Willes, J. The affirmation of readiness and willingness imports competency. It is in truth the same question.] The fact found by the jury, viz. that the plaintiff was incompetent as a workman, might go in mitigation of damages, or might afford ground for a cross-action; but it clearly affords no substantive ground of defence. The real defence is, that the defendant was induced to enter into the contract by fraud. Now, where fraud is put forward as the substantial defence, the defendant is bound to try that question, and that only. Knowing that he had an answer to the allegation of fraud, the defendant went down to trial prepared to meet that charge,—a case which necessarily must depend upon the personal knowledge of the parties; whereas the question of competency would depend upon the testimony of witnesses by whom the plaintiff had been employed. [Williams, J. I told the jury that it would be fraud in the sense in which the word is used in the sixth plea, if, knowing himself to be wholly incompetent, the plaintiff had represented himself to be competent. It is no argument to say that the defendant went down to try the question of fraud and nothing else. Pleaders almost always put in an allegation of fraud.] The allegation of fraud here is a substantive averment of fraud, and not put in as the mere jargon of the pleader. [Williams, J. It is sufficient if so much of the plea is proved as affords a defence. At the most, your argument amounts to mere hardship.] The issue tendered is, whether the plaintiff was competent at the time of the representation; and the [241] finding is that he was incompetent at that time, not at the time the contract was to be performed. [Williams, J. You say he might have learned his art between the time of the representation and the arrival of the time for the performance of the engagement! Byles, J. The substantial issue is, whether the plaintiff was competent at the time when it was material that he should be so.] At all events, want of competency affords no defence to an action of this sort: the absence of competency may go in mitigation of damages, or be ground for a cross-action; but it is no ground for putting an end to a special contract. In the case of a retainer of a skilled artist, the law, no doubt, implies that he shall bring a reasonable amount of skill to the performance of what he undertakes to do. The case of *Burgess v. Beaumont*, 8 Scott, N. R. 668, 7 M. & G. 962, is an authority to shew, that, where parties make a special contract for services, they must satisfy themselves beforehand of the character and capacity of the persons they contract with, and that, in the absence of fraud or an express warranty, they cannot rescind or abandon it. In *Keates v. The Earl of Cadogan*, 10 C. B. 591, it was held that there is no implied duty in the owner of a house which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and that no action will lie against him for an omission to do so, in the absence of express warranty or active deceit. Jervis, C. J. there said: "The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it." In *Cornfoot v. Farke*, 6 M. & W. 358, to assumpsit for the non performance of an agreement to take a ready-furnished [242] house, the defendant pleaded that the plaintiff caused and procured the defendant to enter into the agreement by means of fraud, covin, and misrepresentation of the plaintiff and others in collusion with him; on which issue was joined. It appeared at the trial that the plaintiff had employed one C. to let the house in question, and the defendant, being in treaty with C. for taking it, asked him "if there was any objection to the house," to which he answered that there was not, and the defendant entered into and signed the agreement; but he afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not: and it was held,—Lord Abinger, C. B., dis-

sentiente,—that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that, as the representation was not embodied in the contract, the contract could not be affected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea. So, in *Sutton v. Temple*, 12 M. & W. 52, it was held, that, on a demise of land, or the vesture of land (as, the eatage of a field) for a specific term, at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purposes for which it is taken. And in *Hart v. Windsor*, 12 M. & W. 68, it is laid down that there is no implied warranty on a sale of a lease of a house or of land, that it is or shall be reasonably fit for habitation, occupation, or cultivation; and that there is no contract, still less a condition, implied by law, on the demise of real property only, that [243] it is fit for the purpose for which it is let. And in *Ormeau v. Huth*, 14 M. & W. 651, where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller,—it was held that an action on the case for a false and fraudulent representation was not maintainable, without shewing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. All these cases proceed upon the principle, that, where there is a special contract, in the absence of fraud or express warranty, no term can be implied which is not to be found in the contract itself.

David Keane (with whom was S. Temple, Q. C.), in support of the rule. The declaration alleges that the defendant retained the plaintiff in his service in the capacity of a painter, and that, though the plaintiff had always been ready and willing to continue in the defendant's service in the capacity aforesaid, whereof the defendant had notice, the defendant wrongfully discharged him. The averment of readiness and willingness involves capacity, and that is put in issue by the second plea. The plaintiff could not be said to be ready and willing, if he was altogether incompetent to do the work for which he was retained. In *De Medina v. Norman*, 9 M. & W. 820, it was held that an averment of the plaintiff's readiness and willingness to grant a lease was equivalent to an averment of his having a title to grant it. Parke, B., there says: "The meaning of a contract to demise is, not only that a certain form of words shall be put on paper, but that the party assuming to demise shall have title to demise. The [244] lessee bargains for a good lease, and the lessor cannot maintain an action against him, unless he had power to make a lease. It is, therefore, essential to aver in such a case that the landlord had authority to make a good lease. But then the objection to this declaration must be considered as taken on general demurrer. That being so, it is substantially averred that the plaintiff had title to demise. The declaration states, for instance, that the plaintiff had performed all things on his part to be performed; and, if I mistake not, there is a case in Carthew's Reports (a) which decides that that averment would be sufficient for the present purpose. But, supposing that averment to be insufficient, still the allegation of the plaintiff's readiness and willingness to let the premises is equivalent, on general demurrer, to an averment of his being able to execute such lease; for, on the issue of readiness and willingness, the plaintiff must have proved that he was in a condition to make a valid demise. This was the opinion of Tindal, C. J., and the other judges of the court of Common Pleas, in *Lawrence v. Knowles*, 5 N. C. 399, 7 Scott, 381; and this court laid down the same doctrine in *Hibbaldwhite v. McMorine*, 6 M. & W. 200. We there thought the plaintiff's title to the shares arose 'on the traverse of the readiness to convey, which must involve the capacity to do so.'" [Williams, J. In *De Medina v. Norman*, the plaintiff alleged his readiness and willingness to grant the defendant some estate, and he could not (see *Hayward v. Parke*, 16 C. B. 295). Here, the plaintiff was in the defendant's service in the capacity of a painter, although a very bad one. Byles, J. It seems from the correspondence that the plaintiff represented himself [245] to be a competent scene-painter. The jury found that he was not, though he so represented himself,

(a) *Knight v. Keech*, Carth. 271. And see the 57th section of the Common Law Procedure Act, 1854, 15 & 16 Viet. c. 76.

but without fraud. The representation is in writing.] The last observation disposes of the case as to the sixth plea. This is not an ordinary plea of fraud: but the very essence of it is, that the plaintiff, being incompetent, represented himself to be competent. [Byles, J. Strike out the word "fraudulent," and the plea is proved. The plaintiff was not competent: but he did not know that he was incompetent.] The ground of the decision in *Burgess v. Beaumont*, 8 Scott, N. R. 668, 7 M. & G. 962, was, the uncertainty as to what the plaintiff was to come to meet. [Byles, J. That case is very wide of this. My Brother Williams has a case before him which seems very much in point, but which has not been alluded to at the Bar.] In *Wallis v. Warren*, 4 Exch. 361, in an action for wrongfully discharging the plaintiff from the defendant's employ, the declaration alleged that the plaintiff had always been ready and willing and offered to remain in the employment of the defendant. The defendant pleaded that the plaintiff did not offer to remain in the employment of the defendant: and the plea was held bad, as raising an immaterial issue,—the gist of the averment in the declaration being the readiness, which implied the willingness, of the plaintiff to continue the service from which the defendant wrongfully dismissed him.

WILLIAMS, J. The authorities not having been so fully brought before the court as they might have been, we must take time to look into them for ourselves.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

[246] We are of opinion that this rule must be made absolute.

When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes, —*Spondes peritiam artis*. Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill (*a*). An express promise or express representation in the particular case is not necessary.

It may be, that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, the employer probably would be held to have incurred all risks himself.

But, in the case under consideration, the correspondence shews, in addition to the implied representation, an express and particular representation by the plaintiff that he did possess the requisite skill.

The next question is this,—supposing that, when the skill and competency of the party employed are tested by the employment, he is found to be utterly incompetent, is the employer bound nevertheless to go on employing him to the end of the term for which he is engaged, notwithstanding his incompetency? This is a question upon which we have been furnished by the Bar with no authority, probably because, such labour being seldom retained for a long time certain, the ques-[247]-tion has not often arisen. But it seems very unreasonable that an employer should be compelled to go on employing a man who, having represented himself competent, turns out to be incompetent. An engineer is retained by a railway company, for a year, to drive an express-train, and is found to be utterly unskilful and incompetent to drive or regulate the locomotive,—are the railway company still bound, under pain of an action, to intrust the lives of thousands to his dangerous and demonstrated incapacity? A clerk is retained for a year to keep a merchant's books, and it turns out that he is ignorant, not only of book-keeping, but of arithmetic,—is the merchant bound to continue him in his employment?

Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct. The rule of the civil law, "*Imperitia adnumeratur*," applies

We may add that a precedent of a plea grounded on the implied condition of competency is to be found in the late Mr. Joseph Chitty's work on Pleading, edited by the late Mr. Pearson, p. 363.

(a) See the observations of Jervis, C. J., in *Jenkins v. Betham*, 15 C. B. 189.

So, in *Spain v. Arnott*, 2 Stark. N. P. C. 256, Lord Ellenborough, speaking of a servant who had refused to perform his duty, says,—“The master is not bound to keep him on as a burthensome and useless servant to the end of the year.” And it appears to us that there is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired.

For these reasons, we think the substantial part of the plea was proved, and that the rule must be made absolute.

Rule absolute.

[248] WESTLAKE v. ADAMS. July 5th, 1858.

[S. C. 27 L. J. C. P. 271 ; 4 Jur. N. S. 1021.]

The defendant, upon the apprenticing of his son to the plaintiff by a charitable society, agreed to give the plaintiff, in addition to a premium of 20l. to be paid by the society, four I.O.U.'s for 5l. each, payable at intervals of a year. The boy was apprenticed and served the full term—the indenture stating the consideration to be 20l., paid by the society. After the expiration of the term, the plaintiff sued the defendant upon his I.O.U. :—Held, that the transaction was not a fraud upon the society. —Held also, by Willes, J., and Byles, J.,—dissentiente, Williams, J.,—that the circumstance of the indenture being void by the 39th section of the 8 Ann. c. 9, for not truly setting forth the consideration, did not prevent the plaintiff from suing the defendant upon the I.O.U.,—the execution of the indenture (though void) being a sufficient consideration for the defendant's promise to pay the additional 20l.

This was an action for money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them : Claim 17l.

The defendant pleaded,—first, never indebted,—secondly, that, before and at the time of the making of the fraudulent agreement thereafter mentioned, the plaintiff used and carried on the art and business of ornamental and figure carving, and the defendant was then desirous of apprenticing his son William Henry Adams to the plaintiff to learn the said art and business, but was unable to pay the premiums required by the plaintiff in that behalf, and the defendant then applied to certain persons called and known as the Somersetshire Society, being persons united together for charitable purposes, that is to say, for the purpose of apprenticing the children of deserving poor of the county of Somerset resident in London, and requested the said Somersetshire Society, as an act of benevolence, and in exoneration of the defendant, with and out of their own proper moneys, and on their own behalf, to pay the premium required by the plaintiff for the purpose aforesaid : that thereupon, in consideration that the plaintiff would receive and take the said William Henry Adams as an apprentice to learn the plaintiff's said art, for the term of seven years, at and for the premium of 20l., to be paid as thereafter next mentioned, they the said Somersetshire Society promised the plaintiff to pay him in manner and form and at [249] the times and subject to the consideration in the indenture of apprenticeship thereafter mentioned provided, with and out of their own proper moneys, and on their own behalf, as an act of benevolence, and in exoneration of the defendant, the said sum of 20l. as such premium as aforesaid : and the plaintiff then consented and agreed to and with the said Somersetshire Society to receive and take the said William Henry Adams, as his apprentice, upon the terms and for the premium last aforesaid : that, thereupon, afterwards, in pursuance and performance of the said agreement, by an indenture of apprenticeship sealed with the seal of the plaintiff, and duly made by the defendant, the said William Henry Adams, the plaintiff, and John Jenkyns, therein described as and then being the treasurer of the said Somersetshire Society, it was witnessed that the said William Henry Adams, with the consent of the defendant, and with the approbation of the said John Jenkyns, put himself apprentice to the plaintiff, to learn his said art, and with him after the manner of an apprentice to serve for the term of seven years aforesaid, and that the plaintiff, in consideration of the said premium of 20l. to be paid to him by the said John Jenkyns, or by the treasurer for the time being of the said Somersetshire Society, to wit, for and on

behalf of the said society, at the times, and subject to the consideration therein mentioned, covenanted to teach and instruct, or cause to be taught and instructed, by the best means that he could, the said apprentice, in his art, finding for the said apprentice sufficient meat, drink, and lodging, and medicine in case of sickness, during the said term: that the said premium of 20*l.* was long before this suit duly paid by the said Somersetshire Society with and out of their own proper moneys, and on their own behalf, and as an act of benevolence, and in exo-[250]-eration of the defendant, to wit, by their treasurer at the time being, according to the terms and true intent and meaning of the said agreement and covenant in that behalf: that, at the time of the making of the agreements thereinbefore mentioned, it was secretly and fraudulently, and without the knowledge or privity and in fraud of the said Somersetshire Society, agreed by and between the plaintiff and the defendant, that the defendant should pay to the plaintiff a further premium or sum of 20*l.* for and in consideration of the plaintiff so receiving and taking the said William Henry Adams as such apprentice as aforesaid, over and above the said sum so agreed and covenanted to be paid by the said Somersetshire Society in that behalf as aforesaid: and that the said accounts stated in the declaration mentioned were stated of and concerning the said sum of 20*l.* so fraudulently agreed to be paid by the defendant to the plaintiff as aforesaid, and of and concerning no other debt, matter, or thing whatever.

Upon these pleas the plaintiff joined issue.

The cause was tried before Willes, J., at the first sitting at Westminster in Easter Term last. The facts which appeared in evidence were as follows:—

The plaintiff carried on the business of a wood carver in London. The defendant is a glover in Exeter, and was a native of Yeovil, in Somersetshire. In the month of May, 1850, the defendant, who then resided in London, in answer to an advertisement in one of the London newspapers, applied to the plaintiff to take his son William Henry Adams as an apprentice. The plaintiff required a premium of 40*l.* The defendant told him he was a poor man, but that a society called the Somersetshire Society, which was established for the apprenticing of the children of poor Somersetshire parents residing in London, had granted 20*l.* as a pre-[251]-mium to be paid with his son. The plaintiff consented to take the boy as apprentice, on the society paying 20*l.*, and the defendant giving him an I.O.U. for other 20*l.*, payable by instalments of 5*l.* per annum. To this the defendant agreed: and accordingly the boy was bound to the plaintiff for seven years by an indenture of which the following is a copy:

“SOMERSETSHIRE SOCIETY.

“Established, 1811.

“For apprenticing the children of poor Somersetshire parents residing in London.

“This indenture witnesseth that William Henry Adams, with the consent of William Adams, of, &c., and with the approbation of John Jenkyns, of, &c., Esq., treasurer to the Somersetshire Society in London, doth put himself apprentice to Samuel Westlake, of, &c., ornamental and figure carver, to learn his art, and with him after the manner of an apprentice to serve from the date hereof unto the full end and term of seven years from thence next following, to be fully complete and ended, during which term the said apprentice his master shall faithfully serve, his secrets keep, his lawful commands everywhere gladly do: he shall do no damage to his said master, nor see it to be done of others, but to his power shall let or forthwith give warning to his said master of the same: he shall not contract matrimony within the said term: he shall not play at cards, dice, tables, or any unlawful games, whereby his said master may have any loss with his own goods or others' during the said term, without licence of his said master: he shall buy nor sell: he shall not haunt taverns or play-houses, nor absent himself from his said master's service day or night unlawfully: but in all things as a faithful apprentice he shall behave himself towards his said master and all his during the said term. And the said Samuel Westlake, in [252] consideration of the sum of 20*l.*, to be paid to him by the said John Jenkyns, or by the treasurer for the time being of the society for apprenticing the children of the deserving poor of the county of Somerset resident in London (one moiety to be paid immediately after this indenture shall be approved of by the committee at their first

meeting after the execution thereof, and the remaining moiety to be paid at the expiration of half the said term, if the said apprentice then continue in the service of his said master), doth covenant with the said John Jenkyns to teach and instruct, or cause to be taught and instructed, by the means that he can, his said apprentice in the art of ornamental and figure carving, which he useth; finding the said apprentice sufficient meat, drink, and lodgings, and medicine in case of sickness, during the said term: And, for the true performance of all and every the said covenants and agreements, each of the said parties bindeth himself unto the others by these presents. In witness whereof the parties above named have put their hands and seals the 17th day of May, 1850."

(Signed)

"WILLIAM ADAMS.

"WILLIAM HENRY ADAMS.

"SAMUEL WESTLAKE.

"JOHN JENKYNs."

(Seals.)

The defendant's son duly served the plaintiff under the above indenture until the expiration of the term. The two sums of 10*l.* and 10*l.* were paid by the Somersetshire Society, who were ignorant of the arrangement with the father for the payment of the additional 20*l.* The indenture,—the premium being paid by a public charity,—was unstamped. After the execution of the indenture, the defendant, who had then gone to reside in Exeter, at various times supplied the plaintiff with gloves; and, on his coming to London during the term, an account was gone into between the parties, when it [253] was agreed that the value of the gloves so supplied was 3*l.*, and that the plaintiff should give up the four I.O.U.'s which he held, and receive in lieu of them a fresh I.O.U. for 17*l.* and a receipt for the 3*l.*

On the part of the defendant it was insisted that the plaintiff was not entitled to recover, inasmuch as the taking of the I.O.U. for the additional premium was a fraud upon the Somersetshire Society, who would not have paid the 20*l.* unless they had believed that sum to be the entire consideration for the apprenticeship; and, further, that the indenture was void by the 8 Ann. c. 9, for not setting out the consideration truly (*a*).

[254] On the other hand, it was submitted that the indenture was not void, and that the defendant, having got all he bargained for, was bound to perform his contract.

The learned judge in substance told the jury that the indenture of apprenticeship was void, by the statute, for not truly setting out the consideration; but that, if the

(*a*) The 35th section of that act enacts "that the full sum or sums of money received, or in any wise directly or indirectly given, paid, agreed or contracted for, during the term, with or in relation to every such clerk, apprentice, and servant, as aforesaid, shall be truly inserted and written in words at length in some indenture or other writing, which shall contain the covenants, articles, contracts, or agreements relating to the service of such clerk, apprentice, or servant, as aforesaid, and shall bear date upon the day of the signing, sealing, or other execution of the same, upon pain that every master or mistress to or with whom or to whose use any sum of money whatsoever shall be given, paid, secured, or contracted for or in respect of any such clerk, apprentice, or servant as aforesaid, which shall not be truly and fully so inserted and specified in some such indenture or other writing, shall for every such offence forfeit double the sum so given, paid, secured, or contracted for," &c.

And the 39th section enacts "that all such indentures or writings as aforesaid wherein shall not be truly inserted and written the full sum and sums of money received, or in any wise directly or indirectly given, paid, secured, or contracted for, with, or in relation to such clerk, apprentice, or servant as aforesaid, or whereupon the duties payable by this act shall not be duly paid or lawfully tendered, or which shall not be stamped or lawfully tendered to be stamped, according to the tenor and true meaning of this act, within the respective times herein for that purpose severally and respectively limited, shall be void, and not available in any court or place or to any purpose whatsoever, and the clerk, apprentice, or servant whom the same shall concern or relate to shall in such case be utterly incapable of being free of any city, town, corporation, or company, and of following or exercising the intended profession, trade, or employment, any charter, law, or custom to the contrary notwithstanding."

Section 40 exempts from stamp duty indentures the premium whereof is paid by the parish or by any public charity.

consideration for the I.O.U. upon which the action was brought was the execution of the indenture, such execution was a sufficient consideration for the defendant's promise, notwithstanding the indenture might be void. The plaintiff accordingly had a verdict for 17l.

Kingdon, in Easter Term last, moved for a new trial, on the ground of misdirection. He submitted that the contract to receive the additional 20l. was a fraud upon the Somersetshire Society, who would not have consented to pay the sum they did if they had known that it was not the full and only consideration for the apprenticing the defendant's son. [Willes, J. I told the jury that there could be no fraud, if the defendant got what he bargained for.] This sort of private bargain is contrary to public policy,—like the case of a creditor who has signed a composition-deed bargaining for some private advantage to himself beyond that which the general body of creditors receive: *Jackson v. Duchaire*, 3 T. R. 551. [Byles, J. Is not the object of the society equally attained, whether the master [255] gets more than they pay or not?] The plaintiff covenants with the society to teach the boy his trade, and to feed and lodge him, for 20l. [Willes, J. There was no evidence that the plaintiff knew anything about the rules of the society. Crowder, J. Or to shew that the society would not have advanced the 20l. if they had known of the arrangement with the boy's father.] In *The King v. The Inhabitants of Aylesbury*, 3 B. & Ad. 569, a pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term; and he did so. It did not appear that the trustees were privy to this engagement. The court of Queen's Bench held that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master, within the 55 G. 3, c. 184, Sched. part 1, tit. Apprenticeship, or, assuming that it was, then it was void as being a fraud upon the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. Parke, J., there said: "It is said that there is a benefit conferred on the master by the agreement of the father to provide clothes, and that that is equivalent to a sum of money. Assuming it to be so, the agreement was then a fraud on the trustees of the charity, for it is clear from the covenant in the indenture that they bound out the pauper on the faith that the master was to find apparel, &c.: and the latter could not have sued the father for not providing clothes, for there was no binding engagement on him so to do."

Then, the 8 Anne, c. 9, ss. 35, 39, make the indenture absolutely void to all intents and purposes, for not [256] setting out the full sum given "with or in relation to" the apprentice. *Jackson v. Warwick*, 7 T. R. 121, is a distinct authority. It was there held that no action can be maintained by the plaintiff on a note given to him by the defendant as an apprentice fee with his son who was to be bound to the plaintiff, if it appear that the indenture executed was void by the 8 Ann. c. 9, for want of the insertion of such premium therein, and a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and until he absconded. [Crowder, J. Here, the party has had all the benefit that could result from the covenant.] Not so: for, the indenture being void, the apprentice loses all the benefit that would have resulted to him from having served his time under a valid indenture. In *The King v. The Inhabitants of Amersham*, 4 Ad. & E. 508, 6 N. & M. 12, the indenture was held void on this ground.

CROWDER, J. Upon the first point, I am of opinion there should be no rule. It does not appear that there was anything like fraud: and the mere fact of the existence of the indenture is nothing. In the cases adverted to, there was a clear intention to deceive, and the party advancing the money was deceived. There is nothing here to shew that any deception was practised by the plaintiff upon the Somersetshire Society, or that he had any intention to deceive them. But, upon the other point, viz. that the consideration was not truly stated, the rule may go.

F. Russell, on a subsequent day, shewed cause. This is a mere stamp objection. The provisions of the 8 Ann. c. 9, are modified by the 20 G. 2, c. 45, ss. 5 and 6. [Williams, J. The object of the 8 Anne, c. 9, s. 39, is plain, —to insure the payment of the proper [257] duty, by declaring the indenture void if the full consideration is not inserted. Byles, J. Do you find any case where the non-insertion of the right

sum was held to be cured by the subsequent payment of the proper duty?] There is no decision to that effect. The jury having found that the defendant contracted for this very indenture, it does not lie in his mouth to urge this objection. Nor can he say that the contract is void, when the whole has been performed by the maintenance and instruction of the apprentice for the full period contracted for: *Mann v. Lent*, 10 B. & C. 877, 5 M. & R. 660. *Jackson v. Harwick*, 7 T. R. 121, was cited; but Lord Tenterden said: "If the father had paid the premium, instead of having given the bill for it, he could not, under the circumstances of this case, have recovered it back; for, the son was not only maintained by the master for a time, but might have compelled the latter to continue his maintenance and instruction, by causing the indenture to be stamped. There was not, therefore, a total failure of consideration." In *The King v. The Inhabitants of Bourton-upon-Dunsmore*, 9 B. & C. 872, 4 M. & R. 631, a married woman, on binding her son, an illegitimate child, an apprentice, agreed with the intended master that 10l. should be the premium inserted in the indenture, but, that he should receive something more. The husband of the mother of the apprentice paid the 10l., and the mother, without her husband's knowledge, paid the master a further sum of 2l. 12s. 6d. It was held, that, there being no valid contract to pay more than the sum of 10l., the full sum received, given, paid, secured, or contracted for at the time of the execution of the indenture, was inserted in the indenture within the meaning of the statute 8 Ann. c. 9, s. 39, that the indenture was valid, and that a settlement was gained by service under it. And Bayley, J., said: "The sum [258] really and bona fide paid and contracted for was inserted in this indenture. There was no binding agreement for the payment of any sum beyond that amount. The promise made by the feme covert did not bind her." At all events, the giving up the four pieces of paper originally given to the plaintiff was a sufficient consideration, upon the authority of *Haugh v. Brooks*, 10 Ad. & E. 309, 323, 2 P. & D. 477, 4 P. & D. 288: and, though the contract might not have been enforceable, an action will lie upon the account stated: *Cocking v. Ward*, 1 C. B. 858.

Kingdon, in support of his rule. The indenture was clearly void under the statute 8 Ann. c. 9, and therefore there was a total failure of consideration for the defendant's promise. The statute makes the indenture void on two grounds,—if the true amount of the premium is not inserted, and if the stamp is insufficient. The 20 G. 2, c. 45, may cure the latter defect, but not the former: the case of *Mann v. Lent*, therefore, does not affect the question. In that case it was competent to the parties to cure the defect: here the defendant did not get all the consideration he contracted for. *The King v. The Inhabitants of Baidon*, 3 B. & Ad. 427, is more to the purpose. There, the consideration expressed in an indenture of apprenticeship was 4l. to be paid to the master by a public charity; but the apprentice's mother privately agreed to pay, and did pay the master, after the execution of the indenture, 1l. in addition: and it was held that the indenture, though stamped, was void by the 8 Ann. c. 9, s. 39, the full sum contracted for with or in relation to the apprentice not being inserted. Lord Tenterden says: "The object of the legislature undoubtedly was, to secure the insertion in the indenture of the whole sum paid or contracted for with the apprentice. But the 39th [259] section evidently refers to cases where a duty is payable; whereas, in *The King v. The Inhabitants of Chadby*, 1 B. & Ald. 477, no duty whatever was payable, because the whole premium was defrayed by public charity. That is not so here. Then it is said, that, according to *Roe v. The Inhabitants of Bourton-upon-Dunsmore*, 9 B. & C. 872, 4 M. & R. 631, unless there be a binding contract for the payment of the sum with the apprentice fee, it need not be inserted in the indenture. But there the decision turned upon the disability of the contracting party, who was a feme covert. Here, we cannot presume that the pauper's mother (who is named as the consenting party in the indenture) was a feme covert. It is said that the contract for the additional sum was void by the act of parliament, and that the master could not have sued for this sum, which was not mentioned in the indenture. We are not called upon to decide how that would have been, if an action had been brought by the master; because the clear intention of the legislature was, that everything received, given, paid, secured, or contracted to be paid with the apprentice, should be inserted in the indenture. Here there was a contract to pay a sum not inserted. A party capable of contracting, and making such a contract, though it were honorary, might not know that the statute would protect him from its performance: but a married woman must be presumed to know that she is not liable

upon a contract made by her. Perhaps it would have been better if the legislature had enacted that all engagements to pay more than the sum mentioned in the indenture should be utterly void. But the words of the statute, as they bear upon this case, are so unambiguous, that, without repealing the clause, we cannot hold this indenture to be valid." Here the contract was, that the defendant's son should be taught the trade of a wood carver [260] under a valid indenture. [Byles, J. No: under the particular indenture.] A contract to apprenticeship must, it is submitted, mean, by a legal and valid instrument. Before the execution of this indenture, it had been arranged that the plaintiff should receive 40*l.*, one half from the Somersetshire Society, the other half from the defendant. That clearly brings the case within the words of the 39th section of the statute of Anne. The sum agreed to be paid with or in relation to the apprentice was not inserted in the indenture. The objection was held fatal in *The King v. The Inhabitants of Amersham*, 4 Ad. & E. 508, 6 N. & M. 12. Then, if the indenture is void, the plaintiff clearly cannot recover. The case is virtually concluded by *Jackson v. Warwick*, 7 T. R. 121. Then, as to the account stated,—there could be no better consideration for the giving of the second I.O.U. than there was for the first. Here there is nothing but an account stated, the consideration for which entirely failed: whereas, in *Cocking v. Ward*, 1 C. B. 858, the defendant got everything he contracted for. [Byles, J. There was a point open in *Jackson v. Warwick*, which is not open here: the only plea here is, never indebted.] In *Wilson v. Wilson*, 14 C. B. 616, upon a sale of a leasehold, the purchaser agreed to pay a deposit of 50*l.*, and the residue on completion. Instead of actually paying the 50*l.*, he gave the vendor 5*l.* and an I.O.U. for 45*l.*: and it was held the vendor, failing to make a good title, was not entitled to recover the 45*l.* upon an account stated: and that the defence was admissible under never indebted. [Williams, J. I confess I do not see any substantial difference between *Cocking v. Ward* and the present case, so far as the account stated is concerned. Might not the defendant there have been turned out?] No. The widow of the former tenant had surrendered the premises, and the defendant had become tenant. [261] At the end of the judgment, Tindal, C. J., says: "The principle may not, perhaps, be applicable to cases where it can be shewn the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as by those against usury or gaming: but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it." Can it be doubted that the parties here bargained for a valid and binding indenture of apprenticeship? At the time the defendant gave this I.O.U. he had not got what he bargained for.

WILLIAMS, J. You attempt to distinguish *Cocking v. Ward* from the present case upon two grounds, upon one of which I think consideration is necessary, viz. as to whether the defendant here received all the consideration that formed the inducement or motive for his giving the I.O.U. But, as to the other, you rely upon a distinction between an originally void consideration, and an illegality created by statute. Now, here, the indenture is made void by the statute, but not the debt. That ground of distinction, therefore, fails. But the other question, whether, notwithstanding the finding of the jury, the facts do not of necessity shew that the whole consideration could not have been in existence at the time of the giving of the I.O.U., deserves deliberation.

Cur. adv. vult.

WILLES, J. In this case the court is not unanimous. The cause was tried before me, and the rule, which complains of my direction to the jury, was argued before my Brothers Williams and Byles and myself. The direction was, in substance, that the in-[262]-dentures of apprenticeship were void for not stating the full consideration, by reason of the provisions of the statute of Anne: but that, if the consideration for the I.O.U. upon which the action was brought was the execution of the indenture, notwithstanding it might be void, such execution was a sufficient consideration for the promise. I did not reserve the point. In the absence of my two learned Brothers, I will proceed to read their respective opinions.

WILLIAMS, J. I am of opinion that it is impossible to distinguish this case from *Jackson v. Warwick*, 7 T. R. 121. There, the action was brought on a note given by the defendant as an apprentice fee with his son to the plaintiff, to whom the son was bound. It appeared that no mention was made in the indentures of this premium

having been given with the apprentice; nor was there any stamp thereon in proportion to their value, as required by the statute 8 Ann. c. 9; in default of which, by the 39th section, the indentures are declared to be void and unavailable for any purpose: and it was held that no action could be maintained on the note, because it was given in consideration of the relation of apprenticeship, which these parties supposed was to be created between the defendant's son and the plaintiff, which relation, it turned out, never did exist between them, and therefore the consideration for the note wholly failed, notwithstanding that the plaintiff had provided board for some time for the apprentice, who then absconded.

In the present case, the circumstances are substantially the same, except that the defendant, instead of giving his promissory note, gave an I.O.U. for the premium, on which the action was brought as upon an account stated.

It cannot be disputed that the I.O.U. was *prima* [263] *facie* sufficient evidence to sustain the plaintiff's case; but that it was open to the defendant to rebut it, by shewing that the account was stated in respect of a debt which had no legal foundation. And this was shewn, I think, according to *Jackson v. Warwick*, as soon as it appeared that the supposed debt was founded on a promise to pay, the premium, the consideration for which had wholly failed by reason of the indentures being void. The promise was made by way of purchase of valid indentures; and no such indentures ever existed. And this differs the present case from *Cocking v. Ward*, 1 C. B. 858, where the defendant had had the full benefit of the original contract.

It was, however, contended, on behalf of the plaintiff, that the present case is distinguishable from *Jackson v. Warwick*, by reason of the finding of the jury that the defendant had received all the consideration he expected to receive at the time of making the promise of which the I.O.U. was the evidence. But it is, I think, impossible to support such a view of the case, unless there were some evidence that the defendant knew the indentures were void when he made the promise. It would, in truth, be an evasion by the court of the authority of *Jackson v. Warwick*, by leaving it for the jury to decide that a consideration existed which that case decides has wholly failed.

It was further contended that *Jackson v. Warwick* is not applicable, because it appeared at the trial of the present case that the I.O.U. in question was substituted for four other instruments of the same kind which had been originally given by the defendant as the security for the payment of the premium, and which had been destroyed because the plaintiff had requested the defendant to give him a new I.O.U. in lieu of them, on a suggestion that they were invalid in form. And it was argued that this destruction of them was a new [264] consideration, which would sustain a new promise, according to the principle of *Hatfield v. Brooks*, 10 Ad. & E. 323, 4 P. & D. 288. But surely there was an implied understanding between the parties in the present case that the defendant should not incur any further liability on the new security than on the old. It is difficult to understand how the plaintiff can be in a better condition because the defendant acceded to his request to substitute the one document for the others as evidence of the original promise.

It was further contended for the plaintiff, that, according to the case of *Mann v. Lent*, 10 B. & C. 877, 5 M. & R. 660, M. & M. 240, the indentures might be rendered valid, by causing them to be properly stamped under the 20 G. 2, c. 45, s. 5; and so there would not be a total failure of consideration. But the effect of that statute, I think, is only to render the indentures, after they shall have been properly stamped, as good and available as if the proper stamp-duty had been paid in the first instance; and not to cure the defect of omitting to mention the true amount of the premium.

On the whole, therefore, I am of opinion that there is nothing to distinguish the present case from *Jackson v. Warwick*. That case has been cited in the argument of subsequent cases, and not disapproved of, but distinguished by the court, — as in *Grant v. Welchman*, 16 East, 207. It is also stated without any disapprobation in Bayley on Bills, 4th edit. p. 392. Until, therefore, it shall have been overruled in a court of error, I think it is a binding authority, which must govern this case; and, consequently, that this rule ought to be made absolute.

BYLES, J. It is with great diffidence and regret that I am constrained to differ from my Brother Williams. But I am of opinion that there has been no misdirection, [265] — that the proper question has been left to the jury, and that the plaintiff is entitled to retain his verdict.

There appears to me to have been a full consideration for the last I.O.U., on which the action is founded. I think the execution of the indenture of apprenticeship by the plaintiff, independently of his subsequent performance of his covenant, was a good consideration for the four I.O.U.s originally given. I agree that the statute 8 Ann. c. 9, s. 39, makes the indenture void, because the full consideration was not inserted in the instrument: and that this defect is not curable by the subsequent statute of 20 G. 2, c. 45, s. 5. But still, the indenture was the very indenture which the plaintiff agreed to give, and which the defendant agreed to take. There was no fraud: the defendant knew all the facts, and cannot be heard to say that he was ignorant of the law. It cannot even be said that the deed, though liable to be proved to be void, was valueless: for, it was a good deed on the face of it, and had the evidence of the additional consideration perished, or not been forthcoming, the deed would have had its full operation in every way.

It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration: so that much less consideration than here existed might have sufficed.

Lastly, it must be remembered that the defendant in this case has received a full performance of the terms of the indenture at the hands of the plaintiff. The jury have, I think, made an end of the question: for, they have found (as they well might) that the defendant received what he bargained for, and all that he bargained for.

The only difficulty I feel is in distinguishing this case from the case of *Jackson v. Warwick*, 7 T. R. 121. But that was an action on a promissory note: the defendant [266] had there certainly received some consideration: and the law was not at that time so well settled as it has since been, that an action to recover the full amount due on a bill or note can be sustained unless the consideration fails entirely, or fails to an ascertained and liquidated amount. Moreover, the language of Lord Tenterden, in *Mann v. Lent*, 10 B. & C. 884, 5 M. & R. 660, seems to import some doubt in the mind of the court of King's Bench as to the correctness of Lord Kenyon's decision. And Lord Tenterden in *Mann v. Kent* proposes as the test this inquiry, whether, if the father, instead of having given the bill, had actually paid the money, he could have recovered the money back. Surely in this case he could not have done so; for, it would have been money paid by him with full knowledge of the facts. But the distinction between *Jackson v. Warwick* and the present case is this, that there Lord Kenyon says it was the master's duty to get the consideration properly inserted, and the instrument properly stamped; whereas, here, the master had done, as the jury have found, all he engaged to do.

On these grounds, I think the transaction, such as it was, supported the original I.O.U.s.

It is not necessary to say whether the last I.O.U., having been given in consideration of the surrender of the original I.O.U.s, could have been void for want of consideration: although in *Haigh v. Brooks*, the majority of the court of Exchequer Chamber intimated their opinion, that, had the document in that case surrendered by the plaintiff as a consideration for the promise of the defendant been a mere piece of paper, it would have sufficed to sustain the promise.

WILLES, J. Having now read the opinions of my two learned Brothers, I regret that it falls to me to decide upon an appeal against my own ruling, though I have [267] the consolation to think that in so doing I shall decide in favour of that party on whose side is the justice of the case. I am not ashamed of having been somewhat astute at the trial to defeat what I conceived to be an unjust and unworthy defence: and of course I do not express any different opinion now. As my Brother Byles agrees with me, the result is that the rule for a new trial must be discharged.

Rule discharged.

DUNSTON v. PATERSON. July 5th, 1858.

[S. C. 28 L. J. C. P. 97; 4 Jur. N. S. 1024; 6 W. R. 768.]

A temporary or compulsory residence, at the time of the commencement of an action, in a gaol, does not constitute the place of detention the "dwelling" of the party within the 128th section of the 9 & 10 Vict. c. 95.—The court will require a strong case to be made out before they will overrule the exercise of a judge's discretion

under the 15 & 16 Vict. c. 54, s. 4.—The plaintiff having recovered only 5*l.* in an action for false imprisonment, and the judge having declined to certify under the County-Court Act, 15 & 16 Vict. c. 54, s. 4,—Held, that the plaintiff was equally disentitled to the costs of a demurrer upon which she obtained judgment, as to the costs of the issues of fact.

This was an action for false imprisonment brought against the defendant, the late sheriff of the county of Kent.

See the pleadings, ante, vol. ii., p. 495.

At the trial before Willes, J., at the sittings in London after Trinity Term, 1857, it appeared that the sheriff having a *ca. sa.* against Emily Mary Dunston, the sister of the plaintiff, an officer armed with a warrant proceeded to a place called Lock's Bottom, near Farnborough, in Kent, for the purpose of apprehending her; that he there saw the plaintiff, who answered to the name of "Miss Dunston," and lodged her in Maidstone gaol; that an application was afterwards made to a judge at Chambers for the plaintiff's discharge, but, for some unexplained reason, it was not persisted in; and that the plaintiff remained in custody about four or five months, during a great portion of which time the sheriff and his officers knew she was not the person named in the *ca. sa.*

[268] The defence was, that the plaintiff, by passing herself off as the real defendant in the original action, for the purpose of enabling her sister to escape, was the author of her own imprisonment, and was consequently not entitled to complain of the sheriff's wrongful act.

This objection had already been disposed of upon a demurrer to the rejoinder to the plaintiff's second replication,—ante, vol. ii., p. 495,—and it was insisted for her at the trial, that, assuming that she had at first misled the officer, that was at all events no justification for her detention by the sheriff after he knew she was unlawfully in his custody.

The case went to the jury with strong remarks by the learned judge upon the plaintiff's conduct; and the jury, after some deliberation, returned a verdict for the plaintiff, with 5*l.* damages.

The learned judge stayed execution until the fifth day of Michaelmas Term, and reserved leave to the defendant to move to enter a verdict for him, on the ground that the plaintiff, having misled the officer, was not entitled to complain of the arrest or detention.

A summons was afterwards taken out calling upon the defendant to shew cause why the plaintiff should not be allowed her costs pursuant to the County-Court Act, 15 & 16 Vict. c. 54, s. 4. This summons was returnable before Cresswell, J., who referred it to Willes, J., before whom it came on to be heard on the 27th of November, 1857, when the application was refused. On the 11th of January last,

Woollett obtained a rule calling upon the defendant to shew cause why the plaintiff should not recover against him her costs, as well of the issues in law as of the issues in fact joined between the said parties. The motion was founded upon an affidavit of the plaintiff, in which she was described as "at present residing at [269] Lock's Bottom, near Farnborough, in the county of Kent," and which stated in substance as follows:—That the writ of summons in this cause was issued on the 2nd of March last, at which time the deponent was a prisoner in Maidstone Gaol, in the county of Kent, where she had been taken by a warrant granted by the defendant against her sister, then Emily Mary Dunston, spinster, but now the wife of J. L. Manning, of Lock's Bottom aforesaid, on the 4th of December, and in which gaol she remained until discharged under a writ of habeas corpus issued out of this court on the 8th of June last, by Crowder, J.: that, on the said 4th of December, the deponent was on a visit to the said J. L. Manning at his house at Lock's Bottom aforesaid, by reason of her said sister Emily Mary being about to become his wife, and who wished her to remain there with her until that event occurred: that Maidstone Gaol is more than twenty miles distant from the residence of the defendant, who resided at the time this action was brought at Chiselhurst, in the county of Kent, and more than twenty miles from the place where the deponent was dwelling, viz. at Maidstone Gaol aforesaid: and that, previous to the said 4th of December, the deponent had not for a considerable period any settled abode or permanent residence; and that, on the said 4th of December, when she left her sister's at Lock's Bottom aforesaid, where she was staying only on a visit, she had no other abode than that of Maidstone Gaol, and no residence, lodging, or dwelling place other than the said gaol when she commenced this action against the defendant.

Montagu Chambers, Q. C., shewed cause, upon affidavits, the material statements in which were as follows :—That the defendant's attorneys, having been informed that the plaintiff was not in a position to [270] pay the defendant's costs, declined to incur the expense of making an application to set aside the verdict, anticipating that the plaintiff would not be entitled to the costs of the action, and therefore allowed the time for moving the court to expire without making any such motion, the plaintiff not having, to the knowledge of the deponent, applied for any certificate or order for costs before the time for moving to set aside the verdict had expired : that, on the 10th of November last, the plaintiff's attorney delivered her bill of costs in the action, with notice of taxing for the following day : that the master declined to tax, without a certificate or order : that, on the same day, the plaintiff's attorney took out a summons calling upon the defendant to shew cause why the plaintiff should not recover her costs of this action, which summons was returnable on the 13th of November, before Cresswell, J., who referred it to Willes, J. ; and that, on the 27th, the summons was heard before Willes, J., who indorsed the same "no order : " that Willes, J., attended at chambers to dispose of summonses on the 1st of July, and on the 17th and 21st of August last, on either of which days the plaintiff's application for costs might have been made before him : that, at the time the plaintiff's alleged cause of action arose, the plaintiff resided at Lock's Bottom, in the parish of Farnborough, in the county of Kent and that the defendant resided at Lessons, in the parish of Chiselhurst, in the same county, both at the time the alleged cause of action arose and also at the time of the commencement of the action, and that the said respective residences of the plaintiff and the defendant are within the distance of twenty miles of each other, that is to say, within six miles, and are both within the Bromley district of the county-court of Kent : that the plaintiff's cause of action arose wholly or in some material point within [271] the jurisdiction of the said Bromley district of the county-court of Kent, and not elsewhere : that the plaintiff stated at the trial that she was residing at Lock's Bottom, with her sister Emily Mary, when she personated her : and that she had resided at Lock's Bottom long before the arrest, and returned to the same place, where, as the deponent was informed, she still remained.

The application is out of time ; and the delay has been productive of serious injury to the defendant, inasmuch as he was thereby induced to abstain from availing himself of the leave reserved to him at the trial. In the case of an appeal from the decision of a judge at Chambers, the application must be made within the ensuing term : *Orchard v. Morsy*, 2 Ellis & B. 206 ; *Meredith v. Giddens*, 21 Law J., Q. B. 273. Here, the trial took place at the sittings after Trinity Term, 1857, and no application is made for a certificate until the 11th of November ; and, that being refused, the plaintiff makes this motion in the present Hilary Term. [Williams, J. You contend that the application for costs under the 15 & 16 Vict. c. 54, s. 4, must be made within the first four days of the ensuing term?] Yes.

As to the merits,—the question turns upon the 9 & 10 Vict. c. 95, s. 128, which gives the superior court a concurrent jurisdiction with the county-court, "where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought." Did the plaintiff, at the time of commencing this action, dwell, within the meaning of that statute, more than twenty miles from the defendant? A temporary residence will not do : it must be the party's real home. [272] Now, Maidstone Gaol was not the plaintiff's real home : in her affidavit she describes herself as "at present" residing there : and in the declaration she avers as the damage she sustained, that she was "removed from her home and livelihood." When released from confinement, she returned to Lock's Bottom ; and she resides there now. [Willes, J. When the matter was before me at Chambers, I declined to exercise a discretion. I thought Maidstone Gaol was not the plaintiff's "dwelling" within the 128th section of the 9 & 10 Vict. c. 95 ; and the fact of her having gone immediately back to her sister's house at Lock's Bottom was sufficient to shew that that was her residence within the statute.] In *Macdonnell v. Paterson*, 11 C. B. 755, it was held, that, where a man, having his permanent residence at one place, has a lodging for a temporary purpose only at another place, he does not "dwell" at the latter place, within the meaning of the 128th section of the 9 & 10 Vict. c. 95, so as to oust the jurisdiction of the superior courts. [Cockburn, C. J. In the settlement cases,

"residence" and "dwelling" are treated as synonymous. In *Withorn, App., Thomas, Resp.*, 8 Scott, N. R. 783, 7 M. & G. 1, Lutw. Reg. Cas. 125, the appellant, a freeman of the borough of Tewkesbury, resided and carried on business at Gloucester, which is distant from Tewkesbury more than seven miles: he was a married man, and kept one domestic servant at his house at Gloucester: for the purpose of qualifying himself to vote for the borough of Tewkesbury, he had, since 1841, paid to one S. 9d. per week for a furnished bed-room in S.'s house situate within the borough, and also a closet about six feet by three, without a window, of which closet the appellant kept the key: between January and July, 1844, he slept in the bed-room twelve times, and, during the year ending July, 1844, sixteen times, on his coming to Tewkesbury [273] on business: but he had never taken his meals in the house." The revising-barrister having held that this was not a bona fide residence within the borough to satisfy the 2 W. 4, c. 45, s. 27, the court affirmed his decision (a).]

Woollett, in support of his rule. The question is, whether the plaintiff is not under the statute 15 & 16 Vict. c. 54, s. 4, entitled to her costs, irrespective of any discretionary power in the judge. That section repeals the 13th section of the 13 & 14 Vict. c. 61, and enacts, that, "in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of such act, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action is brought, or to the satisfaction of a judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95,—or for which no plaint could have been entered in any such county-courts,—or that such action was removed from a county-court by certiorari,—or that there was sufficient reason for bringing such action in the court in which such action was brought,—then and in any of such cases the court in which such action is brought, or the said judge at Chambers shall (b) thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the [274] plaintiff shall have the same judgment to recover his costs that he would have had if the before-mentioned act of the 13 & 14 Vict. c. 61, had not been passed." If the court should think there was sufficient cause for bringing the action in the superior court, the plaintiff has a right to come here by way of appeal: and it is difficult to say that the plaintiff was not justified in bringing her action in the superior court, when the defendant himself thought proper to raise a point of law for the decision of the full court upon demurrer. This was a very grave question, involving the liberty of the subject, of which the law is always tender. [Cockburn, C. J. I do not think we ought to be very tender of the detention of a person who thought fit to pass herself off for another, in order to frustrate the process of the court. Williams, J. On the former occasion, we thought the defendant was justified down to the time when he knew that the plaintiff was not the real party. Cockburn, C. J. You say that the point involved in the demurrer was a fit one for discussion in a superior court. That is a point which is worth considering: and it is already raised in a case of *Craske v. Smith*, which is now pending. It may be convenient to suspend the discussion of the point for the present.]

Then, as to the concurrent jurisdiction,—the plaintiff swears, that, from the time the cause of action accrued, and at the time of the commencement of the action, she had no other abode or dwelling place than Maidstone Gaol. In construing the act, regard must be had to the intention of the legislature, which manifestly was, that a plaintiff should not have to go more than twenty miles in search of his debtor, in order to sue him in the county-court. In *Attenborough v. Thompson*, 2 Hurlst. & N. 559, it was held, that, under the 17 & 18 Vict. c. 36, s. 1, which requires an affidavit to be filed of the description of the residence of every attesting-witness [275] to a bill of sale, it is a sufficient compliance with the statute if an attorney's clerk is described as of the office or place of business of his employers, though he sleeps elsewhere.

(a) In *Story's Conflict*, § 47, it is said that "residence in a place, to produce a change of domicile, must be voluntary. If, therefore, it be by constraint, or involuntarily, as by banishment, arrest, or imprisonment, the antecedent domicile of the party remains."

(b) This is imperative, and not permissive or discretionary only: see *Macdougall v. Paterson*, 11 C. B. 755.

Pollock, C. B., there says that "the object of the enactment was that information should be given where the witness was to be found, in order that he might answer any inquiries respecting the bill of sale." The like was held by the court of Queen's Bench in *Blackwell v. England*, 27 Law J., Q. B. 124. Now, the word "residence" is quite as large as "dwelling." If it be urged that here the residence was compulsory, what is to be said of the residence of an officer in barracks, which is equally compulsory? Take the case of a gipsy, who has no fixed abode: he resides or dwells wherever he sleeps. [Crowder, J., referred to *Regina v. Richard Hughes*, Dears. & Bell, 188. There, the prisoner was convicted on an indictment for perjury on the hearing of an affiliation summons. The applicant for the summons had returned from service to the house of her parents to be confined; and, after remaining there for eight months, during which time she had no other home, she went to lodge at D. for the purpose of affiliating her child. D. was not in the same petty-sessional division as the residence of her parents: but she went to D., not fraudulently or for any improper reason, but from motives of convenience; and, after lodging at D. for three weeks, she applied for and obtained the summons in the petty-sessional division in which D. was situate. She stated that she meant to leave D. immediately after the order, and she did leave the day after the order was made, and went into service without returning to her parents. The jury found she had no other home than D., and that she was residing there, if in point of law she could under the circumstances be considered to be so. It was held that her residence was at D., and therefore, [276] that, the magistrates of the petty-sessional division in which D. was situate having jurisdiction, the conviction was right.] Under the poor-law acts a party's residence is, where he sleeps. [Cockburn, C. J. I am inclined to think that Maidstone Gaol could not be said to have been this person's dwelling-place. But I confess I think there is a good deal in the point as to the propriety of bringing the action in the superior court. Chambers. That point is concluded by the exercise of discretion by the learned judge. Cockburn, C. J. Subject to review. You raise a grave question of law by demurrer. Chambers. The fact of the defendant's demurring affords no justification for the plaintiff's bringing her action in the superior court. If the action had been brought in the county-court, the judge would have said, as was said here, that the plaintiff's misrepresentation, whereby she induced the defendant to take the wrong party into custody, deprived her of the right to claim substantial damages for the subsequent detention.]

Cur. adv. vult.

WILLES, J., delivered the judgment of the court:—

This case stood over to await the decision of the court in *Craske v. Smith (a)*, which, however, went off upon a point unnecessary to be considered in the present case; and we proceed to dispose of it upon its own merits.

It was a rule obtained by the plaintiff calling upon the defendant to shew cause why the court should not direct that the plaintiff recover costs, notwithstanding the amount of damages, pursuant to the county-court act, 15 & 16 Vict. c. 54, s. 4.

The cause of action was, an alleged false imprisonment, and so was within the general jurisdiction of [277] the county-court; and, as the plaintiff at the trial obtained a verdict for 5l. damages only, unless the case falls within one of the exceptions in the statute, she is not entitled to any costs.

The application was based upon two grounds,—first, that, at the time of action brought, the plaintiff dwelt more than twenty miles from the defendant,—and, secondly, that, if that were not so, still there was sufficient reason for bringing the action in a superior court.

As to the first ground, it appears that the plaintiff was arrested whilst residing at a place called Lock's Bottom, less than twenty miles from the defendant's residence, and that she personated her sister, against whom a writ of *ea. sa.* had issued, and was in consequence taken instead of her sister to Maidstone Gaol, where she remained in custody until at and after the commencement of this action, which was brought to recover damages for such imprisonment.

It further appears, that, upon the plaintiff's discharge from custody, she returned to the same residence where she was dwelling at the time of the arrest, and (as sworn to by Chapman, and not denied by the plaintiff), long before that time. The plaintiff,

(a) Vide ante, vol. iv., p. 446.

with full opportunity of explanation, does not enter into any particulars as to how long she had resided at Lock's Bottom, or with her sister, or where she had previously resided, or why she returned to that place as her place of residence after she was discharged out of custody, or why she has continued to dwell there since; and she contents herself with swearing, in the most general terms, that that was not her residence, that she was only a visitor, and that in fact she had no residence except Maidstone Gaol.

In this state of facts, the question arises, whether she is to be considered as dwelling at Maidstone Gaol, [278] within the meaning of the statute, at the time the action was commenced: for, if not, she did not dwell at any other place more than twenty miles from the defendant. We are of opinion that the gaol was not a dwelling within the meaning of the act. The residence there was compulsory and temporary, without any intention on the plaintiff's part of remaining; but, on the contrary, with an intention, shewn by the facts, of leaving it when she could, and returning to her former place of residence, whenever she was discharged out of custody.

The statute refers to the place in which the party dwells, as affecting the question of convenience to suitors in attending the county-court, and therefore must mean by the word "dwelling" the ordinary dwelling of the party, and not a place like a gaol, where a person is temporarily detained,—it may be for a single day or night,—in custody.

The first ground, therefore, fails.

As to the other ground of the motion, namely, that there was sufficient reason for bringing the action in the superior court,—this must depend upon the importance of the action, and of the questions likely to be raised in it, upon which the judge who tried the cause, with all the facts fresh in his mind, twice refused, upon application by the plaintiff, to direct the costs to be paid, being then and still of opinion that there was not sufficient ground for bringing the action in a superior court.

If we were satisfied that the learned judge had acted upon an erroneous view of the facts or law of the case, we might review this exercise of his discretion. But, generally speaking, the judge who has tried the cause is best able to appreciate its character and fitness for a superior court: and we ought not to overrule his discretion, except upon much stronger grounds than have been brought forward here.

[279] The rule must, therefore, be discharged, and, being in effect an appeal from a judge at Chambers, with costs.

Rule discharged, with costs.

Jan. 12, 1859.—Wollett, in Michaelmas Term, obtained a rule calling upon the defendant to shew cause why the master should not be at liberty to tax and allow to the plaintiff her costs of the demurrer upon which judgment was directed to be entered for her, and why such costs, when so taxed, should not be set off against the costs allowed to the defendant pursuant to the rule of the 5th of July last. He referred to the 34th section of the 3 & 4 W. 4, c. 42 (a), and to the case of *Bentley v. Davis*, 10 Exch. 347.

Montagu Chambers, Q. C., in Hilary Term, 1859, shewed cause. By the rule of Hilary Term, 1858, the plaintiff asked for the costs as well of the issues of law as of the issues in fact. The court upon that occasion dealt with and disposed of the whole matter. The point, therefore, now sought to be raised is not open to the plaintiff. But, supposing it were open, the point is clearly disposed of by an admirable judgment of Maule, J., in a case of *Abley v. Dale*, 11 C. B. 889, which shews that the prohibition in the county-court acts applies as well to issues of law as to issues of fact. That was an action of tort, in which there was an [280] issue of fact and an issue of law, both of which were determined in favour of the plaintiff, but the damages recovered were less than 5l., and there was a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129; and it was held that the plaintiff was not entitled to any costs. Jervis, C. J., says: "It is unnecessary for us to consider the effect of either the 3 & 4 W. 4, c. 42, s. 34, or Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, because

(a) Which enacts, "that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."

this turns upon a later act, 9 & 10 Vict. c. 95,—in which the legislature has in substance said, that, where the plaintiff has brought a frivolous action in the superior court, he shall have judgment to recover the amount of the verdict only, and no costs. I think we cannot give the plaintiff costs in any shape, without violating the act of parliament.” And Maule, J., says: “In considering what is the proper effect and operation of the 129th section of the 9 & 10 Vict. c. 95, it is material to consider what are the words used, and what was the intention of the legislature. In this case there was an issue in law and an issue in fact, and both have been determined in favour of the plaintiff, but the jury have found that the plaintiff was entitled to less than 5l. damages. Now, the provision in the act is, that, if any action founded on tort, which is not within any of the exceptions, and for which a plaint might have been entered in the county-court, shall be brought in a superior court, and a verdict shall be found for the plaintiff for a sum less than 5l., the plaintiff shall have judgment to recover such sum only, and no costs. Construing these words according to their full literal and ordinary meaning,—which is the proper mode of construing acts of parliament, as well as other documents, unless there is some special reason for construing them otherwise,—these words do deprive this plaintiff of costs. The act in terms says that under these circum-^[281]stances he shall have no costs at all. It has been insisted, on the part of the plaintiff, that, regard being had to the subject-matter, and to the plaintiff's rights under prior statutes, these words require a more narrow construction, and must be taken to mean, no costs ‘in respect of the trial or of the verdict.’ That would, I think, be a very considerable stretch of interpretation. And, when we consider what was the general scope and intention of this act,—to discourage frivolous litigation in the superior courts,—I think it is impossible not to see that it was intended to apply to costs on demurrer as well as to other costs. The term ‘no costs’ is a distinct negation of every description of costs. The words are clearly comprehensive enough to embrace these costs. What, then, was the intention of the legislature? The general spirit of the act was, to provide competent tribunals for the trial of causes of small value, with greater speed and economy than was consistent with the constitution of the superior courts, and to impose a sort of penalty upon plaintiffs who unnecessarily resort to the more expensive tribunal. With certain exceptions, therefore, where the jury, in a case of this sort, find that the cause of action is of less value than 5l., they find conclusively (and the legislature, I apprehend, so intended,) that the cause is not a proper one to be brought in the superior court: and that quite independently of the nature of the question to be tried. If the amount in dispute is so small that it is not fit that it should be made the subject of proceedings in the superior court, the plaintiff is treated as a person who has done wrong in bringing his action there. The plaintiff here says he is entitled to costs because he has by his demurrer raised a question of law upon which he has succeeded. But the answer to that is, that the question of law might have been disposed of in the county-court: it is perfectly competent ^[282] to a defendant or a plaintiff in the county-courts to say that the plaint is insufficient, or the plea no answer to the demand. I therefore think that the words as well as the intention of the legislature manifestly take away all costs under the circumstances which have happened here: and I think this decision is in perfect consonance with all the cases which have been cited.” *Bentley v. Daves*, 10 Exch. 347, has no application: there, the action was properly brought in the superior court. [Cockburn, C. J. There is no more reason why a plaintiff should have the costs of an issue in law than those of an issue of fact. Willes, J. In *Burdon v. Flower*, 7 Dowl. P. C. 786, Coleridge, J., goes fully into the consideration of the 3 & 4 c. 42, s. 34, and holds, that, where judgment passes for the plaintiff on a demurrer to one plea, and the cause is taken down for trial upon another, and a juror is then withdrawn by consent, the plaintiff is not entitled to costs of the demurrer. Cockburn, C. J. I do not see how it is possible to distinguish this case from *Abley v. Dale*, 11 C. B. 889.]

Woollett, in support of the rule. It must be conceded that *Abley v. Dale* is not distinguishable from the present case. But it is submitted that this case must be governed by the decision of the Exchequer in *Bentley v. Daves*, 10 Exch. 347, upon the argument of which *Abley v. Dale* was not referred to. It was there distinctly held, that, under the 3 & 4 W. 4, c. 42, s. 34, the successful party on a demurrer is entitled to his costs in that behalf, whatever may be the ultimate determination of the cause. In delivering judgment, Parke, B., said: “We have considered the question;

and, although my Brother Platt is not, I believe, fully satisfied upon the point, the rest of the court are of opinion that, under the statute 3 & 4 W. 4, c. 42, s. 34, which [283] gives to the successful party upon a demurrer his costs of that demurrer, the plaintiff has a right to these costs quite irrespective of the termination of the suit, and independently of the assessment of damages. The words of the statute are, that 'he shall have judgment to recover his costs in that behalf.' That right, therefore, is not affected by the ultimate determination of the suit." [Cockburn, C. J. The action there was, as Mr. Chambers has observed, properly brought in the superior court. Crowder, J. The reason why *Abley v. Dale* was not cited there probably was, that it was thought to have no application. Williams, J. The 3 & 4 Vict. c. 24, s. 2, limits the deprivation of costs to the costs of the verdict. The County-Court Act is general in its terms,—that, where in tort the plaintiff recovers a sum not exceeding 5l., he shall have judgment to recover such sum only and no costs(a). There is nothing in the County-Court Acts to indicate any intention to repeal the 3 & 4 W. 4, c. 42, s. 34. Reliance was placed, in the argument in *Bentley v. Davies*, upon the 81st section of the Common Law Procedure Act, 1854, 15 & 16 Vict. c. 76, and upon the 62nd rule of Hilary Term, 1853. [Cockburn, C. J. Jervis, C. J., in *Abley v. Dale*, expressly founds his judgment, not upon the 3 & 4 W. 4, c. 42, s. 34, or the 3 & 4 Vict. c. 24, s. 2, but upon the 9 & 10 Vict. c. 95.] Parke, B., in *Bentley v. Davies*, distinctly says that the costs are given by the 3 & 4 W. 4, c. 42, s. 34, at the time the judgment is given on the demurrer. [Crowder, J. Were you entitled to costs immediately upon the judgment on the demurrer?] Yes, though, by reason of the practice of the court, the taxation was postponed. [Crowder, J. In *Abley v. Dale*, Cresswell, J., says: "If it had been necessary to decide this case with reference to the 3 & 4 W. 4, c. 42, s. 34, and the 3 & 4 Vict. c. [284] 24, s. 2, a question of some nicety might have arisen. But I think the County-Court Act, 9 & 10 Vict. c. 95, s. 129, relieves the case from all difficulty. Where the plaintiff in an action of tort recovers less than 5l., the judgment is to be for the amount of the verdict only, and no costs." I do not see how you can get over that."]

COCKBURN, C. J. I am of opinion that this rule should be discharged. It is unnecessary for us to consider whether the decision of the court of Exchequer in *Bentley v. Davies*, 10 Exch. 347, or that of Coleridge, J., in *Burdon v. Flower*, 7 Dowl. P. C. 786, was the more correct exposition of the law, because, as was pointed out in *Abley v. Dale*, 11 C. B. 889, the question does not turn upon the language of the 3 & 4 Vict. c. 24, but upon that of the County-Court Act: and, as is well observed in that case, the latter act takes away all costs in the event provided for. Mr. Woollett was obliged to confess that he was unable to distinguish the present case from *Abley v. Dale*. The facts are precisely the same. And I think the decision is founded upon sound and correct principles.

WILLIAMS, J. The principle upon which the judgment of this court in *Abley v. Dale* proceeded is, that the County Court Acts contain a general prohibition against the plaintiff having costs in the cases provided for, and are not, as is the 3 & 4 Vict. c. 24, limited to the costs consequent upon the verdict. The question does not appear to me to be at all affected by the Common Law Procedure Act. That being so, we are left with the decision of this court in *Abley v. Dale*: and we are disposed to abide by it.

CROWDER, J. I am entirely of the same opinion as [285] my Lord and my Brother Williams. *Abley v. Dale* seems to me to be conclusive of the question. That case, as this, arose upon the County-Court Act. It is a decision precisely in point: and I entirely agree with the reasons expressed by the court. We are referred to the conflict of authorities between the Queen's Bench and the Exchequer: but I desire to give my opinion entirely and solely upon the construction of the County Court Act. I think the rule must be discharged.

WILLES, J. I am of the same opinion. It appears to me that the costs under the 3 & 4 W. 4, c. 42, s. 34, are the same as those under the 8 & 9 W. 3, c. 11, s. 3, and not, as has been contended on the part of the plaintiff, interlocutory costs, but costs which are to be taxed on the final result of the cause. If so, the decision of the court of Queen's Bench in *Burdon v. Flower*, 7 Dowl. P. C. 786, was right, and that of the

court of Exchequer in *Bentley v. Dawes*, 10 Exch. 347, not to be sustained. See Archbold's Practice, 9th edit., by Prentice, 872. However far I am from desiring to put my opinion in opposition to a decision of the court of Exchequer, I think it right to say that I am not satisfied with *Bentley v. Dawes*, and that it seems to me that the doubt expressed by one member of the court was well founded. As to the other point, I cannot entertain a shade of doubt. Besides, this rule is in effect to reopen a matter which was settled and disposed of by the former rule. It is, therefore, a vexatious proceeding, and the rule must be discharged with costs.

Rule discharged, with costs.

[286] JOHNSON, *Appellant*, COCKSEGE, *Respondent*. June 24th. 1858.

[S. C. 27 L. J. M. C. 314.]

By a local turnpike-act (10 G. 4, c. cxxxiii.), the road was divided into three separate districts or divisions, a different set of trustees being appointed for each. The 14th section enabled "the said trustees," or any person or persons by them appointed, to demand and take, at the turnpikes or gates erected or to be erected by virtue of the act, amongst others, a toll of 4½d. "for every horse, &c. drawing any waggon, &c. with four wheels, having the fellies of the wheels thereof of the breadth or gauge of 4½ inches." The 15th section provided that any person having paid the toll for the passing of any horse, carriage, &c., upon producing a ticket should be permitted to pass and re-pass toll free through the same gate or through such other gate or gates (if any) as the ticket for such payment should free, at any time during the same day. And s. 16 enacted "that no more than one full toll should be demanded or taken for or in respect of the same horses, &c., for passing on the same day through all or any of the toll-gates, &c., along the whole line of the said roads:"—Held, that a single toll of 4½d. paid for passing a toll-gate in one of the three districts or divisions cleared all the gates in the three districts.

The following case was stated for the opinion of this court, pursuant to the statute 20 & 21 Vict. c. 43, by way of appeal against a conviction by three justices of the peace acting in and for the liberty of St. Alban's, in the county of Hertford.

On the 10th of November, 1857, Joseph Johnson, of Rickmansworth, in the said liberty of St. Alban's, appeared before certain justices of the peace acting in petty sessions, at Watford, in and for the said liberty, of whom the above-named justices formed the majority, to answer the information and complaint of George Cocksege, of Watford aforesaid, superintendent of police, who complained that he the said Joseph Johnson, on the 30th of September, 1857, at the parish of Rickmansworth aforesaid, in the liberty aforesaid, being then and there the collector of tolls at a certain toll-gate there, commonly called or known as Chorley Wood gate, on a certain turnpike road from Reading, in the county of Berks, to Hatfield, in the county of Hertford, did demand and take from one Joseph Flexman, of Watford aforesaid, corn-dealer, the sum of 4½d. as and for toll for a horse and cart then and there driven by the said Joseph Flexman, and being his own property, for passing through the said gate, he the said Joseph Flexman having previously on the same day paid the like sum as and for toll authorized by law to be taken [287] at a certain other gate commonly called or known as Hagden Lane gate, in the parish of Watford aforesaid, on the same road, for the passing of the same horse and cart through Chorley Wood gate aforesaid: the said Joseph Flexman having at the gate last aforesaid, and on the day last aforesaid, produced to him the said Joseph Johnson a ticket previously and on the said last-mentioned day received by the said Joseph Flexman at Hagden Lane gate aforesaid from the toll-collector there, denoting the payment of such toll thereat on that day: contrary to the form of the statute in such case made and provided.

The above information was laid under the General Turnpike Act, 3 G. 4, c. 126.

On the hearing of the information, it was found, that, on the morning of the said 30th of September, 1857, the said Joseph Flexman passed through the said Hagden Lane gate, on the Reading and Hatfield turnpike-road, in a horse and cart, and there paid the toll demanded of him by the toll-collector at that gate, and which was

admitted to be the legal toll payable by him in respect of the said horse and cart : and he received from such collector a ticket in the form and words following :—

HAGDEN LANE GATE.

Sept. 30th.

No. 9.

On the same day, and on the same turnpike-road, the defendant Joseph Flexman passed through another gate called Chorley Wood gate, where the defendant Joseph Johnson was the collector of tolls, who demanded of him the said Joseph Flexman another sum of $4\frac{1}{2}$ d. for toll, and which the latter refused to pay, contending that, [288] having already paid the toll of $4\frac{1}{2}$ d. at Hagden Lane gate, he was entitled to pass through Chorley Wood gate free.

The last mentioned sum was paid by the said Joseph Flexman after further dispute.

The power to collect tolls on the said turnpike-road is given by an act of parliament passed in the tenth year of the reign of G. 4 (declared to be a public act), intituled “An act for more effectually repairing and improving the road from Reading, in the county of Berks, to Hatfield, in the county of Hertford, and also the road leading out of the said road at Marlow to or near the thirty-mile stone in the turnpike-road from Maidenhead to Reading.”

By one section of that act (the 14th), it is enacted as follows :—“That it shall be lawful for the trustees named therein, or such person or persons as shall be by them appointed, to demand, receive, and take, at the turnpikes or toll-gates, side-bars, or chains now erected and to be continued, or hereafter to be erected by virtue of this act, the several tolls and duties hereinafter mentioned,”—amongst which said tolls and duties is specified the following toll,—“For every horse or beast of draught drawing any waggon, wain, cart, or other such like carriage, having the fellies of the wheels thereof of less breadth in gauge than four inches and a half, the sum of $4\frac{1}{2}$ d.”

By the next following section of the same act (the 15th), it is enacted as follows :—“That, if any person shall have paid the toll hereby authorized to be taken for the passing of any horse or horses, cattle, beast, carriage, or carriages through any of the turnpikes, toll-gates, side-gates or bars continued or to be erected by virtue of this act, the same horse or horses, cattle, beast, carriage, or carriages shall, upon a ticket denoting the payment thereof on that day being produced, be per-[289] mitted to pass and re-pass toll-free (except as hereinafter particularly mentioned) through the same toll-gate, turnpike, side-gate, or bar, and also through such other gate or gates (if any) as the ticket for such payment shall free, at any time during the same day (such day to be computed from twelve of the clock at night to twelve of the clock in the next succeeding night, anything herein contained to the contrary thereof in any wise notwithstanding.”

And by the next following section of the same act (the 16th), it is then further enacted as follows :—“That no more than one full toll shall be demanded or taken for or in respect of the same horses, beasts, or cattle (except as hereinafter mentioned (a)), for passing on the same day (such day to be computed as aforesaid) through all or any of the toll-gates, turnpikes, or side-gates along the whole line of the said roads.”

The said gates called respectively the Hagden Lane gate and the Chorley Wood gate had been erected before the passing of the said act, and were continued thereby : and the tolls and duties authorized by the said act to be taken were and are continued to be taken after the passing of the said act up to the present time.

It was contended, on the part of the complainant, that, under the last-recited section (the 16th) of the said act of parliament, no more than one full toll could under any circumstances be taken for the passing of the same horses, beasts, or cattle on the same day through any toll-gate on the above-mentioned line of road, or, in other words, that payment at one toll-gate for the passing of any horse or beast of draught

(a) Which exception did not affect the case.

cleared the whole of the toll-gates and side-bars on the said line of road through which the same horse, &c., might pass on the same day; and that the said Joseph [290] Johnson was not authorized by law to demand and take of the said Joseph Flexman the said sum of 4½d. at Chorley Wood gate aforesaid, he having already paid the gate toll for the passing of the same horse and cart on the same day at Hagden Lane gate, on the same line of roads.

The whole length of the said turnpike-road is fifty-six miles, and on it there are ten toll-gates, besides side-bars.

The above-recited act of parliament, 10 G. 4, authorizing tolls to be taken, is a renewal or substitution of acts of parliament passed respectively in the 8 G. 3 (c. i.), 27 G. 3 (c. lxxx.), and 49 G. 3 (c. xevii.), and which were severally repealed by that the last act. In none of the repealed acts is there any clause similar to the 16th clause of the act of 10 G. 4 herein last recited, limiting the number of tolls to be taken on the same day.

Considerable sums of money were borrowed before the passing of the existing act of parliament, and are still due and secured upon the tolls authorized to be taken on the turnpike-road in question.

Upon the above facts, and upon a consideration of the last-recited clause, the justices did determine that only one toll was payable by the said Joseph Flexman, and therefore convicted the said Joseph Johnson in a nominal penalty of 1s., and 11. 15s. 8d. costs.

The question for the opinion of the court is, whether, upon the facts stated, the said conviction is right in law and in fact.

Manisty, Q. C. (with whom was Lawrence), for the appellant. The question turns mainly upon the construction of the 14th, 15th, and 16th sections of the 10 G. 4, c. cxxxiii., an act for repairing and improving the road from Reading to Hatfield. The 7th section of [291] the act recites, that, in consequence of the great extent of the said road (fifty six miles, with ten toll gates), it was expedient and necessary that the same should be divided into districts, and then it proceeds to enact that the roads thereby directed to be repaired shall be divided into three separate districts or divisions; and the trustees, who are appointed by s. 5, are expressly appointed trustees for carrying the act into execution, so far as the same related to the first, second, and third districts respectively (a). The 14th section enacts "that it shall be lawful for the said trustees, or such person or persons as shall be by them appointed, to demand, receive, and take, at the turnpikes or toll-gates, side bars, or chains now erected and to be continued, or hereafter to be erected by virtue of this act, the several tolls and duties hereinafter mentioned, that is to say (amongst others).—For every horse or beast of draught drawing any waggon, wain, cart, or other such like carriage with four wheels, having the felines of the wheels thereof of the breadth or gauge of four inches and a half, the sum of 4½d." That is an absolute and unconditional power to receive tolls. The [292] 15th section provides and enacts, "that, if any person shall have paid the toll hereby authorized to be taken for the passing of any horse or horses, cattle, beast, carriage, or carriages through any of the turnpikes, toll-gates, side-gates or bars continued or to be erected by virtue of this act, the same horse or horses, cattle, beast, carriage, or carriages, shall, upon a ticket denoting the payment thereof on that day being produced, be permitted to pass and re-pass toll-free (except as hereinafter particularly mentioned), through the same toll-gate, turnpike, side-gate, or bar, and also through such other gate or gates (if any) as the ticket for such payment shall

(a) "All his Majesty's justices of the peace for the time being acting for the counties of Berks, Bucks, Oxford, and Hertford, together with A., B., C., &c., shall be and they are hereby appointed the trustees for carrying this act into execution, so far as the same relates to the first district of the said road; and all his Majesty's justices of the peace for the time being acting for the said counties of Berks, Bucks, Oxford, and Hertford, together with D. E., F., &c., shall be and they are hereby appointed the trustees for carrying this act into execution, so far as the same relates to the second district of the said roads; and all his Majesty's justices of the peace for the time being acting for the said counties of Berks, Bucks, Oxford, and Hertford, together with G., H., I., &c., shall be and they are hereby appointed the trustees for carrying this act into execution, as far as the same relates to the third district of the said roads."

free, at any time during the same day, such day to be computed from twelve of the clock at night to twelve of the clock in the next succeeding night; anything herein contained to the contrary thereof in anywise notwithstanding." Then comes the 16th section, which gives rise to the whole difficulty: it enacts, "that no more than one full toll shall be demanded or taken for or in respect of the same horses, beasts, or cattle, except as hereinafter mentioned (a), for passing on the same day (such day to be computed as aforesaid) through all or any of the toll-gates, turnpikes, or side-gates along the whole line of the said roads." The question is, whether that means that the payment of one toll in district A. shall clear the gates in districts B. and C., or whether it means that there shall not be more than one full toll taken for passing through any of the gates in the manner mentioned in ss. 14 and 15. If the former be the true construction of the 16th section, the 15th section is altogether destroyed; there is no necessity for any ticket at all. The court will give effect to the general intention of the legislature, taking [293] all the clauses together. [Williams, J. The difficulty is in grammatically construing the words imposing the tax.] The 14th section gives the right to take the toll at every gate, and each time of passing through. [Williams, J. Not necessarily.] The 15th section evidently was intended to put a limit upon what might otherwise have been done under s. 14. The question is, whether the trustees acting for one district are empowered to issue tickets to free gates in the other two districts.

D. Seymour, *contra*. The division into districts is for the convenience of management only, and not with a view to the imposition or collection of tolls: this abundantly appears from the 8th, 9th, and 10th sections, which speak of meetings to be held and acts to be done by "the trustees for all the said districts, or any five or more of them." The power given by s. 14 is, to demand and receive tolls at the turnpikes, not at each of them. Suppose there were three gates; the maximum toll allowed to be taken being 4½d.; and 3d. is taken at gate A., and 1½d. at gate B.,—would not that entitle the traveller to pass through gate C. without paying a further toll on the same day? Having paid 3d. for gate A., the party would be entitled to repass that gate, by s. 15. Having paid an additional 1½d. for gate B., by virtue of ss. 15 and 16 he would be entitled to pass and repass all the gates on the line. If the argument on the other side be tenable, the trustees would be entitled to demand 4½d. for passing and repassing each of the ten gates, or, at all events, for passing and repassing through the several gates of each district or division. This would be to deprive the 16th section of any effect whatever. [Williams, J. I must confess I do not see why a ticket given at one gate, one full toll having been paid, should not, under ss. 15 and 16, free the traveller passing and repassing all the gates on the line.]

[294] Manisty, *in reply*. The trustees have no power to subdivide the toll, taking part at one gate and part at another. [Williams, J. They would have a general power to regulate the tolls by the 3 G. 4, c. 126.] To reduce, but not to subdivide. [Williams, J. What is the meaning of "one full toll?" Does it not imply that there may be tolls which are not "full tolls?" Crowder, J. Who are the trustees spoken of in s. 15?] The trustees appointed by s. 5. "The said trustees" must mean the trustees acting within each district: those appointed for the first district have no power to act in the second and third districts. It is as if there had been three separate trusts. [Williams, J., referred to *Hopkins v. Thorogood*, 2 B. & Ad. 916. By a turnpike act, a certain toll was to be taken at every turnpike on the roads from W. to O. for four horses drawing any carriage, &c.: a subsequent section provided that no person should pay toll more than once in the same day for passing or re-passing with the same horses or carriages through any of the turnpikes, but that every person, after having paid toll once, and producing a ticket, should pass with the same horses and carriages toll-free during such day: and it was held that a second toll was payable for passing on the same day two toll-gates on the road with the same carriage, but drawn by different horses; for, that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment.] Every toll must be single and uniform.

WILLIAMS, J. I am of opinion that the conviction in this case must be confirmed.

(a) The exceptions are, the same horse, &c., drawing a different waggon or carriage, s. 17; and stage coaches, or post chaises with a fresh hiring, s. 18.

There certainly is considerable difficulty in reconciling the 16th section of this act of parliament with the provisions of the 15th. But we are bound to consider this act as a re-[295]-enactment of the former acts respecting the same road (a); and we find that the new act for the first time introduces this clause. We have, therefore, to construe an enactment which the legislature has intended not as part of a general act, but an addition to the then governing statute. The ordinary natural and grammatical construction of the clause is plain: it says, in language which admits of no doubt, that "no more than one full toll shall be demanded or taken for or in respect of the same horses, beasts, or cattle, for passing on the same day through all or any of the toll-gates, turnpikes, or side-gates along the whole line of the said roads." That is a plain and positive enactment that only one full toll shall be taken along the whole line. The question is, whether the difficulty of reconciling that section with the language of the 15th is enough to justify us in altogether rejecting it, and declining to give it any operation whatever. It is not merely that this is the natural and grammatical construction of the section: but there is no other possible construction which can be suggested, so as to give it any effect at all; for, if it be held to mean one full toll at any one gate, that is already provided for by s. 14. In effect, we are asked to decline altogether to give effect to s. 16. I find that this is by no means a new clause with reference to acts of parliament of this description. There was a similar one in the act upon which the question in *Hopkins v. Thorogood*, 2 B. & Ad. 916, arose. In the course of the argument, my Brother Willes called for a volume of the local and personal acts of about the period, and he there finds an act,—the 4 G. 4, c. cix.,—which provides (s. 16) "that no person shall be liable to the payment of more than two full tolls for passing or re-passing, with the same horse, beast, cattle, or carriage on the same day (such day to [296] be computed from twelve of the clock at night to twelve of the clock in the next succeeding night), through all the gates or turnpikes erected or to be erected on the whole length of the said road, and that only one toll shall be taken at any time or times during the same day at the same gate for or in respect of the same horse, beast, cattle, or carriage, upon a ticket being produced denoting such payment having been so made for and in respect of the same on that day." And in the same volume I find another act,—4 G. 4, c. civ.,—which contains a section (s. 20) in a similar manner limiting the number of tolls to be taken on the whole line of roads. It is obvious, therefore, that the legislature in passing these acts has thought it right to make a provision for one or more tolls clearing the whole line of road over which the trustees have control. I do not think we should be justified in rejecting so positive an enactment as that contained in the 16th section of this act, because we find it difficult to reconcile it with the 15th section.

CROWDER, J. I am entirely of the same opinion, though I must confess I have arrived at this conclusion after very considerable hesitation. The 16th section, looked at alone, is free from ambiguity. The intention of the legislature is there fully and clearly expressed, viz. that there shall be but one single maximum toll. The embarrassment arises from the 15th section, which it seems difficult to construe together with the 16th. It may be that there might be a reduced toll imposed which at certain portions of the line of road might be so applied that a person might pay such reduced toll twice over and yet not pay more than one "full toll." Putting the construction we do upon the 16th section, I do not see how there can by reason of the 15th section be any ticket for a full toll that will not clear the [297] whole line. We cannot, in order to give effect to s. 15, alter the words of s. 16. Upon the whole, I think it is manifest that the legislature intended that there should be but one full toll for traversing the entire line of road.

WILLES, J. I am of the same opinion. From my recollection of the mode of framing these acts, and looking at the acts of parliament to which my Brother Williams has referred, and which contain sections similar to the 16th section of this act, I find this to be a very common provision. In all the acts a distinction is made between passing and re-passing; and a provision similar to that of the 15th section here is generally introduced for the purpose of freeing parties from toll for re-passing through the same gate. Clauses similar to the 16th are also found in the 4 G. 4, c. cv., s. 17, and the 4 G. 4, c. cviii., s. 16. In those provisions which are parallel to the 16th section here, the payment must be intended to clear more than the particular gate.

(a) 8 G. 3, c. i.: 27 G. 3, c. lxxxi.: 49 G. 3, c. xevii.

With the light thrown upon the subject by what the legislature appear to have done upon so many other occasions, I think it is abundantly clear that by payment of one full toll the respondent became entitled to pass through every gate on the line. Reading "full" as "maximum," if the trustees charge the utmost the act authorizes at one gate, they cannot be entitled to claim an additional toll at any of the other gates; though, if a portion only be charged at one gate, they may possibly be entitled to charge up to the maximum at another gate. One impression which I received during the course of the argument,—and it is an impression I have not quite got rid of,—is, that the 16th section may be read as empowering the traveller to pass along the whole line of road, but not to re-pass. If so, then the 15th section (which relates to re-passing) may [298] possibly be reconciled with the 16th. Upon the whole, I agree with my learned Brothers that the decision of the justices was correct, and that their decision must be affirmed with costs.

Decision affirmed, with costs (a)¹.

[299] BENJAMIN v. ANDREWS. June 22nd, 1858.

[S. C. 27 L. J. M. C. 310; 4 Jur. N. S. 976; 6 W. R. 692. Referred to, *Newcastle v. Workop Urban Council*, [1902] 2 Ch. 159.]

To entitle a party to exemption from penalties for an offence against the Hawkers' Act, 50 G. 3, c. 41, on the ground that the place where he exposed his wares for sale was a public market, it must be shewn that it was a legally established market,—by grant from the Crown,—and not merely a market *de facto*.

This was an action for assaulting and imprisoning the plaintiff under pretence of his having been guilty of an offence punishable by law. Plea, "not guilty, by statute,"—the statute mentioned in the margin being the 50 G. 3, c. 41, ss. 20, 24. Issue thereon.

The cause was tried before Williams, J., at the first sitting in London in Easter Term last. The facts were as follows:—The plaintiff was an unlicensed hawker and was in the habit of attending fairs and markets for the sale of goods. On Saturday, the 16th of January last, he was following his occupation in the market-place in Woolwich, when the defendant, a shop-keeper in the town, gave him into custody for trading without a hawker's licence, and caused him to be carried before a magistrate. He claimed to be within the exemption of the 5th section of the 50 G. 3, c. 41 (a)², on the ground that the place where he was selling his wares was a legally established market. The magistrate thereupon discharged him.

(a)¹ See *Ekin v. Flay*, 1 New Sessions Cases, 561. By a local turnpike-act (4 Vict. c. xx., s. 8), tolls are made payable on horses. By s. 11, it is provided, that, "except as hereinafter provided to the contrary," only one full toll shall be payable for horses passing and re-passing once in the same day. By s. 12, "all horses, &c., except horses or cattle drawing any stage-coach, waggon, or other stage-carriage," returning the same day, shall, on the production of a ticket denoting payment, pass toll free. By s. 13, no horse which shall have paid the toll once, shall be permitted to return toll-free when drawing "another or different waggon, wain, cart, or other such carriage." By sect. 14, horses drawing any post chaise or other carriage travelling for hire shall pay as often as a new hiring takes place. S. 15 provides that no additional toll shall be payable in respect of any stage coach which shall be freed by such ticket on account only of their conveying other passengers, or of the horses or cattle drawing the same having been changed. It was held, that, in respect of the same horses passing through the toll-gate with a stage-coach, and returning the same day with a different stage coach and passengers, only a single toll for each horse was payable, the horses and both coaches belonging to the same proprietor.

(a)² Which enacts "that nothing herein contained shall extend, or be construed to extend, to hinder any person or persons from selling or exposing to sale any sorts of goods or merchandize in any public mart, market or fair legally established within the Kingdom of England, dominion of Wales, and town of Berwick upon Tweed, but such person or persons may do therein as they lawfully might have done before the making of this act; anything herein contained to the contrary notwithstanding."

On the part of the defendant, it was insisted that the Woolwich market-day was Friday, and not Saturday: and letters-patent of James the First, were produced, whereby a market was granted to those under [300] whom Sir Thomas Wilson held, to be holden on Friday in every week; and it was shewn by the evidence of Sir Thomas Wilson's Steward, that, upon the spot where the market had formerly been held, and which was changed in the year 1843, a board had stood for many years, upon which the tolls for standings were painted, and which stated the market-day to be Friday.

On the part of the plaintiff, evidence was given shewing that for the last twenty or twenty-five years a market had de facto been held every day, and particularly on Saturday, and that the owner of the land, Sir Thomas Wilson, was in the habit of receiving toll every day, as well as Friday, from the plaintiff and others who like him frequented the market.

The learned judge left it to the jury to say,—first, whether there was a market de facto held on every day of the week besides Friday, and particularly on Saturday,—secondly, whether they would presume from the evidence a grant from the Crown to hold the market on every day,—thirdly, whether they were satisfied that a market had been held on the Saturday, as of right, for more than twenty years.

The jury found that there had de facto been a market held on the Saturday for more than twenty years, but that there was no evidence from which they could presume a grant for that purpose: and they returned a verdict for the plaintiff, damages 20l.

Parry, Serjt., on a subsequent day in the same term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a nonsuit. [Crowder, J., referred to *Jenkins v. Harvey*, 2 C. M. & R. 393.]

Skinner, Q. C., and Kemplay, now shewed cause. The question is whether the defendant was justified in causing the plaintiff to be apprehended under the [301] Hawkers' Act: and that will depend upon whether or not the place where the alleged offence was committed was a market legally established within the meaning of the 5th section of the act. The act is a highly penal one, and must be construed strictly. Now, it is impossible that a man who frequents a market can know whether it is held under a legal grant or not. There was abundant evidence that the Saturday's market had existed for from twenty to twenty-five years; and the jury found that that was established. It is submitted that that which was recognized and carried out practically as a market, must, for the purposes of this act, be assumed to have had a legal origin. In *Holcroft v. Heel*, 1 Bos. & P. 400, it was held, that, if the grantee of a market under letters-patent from the Crown suffer another to erect a market in his neighbourhood, and use it for the space of twenty-three years without interruption, he is by such user barred of his action on the case for disturbance of his market. [Williams, J. Referring to that case, Le Blanc, J., in *Campbell v. Wilson*, 3 East, 302, says: "In the case of *Holcroft v. Heel*, the court of Common Pleas thought the adverse possession for above twenty years so strong evidence that the Chief Justice ought to have left it to the jury to find a grant of the market from the Crown."] If the evidence was such as would have justified the jury in presuming a grant, the learned judge should have told them to do so: *Jenkins v. Harvey*, 1 C. M. & R. 877; *Gibson v. Doeg*, 2 Hurlst. & N. 615. [Williams, J. If I was wrong, you should not have taken a verdict: you should have complained of my direction. I cautioned you, and I left it upon Lord Tenterden's Act, 2 & 3 W. 4, c. 71, according to your wishes. [Byles, J. *Jenkins v. Harvey*, 1 C. M. & R. 877, seems to shew that this case was correctly left to the jury.] Then, the arrest of the plaintiff was altogether illegal and [302] unwarranted by the act. The offence with which the plaintiff was charged was punishable by a fine of 10l. under s. 17, which enacts "that, if any such hawker, &c., shall trade as aforesaid without, or contrary to, or otherwise than as shall be allowed by such licence, such person shall, for each and every such offence, forfeit the sum of 10l. to be recovered and applied as hereinafter mentioned; and that, if any person trading under or by virtue of any licence to him or her granted as aforesaid, upon demand made by any person or persons authorized or appointed to demand any such licence by the commissioners for licensing hawkers, &c., for the time being, or any two of them, under their hands and seals, and upon producing or shewing such authority or appointment to such person so trading as last aforesaid, or upon demand made by any justice of the peace, mayor, constable, or other officer of the peace of any county, &c., or place

where he or she shall so trade, or by any officer of the customs or excise, or by any person to whom such hawker, &c. shall offer any goods for sale, shall refuse to produce and shew his or her licence for so trading as aforesaid, or shall not have his or her licence ready to produce and shew unto such person authorized or appointed as last aforesaid, or unto such justice of the peace, &c.,—that then the person so refusing or not having his or her licence ready to produce and shew as aforesaid, shall forfeit 10l., to be recovered and applied as thereafter mentioned, and, for non-payment thereof, shall suffer as a common vagrant, and be committed to the house of correction." The 18th section imposes a penalty of 300l. for forging or counterfeiting a licence. The 19th section imposes a penalty of 40l. for borrowing or lending a licence. Then comes s. 20, which enacts "that it shall be lawful for any person or persons whatsoever to seize and detain any such hawker, &c., who shall be found trad-[303]-ing without a licence contrary to this act, or who, being found trading, shall refuse or neglect to produce to such person or persons a licence according to this act, after being required so to do, for a reasonable time, in order to give notice to a constable, &c., who are hereby required to carry such person so seized, unless they shall in the mean time produce their respective licences, before some one of his Majesty's justices of the peace of the county or place where such offence or offences shall be committed, which said justice of the peace is hereby authorized and strictly required to examine into the fact or facts charged; and upon the proof, either by confession of the party offending, or by the oath of one or more credible witness or witnesses (which the said justice is hereby empowered to administer), that the person so brought before him had so traded as aforesaid, and no such licence being produced by such offender before the said justice, to convict the offender so trading without a licence; and thereupon it shall be lawful for such justice, and he is hereby required, by warrant under his hand and seal, to cause the said sum of 40l. to be levied by distress and sale of the goods, wares, or merchandize of such offender or offenders, or of the goods which such offender or offenders shall be found trading [with] as aforesaid, rendering the overplus, if any be, to the owner or owners thereof, after deducting the reasonable charges for making such distress, and out of the said sale to pay the said respective penalties and forfeitures aforesaid, and in the meantime to commit such offender to the common goal or house of correction for the county, &c., where the said offence shall be committed, there to remain until the said penalties and forfeitures, and the reasonable charges of taking the said distress, shall be levied by such distress and sale as aforesaid, or until the same shall be otherwise paid or satisfied by [304] such offender." That in terms applies only to the penalty mentioned in s. 19, and not to that imposed by s. 17. [W. C. Harrison. In *The King v. McGill*, 2 B. & C. 142, 3 D. & R. 377, Bayley, J., intimates that this was a mere mistake, and that the sum in the 20th section should have been 10l., and not 40l.] That case is in reality an authority in the plaintiff's favour. [Williams, J. It is impossible to apply the 20th section to the offence described in s. 19.]

Parry, Serjt. (with whom were Hawkins and W. C. Harrison), was stopped by the court.

WILLIAMS, J. I regret to say that I entertain no doubt that this rule must be made absolute. Two questions arise, —first, whether the plaintiff is protected from incurring a penalty which he would have incurred upon the facts, if the provision contained in the 5th section of the 50 G. 3, c. 41, had not been there, by reason of his having hawked, sold, and exposed goods in a market legally established; and upon that the only question is whether the Saturday market where he did so was a legally constituted market within the act. It is clear that it was a market *de facto*: and it certainly is extremely hard that a hawker, who has no means of knowing whether the market is rightfully held or not, should be subjected to the highly penal consequences imposed by this act because some person has chosen to exercise a right which the law does not give him. But, on the other hand, it would equally be unjust that unlicensed persons should be permitted, to the detriment of the shopkeepers in the neighbourhood, to carry on their dealings in a place where there is no pretence for saying that a market is held with any colour of right at all. Upon the whole, I think, we are driven to give the words their ordinary [305] and natural construction, and to hold that a market legally established must be a legal market, and that those words are not satisfied by shewing a market *de facto*. That being so, the only question is whether this was a legal market. Now, a market cannot be a legal market without a

grant. Here, the jury negatived any grant authorizing the Saturday market. That is the result of their finding. They also found that there had been an enjoyment as of right for more than twenty years, if Lord Tenterden's Act was applicable. But that was considered, and very properly so, not to be an arguable point. That finding, therefore, became inefficacious. The course taken at the trial was this,—The plaintiff insisted that he was entitled to a verdict. Several objections were urged against it; and I left three questions to the jury, upon which they found,—first, that there was a market *de facto*,—secondly, that there was no grant,—thirdly, that there had been an enjoyment as of right for more than twenty years; and they assessed the damages at 20*l*. I thereupon directed a verdict to be entered for the plaintiff, with liberty to the defendant to move to enter the verdict for him if the court should think the action not maintainable. If the learned counsel for the plaintiff had conceived that he was prejudiced by the way in which the case was left to the jury, or with the mode of dealing with the verdict, they should have asked to have the verdict entered the other way, with leave to them to move, or they might have come with a cross-motion. No such course, however, was taken; and all that remains for us now is, to say whether upon this finding the defendant is entitled to have the verdict entered for him. The court being of opinion that the defendant is entitled to a verdict, it becomes immaterial to consider whether there was any misdirection, or any failure of justice through the finding of the jury; though I do not think there has been either. Mr. [306] Skinner put both the facts and the law very clearly to the jury, telling them that they might presume a grant, if they found nothing inconsistent with it, observing upon the long exercise of the right without resistance, and freely canvassing the conflicting evidence: and I certainly aided the plaintiff's case as much as I thought I ought to do, and directed the jury exactly in accordance with the view which the learned counsel had presented. The remaining question is, whether the defendant had any authority under the act of parliament to apprehend the plaintiff. Unquestionably the 20th section is very clumsily drawn: for, not only is there the blunder of inserting 40*l*., when the context would lead to the inference that 10*l*. was intended, but it begins by enacting that it shall be lawful for any person or persons whatsoever to seize and detain any hawker, &c. who shall be found trading without a licence, or who, being found trading, shall refuse or neglect to produce his licence, and cause him to be carried before a justice; and then it goes on to say that the justice, upon proof that the person so brought before him had so traded as aforesaid, and no such licence being produced, may convict the offender "so trading without a licence," omitting the other alternative, or "refusing or neglecting to produce such licence." Nothing can be more clumsy: and, if it rested upon that section alone, I must own I should have felt some difficulty in knowing how to deal with it, if it was not for the elaborate judgment of Bayley, J., in *The King v. McGill*, which shews that the 40*l*. was by mistake inserted instead of 10*l*. We must follow that decision. The consequence is, that the defendant had authority under s. 20 to cause the plaintiff to be arrested, and, there being no proof that this was a legal market, the plaintiff was not within the protection of the 5th section. The rule, therefore, must be made absolute.

[307] WILLES, J. I am of the same opinion. I am not dissatisfied with the result at which the jury arrived; and, if I were so, it would be of no avail. They found that Sir Thomas Wilson had no grant enabling him to hold a market on the locus in quo upon the day in question. I think that, when we consider the statement made by Sir Thomas Wilson's agent as to the board, giving public notice of a market held on the Friday, and making no mention of any other, the fair and only conclusion that could be arrived at was, that there was no grant but that which appeared. The absence of the circumstances I have referred to might have rendered it competent to the jury, upon the other evidence in the case, to presume a grant: but, with those circumstances, I think it would have been trifling with the truth to have come to any other result than they did. I feel so strongly the necessity of upholding rights the only evidence of which rests upon usage, that I am disposed to give every fair latitude to the mode of proof. But here I think there was no evidence upon which the jury could safely act. Lord Tenterden's Act is clearly inapplicable. Then, the plaintiff, an unlicensed hawker, being found trading in a place which was not a legal market, I am of opinion that the defendant was justified in causing him to be arrested under the 20th section of the 50 G. 3, c. 41. I feel all the difficulties which have been suggested as to the construction of that section. But these difficulties were met in

the case of *The King v. McGill*, 2 B. & C. 142, 3 D. & R. 377, and also in *The King v. Webbsell*, 2 B. & C. 136, 3 D. & R. 360. The result of an elaborate discussion in those cases is, that 40l. had crept into the 20th section by mistake instead of 10l. In the former acts upon the subject, there appear to have been parallel sections to the 17th and 20th, but none parallel to the 19th. Upon the authority, there-^[308]fore, of those cases, as well as upon the general principle that a false description should be rejected if there be sufficient without it to enable us to form a judgment, I am of opinion that the act of the defendant was justifiable, and that the rule to enter a verdict for him must be made absolute.

BYLES, J. I am of the same opinion. I entertained some doubt at first whether the case was properly left to the jury: but I am now satisfied that it was properly left, according to the rule laid down by the court of Exchequer in *Jenkins v. Harvey*: and, further, I think the jury came to the right conclusion. As to the construction of the 20th section of the 50 G. 3, c. 41, I agree with the rest of the court in thinking that 40l. was inserted per incuriam. It is impossible to come to any sensible construction upon it without doing some violence to its language. I think there has been no miscarriage, and that the jury arrived at a proper conclusion under a proper direction.

Rule absolute.

[309] IN THE MATTER OF THE COMPLAINT OF JOSEPH BAXENDALE AND OTHERS, CARRYING ON BUSINESS UNDER THE FIRM OF PICKFORD & Co., Common Carriers, AGAINST THE GREAT WESTERN RAILWAY COMPANY. Nov. 9th, 1858.

[S. C. 28 L. J. C. P. 69; 4 Jur. N. S. 1241; 7 W. R. 54.]

It is not a legitimate ground for giving a preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question: and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business.—The complainants were common carriers from Bristol to London, using for that purpose the Great Western Railway. They were also common carriers from Bristol to various other places, using for that purpose lines in rivalry with the Great Western lines other than that from Bristol to London. One S., a paper-maker near Bristol, who was in the habit of sending large quantities of paper to London and also to the other places before mentioned, prior to August, 1857, employed the complainants to carry his paper to London and deliver it there; and the complainants employed the company to carry it on their railway from the station at Bristol (where it was delivered by S.) to the station at Paddington, whence it was carted by the complainants to its destination in London. The company's charge at that time was 22s. 1d. per ton,—being their rate for first-class goods, less 1s. 6d. per ton for cartage to the station at Bristol, and 3s. 4d. per ton for cartage from the station at Paddington. The 1s. 6d. per ton was allowed to S., the paper being delivered at the station at Bristol by him; and the complainants made their profit upon the cartage in London. In August, 1857, the company raised their charge for this paper to 35s. per ton, being their rate for third-class goods, less cartage. The complainants in consequence made a proportionate increase in their charge to S., who objected to it. The company declined to alter this charge; but they subsequently agreed with S. to carry his paper from the station at Bristol to London for 23s. 4d. per ton, including cartage from Paddington,—in order, as the complainants alleged, to induce S. to send his paper through them, instead of through the complainants, as formerly.—Upon a motion for an injunction under the Railway Traffic Act, 1854, the company sought to justify this preference by alleging, that they carried for S. upon the terms of a special agreement containing stipulations so much to their advantage as to be worth the whole difference of charge: that the rate of 23s. 4d. per ton was agreed upon for paper between Bristol and London (to include cartage in London, but not at Bristol); that the paper carried at that rate was to be at the risk of S., who was also to send all other goods he had to send, at the ordinary rates, by the company, and also to send all his goods (including paper) which were going to any place to

which the company carried, by them : and that it was a great gain to the company, and a fair equivalent for the difference of charge upon the goods carried from Bristol to London, to have the advantage which they derived by securing the whole of S.'s traffic, or that in which he had any interest or could influence, to the north of England and elsewhere upon their lines other than between Bristol and London, together with the advantage of the goods being carried from Bristol to London at S.'s risk :—Held, that the advantages thus stipulated for were wholly distinct from and did not affect the price or profit of the carriage from Bristol to London, and ought not to be taken into account in determining the charge for such carriage ; and consequently, that the complainants were entitled to relief.

C. Pollock, in Easter Term last, obtained a rule on behalf of Messrs. Baxendale, calling upon the Great Western Railway Company to shew cause why a writ of injunction should not issue against the company, pursuant to [310] the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, enjoining the said company to carry paper and other goods in their third class of goods for the complainants from Bristol to London at the same rates that they charged to one William Somerville ; and also enjoining them to desist from charging William Somerville less for the carriage of paper from Bristol to London than they charged to other persons, and less than they charged for the carriage of other goods of the third class ; and also enjoining them to desist from charging the said complainants more than they charged the said William Somerville for the carriage of paper manufactured by him and sent by him from Bristol to London,—with costs.

The affidavits upon which the rule was moved stated in substance as follows :—That the complainants carried on the business of common carriers, under the firm of Pickford & Co., between Bristol and London, employing for that purpose the railway of the Great Western Railway Company from Bristol to Paddington : That, amongst other goods which the complainants prior to October, 1857, were in the habit of sending by the said railway from Bristol to Paddington, was certain paper manufactured by one William Somerville, at Bitton, near Bristol : That, prior to August, 1857, the company were in the habit of charging the complainants 22s. 1d. per ton for the carriage of the said paper, less 1s. 6d. per ton for cartage to the station at Bristol, and less 3s. 4d. for cartage from the station at Paddington ; but in that month they increased their charge to 35s. per ton, less the said sums of 1s. 6d. per ton and 3s. 4d. per ton for cartage as aforesaid : That Somerville was in the habit of delivering the said paper to the company's station at Bristol, consigned to the complainants at Paddington, where the complainants received it, and carted it to the address of the consignees in London, charging Somerville the same rate as the company charged them,—their only profit being, the deduction of 3s. 4d. per ton allowed by the company for cartage : That, in consequence of the company having raised their said rate as thereinbefore mentioned, the complainants were obliged to make a similar increase in their charge to Somerville : That Somerville having in September last complained to the agent of the complainants at Bristol of the increased rate charged, and having intimated, that, unless it was reduced, he should send his paper from Bristol by sea, instead of by railway, the complainants wrote to the company's goods manager on the 24th of October, 1857, as follows :—"We have been in the habit of forwarding a considerable quantity of paper from Bristol to Paddington : the weight averages about 240 tons annually, which until lately was charged by you at the first-class rate, 22s. 1d. per ton ; but, when the alteration in August took place, you commenced charging it at the third-class rate, 35s. per ton, which we were of course obliged to charge to the sender, who now informs us, if not conveyed at the first-class rate, he shall discontinue sending it by rail, as he can get it taken at a considerably less rate by sea. We shall be glad to know if, under the circumstances, you will consent to charge all future lots at the present first-class rate, and thus keep the trade in the railway company's hands : " That the company declined to reduce the charge : That the complainants having shortly afterwards learned that the company had reduced their rate to Somerville to 23s. 4d. per ton, including cartage from Paddington, in order to induce him to send his paper through the company, instead of through the complainants, as he had previously done, the complainants, on the 2nd of December, 1857, wrote to the company, as follows,—"We have been much surprised to find that your Bristol district manager, after refusing [312] to make any reduction

in the rate charged to us for paper from Bristol to London, has gone behind our backs to our customer Mr. Somerville, and made an arrangement with him to carry his paper at about 10s. per ton less than the company were in the habit of charging to us when Mr. Somerville employed us instead of you to cart it to London. We cannot suppose for a moment that the company will sanction such dishonourable as well as illegal conduct on the part of one of their managers; but, unless it is discontinued immediately, and we are allowed to carry Mr. Somerville's paper at the same reduced rate as you are now charging him, we shall place the matter in the hands of our solicitors, and instruct them to take legal measures to obtain compensation for the injury done to us, and to protect us from a repetition of it." That, on the 4th of December, the complainants received a letter from the secretary of the company, as follows,—“I am desired to acknowledge the receipt of your letter of the 2nd, addressed to the directors, upon which they will give their instructions at the next meeting of the board. As you acquaint them with your intention to resort to legal measures, they think it may be proper to refer your letter to their own solicitors before they reply to it.” That, on the 16th of December, the complainants received a further letter from the company's secretary, as follows,—“The directors of this company desire me to acquaint you, in reply to your letter of the 2nd instant, that they must decline to lower any of their proper rates for the conveyance of goods, excepting in cases where a special agreement may enable the board to do so with mutual advantage, upon conditions to which both may assent. The board presumes that it is not your intention to undertake to transmit by this railway all the traffic which you can obtain for the places to which this company are carriers, inasmuch [313] as they know that you are engaged in taking away by other lines as much as you can obtain and influence. If they are mistaken in this view, you will be kind enough to submit any proposal which may enable the board to enter into any special agreement with your firm, in consideration of which terms, it may be in their power to meet your request.” That, on the 21st of December, the complainants wrote to the company as follows,—“We have to acknowledge your letter of the 16th instant. In your reply, you seem altogether to overlook the fact, that, in charging us more than your other customers, you are acting illegally and in direct violation of the Railway Traffic Act; and, besides, even upon your own argument, we should be entitled to be put upon the footing we seek, as we not only use your line exclusively for our traffic between Bristol and London, but bring you as large a traffic between those points as any other person.” That, on the 2nd of January, 1858, the company's secretary replied as follows:—“Your letter of the 21st ult. has been laid before the board. The directors can perceive no reason for altering their former decision upon the question raised: and they desire me to inform you that they have no other reply to give to your communication.” That the quantity of third-class goods which the complainants sent from Bristol to London by the Great Western Railway Company in the course of every month considerably exceeded the quantity of paper sent from Bristol to London by Somerville through them in the same period: That the paper in question came within the description of paper mentioned in the third class of rates which before September last and since, and thence to the present time, had been in use by the company: That Somerville was in the habit of sending all his paper through the complainants by the Great Western railway, and was willing and desi-[314]-rous to continue to do so, if the company would charge the complainants the same rate as they charged him: That the paper now carried by the company was the same description of paper that was formerly carried through the complainants: That the company lowered their rates to Somerville, in order to give a preference to him and to themselves, and to prevent him from employing the complainants, and that it had had that effect, and the complainants were materially prejudiced and injured by being deprived of the carrying and cartage of the said paper, and the company got the benefit of it: That there was, it was believed, some special agreement between the company and Somerville: that there were no circumstances sufficient to justify the difference of charge made to him: and that the cost to the company of carrying the said paper for Somerville was precisely the same as the cost of carrying it for the complainants; and that it was carried by the same description of trains and in the same quantities that it would have been carried for the complainants, if sent through them.

Sir Fitzroy Kelly, Q. C., and Field, in Trinity term, shewed cause, upon the affidavits of James Grierson, the general superintendent of the company's goods traffic, and of

Charles Wilkinson, a person employed by the company at Bristol to canvas for goods traffic and collect accounts.

The former stated in substance as follows,—That all goods are, for the convenience of making rates from and to the various stations of the company, divided into classes, but the goods in any one of the said classes are of various descriptions, and are quite distinct from each other, and the risk, expense, and trouble of carriage to the said company of any one article in each class is not in the same proportion as the risk, expense, [315] and trouble of the other articles contained in the same class: That the said classes, and the rates founded upon them, express the terms upon which the company are willing as a general rule to carry the goods mentioned in them; and other railway companies adopt similar classifications; but it is the practice of all companies and carriers to depart from such rates in those cases where, by reason of any particular circumstances, it is to the advantage or convenience of either sender or carrier to make special agreements: That writing-paper is in the third class, and the rate since August last for all goods in that class from Bristol to London had been 35s. a ton, including 1s. 6d. for cartage at Bristol, and 3s. 4d. for cartage in London, which sums respectively were allowed to parties carting their own goods to or from the stations at either end of the journey, and such rate included the usual carrier's risk, which was borne by the company: That the company were the proprietors of, and carriers of goods upon, other railways besides their line from Bristol to Paddington, that is to say, as well to Birmingham, Manchester, Liverpool, and the north of England, as also to Salisbury, Weymouth, and other places in the south west, and it was of great importance to the company to acquire and increase such last-mentioned traffic: That the Midland and other lines of railway were competing carriers for such last-mentioned traffic, and the complainants were also competing carriers for the same, either on their own account or as agents for such other companies: and the complainants, as the deponent had been informed and believed, did not send any goods from or to Bristol by the Great Western railway other than they could avoid *, but sent by such other competing lines all goods over which they had any control or influence: That Mr. Somerville was a very extensive manufacturer: and had been in the habit of send-[316]-ing large quantities of paper to the north of England, and which paper had been carried by other lines than the Great Western Railway, and that Somerville was also in the habit of receiving large quantities of materials and other goods, and used formerly to send his goods by the said company direct, but that he was solicited and induced by the complainants or their agents to carry with them instead: That, it being of great importance to the company as well to obtain all Somerville's carrying and also that which he could influence to be carried over any of the company's lines of railway, the deponent directed the company's agent in Bristol, Mr. Wilkinson, to ascertain whether and upon what terms he would be willing to come under an engagement to that effect; and, after some negotiation and correspondence, the deponent wrote to Somerville, and offered him a rate of 27s. 6d. a ton on a contract to send all his goods; and to this the deponent received the following reply, dated 7th November, 1857,—“Sir,—27s. 6d. per ton will not meet my views. I have already sent a few lots past you, which I have no wish to do, as I prefer the railway to steamer at all times. I shall not make a final arrangement with all my goods till I hear from you. I prefer sending all by same conveyance, instead of a part by steamer, and a part by you:” That, Somerville having refused to give this rate, the deponent directed Wilkinson to endeavour to arrange a rate with him, and wrote to Somerville to that effect; and subsequently a rate of 23s. 4d. a ton was agreed upon for paper between Bristol and London, which was to include the cartage in London, but not at Bristol, and the paper carried at that rate was to be at the risk of Somerville, who was also to send all other goods he had to send at the ordinary rates by the company, and also to send all his goods, including paper, by the said company, which were going to any place to [317] which the said company directed: That the deponent considered it a great gain to the company to have secured the whole of Somerville's traffic, and a fair equivalent, with the absence of risk on their part, for the reduction in the rate on the one article of paper between Bristol and London, the risk in carrying paper of damaging it being considerable, and particularly paper supplied, as the paper in question was, to a government department: That there was no other person who sent paper from Bristol to London in any quantity

* Sic.

except Somerville : That the complainants are agents for the Midland Railway Company and the London and North Western Railway Company, and would not agree to similar terms to those agreed to by Somerville : That, if they would so agree, the company would enter into a similar agreement with them for the carriage of paper from Bristol to London : That the complainants were constantly endeavouring to obtain the customers of the company, and succeeded in so doing, making contracts or otherwise so as to secure the traffic to themselves : That it is the universal practice with railway companies to enter into special contracts under circumstances similar to that of Somerville, and especially when there is a large quantity of one kind of goods, and two modes of conveyance : and that the deponent believed it was necessary for the fair carrying on of business to allow of such arrangements.

Wilkinson's affidavit was in substance as follows,—That, prior to August last, the company charged for writing-paper from Bristol to London 22s. 1d. a ton where a larger quantity was sent at one time than 6 cwt., and 33s. 4d. a ton for smaller quantities than 6 cwt. sent at one time, and these rates respectively included a charge of 1s. 6d. a ton for cartage at Bristol, and 3s. 4d. a ton for cartage in London, which were respectively allowed to those persons who did the cart-[318]-age themselves : That, in August last, the rates were altered for writing-paper into one general rate irrespective of the quantities sent at one time, except when it was sent as a parcel, and this rate was 35s. a ton from Bristol to London, which also included the above mentioned charges for cartage in Bristol and London ; but the goods charged for at this rate were carried at the company's risk ; and that the complainants were in the habit of sending paper at those rates from Bristol to London, but which chiefly belonged to Somerville : That, in consequence of instructions from Mr. Grierson, the company's general superintendent, the deponent put himself in communication with Somerville, and that, after much discussion about reducing the rates, it was agreed between the deponent and Somerville that Somerville should send all goods of every description over which he had the power to direct the mode of carriage, and which might be going to any place where the Great Western company carried, by the said company ; and that, in consideration of his so agreeing, the deponent agreed on the part of the company that Somerville's writing-paper from Bristol to London should be carried for 23s. 4d. per ton, including cartage to London, but not including the cartage at Bristol ; but at this rate the paper was to go at Somerville's risk : That Somerville also promised to use his influence with those who supplied him with goods carriage paid, to send them by the Great Western Railway Company's railway, but he stipulated, as to goods going to places where there were other railways, that the charges to be made by the company should not be more than other railway companies charged to those places : That, for some time prior to the date of this agreement, Somerville had received at Bristol large quantities of rags, and some other goods, which did not generally travel by the lines of railway of the said [319] company, but were carried on rival lines ; and he had also sent from time to time large quantities of paper to places where the Great Western Railway Company carried, besides London, on other rival railways : That the Great Western Railway Company carried goods to the north of England as far as Manchester and Liverpool, and to intermediate stations, and also southward to Salisbury and Weymouth, to which places there was a keen competition with other railway companies, and also to a very great many other places in England besides London ; and it was a great advantage to the company to obtain a promise of the carriage of all Somerville's goods : That the deponent communicated the above arrangement to Grierson, and he wished him to have the terms agreed upon put into writing, and accordingly Somerville, on the 9th of December, 1857, addressed a letter to the deponent, as follows,—"I am quite willing to send all my papers by your company to the various places at which you deliver, on condition that your rates are not higher than other railway companies. I shall instruct my people to send all goods by you so long as our arrangement of carrying to London continues : " That, after this date, the agreed rate of 23s. 4d. a ton was charged to Somerville, pursuant to the said arrangement, for paper going from Bristol to London : That, subsequently, in order that the meaning of Somerville in the arrangement might be made quite clear, the deponent was requested to have the agreement put in a more formal shape, and he, at the deponent's request, accordingly, on the 17th of February, 1858, wrote the following letter, for the purpose of explaining the agreement,—"In consideration of your charging me for the conveyance

of paper at my exclusive risk from Bristol station to London at 23s. 4d. per ton, delivered within your usual limit, I agree to send by your line all my goods going to stations and [320] places to which you carry : " That the company had carried other goods than paper for Somerville, since the said arrangement, between other places than between Bristol and London, at their ordinary rates,—the reduced rates only applying to paper between Bristol and London, and which said other goods, or some of them, the company would not have carried but for the said arrangement : That the complainants carried on business at Bristol and elsewhere over England in rivalry to the Great Western Railway Company, and in connexion with the Midland Railway Company and other railway companies, for some of which companies they were the agents, and they invariably sent goods that they received for carriage by other routes than the Great Western railway if possible, and, in many instances, they diverted traffic which was intended for the Great Western Railway Company, and sent it on other railways : That the company, for their own convenience, in making out their charges, had made classifications of goods, so that all goods enumerated in each class were charged the same sum per ton, unless carried at the sender's risk or under a special agreement : and that writing-paper sent without any agreement would be charged in the third class, which from Bristol to London was 35s. a ton, inclusive of cartage at Bristol and London, the charge for which was deducted from the rates charged to the complainants, as they carted their own goods : That the goods enumerated in the company's third class, besides paper, were very numerous and distinct, and of various descriptions : that Somerville would be charged the company's ordinary rates for all other goods in that class, except writing-paper, sent to London, in respect of which the said agreement had been made, but the company would undertake in respect of all such goods, and for writing-paper when carried at the rate of 35s. a ton, the usual [321] carrier's risks and liabilities : and that the risk to the company on writing-paper was very considerable, and the more so on Somerville's paper, as he supplied the government chiefly, and his paper was rejected if there was the least defect in or damage done to it : And that the said arrangement was not made to give a preference to Somerville, or to the company, but to secure all his traffic to the company, as aforesaid : and that the deponent thought it was worth the company's while to make that reduction in the terms aforesaid, having regard to their own interest.

Unless the special agreement disclosed by these affidavits be held to be justified, it will be impossible for railway companies to make any special contracts to facilitate the carriage of goods in large quantities, or even to issue season-tickets. [Cockburn, C. J. Those are very different cases: the same advantage is held out to all who choose to avail themselves of it.] The language of the 2nd section of the 17 & 18 Vict. c. 31, is clear, "no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever: nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Is it giving an undue or unreasonable preference to Mr. Somerville, to carry his paper at the lower rate, in consideration of the advantages stipulated for by the company? If, indeed, it could be shewn that the company declined to carry for others at the same rate, under the same circumstances, that might present a case of undue prejudice. But nothing of the sort is suggested here. The court has already, in *Ransome's case*, ante, vol. i., p. 437, decided, that, in dealing with this branch of the section, the [322] fair interests of the company are to be taken into the account. Cresswell, J., in giving the judgment of the court, there says: "The first thing to be ascertained is, the meaning of the expressions 'undue or unreasonable preference or advantage,' and 'undue or unreasonable prejudice or disadvantage.' Are those words to be construed with reference to the interests of the parties using the railway only? or, may the interests of the railway owners be taken in any manner into consideration? Ex. gr. if 1000 tons can be carried for a lower sum per ton than 100 tons, yielding an equal profit per ton to the railway company, may they so regulate the charge as to derive such equal profit? Would the lower rate charged for the larger quantity give an undue preference? Or, if goods can be carried one hundred miles at a lower rate than ten, and yield an equal profit per ton per mile, may the company charge less per mile for those carried one hundred miles, without giving an undue or unreasonable preference? If that may be done without giving what the statute calls an undue

or unreasonable preference, may not the company, in fixing the rates, consider the whole profit, and not the mere profit per mile, and, in order to induce people to carry more on their line, and longer distances, agree to make a deduction in such case? It is true that the sender of smaller quantities for a shorter distance will pay more per mile and more per ton in the respective cases; but, will that be an undue or unreasonable prejudice or disadvantage? After a good deal of consideration, we think that the fair interests of the railway ought to be taken into the account." If that be so as to the company's general tariff, does the circumstance of there being a special contract make any difference? Would it be an undue preference to convey a regiment of soldiers or large number of schoolboys from London to York at a lower [323] rate per head, in consideration of the numbers, than a single individual would be carried for (a)¹? The company profess their readiness to enter into the same contract with any one else that they have made with Somerville. [Cockburn, C. J. One man has goods to carry from A. to B., and thence to C.; another has goods to carry from A. to B.: would the company be justified in charging a higher rate to the latter because he does not also employ them to carry to C.?] The company would be bound to put the parties in exactly the same situation. [Williams, J. Suppose there were two paper-makers at Bristol, each sending large quantities of paper by the railway, and one of them was also a timber-merchant,—could the company say to the latter, "If you will contract to supply us with sleepers at a given price, we will carry your paper for 10s. per ton less than any other paper?"] That would be stipulating for something which would not be for the advantage of the company as carriers. [Cockburn, C. J. You may agree for a lower rate, the owner taking upon himself all the risk of common carriers, provided you do it with all the world.] Then, may not the company enter into a contract for a lower rate, in respect of a larger quantity or a longer distance? [Williams, J. Subject to its being reasonable. They must not swamp the retail dealers.] It is submitted that the statute gives the court no authority to interfere with the freedom of contracts between the company and their customers. [Cockburn, C. J. It is one of the incidents of capital, that the large dealer gets his goods at a lower price than the small dealer. So in the case of carriage. But the question is, whether, in adjusting their rates of charge, the company are acting reasonably, or whether [324] they are not pressing too hardly upon the small dealer. If the latter is subjected to more prejudice than he ought reasonably to sustain, surely that is a matter that is within our province.] If the company are ready to carry at 20s. per ton for every person who will undertake to send 500 tons yearly, is there any law to prevent them from doing so? [Cockburn, C. J. The legislature has taken upon itself to fix the maximum rates (a)², and it has delegated to us the duty of seeing that the rates are imposed with due regard to the interests of the public, and equally. The object of the jurisdiction is, to prevent these great monopolies from degenerating into abuse.] The act itself, in s. 7, recognizes special contracts. [Cockburn, C. J. That does not apply to special contracts for rates of carriage. These special contracts seem to me to be very objectionable. Why not have a graduated scale?] That would be most inconvenient. Is it illegal for a railway company to make special contracts? [Cockburn, C. J. I think it is very questionable. Here, for the purpose of competing with the complainants,—or, rather, depriving them of the trade,—you carry for Somerville for about one-third less than you do for the complainants.] The act applies to railway companies. This is a competition between two rival carriers. [Cockburn, C. J. The complainants are not carriers on your line: they are carried.] In *The Caterham case*, ante, vol. iv., p. 419, Cresswell, J., says: "By the act of parliament in question, very extensive powers are conferred upon this court,—powers which may be exercised for the benefit of the public, but which may also be exercised to the great detriment of those who [325] are engaged in carrying on railway concerns: and therefore the court should be very cautious, before they set on foot an

(a)¹ That would be an arrangement by which nobody could be prejudiced. But, suppose a school consisting of 1000 boys was carried at 10s. a head, while a school of 500 boys was charged 20s. a head?

(a)² This has been questioned (as to the Eastern Counties Railway Company) so far as regards small parcels not exceeding 1 cwt. each. See *Baxendale v. The Eastern Counties Railway Company*, ante, vol. iv., p. 63.

inquiry, to ascertain that there is reasonable ground for believing that the provisions of the act have been infringed."

Bovill, Q. C., and C. Pollock, shewed cause. Wherever there is a difference of charge between one person or class of persons and another, it is incumbent on the company to shew circumstances to justify it: *Ransome's case*, ante, vol. i., p. 437; *Orlade's case*, ante, vol. i., p. 454. In the case of *Harris and the Cockermouth and Workington Railway Company*, ante, vol. iii., p. 693, a railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway: they also made a further reduction, under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway, direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of their traffic: and it was held that neither of these was a justifiable reason for the "undue preference" thus given. [Cockburn, C. J. It is enough for you to say that the company give themselves, as carriers, a preference over the complainants, for the purpose of securing to themselves the advantage of the 3s. 4d. for the delivery in London,—something not incidental to them in the character of a railway company.] In fact, they deprive the complainants of their only source of profit. [Cockburn, C. J. Is it competent to a railway company to make a special contract to carry for an individual, provided [326] they declare their willingness to enter into the like contract with all the world?] The right of the railway company to make special contracts was substantially decided in *Ransome's case*, ante, vol. i., p. 437. [Byles, J. Are they not bound to put up their tariff for all the world (a)? Field. It would be impossible for the company to advertize all their special contracts. Cockburn, C. J. It would, no doubt, be difficult.] The validity of a special contract was virtually allowed in *Orlade's case*, ante, vol. i., p. 454. [Cockburn, C. J. The question was not raised there; but I think it is one that is very deserving of consideration. Since the establishment of railways, there is no longer the wholesome competition which formerly existed between common carriers. The railways have acquired a monopoly of conveyance. The question is, whether the legislature has not intended to prevent these private arrangements, by requiring the exposure of the rates of charge. The question at all events, is one that is deserving of grave consideration.] The 17 & 18 Vict. c. 31, was passed for the express purpose of remedying the insufficiency of the provisions of the 90th section of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20 (b).

Cur. adv. vult.

(a) The 93rd section of the Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, enacts that "a list of all the tolls authorised by the special act to be taken, and which shall be exacted by the company, shall be published, by the same being painted upon one toll board or more in distinct black letters on a white ground, or white letters on a black ground, or by the same being printed in legible characters on paper affixed to such board, and by such board being exhibited in some conspicuous place on the stations or places where such tolls shall be made payable."

(b) See the 51st section of the Great Western Railway Company's Amendment Act, 7 Vict. c. iii., which provides and enacts, "that, in all cases where the said Great Western Railway Company are intrusted with the carriage or delivery of any goods, wares, merchandize, or parcels, or other matters or things, it shall be lawful for the said company to enter into such arrangements as they may think fit with all or any of the persons to whom such goods, wares, or merchandize, parcels, matters, or things may belong, or by whom the same may be brought or sent for conveyance on the said railway, with reference to the warehousing, assortment, weighing, loading or unloading, risk of stowage, and liability to alleged pilferage or damage, or with reference to the collection and delivery of such goods, or with reference to any other special facilities or accommodations afforded to or by the said parties in reference to such goods, wares, merchandize, parcels, matters, or things, and upon such terms and conditions as the company and such parties respectively may be willing to accept and abide by; and it shall also be lawful for the said company to enter into and make such arrangements as they may see fit with any company or person with regard to

[327] WILLES, J., delivered the judgment of the court :—

This was a rule obtained by the persons carrying on business under the firm of Pickford & Co., calling upon the Great Western Railway Company to shew cause [328] why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854, injoining them to desist from an alleged preference to one William Somerville over the complainants in respect of paper manufactured by him, and carried by the defendants from Bristol to London.

The material facts are as follows :—The complainants are common carriers from Bristol to London, using for that purpose the Great Western railway. They are also common carriers from Bristol to various other places, using for that purpose lines in rivalry with the Great Western Railway Company's lines other than that from Bristol to London. William Somerville is a paper manufacturer at Bitton, near Bristol, who is in the habit of sending large quantities of paper to London and also to the other places before mentioned. Prior to August last, Mr. Somerville employed the complainants to carry his paper to London and deliver it there; and the complainants employed the respondents to carry it on their railway from the station at Bristol where it [329] was delivered by Somerville, to the station at Paddington where it was received by Pickford & Co., they delivering it in London. At that time the respondents charged the complainants at the rate of 22s. 1d. per ton, being their charge for first-class goods, including cartage to and from the railway, deducting, in fact, 1s. 6d. for the cartage to the station at Bristol and 3s. 4d. for the cartage in London. The complainants made their profit upon the cartage in London. In the month of August, 1857, the respondents raised the charge for the carriage of the paper from 22s. 1d., the charge for goods of the first class in their printed scale of charges, to 35s. per ton, the charge for goods of the third class in that scale. The complainants in consequence made a proportionate increase in their rate of charge to Somerville. In the following month, Somerville complained of the increased charge, and stated that, unless it was reduced, he would send his goods by sea. A correspondence followed between the complainants and respondents, in which the former endeavoured to persuade the latter to reduce the charge, pointing out that otherwise Somerville's goods would go by sea instead of by railway: but the latter refused to make any reduction. This part of the correspondence closed on the 14th of November, 1857. Shortly afterwards, the complainants learned that the respondents were carrying Somerville's goods at the rate of 23s. 4d. per ton, including cartage from

the collection or delivery of such goods, wares, merchandize, parcels, matters, and things, and upon such terms and conditions, as the company and the parties to such arrangements respectively may be willing to accept and abide by: Provided always, that, if it shall be considered by any such person making use of the said railway that the said company have to his prejudice accorded any special facilities to any other such persons which they are unwilling to accord him, then and in such case it shall be lawful for the party so conceiving himself to be aggrieved to appeal to the court of Quarter Sessions of the county or one of the counties in which such facilities are accorded; and the said court shall have power, and are hereby required, on such application (of which fourteen day's notice shall be given to the company), to appoint a barrister of not less than seven years' standing, or some other competent person not interested in or connected with the railway or the party with whom any such dispute shall arise, to inquire into the matter in difference; and the person so to be appointed shall have power to call before him and to examine all persons whose evidence may be considered necessary to the inquiry, and to require the production of all books, papers, and writings which he may deem requisite or which ought to be produced for the elucidation of the matter referred to him; and, on the report of such person, it shall be lawful for the said court to order and require the said company to admit the party making such appeal to the enjoyment of the same facilities which may at the time be granted by the company to other such persons under the like circumstances, unless it shall be proved to the satisfaction of the person making such inquiry that any wilful fraud or contravention of agreement with the company has been committed by the party making such appeal; and the said company shall in all things conform to and abide by the order which may be so made by the said court upon due consideration of the circumstances under which, and the extent to which such fraud or contravention may have been carried by such party."

Paddington, in order, as the complainants allege, to induce Somerville to send his paper through the respondents, instead of through complainants, as formerly. Thereupon, on the 2nd of December, 1857, the complainants wrote to the respondents, remonstrating upon the course that had been taken, as follows:—"We have been much surprised to find that your Bristol district manager, after refusing to make any reduction [330] in the rate charged to us for paper from Bristol to London, has gone behind our backs to our customer, Mr. Somerville, and made an arrangement with him to carry his paper at about 10s. per ton less than the company were in the habit of charging to us when Mr. Somerville employed us instead of you to cart it to London. We cannot suppose for a moment that the company will sanction such dishonourable as well as illegal conduct on the part of one of their managers: but, unless it is discontinued immediately, and we are allowed to carry Mr. Somerville's paper at the same reduced rate as you are now charging him, we shall place the matter in the hands of our solicitors, and instruct them to take legal measures to obtain compensation for the injury done to us, and to protect us from a repetition of it."

The reply of the respondents (on the 4th of December) was as follows:—"I am desired to acknowledge the receipt of your letter of the 2nd, addressed to the directors, upon which they will give their instructions at the next meeting of the board. As you acquaint them of your intention to resort to legal measures, they think it may be proper to refer your letter to their own solicitors before they reply to it."

Upon the 16th of December, the following further reply was sent by the respondents to the complainants, stating in the most distinct manner the position assumed by the former in this litigation:—"The directors of this company desire me (the secretary) to acquaint you, in reply to your letter of the 2nd instant, that they must decline to lower any of their proper rates for the conveyance of goods, excepting in cases where a special agreement may enable the board to do so with mutual advantage, upon conditions to which both may assent. The board presumes that it is not your intention to undertake to transmit by this [331] railway all the traffic which you can obtain for the places to which this company are carriers, inasmuch as they know that you are engaged in taking away by other lines as much as you can obtain and influence. If they are mistaken in this view, you will be kind enough, perhaps, to submit any proposal which may enable the board to enter into any special agreement with your firm, in consideration of which terms it may be in their power to meet your request."

The complainants did not comply with the terms required in that letter: and, after an ineffectual attempt to alter the decision of the respondents stated therein, the complainants made this application to the court, stating, amongst others, the above facts, and that the paper now carried by the company for Somerville is the same as to quantity and quality, and mode and cost of carriage, and in all other respects, as when carried by the complainants; and that, in fact, there is no circumstance to justify the difference in charge now made.

The respondents, in answer to this case, set up, in effect, that they carry for Somerville upon the terms of a special agreement between them and him, containing stipulations so much to their advantage as to be worth the whole difference of charge. The terms of the agreement, as stated in the affidavit of James Grierson, the respondents' general superintendent of goods traffic, was as follows:—"A rate of 23s. 4d. a ton was agreed upon for paper between Bristol and London, which was to include the cartage in London but not at Bristol: and the paper carried at that rate was to be at the risk of the said William Somerville, who was also to send all other goods he had to send at the ordinary rates by the said company, and also to send all his goods, including paper, by the said company, which were going to any place to which the said company directed."

[332] In the affidavit of a person in the employ of the company at Bristol, who negotiated the agreement, it was stated as follows:—"It was agreed between me and the said William Somerville that the said William Somerville should send all goods of every description over which he had the power to direct the mode of carriage, and which might be going to any place where the said Great Western Railway Company carried, by the said company: and, in consideration of his so doing, I agreed, on the part of the company, that his writing-paper from Bristol to London should be carried for 23s. 4d. per ton, including cartage to London, but not including the cartage at Bristol: but, at this rate, the said paper was to go at the risk of the said William Somerville.

The said William Somerville also promised to use his influence with those who supplied him with goods carriage paid, to send them by the Great Western Railway Company's railway; but he stipulated, as to goods going to places where there were other railways, that the charges to be made by the said company should not be more than other railway companies charged to those places."

The terms of the agreement as existing on the 9th of December, 1857, were put into writing in the following letter written by Somerville in the presence of the respondents' agent Wilkinson:—"I am quite willing to send all my papers by your company to the various places at which you deliver, on condition that your rates are not higher than other railway companies. I shall instruct my people to send all goods by you so long as our arrangement of carrying to London continues."

Subsequently, on the 17th of February, 1858, at the request of the company's agent, for the purpose, as alleged, of explaining the agreement, Somerville wrote the following letter:—"In consideration of your charge-[333]-ing me for the conveyance of paper, at my exclusive risk, from Bristol Station to London, 23s. 4d. per ton, delivered within your usual limit, I agree to send by your line all my goods going to stations and places to which you carry."

On the part of the respondents, it is further stated that it is a great gain to the company, and a fair equivalent for the difference of charge, to have the advantage which they derive by securing the whole of the traffic of Somerville, or in which he is interested, to the North of England and elsewhere, upon their lines other than that between Bristol and London, together with the advantage of the goods being carried from Bristol to London at his risk. It is not alleged in the affidavits, nor was it suggested in the argument, that the insurance upon Somerville's goods from Bristol to London alone was worth the difference of charge,—nearly one third of the entire price of carriage: and it is clear, from the correspondence, that the respondents would never set that up as the cause of the difference of charge, nor have given the complainants the benefit of the difference, even if the latter had taken upon themselves the risk. Indeed, the complainants never had an opportunity of doing this, because they never were informed that it was part of the agreement with Somerville; and they were not required by the letter of the 16th of December to take it upon themselves.

The question, therefore, is reduced to this,—whether it is a legitimate ground for giving a preference to one of the customers of the railway, that he engages to employ other lines of the company for traffic distinct from and unconnected with the goods in question or their carriage. And we are of opinion that it is not. The goods are the same in quantity and quality, in the cost of receiving and carriage, and in the profit which is [334] thereby made, whether they be received from Somerville or from the complainants; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ them in totally distinct transactions. In this respect, the present case is altogether distinguishable from that of Nicholson against the same respondents, (post, p. 366), in which a difference of charge was sustained, upon goods from and to the same places, between persons who sent large quantities at a time, and stipulated to send given large quantities every year, and others who declined to do so. The advantages there stipulated for by the company related to the carriage of the goods upon the same line, and directly affected the rate at which they could profitably be carried. In fact, those advantages made a difference similar to that between the selling of goods wholesale and retail,—the profit of carrying the goods sent in large quantities at the less rate at which they were carried equalling or exceeding the profit upon the goods sent in smaller quantities at the greater rate at which they were carried. In the present case, as already explained, the advantages stipulated for are wholly distinct from and do not affect the price or profit of the carriage from Bristol to London; and they ought not to be taken into account in determining the charge for such carriage.

Upon this ground, therefore,—as to which the facts cannot be disputed,—and without entering into the other points urged on the part of the complainants, we think they are entitled to the relief they ask.

A question was suggested upon the argument, as to whether the rule ought not to have been framed upon the ground of undue prejudice, rather than undue preference. In order to avoid any dispute hereafter upon this purely formal matter, we

mould the rule, as we an-[335]-nounced we should if necessary do, so as to include both points, as follows, viz. injoining the company to carry paper and other goods in their third class of goods for the complainants from Bristol to London, at the same rates that they charge to William Somerville, and also injoining them to desist from charging William Somerville less for the carriage of paper from Bristol to London than they charge to other persons, and less than they charge for the carriage of other goods of the third class; and also injoining them to desist from charging the complainants more than they charge William Somerville for the carriage of paper manufactured by him from Bristol to London;—and to abstain from subjecting the complainants or their traffic from Bristol to London to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The rule will be absolute in these terms, and with costs.

Rule absolute accordingly.

Nov. 25th.—On a subsequent day in this term, Field applied to the court to reform the rule. He submitted that its terms were too large: for, that the court could not have intended to order the company to carry all goods in the third class upon the same terms as they carried Somerville's paper, seeing that, by their arrangement with Somerville, all goods carried for him other than paper, were carried upon the same terms as they were carried for other persons.

Bovill, Q. C., contra, submitted that there was no reason for varying the rule; and that, having put Somerville's paper into the third class for their own purposes, if any [336] embarrassment resulted to the company from so doing they must be left to bear the consequences.

COCKBURN, C. J. The terms of the rule were dictated by my Brother Willes after much consideration. The company seem to have put themselves in a false position by placing paper in their third class. They may take it out again (a).

Amendment refused.

IN THE MATTER OF THE COMPLAINT OF JOSEPH BAXENDALE AND OTHERS, CARRYING ON BUSINESS UNDER THE FIRM OF PICKFORD & CO. *against* THE GREAT WESTERN RAILWAY COMPANY. Nov. 15th, 1858.

[Reading Case.]

[S. C. 28 L. J. C. P. 81; 4 Jur. N. S. 1279; 7 W. R. 64. Confirmed, *Garton v. Great Western Railway*, 1859, 5 C. B. N. S. 669. Followed, *Garton v. Bristol and Exeter Railway*, 1859, 6 C. B. N. S. 651; *Baxendale v. Great Western Railway*, 1863-64, 14 C. B. N. S. 1; 16 C. B. N. S. 137. Referred to, *West v. London and North Western Railway*, 1870, L. R. 6 C. P. 628. Followed, *In re Palmer and London, Brighton and South Coast Railway*, 1871, L. R. 6 C. P. 204. See *Parkinson v. Great Western Railway*, 1871, L. R. 6 C. P. 561.]

It is competent to this court, under the Railway Traffic Act, 17 & 18 Vict. c. 31, s. 2, to interfere to prevent a railway company from fixing the rate of tolls to be taken on the railway with a view to the promotion of their own interests, where their so doing subjects others to unreasonable disadvantage, or operates to their prejudice by giving undue preference to third parties.—Down to a recent period, the Great Western Railway Company charged a uniform rate of 3s. 6d. per ton on all goods in a particular class conveyed on their railway between their station at Reading and Paddington. These goods were collected and delivered (principally) by the complainants at a charge of 4s. 10d. per ton. The company raised their charge for carrying goods under 500 lbs. weight to 8s. 4d. per ton,—being the aggregate of the former charge for carrying and that for collecting and delivering; with an intimation to the public that they would collect and deliver goods free of all charges. The real purpose of this arrangement was made apparent to the court to be, to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business, and

(a) It was stated that the classes were arranged by the railway "clearing-house," but that the rates of charges were settled by the companies respectively.

the profit upon it, to themselves, as well as to exclude the complainants from competing with them in this department of business:—Held, that the complainants were entitled to an injunction,—the above arrangement being objectionable, both as an undue preference given on the one hand, and as an unreasonable disadvantage imposed on the other; for, that it was an undue preference of the company in their separate capacity of carriers other than on the line of railway, inasmuch as they thereby secured to themselves the entire monopoly of the last-mentioned traffic, to the entire exclusion of the complainants and all others; and it was an undue prejudice and an unreasonable disadvantage imposed on the complainants, inasmuch as their goods and those of all persons employing them, as indeed the goods of all persons other than those who employed the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery if they were required to collect and deliver for them, or to an unnecessary charge if they required no such accommodation.

C. Pollock, in Trinity Term last, obtained a rule on behalf of Messrs. Baxendale, calling upon the Great Western Railway Company to shew cause why a writ of injunction should not issue against the company pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), injoining the company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carry-[337]-ing, or in the collecting, carrying, and delivering for themselves or other persons of goods and parcels under 500 lbs. weight, or in their charges for the same, over the complainants, in the carrying of such goods and parcels for the complainants; and injoining the company not to subject the complainants to any undue or unreasonable preference [prejudice] or disadvantage in the charges made to them for carrying such goods or parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such parcels as aforesaid; and injoining the said company from giving any undue or unreasonable preference or advantage to the traffic of goods and parcels weighing more than 500 lbs. weight, over the traffic of goods and parcels weighing less than 500 lbs. weight, with reference to the charges for the collection, carriage, and delivery of such goods and parcels respectively; and injoining the said company to desist from subjecting the traffic of goods and parcels weighing less than 500 lbs. weight to any undue or unreasonable prejudice or disadvantage over [sic] the traffic of goods and parcels above that weight, with respect to their charges for collecting, carrying, and delivering, or carrying only, such goods and parcels respectively; and [338] why the said company should not be enjoined from subjecting the complainants to any undue or unreasonable prejudice or disadvantage, and from giving any undue or unreasonable preference with respect to the carrying, or the collecting, carrying, and delivering of such goods and parcels,—with costs.

The motion was founded upon the affidavit of Thomas William Outrim, a clerk in the service of the complainants, who deposed in substance as follows:—That the complainants are common carriers carrying on business under the name of Pickford & Co., and are in the habit of collecting packages of goods from their customers who require them to be sent between London and Bristol and intermediate places, one of which is Reading: That, for the purposes of their said business, the complainants are in the habit of carting such packages to and from the stations of the Great Western Railway Company, consigning such packages as they cart to the stations of the said railway company in the name of the complainants' firm of Pickford & Co., to their firm at the station to which the goods are to be carried, where they are received by the complainants' clerks or agents, and are by them carted to the residences of the persons for whom they are intended in the neighbourhood of such station: That the company are the proprietors of the railway from Paddington to Bristol, passing the intermediate stations, one of which is Reading: That the company, in addition to their traffic and business as a railway company, also carry on the business of common carriers, by collecting goods from their customers and carting them to the stations upon their railway from which they have to be sent, then carrying them upon their line to the station nearest to the town or place for which they are intended, and from such last-mentioned station carting them to the residence of the person for whom they are [339] intended: That the company charge the public a rate for the carriage of goods upon their said railway from station to station which rate includes collection and delivery,

that is to say, cartage from the residence of the consignor to the railway station from which they are sent, and cartage from the station to which they are sent to the residence of the consignee for whom they are intended: That the company, until the time hereinafter mentioned, in all cases in which the collection and delivery was done by themselves, used to charge the complainants for the carriage of biscuits between Reading and London at the rate of 8s. 4d. per ton; and, when the collection and delivery was done, not by the company, but by the complainants, the company used to charge instead of 8s. 4d., the sum of 3s. 6d. only, and, in the carriage of consignments weighing less than a ton, made a proportionate difference in their charge in the same manner: That, on the 19th of April last, the complainants received a letter from the company, as follows,—“I beg to give you notice, that, on and after Monday next, the rule of not allowing rebate for collection or delivery on consignments under 500 lbs., will be strictly carried out in all cases:” That, on the 19th of April last, the complainants, by their servants, delivered to the company at their station at Reading, fifty-seven packages of biscuits, each package weighing under 500 lbs. weight, and the whole weighing together 2 tons, 2 quarters, and 4 lbs., which said packages of biscuits were delivered by the complainants’ servants to the company at their said station, at the same time, and were consigned in the complainants’ name of Pickford & Co., Reading, to the complainants as Pickford & Co., Paddington, where they were received by the complainants on the following day, and were carted by their servants to the persons for whom they were intended; and that the company, [340] instead of charging to the complainants for the carriage of the said biscuits at the rate of 3s. 6d. per ton, charged at the rate of 8s. 4d., to which charge the complainants objected, but the company insisted thereon, and the complainants paid it under protest: That the complainants on the said 19th of April last, and on every day since except Sundays, have delivered to the company at Reading, consigned to the complainants at the station at Paddington, numerous packages of biscuits and other goods in one consignment, each consignment containing packages of the same articles, such as consignments of separate packages of biscuits and consignments of separate packages of tea, each package of such consignments being under the weight of 500 lbs., but in the aggregate considerably exceeding 500 lbs. weight, and each consignment being carted by the complainants to the station at Reading, and carted by the complainants from the station at Paddington to the residences of the persons for whom they were intended, and the company have charged the complainants the said rate of 8s. 4d. per ton on each of the said consignments: and that the complainants have on each occasion objected to the said charge, and claimed to be charged at the rate of 3s. 6d. per ton only, but the company have on each occasion persisted in charging the complainants at the rate of 8s. 4d. per ton, and the complainants have paid the company at such rate, under protest: That the said overcharge has also since the 19th of April last been made by the company against the complainants, in cases where consignments of packages weighing less than 500 lbs. weight each, but in the aggregate weighing above 500 lbs. weight, have been sent by the complainants for carriage in the manner above described by the company between London and other stations on their line, and also between intermediate stations, although the collection and de-[341]-livery as before described has in all such cases been done by the complainants, and such overcharges, amounting to a large sum of money, have been objected to by the complainants, and paid by them to the company under protest: That, in consequence of the said overcharges, the complainants, by their attorneys, on the 21st of April last, wrote to the company as follows,—“We are instructed by Messrs. Pickford & Co. to protest against a new practice which your company have now commenced, of limiting the allowance hitherto made to them (Pickford & Co.) for collection and delivery of goods which they deliver and receive at the company’s stations, to goods exceeding 500 lbs. in weight: and we are further instructed to give you notice, that, unless the allowance is made upon goods under that weight, as heretofore, legal proceedings will be taken against the company forthwith. We may add that it was decided by the Court of Exchequer in 1842, in a case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, that railway companies are bound to allow for the collection and delivery, where those services are not performed by them, in order to put all the customers of the railway company on an equal footing: and no distinction between goods of any particular weight has ever before been attempted to be made, and obviously cannot be supported:” That the company answered the said letter through

their attorneys, as follows:—"The company consider they are justified in the charges to which you refer, though you do not accurately describe them. The case against the Grand Junction Railway Company, even if it should be sustained by the highest court, which we doubt, really does not determine the question between your clients and ours. The facts are not at all identical,—besides the question of smalls:" That there are no circumstances which make the cost to the company of collecting, carrying, [342] and delivering parcels over 500 lbs. weight less than the cost of collecting, carrying, and delivering parcels under 500 lbs. weight, to the extent of the difference of charges made by the company, as before described: nor are there any circumstances which make the cost to the said company of the carrying only for the complainants of packages under 500 lbs. weight as much as the cost of collecting, carrying, and delivering them: nor are there any circumstances which can justify the company in making such distinction as is complained of by the complainants.

Sir Fitzroy Kelly, Q. C., and Field, shewed cause, upon an affidavit of James Grierson, the general manager of the goods department of the Great Western Railway Company, who stated, that he was well acquainted with their system of and charges for carrying and collecting and collecting, carrying and delivering goods: That the company do not shew any favour or make any distinction between the complainants and the public, or between any other carriers or persons and the public; and that ever since he had been in the employment of the company, their system of charge had been and still was exactly the same to all persons using their line under the same circumstances: That the charge of the company for carriage of goods of the second class from Reading to London, was, and had been since the 17th of April last, 8s. 4d. per ton; and that biscuits and tea are in the second class for Reading, and for other places tea is charged in the third class, and at a higher rate: That Reading is distant thirty-six miles from London, station to station, 1s. 5½d. being the sum charged by the company for 500 lbs. weight, at 8s. 4d. per ton, for carriage between station and station: and that it was a reasonable and fair sum for such carriage, and was and had been since the [343] 17th of April last charged alike to all persons, and like reasonable rates were made for small quantities under 500 lbs. between other stations and places, and the same were charged alike to all persons respectively: That there had been for a long time, and then was, very great competition in the carriage of goods between London and Reading, in consequence of no less than three routes by railway existing between those places, viz. one by the South Western Railway Company's lines, one by the South Eastern Company's lines, and the other by the Great Western Company's line; and that this competition existed much more in the city of London and town of Reading, than at the Great Western Railway Company's stations at Paddington and Reading respectively: That, in the month of April last, an alteration was made in the charges of the company generally, and as to all parcels of goods of the same kind in the second class which weighed more than 1 cwt., but less than 500 lbs., the station to station rate between Reading and Paddington was at the rate of 8s. 4d. per ton, while the same amount was charged for such goods from the city of London to the town of Reading, collected and delivered by the company; and rates and charges were made for the other stations on the company's lines in the same manner: That these rates were open alike to the complainants and to all other persons whomsoever: That the company have agents in various parts of London, and agents in Reading and other towns, for collecting and delivering goods, and who are and always have been ready to call for, collect, receive, and deliver respectively the goods of the complainants, whether above or under 500 lbs., or whether packed parcels or not, exactly in the same way and on the same terms as they do those of every other person employing them: That the company have been in the habit of allowing persons who send goods to lump to [344] gether as one consignment all packages of goods of the same kind, even in cases where they are not obliged to do so by their act of parliament, and have only charged on the aggregate weight, whether above or under 500 lbs., as for one package of such weight: and that they have done this and still do this to the complainants and to all others, although, from the nature of the complainants' business, they gain very much by this practice, inasmuch as they collect as carriers small parcels or packages from different persons, and are very often able to make an aggregate weight of the same kind of goods: That every one of the packages referred to in the seventh and eighth paragraphs of Ontrim's affidavit were separately addressed to persons other than the complainants, and none of them contained any mark shewing that they were

for one consignee, and to be delivered to the complainants: and each of such packages was separately entered with the separate name and address thereon, which separate name was inserted by the complainants in the consignment-bill delivered by the complainants to the company, and according to the system of business invariably adopted by the company, and, of necessity, by any good system of business, each of such packages was required to be weighed separately, and entered separately in the accounts, way-bills, and books, and other documents of the company relating to the same; and the receiving, carrying, and delivering of packages so delivered and addressed, is attended with much more trouble and expense to the company than if the same had been addressed to one consignee: That the company can afford to carry, and collect, carry, and deliver, parcels over 500 lbs. weight at less rates in proportion than parcels under that weight; and the small-parcel traffic is attended with greater expense and trouble in proportion than the traffic exceeding 500 lbs.: That the company [345] carry all goods received from the complainants, referred to in Outrim's affidavit, as carriers, and undertake the duties and responsibilities of carriers, and this is and would be so whether the goods are received at the station and carried to the station, or collected, carted, and delivered by the company: And that the present rate for goods mentioned in the second class of the same kind and sent in one consignment from the station of Reading to the station at Paddington is, and has been since the 17th of April, 3s. 6d. a ton where the weight is over 500 lbs., and that, as in all other cases, equally to the complainants and all other persons.

The affidavits disclose nothing in respect of which the court can be called upon to enforce the provisions of Mr. Cardwell's act against this company. [Cockburn, C. J. Do they not disclose conduct on the part of the company the necessary effect of which must be to drive Messrs. Baxendale's traffic off the Great Western line?] If 8s. 4d. per ton is a reasonable charge for the carriage of the goods in question from Reading to London, whatever the consequence may be, the company are justified in enforcing it. They have no desire to interfere with Messrs. Baxendale's trade: what they have done is merely to enable them to compete with the South Western Railway Company; and they make no difference between Messrs. Baxendale and the rest of the public. A preference to the company themselves is not a preference within the act. The court has no jurisdiction over them as carriers upon their railway. The simple question is, whether 8s. 4d. per ton is a reasonable charge for the carriage of the goods in question from Reading to London. Assuming that it is a reasonable charge, then comes this question,—have the company a right to say, we will charge to all the world this sum of 8s. 4d. per ton, but for that charge we will not only carry the goods upon the railway, but we will [346] also collect the goods at Reading and deliver them to the consignees in London? In many places the passengers are conveyed from the railway to their ultimate destination by omnibus, without any additional charge. By the 7 Vict. c. iii., the company are impowered, when acting as carriers, to make such charges (not exceeding the sums limited by their former acts) as they shall think expedient: and by s. 51 (a) they are impowered to make arrangements for the assortment and delivery of goods and parcels. And by the 10 & 11 Vict. c. cexxvi., s. 54, it is enacted, that, “for the carriage of small parcels (that is to say, parcels not exceeding 500 lbs. weight each) the company may demand any sum which they think fit; provided always that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages.” [Cockburn, C. J. These provisions apply only to carriage on the railway. Here, the company profess to charge 8s. 4d. per ton in respect of the carriage from station to station; whereas, the charge in fact comprehends something which is done beyond the railway. Crowder, J. The special agreement spoken of in the 51st section of the 7 Vict. c. iii., is for something dehors the carriage.] The company had an undoubted right, whether for a good or a bad reason, or from mere caprice, to raise the rate of carriage from 3s. 6d. per ton to 8s. 4d. Our affidavit shews that the company had no desire to prejudice the complainants, but that their sole motive was to compete with the South Western Railway Company in the carriage between Reading and London. [Cockburn, C. J. It might, perhaps, be a legitimate proceeding, if the object of the company was merely to bring increased traffic [347] on their line. But

(a) See the section, ante, p. 326 (b).

here the object manifestly is, to make a profit of the collection and delivery: the charge of 8s. 4d. is ostensibly for carriage on the railway, but in reality it is to cover the collection and delivery likewise.] In *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77, the company agreed with agents to collect and deliver goods for them, charging the public a small charge for doing so, in addition to the charge for conveyance on the railway; to those agents the company allowed in addition a sum out of the receipts of the company. The plaintiff, who collected and delivered his own parcels, but was charged as highly as the rest of the public, complained that in effect this arrangement caused his goods to be charged higher than those sent through the agents, and that the difference was an overcharge. By their act, the company were to charge all persons equally for conveyance, but there was a proviso that they might make agreements as to the collection and delivery of merchandize; and there was an appeal given by the act to the sessions by any one prejudiced, against any arrangement giving special facilities to others. It was held, that, under these enactments, the agreement with the agents, against which there had been no appeal, did not render the charges to the plaintiff overcharges. That case is precisely in point. The judgment of the court upon the eighth question there explains the true ground upon which the present case is to be distinguished from *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, which will probably be relied on by the other side.

Bovill, Q. C., and C. Pollock, in support of the rule. Upon principle as well as upon authority and the true construction of the 17 & 18 Vict. c. 31, s. 2, the charge now appealed against is wholly unjustifiable. [348] The common law imposed upon carriers the duty of carrying for reasonable charges; and reasonableness to a certain extent involves equality of charge. [Cockburn, C. J. We are not dealing with the common-law duties of carriers, but with the case of a company authorized by act of parliament to impose certain rates for the carriage of goods upon their railway.] The company may, it is true, within certain limits, charge what they please: but the charge must be equally imposed upon all: *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399; and that case was approved of by the court of Queen's Bench in *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77. *Pickford v. The Grand Junction Railway Company* is precisely this case. The company there were carriers on the London and Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester Packs" were charged 3s. 3d. per cwt., or 65s. per ton. At the foot of this list was a notice that "goods were brought to the station at Camden Town without extra charge, and that there was no charge for booking or delivery in London." The company made an agreement with C. & H., that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10s. per ton out of the entire charge of 65s. per ton: and it was held, that, under these circumstances, the charge of 65s. per ton, when made to any other persons who were ready to receive their goods at the station at Camden Town, was both unreasonable and unequal. The 51st section of the 7 Vict. c. iii. has no application at all to this case. The object of the recent statute was, to check the growing monopoly of these great companies of all the carrying trade of the country. [Cockburn, C. J. The real question here is, whether the company [349] are not under colour of a charge for carriage upon the railway, making the complainants pay for a service which they do not require at their hands. What right have the company to compel all the world to employ them to collect and deliver?] The charge clearly is not a charge for carrying only: and it is merely adopted as a means of imposing undue prejudice upon the complainants.

Cockburn, C. J. (stopping C. Pollock). The court entertain a strong impression, and will probably pronounce judgment to-morrow.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court:—

We are of opinion, without further calling upon the counsel for the complainants, that this rule must be made absolute.

The short facts are these:—Down to a recent period, the defendants, the Great Western Railway Company, charged a uniform rate of 3s. 6d. per ton on all goods conveyed on their railway between their stations at Reading and Paddington. The goods were collected and delivered both by the company and by the complainants, Messrs. Baxendale & Co., at a charge of 4s. 10d. per ton. The railway company have

now raised the charge for carrying goods under 5 cwt. to 8s. 4d. (being the aggregate of the former charge of carrying and that of collecting and delivering), with an intimation to the public that the company will collect and deliver goods free of all charges.

It is alleged on the part of the complainants, and scarcely denied on the part of the defendants, that the real purpose of this arrangement is, to compel persons desiring to have their goods conveyed by the railway [350] to employ the railway company to collect and deliver such goods, and thus to secure this business and the profit upon it to the defendants, as well as to exclude the complainants from competing with the defendants in this department of business.

We entertain no doubt that this representation is true, and that such is the purpose and will be the effect of this scheme of the company, if it is suffered to be carried out. Some attempt, indeed, was made to shew that a desire to avoid the competition of other railways had prompted the alteration in the rate of charge: but the attempt totally failed, and is unworthy of further consideration.

The main stand made by the counsel for the company was, on the ground, first, that, although the legislature has imposed upon railway companies the obligation of affording accommodation on equal terms to the public, it cannot have been their intention to deprive them of the right possessed by all trading companies as well as by individuals, of using their property, and managing their affairs, within the scope of the purpose for which they are constituted, in such manner as they think most to their advantage: and, secondly, that, in the present instance, the company had by act of parliament the power of raising their rates at their own will and pleasure, provided they raised them equally as against all persons: that here they had raised them equally against all: and that it was not within the authority of this court to fix limits to the amount of accommodation which the company might think proper to afford gratuitously beyond the conveyance by the railway, for which the toll was charged.

We think there is little difficulty in disposing of these arguments. It is abundantly clear, from the statutory enactments which injoin on railway companies the obligation to afford accommodation on [351] equal and reasonable terms, and from the provisions of the statute by which jurisdiction is given to this court against the affording of undue preference or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines: but, in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public.

The policy and justice of such a requirement are manifest, it being obvious that the powers of a railway company, and its monopoly, under the impossibility of all competition, might otherwise be converted into a means of very grievous oppression, by a difference in point of charge or in point of accommodation made in favour of one man at the expense of another, or by disadvantages in respect either of charge or accommodation imposed on one as compared with another. And it is plain that the oppressive effects of such inequality will be equally great, whether its motive and operation be to benefit third parties or the railway company itself.

Such being plainly the intention of the legislature, and this court having been constituted the tribunal by which any injustice or inequality in the working of the railway system as between the companies and the public is to be redressed, we must endeavour to prevent any injustice either in the rate of charge or the degree of accommodation afforded, at the same time that we carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary rights which (subject to the before named [352] qualification) a railway company, in common with every other company or individual, possesses, of regulating and managing its own affairs, either with regard to charges or accommodation, or to the agreements and bargains it may make in its particular business.

Greater difficulty, no doubt, arises in dealing with cases in which the purpose and effect of the matter to be considered, although it may incidentally have the effect of prejudicing third parties, is in reality to the benefit of the company itself, than in those in which the immediate object is to give an undue advantage for the benefit of

a third party; yet we think that no serious difficulty will be found in ascertaining the principles on which the authority of this court should be exercised.

It may be convenient in the first place to advert to a distinction not always kept sight of in argument, between cases in which the interest of the company sought to be promoted by the regulation or act complained of, is one which arises with reference to the railway itself, as to which the question occurs, and those in which the benefit sought to be obtained by the company is one which has reference to interests distinct from those of the particular railway; as, where, for example, the company are the proprietors of another railway, or carry on some other business. In the latter class of cases, it appears to us clear that the company must be taken to be, quoad the particular railway, in the position of third parties, and that they cannot, with a view to such separate interest, give an undue preference or impose an unreasonable disadvantage, any more than they could do so to promote the interest of any other party. Thus, if a railway company, being proprietors of one line from A. to B., and of another line from C. to D., were, in order to obtain the custom of a particular individual on the first of [353] these lines, on which they might be subject to competition from a rival line, to agree to convey his goods on the line from C. to D. at a cheaper rate than those of another person using only the latter line; or, if a railway company carry on, in addition to its business as carriers on the line, that of carriers to and from the termini of the railway, were, with a view to obtain additional custom in the latter, to carry on the railway, for those who employed them as carriers to and from the railway, at a lower rate than for those who did not: in both these cases, we should have no difficulty in holding that the company must be considered, as regards these separate interests, in the light of third parties, and that they cannot promote their interests at the expense of the right of the public to that equality on the particular railway which it was the intention of the act of parliament to secure.

Greater difficulty and nicety perhaps arises in dealing with cases in which the purpose and effect of the thing complained of is, the benefit of the company in their character of proprietors of the particular railway. In these cases, the court might feel greater reluctance to interpose, partly from an unwillingness to interfere with parties in the management of their own affairs for their own advantage, partly from a disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the court became clearly satisfied that a company was seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances and operated unfairly and injuriously upon particular individuals, or that it was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this court would not hesitate to interfere to prevent such a result, although by so doing they [354] might prevent the company from securing all the profit that it might otherwise derive from the use of its property.

Thus, where the complaint was that a railway company, as between the two intermediate stations, charged a higher rate than was due to the intermediate space in proportion to the charge made on the entire line of railway, this court, if it were made to appear that the disproportion was not justified by the circumstances of the traffic,—in other words, was an undue prejudice or unreasonable disadvantage to those using the part of the railway in question,—would interfere to set aside such arrangement (a). So, again, if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favourable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantage were extended to all persons under the like circumstances; yet it would assuredly insist on the latter condition, and would interfere in the case of any special agreement by which the company had secured to a particular individual the benefit of such an agreement, to the exclusion of others, or even where an attempt had been made, by keeping the agreement secret, to make it operate unduly to the prejudice of third parties.

This reasoning appears to us effectually to dispose of the argument that the court cannot interfere to prevent a railway company from fixing the rates of tolls to be

(a) See *In re Jones and the Eastern Counties Railway Company*, ante, vol. iii., p. 718.

taken on its railway in such manner as shall best promote its own interests, in cases where by so doing the company subjects others to unreasonable disadvantage, [355] or operates to their prejudice, by giving undue preference to third parties.

We proceed to consider the second ground taken by the defendants, which is, in substance, that, having power to raise their rates of charge for carrying on their line, and having done so equally as regards all, they do not come within the statutory prohibition against undue preference or undue prejudice, by affording other accommodation in addition to that of carrying on their line.

We think this argument rests upon two obvious fallacies,—first, that of supposing that the whole charge in question is one made by the company in reference to their character and interests with respect to the railway, whereas, in reality, the charge is made by them in a character and interest independent of the railway, viz. as carriers to and from the termini of the railway;—secondly, that the company can convert that which is in reality a charge for collecting and delivering, as well as for carrying, into one for carrying only, by affixing to it the latter denomination in their table of rates.

It is true, no doubt, that the company's acts give them power to impose their own rates of charge for the carriage of this description of traffic: but these acts give them no power to impose tolls or charges for collecting and delivery; and it is palpably an abuse of their powers, if, under the name of a charge for carrying on their line, they impose, otherwise than with the assent of the parties concerned, a charge for a totally different thing. Again, although the legislature has conferred the power of imposing rates of charge, it has annexed to this power the obligation of imposing such rates equally: and the company cannot be permitted so evade this obligation by colourably pretending that that which is in fact a charge for other things as well as for carriage is a charge for carriage only.

[356] The court is bound to look at the transaction in its true light, and cannot suffer itself to be diverted from its duty of interfering to prevent what in effect is such an injustice as it was the purpose of the legislature to prevent, because the transaction is attempted to be covered over by a transparent disguise.

Looking, then, at the alteration in the rates in its true light, we are of opinion that the arrangement is objectionable both as an undue preference given on the one hand, and as an unreasonable disadvantage imposed on the other. It is an undue preference to the company in their separate capacity of carriers other than on the line of railway, inasmuch as they thereby practically secure to themselves the entire monopoly of the last-mentioned traffic, to the entire exclusion of the complainants and all others. It is an undue prejudice and unreasonable disadvantage imposed on the complainants, inasmuch as it is plain that their goods, and those of all persons employing them, as, indeed, the goods of all persons other than those who employ the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery if they employ others to collect and deliver for them, or to an unnecessary charge if they require no such accommodation.

On these grounds, we are of opinion that the case is one within the mischief and provision of the act; that it is our duty to interfere: and that, consequently, this rule must be made absolute, and with costs.

Rule absolute, with costs (a).

(a) The rule was originally drawn up in the terms in which it was moved; but, upon application to the court, and reference to a judge at Chambers, it was ultimately settled as follows:—"That a writ of injunction do issue against the company, pursuant to the Railway and Canal Traffic Act, 1854, injoining the company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and delivering, for themselves or other persons of goods and parcels under 500 lbs. weight, or in their charges for the same, over the complainants, in the carrying of such goods and parcels for the complainants: and injoining the said company not to subject the complainants to any undue or unreasonable prejudice or disadvantage in the charges made to them for carrying such goods or parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such parcels as aforesaid."

The Court declined to review the above decision, under the 5th section of the 17 & 18 Vict. c. 31, upon a suggestion that it had been erroneously assumed on the argument that the collection and delivery of parcels was a source of profit,—the fact being otherwise.

Jan. 18, 1859.—The Attorney General (with whom was Field), in the [357] course of the following term, moved to rescind or vary the rule of the 15th of November, under the 5th section of the 17 & 18 Vict. c. 31, which enacts, that, “upon the application of any party aggrieved by the order made upon any such motion or summons as aforesaid [s. 2], it shall be lawful for the court or judge by whom such order was made, to direct, if they think fit so to do, such motion or application on summons to be re-heard before such court or judge, and upon such re-hearing to rescind or vary such order.

The affidavit upon which the motion was founded stated, that the change of system made by the company in April last was adopted by the company for the purpose of restoring and securing to them their fair and legitimate profits as owners of and carriers upon their lines of railway, of which they had to a great extent been deprived by the practices of the complainants and other carriers: That the company's rates of charge on the railway were much higher in proportion for parcels under 1 cwt. than for parcels above that weight, and the complainants and other carriers adopt every means [358] in their power to get the parcels and packages they deliver to the company above 1 cwt., by packing such parcels together and sending them as one parcel in a bag or hamper, and thereby they obtain the carriage of such parcels on the company's lines at a sum far under the sum charged by them to the aggregate of the senders and consignees, and far under the sum which the company would be entitled to and would receive for the carriage of the same parcels if they had been sent separately; the carriers thus taking to their own use and depriving the company of the profit thereby made, and which the company otherwise would receive: That the complainants and other carriers gain so much by this system of packing that they can afford to underbid the company in their rates, and to carry parcels for less than the company's charge would be for the same parcels if received by them direct: That the complainants and other carriers are in the habit of aggregating parcels without packing them into one bag or hamper, that is to say, they put their own address over that of the ultimate consignee, and thus bring up small parcels into a weight enabling them to be carried at a less proportional charge, and which they charge the sender or consignee for at the higher rate of charge: That, in all these cases, the complainants and other carriers collect the parcels as separate parcels, either by the sender taking them to their receiving offices, or from door to door by sending round carts for the purpose, and they deliver the parcels packed or aggregated at, and receive them from, the stations of the railway, claiming the deductions formerly allowed for collection and delivery: That a sum was formerly allowed to carriers and the public alike, in all cases where goods were delivered to and received from any of the stations of the railway, and whether they were small parcels or not,—the sum of 3s. 4d. a ton or at that rate being allowed in Lon [359]-don, and 1s. 6d. a ton at country stations, which sums were not fixed upon with a view to a profit being made upon collection and delivery respectively, but the company were willing to collect and deliver for those sums as representing about the actual cost of the services performed, they looking then, as they do now, to making their profit on the railway, and merely performing those services as subsidiary thereto; and that complainants and other carriers made no profit out of the allowances so given to them, but made their profit out of booking-fees and by means of their being able to use the railway by packing and aggregating goods, and the other practices above mentioned: That the company were advised that the practices of the carriers as above mentioned were authorized by law, and that the company were bound to receive the parcels from the carriers so packed or aggregated, as if they were persons in trade, and as if the parcels were really sent by them in that way to other persons in trade; and that, in consequence of the continued practices of the complainants and other carriers to pack and aggregate in the manner above mentioned, and their rivalry against the company, the company considered that they could afford to forego the whole or a portion of their charge for collection and delivery of smalls, by offering inducements to the public to send such parcels to them direct, instead of their passing through the hands of carriers, and that the company would in

that way obtain more by being able to charge for the carriage on their railway for parcels received from the public separately than they did formerly, when they made a charge for collecting and delivering: That the company therefore, in April last, determined to make no charge for the collecting and delivery of parcels under 500 lbs. weight, or, in other words, to make the charge from station to station, on the railway the same as the [360] charge from or to the company's receiving-houses or the sender's door, to and from the consignee's door; but that, inasmuch as the system of packing or aggregating was not adopted (as being of no advantage to the carriers) when applied to parcels or packages other than smalls, the company had not altered their system in respect to these parcels or packages: That the company had for some time established receiving-houses in several parts of London, and in all large towns and places where their lines of railway touched, at convenient spots for collection of goods, and thereby and by offering inducements to deal with them direct, they obtained (but in a fair way of business) the direct delivery of smalls to them at such receiving-houses, instead of having them "packed" or aggregated at the stations by the carriers as aforesaid; and that the difference of profit earned by the company upon their lines of railway in respect of small parcels delivered at their receiving-houses, or collected by them from door to door, was enough to render it well worth their while to collect and deliver such parcels to and from the stations without any charge at all for such collection and delivery: That the rates mentioned in the affidavits of the complainants as charged by the company, did not, nor did any of the company's rates from station to station, include the collection and delivery of goods as alleged, but they were rates for carriage on the railway only, and it was by the profit on the railway that the company were enabled to defray the cost of collection and delivery as to smalls: That the complainants and other carriers were, under the circumstances aforesaid, rival and competing carriers on the railway, and the company were acting in the premises bona fide with a view to their legitimate and fair profits as carriers on their railway: That the company charged the same rate to every body as well as to the complainants and [361] other carriers: and they had at all times been ready and willing to collect and deliver for them on the same terms and in the same way as they did for the public generally; and that the system adopted, and now complained of, was, under the circumstances, a fair system, and one which treated carriers in respect of collection and delivery as if they were not carriers,—as they had always claimed to be treated when packing and aggregating goods: That the complainants and other carriers might still make a large profit by such packing and aggregating, and also by getting a booking-fee on each parcel, while they would only be obliged to pay the company one booking-fee for a packed parcel, even if sent to the company's receiving-offices: That the complainants are agents for the London and North Western Railway Company, and other railway companies, for the management of their goods business in London and elsewhere, and as such agents they have for a long time adopted the same system, with the public and with carriers, as to making allowance for the collection and delivery of parcels, that they complain of against the Great Western Railway Company: And that it is the general practice of all principal railway companies which collect and deliver goods, to refuse to make an allowance for collection and delivery on parcels below a certain weight, or, in other words, they collect, carry, and deliver such goods for the same charge as they make for the carriage from station to station, and bear the cost themselves of the collection and delivery.

The clause upon which this application is founded was evidently introduced in consequence of the magnitude of the interests which are involved in the inquiry, and the absence of an appeal. [Cockburn, C. J. We made the order after full consideration, and gave our reasons very elaborately: and I do not see why we [362] should be called upon to review it,—unless, indeed, it can be shewn that we misapprehended the facts, or there be some new matter.] The court is asked to review the principle of the decision: and the importance of this is obvious, seeing that, if the court err, the error is irremediable. The attention of the court is invited to the same facts, but in a more enlarged view. [Cockburn, C. J. What probability is there of our arriving at a different result from that which we came to after much consideration?] It is found to be utterly impracticable to obey the rule. The order is, "that a writ of injunction do issue against the company pursuant to the Railway and Traffic Act, 1854, injoining the company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and

delivering, for themselves or other persons, of goods and parcels under 500 lbs. weight, or in their charge for the same, over the complainants, in the carrying of such goods and parcels for the complainants: and enjoining the company not to subject the complainants to any undue or unreasonable preference or disadvantage in the charges made to them for carrying such goods or parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such parcels as aforesaid." The charge for a package not exceeding 500 lbs. weight from Paddington to Reading, or vice versa, is 8s. 4d. per ton. Messrs. Baxendale bring to Paddington a package weighing 500 lbs., to be conveyed to Reading. The company charge for that 4s. 2d. It is said that this is forbidden by the rule: and they are called upon to reduce the charge by 3s. 4d. per ton in respect of collection in London, and 1s. 6d. in respect of delivery at Reading. But the court has not specified the sum. [Cockburn, C. J. In order to secure the traffic to themselves, the [363] company increased their charge by exactly that sum. The true effect of the rule which we pronounced is this,—the company may charge what they like for conveyance on the railway, but they must not charge for collecting and delivering off the railway, which is ultra the character of a railway company. All was easy enough before the company mixed up the two charges, for their own purposes. Why is it so difficult to disentangle them? Why put on the charge of 3s. 4d. and 1s. 6d., the price Pickford & Co. charge for the collection and delivery, when you say that the company can afford to collect and deliver without any charge?] We shew that this is done by all the companies, and by Pickford & Co. themselves, as agents for the Great Northern Railway Company. It is impossible to give effect to this rule consistently with the act of parliament. If the court had intimated, or will now intimate, what the company are to deduct from or to add to the charge for carriage on the railway, the whole may be understood. [Cockburn, C. J. The company have no right to call upon us to specify any sum. All we say is, do not include in your charge for carriage on the railway a charge for something else.] If the court will give us a principle upon which we can ascertain the sum, that is all we ask. [Cockburn, C. J. Why add precisely 3s. 4d. for collecting?] Because our acts of parliament allow us to charge what we please. [Cockburn, C. J. Then make the charge equal. The fact of your adding the 3s. 4d. was too transparent to deceive any one.] The 3s. 4d. was found to be the average expense to Messrs. Baxendale for collecting and conveying parcels and packages to Paddington. If Messrs. Baxendale are entitled to make this claim upon the company, has not every one else the same right? Or, might not an individual claim even a larger deduction, by reason of the average cost of collection and delivery to him being greater [364] than it is to Messrs. Baxendale? Neither party, it appears, derives any profit from the collection and delivery: the profit to Baxendales, as well as to the company, arises from the carriage on the railway, by reason of the number of small parcels which are packed or aggregated. [Cockburn, C. J. This was never suggested on the former argument.] It was found as a fact in *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77, that 3s. 4d. per ton was not an adequate sum to pay the expense of collection. [Cockburn, C. J. We all assumed in this case that the company imposed this charge for the purpose of taking away the complainants' profits.] The affidavit upon which this motion is made expressly and pointedly denies that the collection and delivery are any source of profit. This court has no jurisdiction in respect of the charges for collection and delivery. The principle of the decision to which the court has come upon this rule subverts the entire course of railway business. It in effect prohibits the company from doing what every man has a right to do, viz. to collect and deliver gratuitously.

COCKBURN, C. J. We are of opinion that the application for a modification or a re-hearing of the rule pronounced in this case should not be granted, no sufficient ground having been made out for the interference of the court in the present stage of the proceedings. It is not suggested that the court misapprehended the facts stated in the affidavits or admitted on the argument: but it is suggested that one of the facts which we assumed on that occasion, viz. that this business of collecting and delivering small parcels, that is, parcels not exceeding 500 lbs. weight each, which was carried on both by the complainants and the company, was a source of profit, was an erroneous assumption. We cannot, however, help observing that [365] it was allowed on all hands to be assumed as a fact; and, if erroneous, the company had ample means of making the fact known. We think it would be *pessime exempli* upon such a ground to re-open the rule. But it is unnecessary to determine that, because it is plain that

the judgment proceeded upon the two-fold ground that the company, in making the charge for carriage on the railway cover the expense of collecting and delivering, were doing that which they were not justified in doing, viz. giving an undue and unreasonable preference to themselves as carriers, and imposing an undue and unreasonable prejudice and disadvantage upon the complainants. The question now suggested leaves the second of these grounds wholly unaffected. The court was of opinion, and is still of opinion, that, by subjecting the goods of the complainants to the charge for collection and delivery, they imposed upon them an undue and unreasonable disadvantage as regards the goods of other persons. We are prepared to abide by the principle upon which we decided on that occasion: and we should add, that my Brother Willes, who was not present at the former argument, entirely coincides with the principles enunciated by the court upon that occasion.

Rule refused (*a*).

[366] IN THE MATTER OF THE COMPLAINT OF THOMAS NICHOLSON THE YOUNGER AND ISAIAH BIRT NICHOLSON AGAINST THE GREAT WESTERN RAILWAY COMPANY. Nov. 9th, 1858.

[S. C. 1 Ry. & Can. Traff. Can. 121; 28 L. J. C. P. 89; 4 Jur. N. S. 1187; 7 W. R. 49. Explained, *Garton v. Bristol and Exeter Railway*, 1859, 6 C. B. N. S. 656. Upheld, *Nicholson v. Great Western Railway*, 1860, 7 C. B. N. S. 755. Referred to, *Great Western Railway v. Sutton*, 1869, L. R. 4 H. L. 252. *Rhymney Iron Company v. Rhymney Railway Company*, 1888, 6 Ry. & Can. Traff. Cas. 74; *Evershel v. London and North Western Railway*, 1877-78, 2 Q. B. D. 266, 3 Q. B. D. 134; 3 App. Cas. 1029.]

It is competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that, in entering into such agreements, the company have only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them be adequate, and the company are willing to afford the same facilities to all others upon the same terms.—Nor is the 2nd section of the Railway Traffic Act, 17 & 18 Vict. c. 31, contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train-loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the diminished cost of carriage although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee.

The complainants, coal-owners in the Forest of Dean, in Trinity Term, 1857, obtained a rule calling upon the Great Western Railway Company to shew cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the company to desist from giving any undue preference or advantage to or in favour of the traffic in coals from Ruabon, and also to desist from subjecting the traffic in coals from Bullo and Lydney, in the county of Gloucester, over their lines of railway, to undue or unreasonable prejudice or disadvantage; and also to desist from giving to the Ruabon Coal Company (Limited) any undue preference or advantage for or in respect of the carriage of coal by the said Great Western Railway Company, and also to desist from subjecting the complainants, for or in respect of the carriage of coals for them by the said Great Western Railway Company from Bullo and Lydney, to any undue or unreasonable prejudice or disadvantage; and also enjoining the said railway company to carry coals for the complainants on equal terms with the said Ruabon Coal Company (Limited), having regard to the circumstances, if any, which render the cost to the said railway company less, in carrying for the said Ruabon Coal Company (Limited), than it costs [367] the said railway company in carrying for the complainants,—with costs.

The motion was founded upon the joint affidavit of Isaiah Birt Nicholson, one

(*a*) No light whatever is thrown upon the 5th section of the Railway and Canal Traffic Act, 1854, by the discussions in either House during the progress of the bill: but it may well be doubted whether it was intended to give this anomalous sort of appeal, and whether it was not rather meant to afford a remedy to some third person (not party to the original motion) who might be aggrieved by the order.

of the complainants, and Aaron Goold and John Trotter, who were respectively lessees under the crown and proprietors of coal-mines and collieries in the Forest of Dean, and who deposed in substance as follows :—

1. That Nicholson and his co-partners were in the habit of purchasing large quantities of coal raised in the Forest of Dean, amounting to many thousand tons a year, and transmitting the same from Bullo and Lydney, by means of the Great Western railway, to their customers or agents for sale at or near the various stations of the Great Western railway and its branches : 2. That Goold and his partner were lessees under the crown and proprietors of extensive coal-mines and collieries in the Forest of Dean, and were engaged as partners in working the same : and, in the course of such business raised annually many thousands of tons of coal, the greater portion of which they transmitted to Bullo, and there delivered the same to the Great Western Railway Company for the purpose of being carried by them by means of their railway, either for the traders who purchased the same from them, or to their customers or agents for sale thereof, at or near the various stations of the Great Western railway and its branches : 3. That Trotter and his partners also were lessees under the crown and proprietors of extensive coal-mines and collieries in the Forest of Dean, and engaged as partners in working the same ; and, in the course of such business, raised many thousands of tons of coal annually, a portion of which they transmitted to Lydney, and there delivered it to the Great Western Railway Company either for the purpose of being carried by them by their railway for the traders [368] in coal who purchased the same from them, or on their own account to their own customers or agents for sale thereof at or near the various stations of the Great Western railway and its branches : 4. That the Great Western railway commences at London and proceeds thence to Didcot, thence to Swindon and Bristol, and one branch thereof proceeds from Swindon to Gloucester : that it is there joined by the Gloucester and Forest of Dean railway, of which the Great Western Railway Company have become and are the lessees, working the same, and which railway proceeds to Grange Court, in the county of Gloucester, at which point it communicates with the South Wales railway, which runs thence to Bullo and Lydney, both which places are near to the Forest of Dean, at each of which places there is a considerable goods station on that line, the former of these places being about five miles and the latter twelve miles from Grange Court : 5. That the Great Western railway is entitled to one fourth of the capital and one third of the revenue of the South Wales Railway Company, and to nominate one third of the directors thereof, with the privilege of supplying all rolling stock ; and, by an arrangement with the South Wales Railway Company, the whole of the coals at Bullo and Lydney intended to pass on, to, or over any portions of the Great Western railway are there received by the said Great Western Railway Company, and that that Company charge certain freight ; and that the said Great Western Railway Company charged the deponents, the consignors, in their accounts with them, and they paid them, the entire freight for the coals carried for them respectively over any portion of the Great Western railway from Bullo and Lydney aforesaid : 6. That the line of the Great Western railway at Didcot is joined by a branch from Oxford, which is continued thence to Birmingham ; and thence the said Great [369] Western railway is continued to Ruabon, in the county of Denbigh, by means of a line of railway of which the Great Western Railway Company have become and are either proprietors or lessees, and that the company conduct and work the whole traffic on their said line to and from Ruabon aforesaid to London and the various other stations on their said lines of railways and the branches thereof next mentioned : 7. That the Great Western Railway Company have also various branch lines from their said main lines,—viz. from Drayton to Uxbridge, from Slough to Windsor, from Maidenhead to High Wycombe, from Reading to Hungerford, from Reading to Basingstoke, from Chippenham to Warminster, and thence to Weymouth ; and, upon the said various main lines and branch lines the company have numerous stations : 8. That the Great Western railway is the only railway by which the coal raised in the Forest of Dean can be forwarded to London and the southern, eastern, and western parts of England, and the various stations of the Great Western railway and its branches : 9. That Bullo and Lydney are the nearest points on the line of railway to the coal-mines in the forest ; and that, since the opening of the South Wales railway to those stations, the deponents had been accustomed to deliver or purchase, to be delivered at Bullo and Lydney, large quantities of coal, amounting to about 100,000 tons a year, for the purpose of being put upon the said railway there, and conveyed by the Great Western

Railway Company to various stations on their lines of railways on or for sale as aforesaid : 11. That, for the purpose of establishing the said trade, and promoting the sale of the coal at and near such stations, and conducting the said traffic, the deponents had expended very considerable sums of money ; and, until the course hereinafter complained of, was adopted by the company, they car-[370]-ried on a prosperous business : 12. That, finding the Great Western Railway Company did not afford them all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from the said line of railway to the various stations on their said railways and the branches thereof, some of the coal-owners had incurred very considerable expense in providing trucks to assist in the conveyance of the coals from Bullo and Lydney to the stations of the Great Western railway : 13. That, about one year since, a joint-stock company was established for the working of certain mines of coal at Ruabon, in Denbighshire : and the formation of the said company was mainly promoted by the directors and officials connected with the Great Western Railway Company : 14. That, on the 21st July, 1856, the company was duly registered, pursuant to the statute 18 & 19 Vict. c. 133, and that the following is a copy of the memorandum of association, and of the names of the persons registered as forming the said company :—

“[LIMITED COMPANY.]

“MEMORANDUM OF ASSOCIATION

“OF

“THE RUABON COAL COMPANY (LIMITED).

“1st. The name of the company is the Ruabon Coal Company (Limited).

“2nd. The registered office of the company is to be established in England.

“3rd. The objects for which the company is established are, the winning, working, raising, getting, manufacturing, and selling, either manufactured or not, and either at the pit's mouth or elsewhere, of coal, cannel, slack, culm, iron-stone, fire-clay, free-stone, and other minerals and mineral substances whatsoever, lying [371] or to be found in, under, or upon certain mines or collieries, commonly called or known by the name of the Ruabon Collieries, situate in or near to the parish of Ruabon, in the county of Denbigh, in the North Wales, and elsewhere, as the company may from time to time determine.

“4th. The liability of the shareholders is limited.

“5th. The nominal capital of the company is 50,000l., divided into 1000 shares of 50l. each.

“We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names :—

Names and addresses of subscribers.	No. of shares taken by each subscriber.
1. Daniel Gooch, of Fulthorpe House, Paddington, in the county of Middlesex, Esquire	400
2. Thomas Bulkeley, of Clewer Lodge, Windsor, in the county of Berks, Esquire	60
3. Herbert Clifford Saunders, of Westbourne Lodge, in the county of Middlesex, Esquire	100
4. David Thompson, of 7 Charles Street, Westbourne Terrace, in the county of Middlesex, Gentleman	2
5. William Sampson Tanner, of 5 Monmouth Road, Westbourne Grove, in the county of Middlesex, Gentleman	1
6. John Drew Higgins, of 46 Westbourne Park Road, Paddington, in the county of Middlesex, Gentleman	1
7. Thomas Merriman Ward, of 15 Randolph Road, Paddington, in the county of Middlesex, Gentleman	10
Total shares taken	574

15. That the whole of the said persons are either officers of, or persons immediately connected with, the [372] Great Western Railway Company; the said Daniel Gooch being locomotive superintendent thereof, and having great power and influence over the supply of engine power and various officers and servants on the railway. 16. That the said Thomas Bulkeley is a director of the said company; the said Herbert Clifford Saunders is the son of the secretary of the company; that the said Thomas Merriman Ward is an officer of the said company in the registration-office; and the said Messieurs Thomson, Tanner, and Higgins are or were clerks at the Paddington station of the said company: 17. That the whole paid-up capital of the said coal company, as registered, amounts to 28,700*l.*, and that the deponents had been informed and believed that the whole thereof had been subscribed by persons in the service of, or connected with, the Great Western Railway Company: 18. That the Ruabon Coal Company had been actively engaged in raising and getting the said coal ever since the time of its establishment, and sending the said coal along and over the Great Western Railway Company's lines to the various stations thereon: 19. That, ever since it commenced operations in July, 1856, most undue preference and partiality had been exhibited by the Great Western Railway Company to and in favour of the Ruabon Coal Company, to the prejudice of the deponents and other persons: 20. That the Great Western Railway Company, contrary to and in violation of their own acts, and the statute 17 & 18 Vict. c. 31, made and gave an undue or unreasonable preference or advantage to and in favour of the traffic in the said Ruabon coal, and subjected the traffic in the said Forest of Dean coal to undue or unreasonable prejudice or disadvantage in the respects hereinafter mentioned: 21. That the Great Western Railway Company also, in violation of the said acts, made and gave an undue or unreasonable [373] preference or advantage to or in favour of the said Ruabon Coal Company in the same description of goods as those in which the deponents traded and trafficked, and subjected them and their goods or traffic to an undue or unreasonable prejudice or disadvantage: 23. That the effect of such undue preference and advantage had been greatly to injure the deponents' trade and the trade and demand for coals at Bullo and Lydney; and that, unless some measures were taken to put an end to such preference, the whole of their traffic would be limited and confined to Gloucester and other places in the neighbourhood, and the effect would be to exclude them from other markets at a distance, and to inflict the most serious loss on the whole of the coal traders and coal-mine owners in the Forest of Dean. 24. That the deponents had learned that a special agreement had been entered into between the Great Western Railway Company and the Ruabon Coal Company (Limited), respecting the carriage of coal for the last-mentioned company upon the said railways and the branches thereof. 25. That the same had been kept strictly private, and, though the deponents had formally applied for a copy thereof to the secretary of the railway, who promised to lay their request before the board of directors, they had never given them any copy thereof; and the same had been kept strictly private, and had not been communicated to traders, and a copy of it had been sent to a shareholder only upon the terms that it was not to be used for litigation in any courts of law or equity by other parties, or by himself as advocating other interests against those of the Great Western Railway Company. 26. That hence the deponents had been unable to ascertain the precise nature of the agreement, but they believed that the practice and course of dealing thereafter mentioned as pursued between the Great Western Railway [374] Company and the Ruabon Coal Company was in a great measure in accordance with and based upon it, and that it secured to them some of the following preferences and advantages, and the residue thereof was out of favour and partiality accorded to them by the Great Western Railway Company to the deponents' prejudice; and they had, in common with the other traders in the Forest of Dean coal, and the proprietors of collieries there, lately made complaints upon the subject of the various matters following to the Great Western Railway Company, and had been unable to obtain any satisfactory answer thereto or redress for the same, and that they did not deny that the agreement contains some stipulations of the nature thereinafter mentioned. 27. That the stationary and other materials of the Great Western railway were supplied by that company to the Ruabon Coal Company in the conduct of their business, and that no such privilege or liberty was allowed to the deponents. 28. That, with the permission of the Great Western Railway Company, the Ruabon Coal Company plastered their stations with advertisements of the said coal and the prices thereof; and the ticket-

offices of the railway company were furnished with circulars of the said coal company for distribution, and that no such privileges were allowed or permitted to the deponents. 29. That, with the permission of the Great Western Railway Company, the porters of the company were employed by the said coal company in unloading the trucks with their coal, and weighing the coal of the coal company into their customers' carts, and that no such privilege was allowed to the complainants: 30. That, with the permission of the Great Western railway, the station-masters and clerks of the railway company were employed by the Ruabon Coal Company to effect sales of, and in seeking orders for, the coal of the said company, and that [375] no such privilege was allowed to the complainants: 31. That, under the said agreement, it was provided that the Great Western Railway Company should pay 50l. a year towards the salary of each collecting clerk employed by the Ruabon Coal Company, and that no such privilege was allowed to the complainants: 32. That the deponents had been informed and believed that Mr. Hill and Mr. Stodart, as agents of the Ruabon Coal Company, and Mr. Gooch and Captain Bulkeley, when engaged or employed on the business of the Ruabon Coal Company, and coal-merchants and traders, had been and were permitted to pass over the Great Western Railway to and from Ruabon, and to and from the various stations, on the business of the said coal company, and for the purpose of inspecting the coal and treating respecting the same, and other purposes connected with the business thereof, free of charge by the railway company,—a privilege not granted to the complainants and their agents or representatives, or to their customers: 33. That, under the said agreement, forty-eight hours was allowed for unloading the trucks of the Great Western Railway Company after their arrival, free of charge, when loaded with coal from Ruabon: but that practically a far longer time was allowed without any demurrage being charged: whereas, the complainants and their customers were only allowed twenty-four hours for unloading their goods from the trucks; and, if they failed to unload within that time, they were charged demurrage for the same: 34. That the rates per ton charged for the carriage of coal to the Ruabon Coal Company by the Great Western Railway Company were much lower than those charged to the complainants, either for a single truck-load, or for any larger quantity, carried the same distance: 35. That, for power and road, the Great Western Railway Company charged the Ruabon company 12½ per cent. [376] less than they charged the complainants: 36. That, for terminals, the Great Western Railway Company charged the Ruabon Coal Company 88 per cent. less than they charged the complainants: 37. That, for trucks, the Great Western Railway Company charged the Ruabon Coal Company in most instances 50 per cent. less than they charged the complainants, while, in some instances, the charge was 60 per cent. less than the charge made to the complainants: 38. That the Great Western Railway Company charged the Ruabon Company a far less charge than they charged the complainants for conveyance of coal the like distances: that, for fifty miles the Ruabon coal was charged 25 per cent. less freight than the complainants were charged; that, for ninety-nine miles the Ruabon coal was charged the same freight as the complainants were charged for fifty miles only: that, for one hundred and fifty miles, the Ruabon coal was charged the same freight as the complainants were charged for ninety-nine miles only: and that, for two hundred miles, the Ruabon coal was charged 8 per cent. less freight than the complainants were charged for one hundred and fifty miles: 39. That these were instances and illustrations of the general scale of unequal rates charged against the complainants in comparison with the rates charged against the Ruabon Coal Company, and of the undue preference, partiality, and favour shewn to the Ruabon Coal Company against the complainants and other traders at Bullo and Lydney aforesaid: 40. That the freight for conveyance of the Ruabon coal to London professed to be 8s. 6d. per ton; but by the said agreement the deponents were informed and believed it was provided that this rate was only to be enforced when they did not sell their coal at a less price than 21s. 6d. for the best, and 20s. 6d. for the second or inferior coal, delivered to houses in London; and that, in the event of [377] the said coals being sold at lower prices, that a reduction should be made by the railway company in the freight which should be equal to one-half of the reduction in price for which the same should be sold, such reduction not to exceed 1s. 3d. per ton: and that no such reduction or allowance was made in favour of the complainants from the Forest of Dean, but they were charged full freight for the whole sent by them whatever price they might realise: 41. That the deponents were informed there

was a provision for a corresponding increase of charge in the event of the average price exceeding 23s. 6d. for the best, and 22s. 6d. for the second coal; but that the general price of such coal had not exceeded on the average the first-mentioned price, nor was it likely to do so: and that, at the present time, the price of the said second coal delivered in London does not exceed 18s. per ton; and that the Great Western Railway Company were carrying the Ruabon coal one hundred and ninety eight miles for the sum of 7s. 3d. per ton, while the complainants would be charged 8s. 6d. per ton for the conveyance of like coal the distance of one hundred and thirty-three miles and a half only, to the same place, and that no reduction whatever in respect of bad prices was allowed to them: 43. That, further, the deponents were informed and believed that it was provided by the said agreement, that, when the gross yearly revenue paid by the Ruabon Coal Company amounted to 60,000l., the Great Western Railway Company would allow 3d. per ton on the whole quantity sent, and when it amounted to 80,000l., 6d. per ton on the whole quantity sent; but no such deduction was allowed to the complainants: 43. That, further the deponents were informed and believed it is provided by the said agreement, that, in the event of the debts for the sales of the said coal in London turning out bad, the railway company [378] were to allow the Ruabon Coal Company one half of the freight of the coals in respect of which the said bad debts should have been incurred; and that no such reduction was allowed to the complainants from the Forest of Dean: 44. That the railway company professed that they were ready to enter into an agreement containing similar stipulations with that entered into with the Ruabon Coal Company: but the deponents were informed and believed that they should thereby be required to bind themselves to send sufficient coal over the said railway beyond one hundred miles, producing a gross yearly revenue of 40,000l. to the railway company, and, after one year, in certain events, a gross yearly revenue of 60,000l., and, after two years in certain events, a gross yearly revenue of 80,000l.; and that it was impossible for them to enter into any such stipulations: 45. That it was impossible for any traders or coal-owners in the Forest of Dean to enter into such engagements; that the defendants believed them to be a pretext and attempt in order to evade the act of parliament enforcing equal rates: that the operation of the bonus mentioned in the 42nd paragraph was calculated to protect the Ruabon Coal Company from the competition of other companies and persons, rather than to promote the development of the coal trade and the increase of the revenue of the Great Western Railway Company; and that the effect of the said agreement would be, if supported, to give a monopoly to the Ruabon Coal Company; and such was the intention thereof: 46. That the railway company had no right to impose any such terms upon the complainants, and that they were entitled to have their coals carried and conveyed by the Great Western Railway Company upon equal terms with the Ruabon Coal Company: 47. That the privileges, advantages, benefits, and preferences, stated in paragraphs numbered 27, 28, 29, 30, and 32, of the [379] affidavit, were not provided for or tendered under the terms of the said agreement, but were privileges, advantages, benefits, and preferences, granted out of favour, partiality, and preference for the Ruabon Coal Company, quite irrespective thereof: 48. That the main inducement held out by the Gloucester and Forest of Dean Railway Company to prevail upon the legislature to grant their act was, the great advantage which would ensue to the Crown, to whom the coal in the said forest belongs, and to the public, from the facilities which their railway would afford for the conveyance of the Forest of Dean coal, which would be effectually frustrated if the said preference and partiality continued: 49. That the deponents were informed and believed there was some provision in the agreement, that the Ruabon coal was to be carried in full train loads; but they had ascertained, that, in practice, this was not and never had been carried out, and, as the principal traffic therein was at different stations on the line, and not in London, it would be found to be impossible practically to carry it out: 50. And that, in consequence of the railway company having given such undue and unreasonable preferences and advantages to or in favour of the Ruabon Coal Company, and in consequence of the railway company having subjected the complainants and their said traffic to such undue and unreasonable prejudices and disadvantages as aforesaid, they had been and were much injured in their said trade and business; and, in consequence thereof, the trade and traffic in Forest of Dean coal on the Great Western railway had been diminished, and great injury had been sustained by owners and lessees of collieries in, and traders in coal from, the said

forest, who had urged the complainants to make this application, not only for the protection of their own, but their interests.

[380] Bovill, Q. C., and Dowdeswell, on a subsequent day, appeared to shew cause, upon the affidavits of C. A. Saunders, secretary to the Great Western Railway Company, W. L. Newcombe, their goods-manager, and James Grierson, general traffic-manager.

The affidavit of Saunders was as follows :—

1. The Great Western Railway Company became the proprietors of the Shrewsbury and Birmingham and Shrewsbury and Chester railways in the year 1854, under and by virtue of the 17 & 18 Vict. c. cxxii., and thereby for the first time obtained a direct through communication by their railways from Chester to London. 2. Before and at the time of their becoming such proprietors, the traffic in coal from the collieries in Denbighshire and Flintshire, near which the line passes, to places south of Birmingham, did not exist. 3. When the Great Western Railway Company became proprietors of the before-mentioned northern railways, and succeeded to the working of them in connexion with their own proper railways south of Wolverhampton, the attention of the directors was called to this question of coal-traffic, and it was suggested that arrangements might be made for greatly increasing the supply of coal from the district before mentioned to London and other places south of Birmingham to which their railways afforded access, and thereby of bringing upon and carrying over a long extent of their lines a large and remunerative traffic. 4. With this object, after finding it unavailing to rely upon the individual efforts of the then proprietors of the collieries, the Great Western Railway Company, considering it their interest that a joint-stock company should be established for purchasing and working some valuable mines at or near Ruabon, in Denbighshire, in close proximity with their Shrewsbury and Chester line, entered into communication with parties for encouraging [381] that object. 5. The company was in the course of formation and a provisional purchase of one half of the collieries had been made, when at the ordinary half-yearly meeting of the proprietors of the Great Western Railway Company, held in February, 1856, the attention of the whole body of proprietors was expressly directed to this subject by the following passages in the report then presented :—“ But, advertng to the still more important subject which has been treated in much detail by the special committee in their report, viz. the conveyance of coals for domestic purposes over considerable distances of your lines, and in constant as well as extensive supplies to the Metropolis and elsewhere, the directors are desirous of ascertaining the views of the proprietors upon that topic. Since that report was framed, one colliery near Ruabon, in North Wales, has already changed hands, with the avowed intention of working it by means of a joint-stock company under the proposed new law, with limited liability, possessing an extended capital, for the purpose of raising and transmitting the best coals which can there be obtained for London and other southern markets over your lines. The advantages of that undertaking to the railway company, distinct in itself, as well as being a probable forerunner and example to be imitated by others in similar operations for procuring extended supplies of coal, are unquestionable; but the directors deem it right and proper to state that some of the parties engaged in the inception of this joint-stock investment, are more or less officially connected with the service of the company, who propose to embark capital in it upon the same principle as was explained to and approved by the proprietors in February, 1853, and subsequently carried into effect in the instance of the Great Western Hotel Company. The directors think it, however, worthy of consideration, whether any person [382] having a duty connected with the management and disposal of coals, proposing to take part in the new joint-stock company, should not at the discretion of the board be required to make his election within a reasonable period, either to relinquish his appointment in the Great Western service, or to forego any participation in the concerns of the joint-stock company. With such special qualification, if the proprietors approve of it, your board can see no reason for withholding their sanction to the measure. If there seemed to be any probable conflict of interest in a matter so important both to the railway company and the lessees of the colliery, the board would have hesitated to entertain any question of arrangement with a joint-stock company so constituted; but they believe, on the contrary, that transacting such business openly and avowedly upon fixed and definite conditions with individuals directly interested in the welfare of this company, subject to the above-mentioned qualifications, and neither exclusively nor preferentially with such company, but rather as an induce-

ment to similar arrangements with other companies or persons upon equal terms and conditions, will be just and right in principle, as well as extremely beneficial to the company. The directors believe, that, even during the present half-year, a considerable accession of receipts from such traffic can be obtained, and that it will rapidly increase if properly managed, and add no immaterial amount to the future dividends for the shareholders." 6. The report containing these passages was received and adopted; and, with reference to the matter in these passages more particularly referred to, the following resolution was passed:—"It was resolved, that this meeting approves and sanctions the proposed arrangement for securing to this railway, upon agreed terms of profit, a large and continuous supply of coals in the manner and subject to the conditions recommended in the two reports presented for consideration this day; and hereby authorises the directors to conclude such agreements for that purpose as they may deem most advantageous to the proprietors of this company." 7. In pursuance of an assurance given by the chairman of the directors at this meeting, a case was stated for the opinion of counsel as to the legality of entering into the proposed arrangements; and, such opinion having been obtained that the arrangements would be perfectly legal, further negotiations took place between the promoters of the intended company and the directors of the Great Western Railway Company, which resulted in an agreement subsequently reduced into formal shape, and duly executed between the Great Western Railway Company and the company then lately registered in accordance with the provisions of the statute, under the name of "The Ruabon Coal Company (Limited)." 8. That agreement bears date the 31st day of July, 1856, and a copy of it is hereto annexed (a).

(a) The agreement was as follows:—

An agreement, made the 31st of July, 1856, between the Great Western Railway Company of the one part, and the Ruabon Coal Company (Limited), being a joint-stock company incorporated pursuant to the Joint-Stock Companies Act 1856 (19 & 20 Vict. c. 47), of the other part: Whereas the said Ruabon Coal Company (Limited), hereinafter, called "the coal-proprietors," are owners or lessees, or may become owners or lessees, of certain collieries and beds or mines of coal at Ruabon, in the county of Denbigh, from which place the Great Western Railway Company, hereinafter called "the company" merely, have, by means of railways, a continuous and direct communication to London and elsewhere: And whereas it is considered that mutual benefits and advantages may be obtained by the company and the coal-proprietors, by carrying coals from the said collieries to Paddington and to other stations on the company's lines, and in their storing and keeping it for the coal-proprietors until sold or removed; and the company are willing to afford to the coal-proprietors great facilities and advantages in carrying, storing, and keeping the coal, for reasonable freights and charges, in consideration of the coal-proprietors guaranteeing to them a constant and regular traffic of coal, for a certain term of years, subject as hereinafter mentioned: And whereas arrangements of the like kind, having regard to the circumstances and the quality of the coal, are intended to be and may from time to time be made between the company and other companies or persons who may be owners or lessees of collieries or beds of coal, or with coal-factors and others engaged in the traffic of coal: and the persons with whom at any time and for the time being such arrangements may be in operation, including those parties hereto, are hereinafter collectively designated as the coal-consignors: And whereas it is also intended that the company shall make, on behalf of all the coal-consignors alike, and without distinction, having reference in each case to the quality and market-value of the coal, arrangements for the coal sent by them respectively to London being there sold and delivered on account of and by persons acting as the general agents and servants of the various coal consignors respectively, all the charges and expenses of these arrangements being considered as laid out and incurred for the general benefit of all the coal consignors, and being ascertained and apportioned among and borne by them respectively, as hereinafter mentioned: And whereas this agreement is for the purpose of carrying into effect these several proposals and objects, as far as the coal-proprietors, parties hereto, are concerned therewith: Now, therefore, it is hereby mutually agreed by the parties hereto, as follows:—

1. This agreement shall come into force on and take effect upon and as from Saturday, the 3rd of January, 1857, inclusive, and shall continue in force for the term

[384] 9. In the interval which elapsed between the time of this agreement and the ordinary half-yearly meeting of the Great Western Railway Company, in February, 1857, questions had been raised, and objections taken, principally, as was believed, by persons inter-[385]-ested in collieries in other districts of the country, as to the

of ten years from that day, subject to partial suspension and to prolongation and sooner determination, as hereinafter respectively mentioned; but it is agreed that all coal which may have been carried on the railways of the company, within the limits hereinafter mentioned, by the coal-proprietors, from the 1st of March, 1856, shall be considered to have been carried at the rates and prices for freights, terminals, waggon-hire, and break of gauge and otherwise, hereinafter agreed upon.

2. A year, under this agreement, shall consist of two halves of a year, as next defined. Half a year, under this agreement, shall be reckoned from the Saturday next after the 1st of July, to the Saturday next after the 31st of December, both days inclusive: or, in like manner, from the Saturday next after the 31st of December to the Saturday next after the 1st of July, both inclusive. A month shall be reckoned as four weeks, taken in succession in each half a year, the remaining weeks and days being included in the last month of each half a year; and a week shall be reckoned from Sunday to Saturday, both inclusive.

3. Subject to the provisions hereinafter contained for the partial suspension of this agreement, the coal-proprietors are to send over the railways of the company from the said collieries, consigned to stations on the company's railways beyond the distance of one hundred miles from the junction of the railway, with the siding leading to the colliery, such sufficient quantity of coal during each year as will produce to the company as and for freight, terminals, waggon-hire, and break of gauge, during the continuance of this agreement, except when prevented by the circumstances hereinafter particularly specified, a yearly gross revenue of 40,000*l.*, subject to be increased as mentioned in clause 4, or increased or reduced as mentioned in clause 26; and the minimum quantity to be sent and consigned in each month, so as to make up the said yearly revenue, or the increased or reduced yearly revenue, as hereinafter mentioned, shall from time to time be arranged between the parties hereto, or, in case of disagreement, by the standing referee hereinafter mentioned; it being agreed that all such arrangements shall from time to time be reduced to writing, and shall be signed by some competent person on behalf of the company and the coal-proprietors respectively, or by the standing referee as aforesaid, and that the last of such written and signed arrangements shall always be as binding as if the terms thereof had been inserted in this agreement.

4. Subject to the provisions for the partial suspension of this agreement, the coal-proprietors agree, at any time after the expiration of one year from the 3rd of January, 1857, upon notice in writing given for that purpose by the coal-manager hereinafter referred to, and provided the coal then can be sold at Paddington at not less than the minimum prices hereinafter mentioned, to increase the quantity of coal to be sent thereafter to the said stations, so as to produce to the company, from the sources and for the services aforesaid, thenceforth during the continuance of this agreement, a gross revenue of 60,000*l.* per annum, subject to be increased as next mentioned, or to be increased or reduced as mentioned in clause 26; and, in like manner, and subject as aforesaid, the coal-proprietors agree, at any time after the expiration of two years from the said 3rd of January, 1857, upon notice as aforesaid, to increase the supply so as to produce thenceforth during the continuance of this agreement a like gross revenue to the company of 80,000*l.* per annum subject to be increased or reduced as mentioned in clause 26. But it is hereby expressly agreed between and by the parties hereto, that, when the annual gross revenue to be paid to the company under this agreement, or actually so paid, whether or not in consequence of such notice in writing as aforesaid, shall in any one year amount to the gross sum of 60,000*l.* the sum of 3*d.* per ton shall be allowed to the coal-proprietors in account, by way of discount, in respect of such part thereof as shall have arisen on coal carried within the London district; and, in like manner, when the annual gross revenue shall amount to the sum of 80,000*l.* in any one year, the sum of 6*d.* per ton shall be allowed to the coal-proprietors in account, by way of discount on the like part; and, in calculating the said sums of 60,000*l.* and 80,000*l.*, the coal-proprietors, for the purpose of allowance by way of discount, shall be at liberty to apply the surplus money of any one year towards the deficiency of any other year. It being hereby agreed that such discounts shall be

arrangement so made with the Rudon Coal Company; and, in consequence thereof, the directors of the Great Western Railway Company, in their report to the proprietors at that meeting, which was held [386] on the 15th day of February, 1857, made the following statement:—"The question of rates for the conveyance of coals over the Great Western lines having been raised by an advertisement and circular letters which tend to mislead the proprietors, and to impute to the [387] board preferential dealings,

respectively allowed on an average calculated over the whole term of ten years, but shall be allowed yearly, as they accrue. And it is further agreed, that, for the purposes of this agreement, the London district shall be taken as including all stations on the company's railways within twenty-five miles of Paddington, or on any branch the junction of which with the main railway is within twenty-five miles of the said Paddington station.

5. The coals to be sent under the two last preceding clauses shall consist of the best quality of coal, known generally as "yard" coal, and of the inferior quality of coal, known as "wall and bench" coal; and these qualities of coal shall be sent, under the two last preceding clauses, in the proportions following, viz. during the period when the gross revenue shall not exceed 40,000*l.* a year, in the proportion of two thirds of yard coal to one third of other coals; during the period when the gross revenue shall, or, but for the making of such reduction as mentioned in clause 26, would, exceed 40,000*l.* a year, in the proportion of eleven twentieths of yard coal to nine twentieths of other coals.

6. Subject to the proviso in the present clause, the company are to provide and supply to the coal-proprietors, at the said collieries, coal-trucks for the carriage of all coal to be sent over the said railways by the coal-proprietors, either under the preceding clauses, or to any stations on such railways, beyond the distance of fifty miles from the said junction; and, to this end, the company are on each working day to provide and supply (without requisition) at the said collieries, coal-trucks sufficient for the carriage of at least one twenty-fourth part of the minimum quantity of coal fixed for that month; and, further, whenever notice shall have been given to their traffic-manager, not later than the Friday of any week, that the coal-proprietors will during the ensuing week require trucks sufficient to accommodate a traffic of a greater number of tons than one twenty-fourth part of the current monthly minimum, then the company are on each working day of the week so ensuing to provide coal-trucks to accommodate the proportion of the traffic to the specified extent, provided the number of tons specified do not exceed 25 per cent. of the quantity of coal apportioned for that week according to the current monthly minimum, beyond which it is to be optional with the company whether they will provide trucks or not, and to what extent. And, further, if at any time this agreement shall be partially suspended, under the provisions hereinafter in that behalf contained, the company are not, during the continuance of such partial suspension, to be bound to provide and supply any coal-trucks as aforesaid beyond such number within the limits aforesaid as shall be actually required, by some such weekly notice as aforesaid, to be supplied during the ensuing week.

7. The coal-trucks are to be supplied at the said collieries with such order and regularity as may provide generally a sufficient number for the average of the working days during the week, the supply not being delayed on the one hand, or too quickly made on the other hand. They are to be such as are suitable to the purpose, and in good repair and condition, and the coal-proprietors are not to be liable for their maintenance or repair, beyond the making good any damage or injury caused to the coal-trucks by their own fault or neglect.

8. The coal is to be loaded into the coal-trucks by and at the expense and risk of the coal-proprietors, who are also to provide all that is necessary for the purpose. The coal proprietors are also to provide, and maintain in good order, the branch railway and sidings and other conveniences usual and necessary, except motive power for loading and for leading the coal in the trucks beyond the colliery and the point where it reaches the land belonging to the company near to the junction with the company's railway.

9. For every coal-truck provided by the company, which, after having been for two clear working days properly, under the sixth and seventh clauses of this agreement at the loading place of the coal-proprietors, ready for use by them, shall not be

the directors think the best answer to such misrepresentations, industriously propagated to serve a particular object at this moment, will be, to publish an authorised scale of the rates, as well as the particulars of the system which is in opera-[388]-tion, equally and impartially, with every freighter who may be willing to transmit coals over this railway. It will be appended to this report for the information of all parties desirous of ascertaining the facts. It is perfectly true that a retail dealer who may

loaded and ready to be taken away by the company, the coal-proprietors shall pay a demurrage of 2s. for any time not exceeding twenty-four hours, and 2s. 6d. for every twenty-four hours or fraction of twenty-four hours beyond the first twenty-four hours of detention, to be reckoned from the time when the company shall first be ready, and shall by their servants or agents in that behalf offer in writing to take away the same, until it shall actually be loaded, or, which shall first happen, taken away unloaded. The coal-proprietors are also to pay, as demurrage, the same rate of charge for the trucks at the unloading stations, where the company shall have provided dépôts and conveniences for unloading the coal, as hereinafter mentioned. Excepting always those stations, at which the business of the coal-proprietors shall be conducted by a manager, appointed by the company or by the company's superintendents or station-masters.

10. The coal-trucks so provided and supplied by the company shall, when loaded, be weighed on the machine at the colliery in the presence of a servant of the coal-proprietors and of a person to be appointed and paid by the company, which person shall give a receipt to the coal-proprietors for the quantity so ascertained; and the correctness of such receipt shall not, unless disputed at the time by the servant of the coal-proprietors, afterwards be questioned or disputed; and the company, in consideration of the special notice and circumstances of this agreement, and of the large minimum quantity of coal agreed to be sent over their railways, undertake to be responsible for delivering the same weight (less 5 per cent. for waste and breakage, taken upon an average in each month,) to the agent, or others appointed to receive the coal on the behalf of the coal-proprietors at the respective unloading stations. And the company shall with their own engines carry the said coals, and deliver them, according to the consignment of the coal-proprietors, to and at the Paddington station, or to and at any other station on the company's lines of railway beyond fifty miles from the aforesaid junction; and the company shall carry and deliver the same with despatch, regularity, care, and attention, and shall remove the loaded waggons from the sidings at the colliery as often as may be agreed upon, so that the regular working of the colliery may not be interrupted by reason of the loaded waggons filling up the sidings. Provided always that the company shall not be bound to carry coal for the said coal-proprietors upon the terms of this agreement under any circumstances for a less distance than fifty miles on their railways; but nothing herein contained is to deprive the coal-proprietors of their right to send coal at the ordinary rates of carriage for any such less distance.

11. When the quantity of coals sent and consigned by the coal-proprietors in a month to stations beyond the one hundred miles before mentioned, shall be in such proportion as would produce an annual gross revenue of 40,000l. as aforesaid, the company shall not be bound to employ for the carriage of them more than seven trains in each week; when the quantity shall be in such proportion as would produce an annual gross revenue of 60,000l. as aforesaid, they shall not be bound to employ more than eleven trains in each week; and, when it shall be such as would produce an annual gross revenue of more than 80,000l., they shall not be bound to employ more than fourteen trains in each week, so as to insure that the coal-trains supplied shall in all cases be fully loaded.

12. The company are to deliver the coal so carried by them under this agreement into the care of the agents, or others appointed by them on behalf of the coal-proprietors for receiving the same. The quantities of coal from time to time carried and delivered for the coal-proprietors, shall be correctly weighed, ascertained, and recorded, at the time of the arrival of each train, by the agents or servants of the company and of the coal-proprietors present, if any, at the places of unloading; and the result then arrived at shall not be afterwards questioned or disputed according to the quantity so recorded.

13. The company are to provide for the coal-proprietors in their stations at

send single [389] trucks of coals, or coals in small quantities, whenever he pleases, without engagement or obligation of any description to the company, pays more for the single truck than the freighter who engages to provide full train loads adapted to the power of the engine, sent at [390] all seasons of the year, and for a stipulated annual amount of freight payable to the company. The question really is, whether such rates are disproportional or otherwise, and the publication of the scale will be

Paddington and at such other of the stations upon the company's railways, within the limits of this agreement, as the coal-proprietors shall from time to time appoint, by notice in writing to the company's traffic-manager, so far as the station and available room of the company then existing and the convenience of all the coal-consignors will severally admit of, having regard to the general traffic at such stations, as to which, any question shall, in case of dispute, be referred to the standing referee, good and sufficient and convenient depôts or store places for the separate storing and keeping of the different kinds of coal so sent; and are also (to the like extent) to provide for their use, in common with the other coal-consignors, sufficient space for the convenient unloading, receiving, and discharging of the coals; and the coal-proprietors, in consideration, of the terminal charge hereinbefore referred to, are to have the use of the same respectively, under proper regulations, for the receiving, unloading, storing, selling, and loading of the coal so sent, and to have free access thereto for themselves and their agents and servants and others duly authorised by them in that behalf, at all reasonable hours for all or any of these purposes.

14. The company are also to provide at the stations last-mentioned, for the use of the coal-proprietors, in common with the other coal-consignors, and to allow them and their agents and servants and others, by their authority, under proper regulations, access to, and use of, the sidings already made, or which may hereafter be made by the company to afford access to the said depôts respectively, and the weighing-machines thereat, and also at the Paddington station, desks, and all other office-fittings and furniture for offices, and are at all times to keep the same respectively in good repair and working order, at their own expense, except that the expense of repairing and making good any damage or injury caused by the act or default of any of the agents or servants appointed by or acting for or on behalf of the coal-proprietors shall be paid for by the said coal-proprietors.

15. The company are to engage and provide a general coal-manager, at the Paddington station, for the purpose of selling the coals, keeping the accounts, and generally managing the whole of the coal business at that station; and also to appoint a sufficient and complete staff of clerks and other persons (who are, however, to be the agents and servants of the coal proprietors) necessary for conducting the business of unloading, stacking, selling, distributing, and disposing of the coals, and collecting and receiving the prices thereof; also to provide, by hire or otherwise, the requisite horses, carts, and other things necessary for the weighing and delivering of the same.

16. The company are from time to time to have the appointing, removing, and discharging of the said general coal-manager and of all the said staff, without any right on the part of the coal-proprietors to interfere therein; and are from time to time to cause such security to be given by each person so appointed for their faithful accounting to the company and to the coal-proprietors, as the company may think necessary; and to appoint and prescribe the several duties and functions of such manager and staff, and fix and determine their respective wages and salaries. But such general coal-manager and staff, or any individual thereof, shall be removed by the said company, upon the coal-proprietors certifying in writing, stating therein reasonable grounds for so certifying, that the said general coal manager, or any one or more of his staff, are or is unfit or incompetent, or neglect to, or do not properly, discharge the duties or functions to be performed by them or him respectively.

17. The general coal-manager and staff may act for the other coal-consignors besides the other coal-proprietors: they are to be considered and treated as acting solely for the coal-proprietors, and as their individual agents and servants, and not as the agents and servants of the company, or of any of the other coal-consignors; and the coal-proprietors are to be solely bound by, and answerable for, the contracts and representations, acts, and defaults, of the coal-manager and staff when dealing with the coal of the coal-proprietors.

18. The general coal-manager is to make for and on behalf of the coal proprietors,

the best mode of testing it. The directors can say with [391] confidence, that their sole object has been to secure to the lines the utmost amount of freight from coals carried in the manner most economical and remunerative to the proprietors, and upon one uniform principle, applicable alike to all, and recognized as just. It was [392] sanctioned by the highest opinion of counsel immediately after the last February meeting; and the system has since been confirmed as legal by a recent decision of the

and, if he shall find it more economical or convenient so to do for them, in common with other coal-consignors, all the necessary arrangements at Paddington station for the sale and delivery from the depôts there of the coal; and, for this purpose, may, if so authorised by the company, hire or contract for the use of all necessary horses, waggons, carts, trucks, harness, shovels, sacks, tools, and other requisites for such sale and delivery, the expense of which is to be defrayed as hereinafter mentioned.

19. The general coal-manager is also to cause to be kept at the Paddington station all usual and proper books of accounts, and to cause full and accurate entries to be made therein of all sales and deliveries, moneys received, and disbursements, and all other transactions relating to the sale and delivery of the coal-proprietors' coal, and the receipt of the proceeds thereof: the coal-proprietors, either personally or by their agents duly authorised for that purpose, are to have the right, at all reasonable hours, to inspect or examine all or any entries in the books.

20. The company are to afford all facilities and give all assistance in their power for enabling the coal-proprietors, as regards the Paddington station, through and by means of the personal services of the general coal-manager and his staff, and, as regards every other station, within the limits of this agreement, through and by means of the services of the manager and staff at such station, by whomsoever appointed, to manage the sale and realise the proceeds of the coal of the coal-proprietors, and are to use all means in their (the company's) power for putting all the coal-consignors on an equal footing, and affording the like conveniences and advantages to all without favour or distinction.

21. The coal-proprietors are to have the continued use of the several depôts, offices, and plant for the purposes of this agreement; and all the provisions of this agreement, as to the keeping, selling, and delivering the coal at and from the same, are to continue in force for a period of twenty weeks, if necessary, after this agreement shall in other respects have been terminated, in order to afford the coal-proprietors sufficient time for selling off, or removing the coal then in store: and accounts are to be kept and balance-sheets made out and delivered and adjusted for this extra period upon the same principle and in the same manner as the accounts and balance-sheets respectively hereinafter mentioned.

22. The company are, from time to time, to pay and discharge all the charges and expenses arising out of and incident to the unloading, storing, selling, and delivering at and from the Paddington station, of all the coal consigned by the coal-consignors respectively to that station, that is to say, the salaries and wages of the general coal-manager and of the staff as aforesaid, and also the charges and expenses of hiring or otherwise providing horses, wagons, carts, trucks, sacks, harness, shovels, tools, books, papers, and other requisites for conducting the business of unloading, storing, selling, and distributing the coals: also any moneys paid or expended for making good or by way of compensation for damage or injury caused by the default or neglect of any of the said staff, and in respect of the tax or duty payable on coal, and in general in or incident to the doing of all things necessary or proper to be done for the unloading, storing, keeping, selling, weighing, loading, and delivering coal, and receiving and collecting the price thereof, as hereinafter mentioned.

23. The company are to keep a separate account, as far as practicable, of each of these various charges and expenses in each half-year against the several consignors, which are to be paid by the several coal-consignors respectively: and those charges and expenses which cannot be so separately ascertained shall be taken and charged rateably among all the coal-consignors according to the quantity of coal which they may respectively during that half-year have consigned to the Paddington station: and, subject to the next clause, the coal-consignors shall pay the same accordingly. But the company shall, out of or towards such charges and expenses, pay or bear the sum of 200l. a year towards the salary of the general coal-manager, who, in that capacity, will perform several duties on behalf of the company, and also the sum of

court of Common Pleas (referring to *Delade's case*, ante, vol. i., p. 454). To this principle [393] the directors feel it their duty to adhere; and they will rejoice to find that it is extensively adopted by the Somersetshire, Forest of Dean, and all other collieries, whether large or small, under arrangements with this company similar to that which is now in force with [394] the Ruabon Coal Company." 10. The graduated scale referred to in this report, was a scale which had been prepared and arranged for the express purpose of enabling other persons interested in collieries in any other districts, to carry on an extensive traffic in coals upon [395] similar terms and conditions, even with a lesser quantity than that which had been agreed with the Ruabon company to send, and such scale was calculated, as I believe, to afford to all consigners equal and fair advantages in respect of carriage and freight of coal over [396] any of the railways of, or worked in connection with, the railways of the Great Western Railway Company. 11. The following is a copy of such graduated scale, which was extensively circulated, and was communicated or

50l. a year towards the salary of each clerk employed by or acting under such coal-manager in collecting the price of coals sold, who will to that extent be necessary and required for the collection and protection of the company's freights earned by the carriage of such coals.

24. The total sums appropriated to the coal-proprietors, as aforesaid, in respect of compensation for damage or injury, under clause 22, and also the said charges and expenses at the Paddington station, are to be debited to the coal-proprietors, in the quarterly statements of accounts, and are to be re-paid to the company by them, as hereinafter mentioned.

25. The rate of charge by way of freight for all the coal carried by the company and delivered under this agreement beyond the one hundred miles before mentioned, is to be seven-sixteenths of a penny per mile per ton of 21 cwt. of 112 lbs. received at the loading-place, to be computed from such loading-place, subject to increase or reduction as hereinafter mentioned; and this charge shall be in full of all rates, tolls, and charges of the company, except those hereinafter mentioned for trucks and terminals, and transfer from the narrow to the broad gauge, up to the time of delivery of such coal at the coal-dépôts, to be provided as aforesaid.

26. In case at any time during this agreement the average selling price of the coal of the proprietors at Paddington, to be ascertained as next hereinafter mentioned, should exceed the sum of 23s. 6d. per ton for the first quality or yard coal, or shall exceed the sum of 22s. 6d. per ton for the second quality or wall and bench coal, then, in respect of the coal on which there shall be such express price, the rate of charge per ton for the carriage of such coal from the collieries to the Paddington station under this agreement, shall be increased by one half of such excess price; and, in every year in which there shall be such an increase in the rate of charge, the gross revenue of 40,000l., 60,000l., or 80,000l., as the case may be, to be provided in that year by the coal-proprietors, shall be increased in like proportion (that is to say) by a sum equal to the amount of the increase made by virtue of the present clause in the charges payable to the company during the same year; and if, on the other hand, the average selling price of the said coal shall be less than 21s. 6d. per ton for the first quality, or less than 20s. 6d. per ton for the second quality, then, in respect of the coal on which there shall be such diminution of price, the rate of charge per ton for the whole distance to the Paddington station shall be reduced by one half the difference per ton for the time being between such respective prices of 21s. 6d. and 20s. 6d., or either of them, as the case may be, and the average selling price; and every year in which there shall be such reduction in the rate of charge, the gross revenue of 40,000l., 60,000l., or 80,000l., as the case may be, to be provided in that year by the coal-proprietors, shall be reduced in like proportion (that is to say) by a sum equal to the amount of the reduction made by virtue of the present clause from the charges payable to the company during the same year. Provided always, that the selling price shall, for the purpose of this clause and this agreement, be considered never less than 19s. per ton for coals of the first quality, and 18s. per ton for coals of the second quality. Provided also, and it is further agreed, that no reduction or advance shall be made in the rate of charge for the carriage of the coal from the collieries to stations other than Paddington, whatever may be the selling price

27. The average selling price for the time being of the first and second qualities

became known to all persons [397] interested in the coal traffic passing upon any of those railways, and, among others, to the complainants and other coal proprietors of the Forest of Dean:—

[398] *Statement of Total Charge per Ton for Coals over the Great Western Lines referred to in the foregoing Report:—*

	Per Ton per Mile.	
	Freight.	Use of Wagon.
Contract charge in full train loads, for distances exceeding 100 miles. Total freight 5000l. and upwards per annum for a term	7 16ths of a penny.	1/16th of a penny.
Retail charge, in single trucks, for distances exceeding 50 miles, without any engagement for quantity or time	8/16ths of a penny.	2/16ths of a penny.

	Contract Charge, Freight exceeding per Annum.						Retail charge for small quantities.
	40,000l.	30,000l.	20,000l.	15,000l.	10,000l.	5,000l.	
	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
Additional charge in each case for terminals and other expenses	0 3	0 6	0 9	1 0	1 3	1 6	1 6
Thus, the total charge, including freight, wagon-hire, and other expenses, is, for							
Somersetshire coal—							
Distance 124 miles from Radstock to Paddington	5 5	5 8	5 11	6 2	6 5	6 8	8 0
Forest of Dean coal							
Distance 128 miles from Bullo Pill to Paddington	5 7	5 10	6 1	6 4	6 7	6 10	8 2
[This may be varied, to some extent, by South Wales railway charges over their line.]							
North Wales Coal—							
Distance 198 miles from Ruabon to Paddington	8 6	8 9	9 0	9 3	9 6	9 9	11 10

of coal of the proprietors, is to be ascertained by taking at the end of each month the actual average of the selling prices of all coals of each kind sold by them at the Paddington station, and delivered in or near the metropolis (adding 2s. per ton to the price of any coal that may be sold to persons carting it away from the station) during that month, and the result so arrived at is to be assumed, for the purposes of all calculations under this agreement, to be the average selling price of their coals for that month. The price at which coal is to be sold under this agreement is to be fixed from time to time between the company and the coal-proprietors; and, if any dispute should arise in fixing such, or in arriving at the average selling price as above

[399] 12. No coals are delivered to or received by the Great Western Railway Company at Bullo or Lydney, neither of those places being on any of the lines of the Great Western railway, but upon the line of the South Wales railway, over which the Great Western Railway [400] Company has only such interest and limited share in the working and management of the traffic passing over it as hereinafter particularly mentioned: 13. The working of all the traffic passing upon or over any part of the

mentioned, such dispute is to be determined by the standing referee hereinafter mentioned; but the average selling price is not to be ascertained or affected by the selling prices at other stations than Paddington.

28. Whenever the price at which the two qualities of coal hereinafter described, or either of them, can be sold at the Paddington station, shall fall below 19s. and 18s. per ton respectively (the question of price being in the event of dispute decided by the standing referee hereinafter mentioned) it shall be at the option of either of the parties hereto, by notice to that effect given to the other of them, partially to suspend this agreement until such time as the average selling prices shall again be equal to, or more than, 19s. and 18s. respectively, and thereupon this agreement shall be partially suspended accordingly, the incidents and results of every such partial suspension being those which are defined or referred to in clause 35. But the full performance of this agreement shall be again resumed, as of course and without formal notice, on its being certified by the general coal-manager to the coal-proprietors and the company respectively, that the average selling prices have risen to or above such several amounts as last aforesaid.

29. The coal-proprietors are to pay, in addition to the said rates, by way of freight for carriage, a sum of 1s. per ton, in respect of all the coal carried and delivered for them under this agreement to any station within the London district, as defined in the fourth clause of this agreement, and for coal carried and delivered to any shorter distance (exceeding one hundred miles as aforesaid) at the same proportionate rate per mile 1s. bears to 197 miles, as a commuted charge for the use of trucks; and the coal-proprietors are, in respect of all coal carried and delivered to and at any railway station under this agreement, to pay a further sum of 1d. per ton for the transfer from the narrow to the broad gauge, when it shall be so transferred, and a further sum of 2d. per ton by way of a commuted terminal charge for the use of the sidings, depôts, offices, and for shunting the waggons at the respective stations, and for all other conveniences and advantages offered by the company, and in addition to those defined by clause 13. It is understood and agreed that the above terminal charge is made for the accommodation of the unloading stations alone, inasmuch as the loading-place will be on the property of the coal-proprietors, who are there to receive and form the trains, subject as to the positions and number of trucks in a train to revision by the company, and there to perform all the work usually included in terminal charges, and who are also to maintain at their own cost the branch line and its sidings and conveniences leading to the junction with the company's railway, and although the company's charge for carrying the coal is to commence from the loading-place, calculated as one mile from Ruabon station.

30. In case in any month during the continuance of this agreement, and subject to the incidents and results of any partial suspension as hereinafter mentioned, the coal-proprietors shall send over the railways under this agreement a less number of tons than that arranged as the minimum for that month as hereinbefore mentioned in clauses 3 and 4, they are, nevertheless, to pay for carriage such a sum, calculated on the previous month's work in accordance with clauses 3, 4, and 26, as would be payable on that minimum number of tons if actually sent by them over one hundred miles; and in like manner in case in any half-year during the continuance of the agreement the total of the receipts by the company for carriage shall be less than the minimum amount due for such half-year, in accordance with the conditions contained in clauses 3, 4, and 26, then, subject to the incidents and results of a partial suspension, they are, nevertheless, to pay that minimum amount as if the coal had been actually sent during that half-year over one hundred miles as before mentioned, subject in each case to the provisions herein contained for relieving the coal proprietors from their obligations in this respect under certain circumstances; but the coal proprietors are to be allowed to send at any time or times during the continuance of this agree-

South Wales railway, to or from the Great [401] Western railway, including therein the traffic of coals, is managed and conducted by and through the medium of a joint committee, consisting of five directors of the South Wales Railway Company and five directors of the Great Western Railway Company; and such [402] joint committee is an independent and distinct body, the existence and constitution of which is recognised and sanctioned by act of parliament; and the Great Western Railway Company

ment, carriage free, so much coal as shall be sufficient to make up the short quantity for the carriage of which they shall have paid under this clause in previous years.

31. As regards coal sent by the coal-proprietors over the company's railways between the respective distance of 50 miles and 100 miles from the junction before mentioned, the coal-proprietors shall pay to the company for the carriage of such coals the sum of 3s. 9d. per ton, or a sum calculated at the rate of five-eighths of a penny per ton per mile, whichever shall be the less amount, and also 4d. per ton for the hire of trucks for the whole distance, in lieu of all the rates and charges hereinbefore provided for, and in addition thereto 2d. a ton for terminal charges, and 1d. per ton for the transfer of gauge, when actually transferred; but it is agreed that the coals sent under this clause shall not be taken into account in any way in making up the minimum quantities agreed to be sent under clauses 3 and 4, or in producing the gross annual revenue in clauses 3, 4, 26, and 30 of this agreement.

32. As regards all coals of the coal-proprietors sent and consigned over the company's railways to the Paddington station under this agreement, and in consideration of the large minimum quantities agreed to be sent on the railway, an allowance shall be made by the company to the coal-proprietors equal to one half of the company's charges for the freight, terminals, waggon-hire, and break of gauge, on all coals in respect of the sale of which any bad debts shall have been made by the coal-proprietors.

33. If at any time during the continuance of this agreement the coal-proprietors shall be prevented from sending any quantity of coal over the railway by reason of any fault or neglect of the company or their servants, the coal-proprietors shall not be answerable to the company for any deficiency which may be thereby caused in the monthly or half-yearly quantities sent by them over the railways, and shall be relieved from their obligations in that respect to the extent by which such deficiency shall be caused by such fault or neglect.

34. If at any time during the continuance of this agreement the coal-proprietors shall be prevented from working their collieries and mines, either wholly or to such extent as may be necessary for their sending over the railways beyond the aforesaid distance of 100 miles a minimum monthly quantity for the time being at the least, by reason of a strike of or inability to obtain workmen, or of the collieries or mines becoming flooded, or of any extensive fault, accident, or any circumstance of a substantial character, it shall be at the option of the coal-proprietors, by notice in writing to the company to that effect, partially to suspend this agreement until such time as the cause so preventing the carrying out of this agreement shall have ceased to operate; and thereupon this agreement shall be partially suspended accordingly, the incidents and results of every such partial suspension being those which are defined or referred to in clause 35. But the full performance of this agreement shall be again resumed upon the said cause ceasing to operate, and the coal-proprietors shall forthwith give notice of the cessation of such cause to the traffic-manager of the company.

35. In all cases in which under any of the provisions hereof this agreement shall be partially suspended, the coal-proprietors shall be relieved during the period of such partial suspension from their obligation or liability to provide for the company such yearly gross revenue as hereinbefore mentioned, that is to say, whether or not any coal shall during any such period be actually sent by the coal-proprietors over the company's railways beyond the aforesaid distance of 100 miles, the coal-proprietors shall be deemed and taken to have so sent the minimum during each month of the same period, and after a corresponding rate for any week or day thereof, taking the minimum in each instance as that in force at the time of the commencement of the partial suspension. But, in other respects, the provisions of this agreement shall continue in force notwithstanding any such partial suspension thereof.

36. In the case of any such partial suspension, the period during which this agreement is to continue in force is to be extended with the same provisions and conditions

and the board of that company, have no power of themselves to regulate any [403] traffic passing over the South Wales railway or any part thereof, or to fix or alter the rates or charges for the carriage of the same, but such rates and charges are fixed by the said joint committee quite independent of any rates or charges paid or made by [404] the Great Western Railway Company for or in respect of the traffic over their own proper lines of railway; and it was for this reason, that, in the statement

as during the last half-year of the original term, for a further term equal to that during which such partial suspension shall have existed, and so on each occasion of such partial suspension.

37. If the coal-proprietors shall become bankrupt or insolvent, or if they shall for the space of six calendar months wholly omit to send any coal over the company's railways under this agreement, whether in consequence of a partial suspension as before mentioned, or of a breach of covenant on their parts, the company may give to the coal-proprietors, provided such omission be not caused by or be in consequence of any act or default of the company, three months' notice in writing, requiring them to resume the sending coal over the railways under this agreement beyond the aforesaid distance of 100 miles; and if they shall not, during four weeks thence next ensuing, send over the railways beyond such distance a full and proper quantity of coal under this agreement, the company may thereupon, by a further notice in writing, absolutely determine and put an end to this agreement; but such notice and determination are to be without prejudice to the rights and remedies of the company in respect of any previous breach of covenant by the coal-proprietors.

38. The clerks, collectors, or other persons receiving the same are to pay over to the company the moneys from time to time received as the price of coal of the coal-proprietors sold at or from the Paddington station.

39. Within fourteen days after the expiration of each month, the company are to pay over, by way of advance to the coal-proprietors, in such manner as the coal-proprietors may from time to time direct, three-fourths of the net value of their coal consigned to the Paddington station, after deduction of the charges for freight, trucks, terminals, transfer from narrow to broad gauge, and of coal depôt expenses at Paddington, calculated at the rate of sales during the previous month; and, for the purpose of such estimate, the said coal depôt expenses for that month are to be assumed to have been at the same rate as for the month preceding, the amount of which shall be calculated by the company as nearly as may be accordingly to their judgment and belief, and within fourteen days after the end of each month.

40. The company are to make out and to deliver or send to the coal-proprietors within twenty-one days, a full, clear, and correct account, under this agreement, for each such month, shewing therein for each week the number of tons carried, the respective distances to which they were carried, the deficiency (if any) of the week charged for, though not carried, the tonnage-rate for that week, the amount of the charges upon the number of tons carried, and on the further quantity so charged for, the demurrage (if any), and any other special expenses chargeable against the coal-proprietors, the amount received by the company, and the amount paid over by them to the coal-proprietors as before mentioned; and if within fourteen days after the receipt of any such account the coal-proprietors shall object to any item or items therein, the question in difference, as to the item or items so objected to, shall (unless it can be settled by the parties hereto by agreement between themselves) be referred to and settled by the standing accountant for the time being, as hereinafter mentioned; and the certificate in writing of such standing accountant shall, without any formal award, be binding and conclusive on the parties hereto respectively, as to the matters so referred to him. The item or items not objected to within such last-mentioned period, or the whole account if no item be objected to, shall be thenceforth treated as having been settled and adjusted, and shall not be reopened or questioned for any purpose whatsoever, unless there shall be therein an intentional or fraudulent misstatement.

41. Within ten days after the end of each three months during this agreement, and also within ten days after the expiration of the additional period allowed for selling off or removing the coal in the depôts, the company are in like manner to make out and deliver, or send to the coal-proprietors at their principal office or place of business for the time being, a full, clear, and correct account and balance sheet for the three months, or such other period, shewing therein the total number of tons carried in the

hereinbefore referred to as the graduated scale, the scale of charges as to the Forest of Dean coal is [405] stated to be subject to variation to some extent by the charge over the South Wales railway; and the Great Western Railway Company have urged upon the said joint traffic committee to agree upon equal mileage rates over the South Wales railway in respect of coals [406] sent in considerable quantities from the Forest of Dean, and they have been unable to induce the said joint committee to consent

three months, and the amount of charges upon the weekly quantities sent or charged for, the deficiency (if any) to be charged for, although not earned, and the amount charged on this deficiency, the total of all the amounts charged for weekly deficiencies, the total amount of demurrage for the three months, the total of the coal depôt expenses for that period at the Paddington station, and the proportion thereof to be borne by the coal-proprietors, the total amount of any extra charges or expenses to be borne by the coal-proprietors, the total amount of money received by the company in the half-year, the total amount paid over by them to the coal-proprietors, the discounts and other credits (if any) to be allowed to them, and the balance on the whole account payable over to the coal-proprietors, or payable by them to the company, as the case may be; and the coal-proprietors in like manner to render quarterly accounts to the company of any claims and charges they may have against them.

42. No question or objection shall be made as to the accuracy of any such quarterly account, except as regards the amount of the coal depôt expenses, and as to its being a correct summary of the monthly accounts; and if within ten days after the final settlement or adjustment of all monthly accounts standing open at the time of the delivery of any quarterly account, the coal-proprietors shall object that such account is not a correct summary of the monthly accounts, as finally settled and adjusted, such question is, unless settled by agreement between the parties hereto, to be referred to and settled by the standing accountant, in the same manner as any question or dispute upon a monthly account. In the absence of any such questions or objections being made within the time last mentioned, the quarterly account shall be thenceforth treated as having been settled and adjusted, subject to any subsequent alteration of the amount or proportion of coal depôt expenses as hereinafter mentioned; and, if referred to arbitration, shall be in like manner binding and conclusive upon both parties as settled and adjusted by the standing accountant, subject to the like alteration with regard to the coal depôt expenses, and shall not be re-opened or questioned except in case of fraud or intentional misstatement.

43. If the coal-proprietors shall, within ten days after the delivery to them of such quarterly account, or if any other of the coal-consignors shall, within the time limited by their respective agreements (which time shall in no case exceed by twenty-one days the time allowed to the coal-proprietors for the like purpose), object to the amount or apportionment of the coal depôt expenses, the question so raised is in all cases to be referred to the standing referee hereinafter mentioned, and the coal-proprietors or any other of the coal-consignors may come in as parties to such reference or not as they shall think fit, and the decision and certificate of such standing referee upon the question so referred shall be binding and conclusive, as well upon the coal-proprietors and the company, as upon all the other coal-consignors, whether they shall have come in as parties to such reference or not; and all quarterly accounts and balance-sheets into which such coal depôt expenses enter as an element, shall (if necessary) be amended in accordance with such decision and certificate: but the account and apportionment respectively stated in any such quarterly balance-sheet shall be final and conclusive on all the coal-proprietors, unless objected to by them or some other of the coal-consignors within the times limiting them respectively for making such objection.

44. The balance upon every such quarterly account, whether against or in favour of the coal-proprietors, is to be paid by the party against whom it stands, to the other, within fourteen days after the final settlement and adjustment of such quarterly account and balance-sheet, and, if not so paid, may be recovered by the party entitled to it, from the other, by action of debt in any of the superior courts of common law.

45. If, at any time, whether during the continuance of this agreement or afterwards, before the final settlement of all accounts and claims under it, any question or dispute or difference shall arise between the parties hereto as to the meaning of this agreement, or as to the fact or intent of any breach of it by either party, or as to the damage or compensation to be paid to the other party for such breach, or as to any

thereto: 14. Although the Great Western Railway Company receive the entire freight for the coals carried from Bullo or Lydney over [407] any portion of the Great Western railway, this is done merely for convenience, and is accounted for in common with other through freight, by arrangements with and to the South Wales Railway Company: 15. The South Wales Railway Company are in no way interested, nor [408] do they participate directly or indirectly in the coal traffic from the Ruabon

other matter or thing arising out of this agreement, every such question, dispute, or difference, unless a mere matter of account, such as is hereinbefore directed to be referred to and settled by the standing accountant, shall be referred to the standing referee for the time being, and his decision therein shall be final and conclusive on both parties, and they shall respectively do and concur in all acts and matters for giving effect and validity to such reference and decision.

46. The standing referee for the period from the date of this agreement to the 31st of December next, shall be J. W. K., of, &c.; and, in the month of December in this and each following year, until the final determination of this agreement, an impartial and competent person shall be appointed, either by agreement between the company and the coal-consignors, or, if they shall be unable to agree in such appointment on or before the 15th of December, then by the director of the metropolitan school of science applied to mining and the arts for the time being, on behalf of all parties, to be the standing referee under this agreement during the next year; and the person so appointed shall accordingly be the standing referee from the 1st of January then next for the space of one year, unless he shall die, decline to act, or become incapable of acting, in the happening of any which events another is to be appointed in the same manner, to hold the office until the end of the year, who shall have the same powers in all respects as the original referee, and so on (toties quoties); and any question which at the end of the year for which any standing referee was appointed shall be pending before him and then undetermined, may be heard and decided by them as if such year had not expired.

47. If from any cause the appointment of a standing referee for the next ensuing year shall fail to be made, the then referee shall continue to be the standing referee for such ensuing year, as if newly appointed.

48. The standing accountant under this agreement, for the period from the date hereof to the 31st of December next, shall be the said J. W. K., and thereafter the same provisions shall apply to the appointment of a competent and qualified person to be the standing accountant for each successive year as are hereinbefore made for the appointment of a standing referee.

49. The Great Western Railway Company, for themselves, their successors and assigns, hereby covenant with the Ruabon Coal Company (Limited), their successors and assigns, that they, the Great Western Railway Company, their successors and assigns, shall and will do and perform all things hereinbefore contained which are by them or on their behalf to be done and performed; and the Ruabon Coal Company (Limited), for themselves, their successors and assigns, hereby covenant with the Great Western Railway Company, their successors and assigns, that they, the Ruabon Coal Company (Limited), their successors and assigns shall and will do and perform all things hereinbefore contained which are by or on behalf of the coal-proprietors to be done and performed.

50. Provided always, that any breach of this agreement by either party shall be the subject of compensation, by way of damages, to be ascertained, if any doubt arise as to the amount, by the standing referee herein appointed, on any complaint made to him by either party, and to be paid as he shall direct; it being agreed that the performance of any stipulation on either part shall not be considered as a condition- precedent to the due performance of all the stipulations by the other party, but simply a matter of compensation. Provided also that nothing herein contained shall be construed as creating any participation by the Great Western Railway Company in any profit or loss from the sale of the said coals so to be carried as aforesaid, or as constituting the said company partners in interest in any respect with the coal-proprietors in relation to the sale or disposition of such coals. Provided also, that, if at any time during the continuance of this agreement, any clause, article, covenant, proviso, or condition herein contained, shall, by a court of competent jurisdiction, be held or adjudged to be illegal or beyond the power or competency of the Great

Coal Company, and have no voice or share in any arrangements affecting that traffic ; 16. By the returns of the traffic made up to the 31st December, 1856, it appears that the total [409] quantity of South Wales coal, including Forest of Dean coal, conveyed by the South Wales railway from Bullo and Lydney, and brought to the Great Western railway, has been substantially as large since the making of the agreement with the Ruabon Coal Company as it was [410] before that agreement ; but, if the

Western Railway Company, this agreement shall not be avoided or determined thereby, but the clause, article, covenant, proviso, or condition so held or adjudged to be illegal or ultra vires, or, if more than one, each of them, shall thereupon become and be inoperative and ineffectual, and this agreement shall be read and construed as if no such clause, article, covenant, proviso, or condition, were contained therein ; and fresh alterations in or modifications of this agreement, if any, as may be required by reason of the rejection or omission thereof, shall be forthwith made as may be advised by the respective counsel of the company and of the coal-proprietors, or, in case of their not agreeing, by some third counsel to be nominated by them, or, failing the nomination, by the Attorney-General for the time being ; and if, by reason of such rejection or omission of, or such alteration or modification, either of the parties hereto shall claim to be entitled to any compensation, and the other of them shall dispute such claim, or they shall be unable to agree as to the kind or amount of compensation to be made, the question in the first of these cases, whether any, and if any, what compensation, and in the second of these cases, what compensation shall be made, and how and in what way it shall be made, to the party claiming the same, shall stand referred to and be determined by the standing referee.

The supplementary agreement was as follows :—

A Supplementary Agreement, made the 31st of July, 1856, between the Great Western Railway Company, hereinafter called “the company” merely, of the one part, and the Ruabon Coal Company (Limited), hereinafter called the coal-proprietors, of the other part : Whereas, an agreement bearing even date herewith has been entered into between the company and the coal-proprietors, whereby certain arrangements to continue in force for the period of ten years from the time therein indicated were made for the carriage of the coal of the coal-proprietors over the Great Western Railway to Paddington, and certain other stations as therein defined, and for the storing and disposing of such coal at these places ; and it was, amongst other things, thereby agreed that the company were to engage and provide a general coal-manager at the Paddington station for selling coals, keeping the accounts, and generally managing the whole of the coal business at that station, and to appoint a sufficient and competent staff of clerks and other persons (who were, however, to be the agents and servants of the coal-proprietors) necessary for conducting the business of unloading, stacking, selling, distributing, and disposing of the coals, and for collecting and receiving the prices thereof at Paddington : And whereas the company have consented, at the request of the coal-proprietors, for their temporary accommodation, to allow their superintendents at the stations, other than at Paddington aforesaid, on their railways, within the limits of the said recited agreement, to act for a limited period as the agents of the coal-proprietors for managing the sale of their coals there ; therefore it is hereby agreed by and between the said parties hereto, that, for a period of twelve months from the commencement and taking effect of the recited agreement, and for a further period after the expiration of that time, terminable by either party giving to the other of them three months’ notice in writing, the company will allow their superintendents at the several stations to which coals may be consigned under the said recited agreement, other than Paddington aforesaid, to act as the agents of the coal-proprietors, and for them and on their account to manage the sale of the coals received at such stations respectively by or for the coal-proprietors, and, so far as they may from time to time direct or require, to do all such acts, matters, and things for that purpose, and in relation thereto, as may be done under the terms of the said recited agreement by the general coal-manager at the Paddington station as aforesaid ; and that, in consideration of such services the coal-proprietors will pay for the services of such superintendents respectively while so acting, 3d. per ton on all coals sold at the said stations, the aggregate sum so paid to be distributed among such superintendents in such manner and proportions as the directors of the company may think proper and determine. Provided that an account of the actual expense of and incident to the

sale and supply of the said coal to London, or to any other particular stations on the Great Western railway to which access is also afforded by the line of the Great Western Railway Company for Ruabon coal, has been at all affected by the agreement, it has been so affected, not by reason of any undue preference or advantage afforded to the Ruabon Coal Company, but to the superior quality of the coal raised from the Ruabon collieries as compared with coal of the like kind supplied from the Forest of Dean, and also to the lower cost of the best coal at Ruabon over that raised from the Forest of Dean: 17. The said coal company was framed under the circumstances hereinbefore mentioned; and, [411] although the formation of such company was encouraged by the directors of the Great Western Railway Company with a view to the development of the coal-traffic over their railways, as hereinbefore mentioned, yet the said company was and is wholly independent of the Great Western Railway Company; and many of the proprietors thereof are altogether independent of, and some have no connection with, that company: 18. No undue preference or partiality has been knowingly or intentionally exhibited by the Great Western Railway Company to or in favour of the Ruabon Coal Company to the prejudice of other persons, or in favour of the traffic of the Ruabon coal; nor is the Forest of Dean coal subjected to any undue or unreasonable prejudice or disadvantage: and the same terms and conditions which are agreed and acted upon with the Ruabon Coal Company, are open and have been publicly offered to all other coal-proprietors who may be desirous of sending coals in like manner over the railways of the Great Western Railway Company: 19. In consideration of the large quantity guaranteed to be sent annually and regularly in full train-loads from the Ruabon collieries over the Great Western railway, the charge per mile is less for coals conveyed from the Ruabon colliery than for coals conveyed in smaller quantities from the Forest of Dean collieries; but the circumstances justify such lower charge per mile, and, under like circumstances, and subject to the like conditions, the Great Western Railway Company are willing, and have offered, to make the same reduced charge per mile to all other coal-proprietors; and the actual freight of coals conveyed from the Forest of Dean collieries to London without any contract for quantity is less than the freight paid by the Ruabon company under their agreement, owing to the nearer proximity of the said Forest of Dean collieries to London: 20. [412] The trade or demand for coals at Bullo and Lydney has not been in any way injured by any such supposed undue preference or advantage; and, if such trade has been injured, it is only by reason of the competition with a better article sold at the pit's mouth at a lower price. [The affidavits then proceeded to explain or deny the allegations as to the preferences given to the Ruabon Coal Company in respect of the alleged supplies of stationery, the advertizing, the employment of porters, station-masters, and clerks, payment of salaries, and passes.] 28. The Ruabon Coal Company are held strictly to the period of forty-eight hours allowed for unloading, and a demurrage account is kept against them for any excess or delay: 29. According to the difference of circumstances, the charges are fairly proportionate; the mere question of distances affords no certain criterion as to the reasonableness of the relative charges. For distances under fifty miles, the ordinary rates are charged to the Ruabon Coal Company, and, for distances less than one hundred miles, higher rates in proportion are charged to them than for distances exceeding one hundred miles. And this is a well-known and usual principle of charge adopted by railway companies. The rates on the table or schedule annexed to this my affidavit (see next page) are the rates now in force for coals brought to the several places mentioned in such table, from Bullo or Lydney respectively; and, having regard to the fact that there is in these cases no special contract for a con-

unloading, storing, selling, and delivering of the coals of the coal-proprietors at each of such stations, and of collecting and receiving the prices thereof, shall be kept by the superintendents there respectively, and that the company shall in all cases be reimbursed by the coal proprietors all moneys that shall be paid or expended in respect of the services and matters last aforesaid beyond or in excess of the sum made up of the said payment of 3d. per ton. And it is agreed between the parties thereto that the provisions of the said recited agreement respecting the settlement of accounts and disputes by the standing accountant and standing referee mentioned in or to be appointed under such agreement, shall be applicable and apply accordingly to the settlement of accounts and disputes arising hereunder.

siderable quantity to be sent annually and regularly, or for the loading of full train loads, as is the case with the Ruabon Coal Company, the rates so charged are in every

[413] Rates for Carriage of Coal from Bullo Pill and Lydney, showing the Great Western and South Wales Companies' Proportions respectively.

		LYDNEY.									
		BULLO PILL.									
To		Private Trucks.					Company's Trucks.				
		Total distance.	Great Western proportion.	South Wales proportion.	Through rate.	per ton.	Great Western proportion.	South Wales proportion.	Total rate.	per ton.	Total rate.
Paddington		127	5/9½	0/11½	6/9	7/1	per ton.	per ton.	8/1	per ton.	per ton.
Bull's Bridge		116	5/4½	0/11½	6/4	6/7	per ton.	per ton.	7/7	per ton.	per ton.
Reading		92	4/4½	0/11½	5/4	5/3¾	per ton.	per ton.	6/4	per ton.	per ton.
Oxford		84	4/0½	0/11½	5/	4/10¾	per ton.	per ton.	5/11	per ton.	per ton.
Swindon		50	2/7½	0/11½	3/7	3/3½	per ton.	per ton.	4/4	per ton.	per ton.

respect fair and reasonable as compared with the rates charged under the special circumstances aforesaid to the Ruabon Coal Company: 30. It appears from returns made, that the average receipts per ton for the tonnage of all coal sent from Bullo or

Lydney to stations on the Great Western railway, including terminals, is 4s. only, whilst the average receipts per ton for the carriage of the Ruabon coal sent to stations on the Great Western railway, including terminals, is 8s. 1d. : 31. As to the charge for terminals, the charge made to the complainants on the conveyance of coals from the Forest of Dean, is the ordinary station-to-station terminal charge of 1s. 6d., and for this charge accommodation is afforded as well at the loading as at the unloading stations ; and such charge is apportioned between the Great Western railway and the South Wales railway companies : the smaller charge on Ruabon coals for terminals is made partly in respect of the large quantity annually consigned, and partly because the work of moving the trucks and forming the train, as well as loading the coal, is performed on the sidings and property of the Ruabon Coal Company, and at their expense ; and a proportionate reduction of the usual charge is and has been offered to all other consignors of coal, according to the quantity which they may respectively contract to send annually over the railway : 32. The agreement as to the allowance in respect of bad debts made in London only, is consistent and reasonable, having regard to the fact that the coals are to be sold and delivered by a general agent acting for the railway company, as well as for all owners of coal who may wish to employ him for the same purpose, and that, in such capacity, as receiving the freight payable to the railway company, he would have no interest in preventing the sale of coal to improper or insolvent customers if the entire loss were to fall on the coal company whether they receive the money or not ; and it is therefore a just as well as a necessary precaution that the railway company receiving the freight should participate to some extent in the loss occasioned by bad debts so far as their freight is concerned ; and the railway company, if no such allowance were made, would have a distinct interest in as large a quantity as possible being sold, regardless of payment, inasmuch as every shilling which is earned by the Great Western Railway Company, by increasing the quantity of such traffic to London, beyond the actual expenses, is a new and additional gain to them and their shareholders : 33. The Great Western Railway Company not only professes to be but is ready to enter into agreements with other coal-consignors on the same terms as those contained in the agreement with the Ruabon Company, in which agreement provision is actually made for other coal-consignors participating in the benefit of the agreement : and, moreover, for the accommodation of those who might not be able or willing to guarantee the consignment of so large a minimum quantity per annum, they have provided and offered the graduated scale before mentioned, varying the charges according to quantities, on the same principle as has been adopted in the case of the Ruabon Coal Company, and as has been and is acted upon by the Great Western Railway Company in other instances ; but the complainants as traders of the Forest of Dean have refused, although proposed to them, either to adopt such graduated scale or to bind themselves to send any specified quantities of coals to, upon, or over the Great Western railway. [The affidavit then went on to assert that the principle of the agreement was fair and equitable.] 36. The obligation imposed upon the Ruabon Coal Company by the agreement to send full train loads is strictly enforced ; and, although the trains are occasionally broken up at Wolverhampton, where there is a break of gauge, or at Didcot, for dispatch to different stations, yet this is done solely for the convenience of the Great Western Railway Company, and the coal company have no concern or part in it : the obligation on the coal company to send the coals in full train loads is a great advantage [416] to the Great Western Railway Company, inasmuch as it utilises to the greatest practicable extent the engine-power employed in this traffic, and on the other hand it prevents unnecessary interference with the passenger trains and other traffic, by diminishing the number of such coal trains ; it also enables the Great Western Railway Company to appropriate trucks for such special service, and to keep such trucks in active and constant employ : 37. No undue preference or advantage is given to the Ruabon Coal Company, to the prejudice or disadvantage of the complainants or the other traders of the Forest of Dean : and it would be inexpedient and unjustifiable as respects the interest of the Great Western Railway Company itself that any impediment or obstruction should be imposed on the traffic of coals from any district because it may compete with some other district, the object and the interest of the railway company being to encourage such traffic to the utmost extent, and to give all reasonable aid to its increase and development to all persons and from whatever district it may be derived : 38. The Great Western Railway Company have not nor

ever had any interest in the success or failure of the Ruabon Coal Company, except as regards the freight upon the conveyance of such coal; and their only object in promoting the coal-traffic from the collieries in the Ruabon district was, to benefit their own proprietors by means such of a profit to be derived from traffic.

A further affidavit of Grierson stated, that, in consequence of the steep gradients between the Gloucester and Swindon stations of the Great Western Railway, coal coming from the Forest of Dean or other places on the South Wales railway cannot be carried in such heavy train-loads as coal can coming from West Bromwich, through which place the Ruabon coal comes: that the coal coming from the said South Wales rail-[417] way, after it has arrived at Swindon, has been and is carried beyond Swindon in the most advantageous way for the railway company, either by its being sent on in a train by itself, or, if there is not enough to form a full train, then it is attached to goods trains: and that, if, in consequence of the said Ruabon Coal Company's full train loads having been broken up by the said Great Western Railway Company, any South Wales coals can be sent on by the train from Ruabon, it is so sent from Didcot, as a matter of economy and convenience to the Great Western Railway Company.

It was referred to one of the masters to report upon such points as should be settled by one of the judges (*a*). These were afterwards settled by Williams, J., and were as follows:—

1. Whether the Great Western Railway Company have entered into any and what agreement or arrangement with the Ruabon Coal Company (Limited) for the carriage of coal from Ruabon, and what are the terms and details thereof. The master to be at liberty [419] to suppress any part irrelevant in his opinion to the present inquiry.

2. The master to report any facts relevant to the question whether the Great Western Railway Company have given or give any and which of the preferences or advantages specified in the affidavits to or in favour of the traffic in coals from Ruabon, or to or in favour of the Ruabon Coal Company (Limited), which have not equally been given, or are not equally given, to or in favour of the complainants: and also whether the said Great Western Railway Company subject the traffic in coals from Bullo and Lydney, or either of them, or the complainants for or in respect of the carriage of coals for them by that company, to any and what of the prejudices or disadvantages specified in the affidavits.

3. Whether the Great Western Railway Company have carried or carry coals from Ruabon on any and what terms different from the terms on which the company have carried and carry coals from Bullo and Lydney for the complainants, as suggested in the complainants' affidavits.

4. Whether there is any and what difference, as affecting the cost of carriage, between the circumstances under which the said railway company have carried or carry coals for the Ruabon Coal Company, and the circumstances under which they have carried or carry coals for the complainants.

In Easter Term last, the master made his report, as follows:—

"The parties have been before me, and the case was conducted on either side by filing affidavits only. The affidavits are those of J. B. Nicholson, one of the complainants, and of Aaron Gould and John Trotter, in support of the motion: and of Charles Alexander Saunders, secretary to the Great Western Railway Company, William Lister Newcombe, goods manager of [420] the Great Western railway, James Grierson, late goods manager of the Great Western railway at Wolverhampton and for the district including Ruabon,

(*a*) Before the master an affidavit in reply was used by the complainants. The only material parts of this affidavit were the second and fourteenth paragraphs. The former stated that "the sale and supply of Forest of Dean coal have been materially affected to our injury by reason of the undue preferences and advantages afforded to the said Ruabon Coal Company, and not in consequence of the quality or cost thereof, as compared with that of the said Ruabon coal;" and the latter that "the complainants' trade and the trade in coal from Bullo and Lydney is not small, irregular, and intermittent, but large, regular, and constant: and, to the best of the deponents' belief, exceeds in quantity the coals sent by the Ruabon Coal Company."

Appended to this affidavit was a table professing to give a correct statement of the distances coals are carried on the Great Western railway, and the tonnage and other rates charged from and to the several places mentioned. See the table, next page.

[418] *Rates of Carriage of Coals.*

From	To SWINDON.				To DIDCOT.				To BANBURY.				To READING.				To MAIDENHEAD.				To COOKHAM. (Wymondley Branch.)				To WINDSOR.				To LONDON.										
	Distance.	Power and Road.	Terminals.	Trucks.	Total.	Distance.	Power and Road.	Terminals.	Trucks.	Total.	Distance.	Power and Road.	Terminals.	Trucks.	Total.	Distance.	Power and Road.	Terminals.	Trucks.	Total.	Distance.	Power and Road.	Terminals.	Trucks.	Total.	Distance.	Power and Road.	Terminals.	Trucks.	Total.									
	Miles.	2d.	ld.	transfer	Miles.	2d.	ld.	transfer	Miles.	2d.	ld.	transfer	Miles.	2d.	ld.	transfer	Miles.	2d.	ld.	transfer	Miles.	2d.	ld.	transfer	Miles.	2d.	ld.	transfer	Miles.	2d.	ld.	transfer							
Ruabon .	169	6 2	& 0	11 7 4	145	5 4	& 0	9 6 4	112	4 1	0 2	0 7 7	4 10	162 1/2	5 10	& 0	10 6 11	175 1/2	6 5	& 1	0	7 8	177	6 6	& 1	0	7 9	183	6 8	& 1	0	7 11 198	7 3	& 1	0	8 6			
Blanelly .	148	6 2	1	6 17	9 3	172	7 2	1	6 11	10 6	205	8 7	1 6	2 2	12 3	189 1/2	7 11	1 6	2 0	11 5	202 1/2	8 6	1 6	2 0	12 0	204	10 0	1 6	2 0	13 6	210	8 9	1 6	2 0	12 3 225	9 6	1 0	2 0	12 6
South .	131	5 6	1	6 1 5	8 5	155	6 6	1 6	1 8	9 8	188	7 10	1 6	2 0	11 4	172 1/2	7 3	1 6	1 0	10 7	185 1/2	7 9	1 6	2 0	11 3	187	9 3	1 6	2 0	12 9	193	8 1	1 6	2 1	11 8 208	8 8	1 0	2 0	11 8
Cardiff .	93 1/2	3 11	1	6 1 0	6 5	117 1/2	4 11	1	6 1 3	7 8	150 1/2	6 4	1 6	1 7	9 5	134 1/2	5 8	1 6	1 5	8 7	147 1/2	6 3	1 6	1 7	9 4	149 1/2	7 9	1 6	1 7	10 10	153 1/2	6 6	1 6	1 8	9 8 170 1/2	7 2	1 6	1 0	10 6
Newport	82 1/2	3 5	1	6 0	11 5	10 106 1/2	4 5	1	6 1 2	7 1	139 1/2	5 10	1 6	1 6	8 10	123 1/2	5 2	1 6	1 4	8 0	137	5 9	1 6	1 6	8 9	138 1/2	7 3	1 6	1 5	10 2	144 1/2	6 0	1 6	1 6	9 0 159 1/2	6 8	1 6	1 6	1 8 160
Lydney .	56 1/2	2 5	1	6 0	9 4 8	80 1/2	3 5	1	6 0	11 5	10 113 1/2	4 9	1 6	1 3	7 6	97 1/2	4 2	1 6	1 1	6 9	110 1/2	4 8	1 6	1 2	7 4	112 1/2	6 2	1 6	1 2	8 10	118 1/2	5 0	1 6	1 3	7 9 133 1/2	5 7	1 6	1 5	8 6
Bullo .	49	2 1	1	6 0	9 4 4	73	3 1	1	6 0	10 5 5	106 1/2	4 6	1 6	1 2	7 2	90 1/2	3 10	1 6	1 0	6 4	103 1/2	4 5	1 6	1 2	7 1	105	5 11	1 6	1 2	8 7	111	4 8	1 6	1 2	7 4 126	5 3	1 6	1 4	8 1
Radstock	46	1 11	1	6 0	9 4 2	71	3 0	1	6 0	9 5 3	104	4 4	1 6	1 1	6 11	88	3 8	1 6	0 11	6 1	103	4 3	1 6	1 1	46	102 1/2	5 9	1 6	1 1	8 4	109	4 7	1 6	1 2	7 3 124	5 2	1 6	1 4	8 9
Bristol .	41 1/2	1 9	1	6 0	9 4 0	65 1/2	2 9	1	6 0	9 5 0	98 1/2	4 2	1 6	1 1	6 9	83 1/2	3 6	1 6	0 11	5 11	95 1/2	4 0	1 6	1 1	6 7	97 1/2	5 7	1 6	1 1	8 2	103 1/2	4 4	1 6	1 2	7 0 118 1/2	5 0	1 6	1 4	7 16

Rate for		50 miles.		99 miles.		150 miles.		200 miles.	
RUABON COALS		s.	d.	s.	d.	s.	d.	s.	d.
OTHER COALS		3	3	4	4	6	7	8	7
		4	4	6	9	9	4	11	11

N.B.—Ruabon coal pays 1d. per ton for transfer from narrow to broad gauge trucks at break of gauge. Other coal pays 1s. 6d. per ton extra on Maidenhead rate, for Wymondley branch, which, to Cookham, amounts to 6d. per ton per mile; while Ruabon coal pays only the extra mileage at the same rate as is charged on the main line, viz. seven-sixteenths of a penny per ton per mile.

As Ruabon coal is now sold in London at a reduced price, the railway company allow the Ruabon Coal Company 14 7/8 per cent., or 1s. 3d. per ton, off the rate; and therefore Ruabon coal is now earned 19s. 6d. (including transfer), while other coal pays that sum for conveyance 10s. 6d. without respect to price at which it is sold.

and now general goods manager of the Company, and of John Hogg, in opposition to the motion (a).

"It appears from the affidavits of Nicholson, Goold, and Trotter, that Nicholson and his partner are extensive dealers in and purchasers of coal in the Forest of Dean, that Goold and his partner are proprietors of and work extensive mines in the forest, and that Nicholson and Goold and their partners raise annually many thousand tons of coal, the greater portion of which they send to Bullo, on the South Wales line, to be carried on that line and the Great Western, and to be delivered by the Great Western Railway Company to their agents at or near to the various stations on the Great Western; that Trotter and his partners are also lessees of and work extensive coal-mines in the forest, and that they also transmit annually large quantities of coal to Lydney, on the South Wales railway, [421] to be carried on and to be delivered by the Great Western in a similar manner.

"The position of the railways is as follows:—The Great Western, commencing at London, proceeds to Didcot, and thence to Swindon and Bristol; a branch from Swindon goes to Gloucester, where it is joined by the Gloucester and Forest of Dean railway, which the Great Western work as lessees. The latter line proceeds to Grange Court, in Gloucestershire, where it is joined by the South Wales railway, which runs thence to Bullo (five miles), and Lydney (twelve miles), both of which places are near to the Forest of Dean, and have a goods station each. The traffic over any portion of the South Wales line to or from the Great Western, is managed by a joint and distinct board of ten directors, consisting of five directors of the South Wales Railway company, and of five directors of the Great Western Railway Company, and these directors have a joint power only to fix the rate of charges. The Great Western company, for convenience sake, receive the freight for the coal which is carried over any portion of their line from Bullo and Lydney, and account for it to the South Wales company, in common with other through freight. From Didcot, the Great Western runs through Oxford to Birmingham, and the line thence to Ruabon, in Denbighshire, is worked by the Great Western company: the Great Western having also various branches, viz. to Uxbridge, Windsor, High Wycombe, Hungerford, Basingstoke, and Weymouth. It is only by means of the Great Western and South Wales railways that the Forest of Dean coal can be sent by rail to London and to the southern and western parts of England, and to the various stations on the Western line: and Bullo and Lydney are the nearest points on the South Wales line to the coal mines in the Forest. To these places the complainants have, [422] since the opening of the line, sent annually many thousands of tons, to be carried thence and by the Great Western railway to their stations, for which purpose the complainants have expended considerable sums of money.

"In 1856, a joint-stock company (limited), with a nominal capital of 50,000*l.*, and 28,700*l.* paid up, was formed for the purpose of working certain coal-mines at Ruabon. On the 21st of July, 1856, this company was duly registered under the name of 'The Ruabon Coal Company (Limited).'

"With this company the Great Western Railway Company entered into a certain arrangement hereinafter mentioned, since which time the former company had been actively engaged in raising and sending coal along the Great Western line.

"As to the first point, I find that the Great Western Railway Company did enter into an agreement or arrangement with the Ruabon Coal Company (Limited), and that such agreement or arrangement is embodied in two instruments annexed to the

(a) Mr. Grierson's affidavit contained the following passage,—"That, in consequence of the steep gradients between the Gloucester and Swindon stations of the Great Western railway, coal coming from the Forest of Dean or other places on the South Wales railway cannot be carried in such heavy train loads as coal can coming from West Bromwich, through which place the Ruabon coal comes. The coal coming from the said South Wales railway, after it has arrived at Swindon, has been and is carried beyond Swindon in the most advantageous way for the railway company, either by being sent on in a train by itself, or, if there is not enough to form a full train, then it is attached to goods trains: and if, in consequence of the said Ruabon Coal Company's full train loads having been broken up by the said Great Western Railway Company, any South Wales coal can be sent on by the train from Ruabon, it is so sent from Didcot as a matter of economy and convenience to the Great Western Railway Company."

affidavit of Mr. Saunders (ante, p. 383, n.). Both parties contend that the whole of these agreements are material to the present inquiry, and I am unable to suppress any part of them.

"As to the second point, I find that the Great Western Railway Company have acted on the above-mentioned agreements, and have acted throughout and still act upon the agreement of the 31st of July, 1856; but the terms and provisions of the said agreements have not been extended to the complainants. The Great Western Railway Company have offered to enter into a similar agreement with the complainants, and upon the same terms, but the latter have refused to accept the same, alleging that it is impossible for them to enter into such an agreement.

"The following graduated scale of rates was ap-[423]-pended to a report made by the directors of the Great Western Railway Company to their proprietors at a meeting held on the 15th day of February, 1857. This scale was extensively circulated, but the complainants refused to adopt it, although it was proposed to them (see next page):—

"The complainants allege that the Great Western Railway Company give undue preference to the Ruabon company, to the prejudice of themselves, in the following matters, some of which are in addition to those matters which are contained in the agreement, and that such privileges and benefits are not allowed to them. And it appears,—First, that the Great Western Railway Company supply the Ruabon company with stationery, viz. with certain printed headings of invoices, bills, and the like, headed with the name of the Great Western Railway Company, which is done for convenience, and that the expense is borne by the consignees under the agreement before referred to,—Secondly, that, by the permission of the Great Western Railway Company, the Ruabon company placarded the stations of the Great Western with advertisements of the coal and the price; and that the ticket-offices of the Great Western railway are furnished with circulars of the coal company for distribution. It appears that the company and directors have nothing to do directly or indirectly with this, except in granting the same permission as is conceded under similar circumstances to other traders who may have coals to sell,—Thirdly, that the porters of the railway company are employed in unloading the trucks of the Ruabon company, and of weighing the coal into their customers' carts. It appears that the same thing is done, when required by consignees, in the case of all goods carried at mileage rates, and that the time the porters are engaged is charged to the Ruabon company at the price of la-[425]-boursers' work,—fourthly, that, by the permission of the railway company, its station-masters and clerks are employed by the Ruabon company to effect sales and to seek orders for them. This is the subject of the supplemental agreement (ante, p. 409, n.). This was a purely experimental arrangement, intended to continue for one year only, for the immediate accommodation, of the Ruabon company, who, at their first formation, had no regularly organised agents to undertake the sale of their coals; and minutes of the Great Western Railway Company and Ruabon boards had passed to the effect that the arrangement should terminate in August, 1857, and that it would in consequence terminate at that time, fifthly, that under the agreement of the 31st of July, 1856, the Great Western railway pays 50l. a year towards the salary of each collecting clerk employed in reference to coals sent by the Ruabon company. It appears, that, in so doing, the clerks would be collecting the freight due to the company, for which service, if separately performed, the company would have to pay more,—sixthly, that, by the agreement of the 31st of July, 1856, the Ruabon Company are allowed forty-eight hours to unload their trucks, free of charge; but that the complainants are only allowed twenty-four to unload theirs, and are charged for excess of that time, and without any notice in writing.

"As to the third point, I find that the terms upon which the Great Western Railway Company have carried and carry coals from Ruabon are contained in the agreements above referred to, the terms of which agreements have been acted upon, and the first agreement has been throughout and is still acted upon, enforced, and carried out by the Great Western Railway Company.

"A scale shewing the distances coals are carried on the Great Western railway, and the rates per ton [426] (of 21 cwt.) at which they are charged to the Ruabon company under the agreement, and also the distances coals are carried, and the rates per ton (of 20 cwt.) at which they are charged to the complainants, and the difference between the rate of charge to the Ruabon company and that made to the complainants,

is shewn in the table annexed to one of the affidavits of complainants.* The scale annexed to the affidavit of Mr. Saunders (ante, p. 398) also shews the rates of charges from Bullo and Lydney.

"As to the fourth point, I do not find any facts relevant to it."

The Attorney-General, Montague Smith, Q. C., and John Gray, in Easter Term

[424] *Statement of Total Charges per Ton for Coals over the Great Western Lines.*

	Per Ton per Mile.							
	Freight.				Use of Wagons.			
Contract charge in full train loads, for distances exceeding 100 miles. Total freight 5000l. and upwards per annum for a term	7/16ths of a penny.				1/16th of a penny.			
Retail charge, in single trucks, for distances exceeding 50 miles, without any engagement for quantity or time	8/16ths of a penny.				2/16ths of a penny.			
	Contract Charge, Freight exceeding per Annum.						Retail charge for small quantities.	
	40,000l.	30,000l.	20,000l.	15,000l.	10,000l.	5,000l.		
	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
Additional charge in each case for terminals and other expenses	0 3	0 6	0 9	1 0	1 3	1 6	1 6	1 6
Thus, the total charge, including freight, wagon-hire, and other expenses, is, for								
Somersetshire coal—								
Distance 124 miles from Radstock to Paddington	5 5	5 8	5 11	6 2	6 5	6 8	8 0	8 0
Forest of Dean coal—								
Distance 128 miles from Bullo Pill to Paddington	5 7	5 10	6 1	6 4	6 7	6 10	8 2	8 2
[This may be varied, to some extent, by South Wales railway charge over their line.]								
North Wales Coal—								
Distance 198 miles from Ruabon to Paddington	8 6	8 9	9 0	9 3	9 6	9 9	11 10	11 10

last, shewed cause. The complainants are the owners and consignors of coals which are brought from their collieries at Bullo and Lydney, in the county of Gloucester, by the Great Western railway, to various stations on their line between those places and London. The parties said to have been preferred are the Ruabon Coal Company, who send their coal from Ruabon, in Denbighshire,—the distance from which place to Didecot, where they join the trunk or main line of the Great Western railway, is

* This table was found to be slightly inaccurate, and therefore was not relied on.

143 miles, which, added to 53 miles, the distance from Didcot to London, makes the whole transit 196 miles. From Lydney to Didcot is 82 miles, and consequently the whole distance from Lydney to London is 135 miles. It appears that the Great Western Railway Company charge to the Ruabon Coal Company for the carriage of their coal 7/16ths of a penny per ton per mile, and to the complainants and others who send coals from the Forest of Dean 8/16ths of a penny. They also make a difference in the charge for terminals,—the use of stations, and the making up and starting trains,—charging the complainants at the rate of 1s. 6d. per ton, and the Ruabon Coal Company [427] (who have their own sidings and load their own trucks) 2d. per ton only. The Ruabon Coal Company was established a few years since, at a time when the traffic in coal became of great importance to the interests of railway companies; and many of its shareholders are officially connected with the Great Western Railway Company. That, however, makes no difference: the real question will be, whether or not an undue and unreasonable preference has been given to the Ruabon Coal Company under the agreement set out in the affidavits filed in answer to this rule. Under that agreement, the Ruabon Coal Company, for a comparatively trifling advantage, engage to send their coals in full train-loads, and in such quantities as will produce to the railway company a yearly revenue of not less than 40,000l. The first answer to the application, therefore, is, that, upon the authority of *Ransome's case*, ante, vol. i. p. 437, and *Orlade's case*, ante, vol. i. p. 454, it is perfectly competent to a railway company to enter into a special agreement for the carriage of goods for a particular individual or company at a lower rate in respect of large quantities of goods and longer distances, than for one who sends them in small quantities and shorter distances. It is necessarily one of the incidents of capital, to enable its possessor to trade to greater advantage than one whose command of money is limited. The two cases above referred to fully bear out the principle here contended for. Upon three other grounds, this application, it is submitted, is completely answered. In the *Caterham case*, ante, vol. i. p. 410, it was distinctly held, that, to constitute an “undue or unreasonable preference” within the 17 & 18 Vict. c. 31, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the same line or the same portion of the line. Here, the lines from Ruabon to Didcot and [428] from Lydney to Didcot, are totally distinct, running through different districts, and differing essentially as to gradients and otherwise. Unless the two lines are identical, there are no means of instituting a comparison. How can the Bullo and Lydney proprietors be said to be subjected to undue prejudice because they are charged 1/16th of a penny per ton per mile more than the Ruabon Coal Company are charged for the conveyance of their coals over another line of railway? [Crowder, J. Both lines are branches of the Great Western railway.] To Grange Court only: beyond that is the South Wales railway, over which the Great Western Railway Company have no control. In *The Caterham case*, Cresswell, J., says: “By the act of parliament in question, very extensive powers are conferred upon this court,—powers which may be exercised for the benefit of the public, but which may also be exercised to the great detriment of those who are engaged in carrying on railway concerns; and therefore the court should be very cautious, before they set on foot an inquiry, to ascertain that there is reasonable ground for believing that the provisions of the act have been infringed. Four several grounds of complaint have been urged in this case. The first is, that the companies against whom the application is directed make unequal charges to persons travelling along their lines to the Caterham branch. It does not, however, appear that there is any inequality of charge to persons using the same portion of those lines: and it is not sufficient to shew an inequality as compared with the rates charged on another line. The words of the 2nd section of the act are, that ‘no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such [429] company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.’ I apprehend that it cannot be said, that, because persons may travel between London and Epsom at a less rate than they can between London and Caterham, any undue or unreasonable preference or advantage is given, or any undue or unreasonable prejudice or disadvantage imposed. I can see nothing upon the affidavits to shew that any undue preference has been given to any particular person or company. All persons, it appears, who

come from London to Caterham are charged alike." So, here, all persons who wish to send coals from Ruabon to London in similar quantities and under similar guarantees, would be charged precisely the same rates as are charged to the Ruabon Coal Company. The next answer to the motion is, that there is no preference in point of fact here: the company profess to carry for all the world alike, regard being had to quantity, full train-loads, and distances. The next answer is quite peculiar to this case. The portion of the line between Grange Court and Lydney,—twelve miles of the eighty-two,—does not belong to the Great Western Railway Company, but to the South Wales Railway Company. The terms, therefore, upon which coals can be carried on that portion of the line do not depend upon the Great Western Railway Company. Several minor points are disposed of by the master's report: these matters all range under one head,—equivalents for the advantages which the railway company derive from the contract.

Bovill, Q. C., Manisty Q. C., and Dowdeswell, in support of the rule. There is nothing either in the affidavits or in the master's report to shew that there exists such a difference of circumstances here as to [430] warrant the great difference in the rates charged to the complainants and other coal-proprietors of the Forest of Dean, as compared with those charged to the Ruabon Coal Company. The scale (ante, p. 418) is so arranged as totally to destroy the trade of the complainants, by annihilating a portion of the district, giving a manifest and unjustifiable preference to the North Wales coal. In this respect, the case is not unlike *Osblode's case*, ante, vol. i. p. 454, where the court held that the desire to introduce the northern coke into Staffordshire afforded no justification for the lowering of the company's rates in favour of the persons dealing in that article. Cresswell, J., in giving the judgment of the court upon that part of the case, says,—1 C. B. (N. S.) 496,—"It appears that 'a desire to introduce the northern coke into Staffordshire' induced the company to make three special agreements with different parties for the carriage of coal and coke at a rate lower than their ordinary charge. We think that the desire to introduce the northern coke into Staffordshire was not a legitimate ground for making such agreements. Lowering their rates for that purpose was giving an undue preference to that traffic." Now, what does the master find here? The fourth question submitted to him was "whether there is any and what difference, as affecting the cost of carriage, between the circumstances under which the said railway company have carried or carry coals for the said Ruabon Coal Company, and the circumstances under which they have carried or carry coals for the complainants." And as to this the master says,—“I do not find any facts relevant to this point.” [Crowder, J. Saunders's affidavit discloses circumstances of difference, which the master seems to have overlooked.] The affidavit does not state that the difference in price is consequent upon the Ruabon coals being carried in full train loads: and it is obvious that [431] that would not justify the discrepancy which appears from the table, ante p. 419. There we find that the charge for conveying the North Wales coal from Ruabon to Banbury, a distance of 112 miles, including terminals and the use of trucks, is 4s. 10d., and from Ruabon to Cookham, a distance of 177 miles, 7s. 9d.; whereas, the charge for the South Wales coal from Lydney to Cookham, a distance of 112½ miles, is 8s. 10d.,—from Lydney to Maidenhead, a distance of 110¾ miles, 7s. 4d.,—from Lydney to Banbury, a distance of 113¼ miles, 7s. 6d.,—from Bullo to Banbury, a distance of 106 miles, 7s. 2d. from Bullo to Cookham, a distance of 105 miles, 8s. 7d.,—and from Bullo to Windsor, a distance of 111 miles, 7s. 4d. Again, the charge for conveying coal from Ruabon to London, a distance of 189 miles, professedly is 8s. 6d. per ton, but in reality 7s. 3d. per ton; whereas, the charge is the same (8s. 6d.) from Lydney to London, a distance of 133¼ miles only; and 8s. 1d. from Bullo to London, a distance of 126 miles. [Crowder, J. The real question is, whether the special agreement between the Great Western Railway Company and the Ruabon Coal Company is warranted by the special circumstances under which it was entered into.] The burthen lies on the company to shew that the inequality of charge is justifiable. [Willes, J. It is for the applicant to make out a *prima facie* case of inequality: but, the *prima facie* case being made out, the onus is cast upon the company to justify the charge.] Now, the 31st clause of the agreement (ante, p. 400, n.) fixes the charge for carrying the Ruabon coal over the Great Western railway between the distance of 50 miles and 100 miles from the Ruabon junction, at 3s. 9d. per ton, "or a sum calculated at the rate of 5/8ths of a penny per ton per mile, whichever shall be the lesser amount," with 4d. per ton for

trucks, 2d. per ton for terminal [432] charges, and 1d. per ton for the transfer of gauge. Seventy-two miles at $5\frac{8}{10}$ ths of a penny per ton per mile on a full train-load would be 3s. 9d.; consequently, 3s. 9d. would be the charge per ton to the Ruabon company for any distance beyond 72 and within 100 miles. To the complainants the charge is uniformly $8\frac{16}{10}$ ths of a penny per ton per mile: and, as nearly all the traffic in the South Wales coals is within 100 miles of Grange Court, the proprietors of that description of coal are deprived of their natural advantage of proximity to those places. To say that the company are willing to carry for us upon the same terms as for the Ruabon company beyond the distance of 100 miles, is not doing equal justice: we do not want to go 100 miles. The object of this is manifest from the third paragraph of Saunders's affidavit, ante, p. 380. The other provisions of the agreement giving various facilities and advantages to the Ruabon Coal Company which are not afforded to the complainants or to others in their position, clearly amount to an infraction of the provisions of the statute. The explanations afforded by Saunders's affidavit tend rather to shew that all this was a mere pretence, for the purpose of preferring the Ruabon Coal Company and their traffic to the complainants and their traffic; and the result must be, the total destruction of the very valuable mining property in the whole of the Forest of Dean. In this respect, the present case differs very little from that of *Ransome v. The Eastern Counties Railway Company*, ante, vol. iv., p. 135. There, the company made a scale of charges for the carriage of coals from Peterborough and Ipswich respectively to various places, the effect of which was to diminish the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expence of carriage) in favour of the latter a certain portion of the distance between [433] Peterborough and those places: and this was held to be an undue preference of the Peterborough dealers over those of Ipswich. [Willes, J. Is there anything in the affidavits to shew the value of the special agreement to the Great Western Railway Company?] Not one word. [Crowder, J. Can the Great Western Railway Company be held responsible for a difference of charge upon different branches?] It is true, the two descriptions of coal come from two different places; but both branches belong to the same company. Why is a preference to be given to the traffic from Ruabon over that from Grange Court? The same objection might have been urged in *Ransome's case*, ante, vol. i., p. 437. In *The Caterham case*, ante, vol. i., p. 410, all persons travelling by the same route were charged at the same rate: and Williams, J., in his judgment, says,—"If it could be distinctly shewn that the excess of charge on the Caterham branch was owing to a design on the part of the other companies to exclude the Caterham Railway Company from the benefits to be derived from the use of their lines, that would bring the case within the act." In *Harris v. The Cockermouth and Workington Railway Company*, ante, vol. iii., p. 693, a railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway: they also made a further reduction under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of their traffic: and it was held that neither of these was a justifiable [434] reason for the "undue preference" thus given. The dictum of Crowder, J., in *The Caterham case* (ante, vol. i., p. 422),—"The meaning of the act, as it seems to me, is, that railway companies shall so conduct their traffic that no undue preference shall be given to, and no undue prejudice imposed upon, any particular person or company, and that these words refer to persons using the line from the same point of departure to the same point of arrival,"—was not necessary to the decision. [Crowder, J. If Didecot were the terminus, I presume you would not say that the North and the South Wales coals were carried over the same line. Is there any explanation of the arbitrary fixing of the 100 mile distance, which the complainants say excludes them from nearly all the places they trade with?] None. [Crowder, J. Swindon, Didecot, and Reading are within the 100 miles.] They are so: but all the other places are beyond. The agreement with the Ruabon Coal Company is based upon revenue, not upon quantity.

Cur. adv. vult.

CROWDER, J., delivered the judgment of the court:—

This was an application by Messrs. Nicholson, coal-owners in the Forest of Dean, for an injunction to restrain the Great Western Railway Company from giving undue preference to the coal-traffic of the Ruabon Coal Company as against the coal-traffic of the coal-owners of the Forest of Dean: and several grounds of complaint are set forth in the affidavits upon which the rule was obtained.

Affidavits having been filed on the other side, and also affidavits in reply by the complainants, the matter was referred to the Master to report upon certain points settled by my Brother Williams. The case was argued before my Brother Willes and myself. We [435] think the Master's report disposes of all the alleged grounds of undue preference except those arising out of the special agreement.

The main ground of complaint is, that the Great Western Railway Company did, on the 31st of July, 1856, enter into an agreement with the Ruabon Coal Company, by which numerous advantages (all reducible to a money value) were secured to the coal-traffic of the Ruabon Coal Company on the line of the Great Western railway, as against the coal-owners of the Forest of Dean, and greatly to the prejudice of their trade in coals conveyed on that line.

The complainants in their affidavits rely much on the history of the Ruabon Coal Company, shewing its formation by two or three persons who were intimately connected with the Great Western Railway Company, and who held five hundred out of five hundred and seventy-four shares in the Ruabon Coal Company: and the complainants charge the railway company with entering into stipulations in the special agreement, calculated to promote the interest of the coal company, without regard to the interest of the railway company: and they further allege that this agreement was kept secret from the complainants. They then set forth in the affidavits various advantages secured to the coal company by the agreement, in connection with the conveyance of coal along the Great Western railway, all of which, as is admitted on both sides, are capable of pecuniary valuation, and therefore in effect diminish the rate of carriage of coals to the Ruabon Coal Company, and thus give them an advantageous position in the market.

The affidavits in answer positively deny any community of interest on the part of the railway company with the coal-traffic of the Ruabon Coal Company, or that the railway company has any interest in the success or failure of the coal company, except as regards [436] the freight on the conveyance of the coal: and allege in unqualified terms that the only object of the railway in promoting the coal-traffic from the Ruabon collieries has been to benefit their own proprietors by means of a railway profit derivable from such traffic. It is also positively denied that there was any secrecy intended in the special agreement: and it is alleged that an offer of a similar agreement was made to all other consignors of coals on the Great Western line.

The agreement is set out at full length: and it thereby appears that the consideration moving the Great Western Railway Company to allow the various advantages complained of was, the engagement by the Ruabon Coal Company to send for ten years along the Great Western line of railway beyond the distance of one hundred miles such a sufficient quantity of coal during each year as would produce to the company for freight, terminals, waggon-hire, and break of gauge, a yearly gross revenue of 40,000*l.* in fully loaded coal trains, at the rate of seven per week.

On a careful review of the affidavits on both sides, we think it sufficiently appears that the Great Western Railway Company, in entering into this agreement, had only the interests of the proprietors in view, and the legitimate increase of the profits of the railway.

It has been said by this court in the case of *In re Ransome*, 1 C. B. (N. S.) 452, "that, in considering the question of undue preference, the fair interests of the railway ought to be taken into the account." In that case, the decision was against the railway company, only because it appeared to be the manifest object of the railway company, in charging different rates, to enable one set of coal-owners to compete with another set. And, in the case of *In re Orlebar*, 1 C. B. (N. S.) 454, the decision was also against the railway company, because the lowering the rates appeared to [437] be solely from a desire "to introduce northern coke into Staffordshire."

When the statute speaks of "undue and unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage," it uses language implying that there may be advantage to one person or one class of traffic, and prejudice to another, which would not be within the act of parliament. The preference and pre-

judice must be "undue" or "unreasonable," to be within the statute. And, although, in the case now before the court, it is quite manifest that the Ruabon Coal Company have many and important advantages in carrying their coal on the Great Western railway, as against the complainants and other coal-owners in the Forest of Dean, still the question remains, are they "undue" or "unreasonable" advantages? This mainly depends upon the adequacy of the consideration given in return to the railway company for the advantages afforded to the Ruabon Coal Company.

The affidavits on the part of the railway company assert, that, regard being had to the large quantity sent by the Ruabon Coal Company, the distance of passage over the line, and the regular full coal-trains made up for its conveyance, there is a greater remuneration to the railway company per ton per mile for such carriage at the lower rate, and with the advantages afforded, than for carrying the complainants' coals at the higher rate. Mr. Saunders, the secretary of the Great Western Railway Company, referring to the interview between the directors of the railway company and the representatives of the coal traders of the Forest of Dean, in the 35th paragraph of his affidavit, states "that the only substantial point of difference between the traders and the railway company is this, —that the company proposed and insist upon a scale graduated under a contract in respect of quantities and distance, and for full [438] loads, whilst some of the traders insist upon a scale graduated according to distance only, without contract for quantity, and corresponding in point of mileage only according to distance with the charge made to the Ruabon Coal Company for a corresponding distance, however small the quantity carried, and under whatever different circumstances as to loads or otherwise it may be supplied for conveyance; and that this is a principle which is not and cannot be recognized or admitted by railway companies without serious loss and prejudice to their interest; that the guarantee of a large traffic enables them to work such traffic with greater economy by the arrangement of trains and times, and by a special organization of service and constant use of plant adapted to such traffic; and that there is a better remuneration or profit to the railway company per ton from a large, regular, and constant traffic carried on at a less rate, than from a small, irregular, and intermittent traffic carried at a higher rate."

The only answer given to this paragraph by the affidavits of complainants in reply, is in paragraph 14,—"We say that our trade, and the trade in coal from Bullo and Lydney is not small, irregular, and intermittent, but large, regular, and constant, and, to the best of our belief, exceeds in quantity the coals sent by the Ruabon Coal Company."

Again, Mr. Saunders, in the 29th paragraph of his affidavit, refers to the several instances of preference alleged by the complainants to be given to the Ruabon Coal Company, in the 34th, 35th, 36th, 37th, 38th, and 39th paragraphs of their affidavit, and says, "that, according to the difference of circumstances, the charges are fairly proportionate; that the mere question of distances affords no certain criterion as to the reasonableness of the relative charges; that, for distances under fifty miles, the ordinary rates are charged to the [439] Ruabon Coal Company, and that, for distances less than one hundred miles, higher rates in proportion are charged to them than for distances exceeding one hundred miles; and that this is a well-known and usual principle of charge adopted by railway companies.

The table of rates is then referred to; and the 29th paragraph concludes thus,—"that, having regard to the fact that there is in these cases no special contract for a considerable quantity to be sent annually and regularly, or for the loading of full train loads, as is the case with the Ruabon Coal Company, the rates so charged are in every respect fair and reasonable, as compared with the rates charged under the special circumstances aforesaid to the Ruabon Coal Company."

The whole of this paragraph is left entirely unnoticed by the affidavits of the complainants in reply. Had the complainants disputed this alleged "well-known and usual principle of charge," or had they by their affidavit called in question the allegation in this paragraph that the rates charged without agreement are fair and reasonable, as compared with the lower rates charged under the special agreement with the Ruabon Coal Company, regard being had to the different rate of cost of carriage to the railway company, the court would have felt bound to submit these matters to a detailed investigation by an engineer or traffic-manager of a railway, who would be able, by calculations, to arrive at a satisfactory result, upon the principle recognised by railway

companies, of obtaining the greatest quantity of work from an engine, at the least expense.

Mr. Saunders, in paragraph 19 of his affidavit, while admitting the existence of the special agreement with the Ruabon Coal Company, says "that the circumstances justify such lower charge per mile, and that [440] under like circumstances, and subject to like conditions, the Great Western Railway Company are willing and have offered to make the same reduced charge per mile to all other coal-proprietors."

The complainants, in their first affidavit, paragraph 44, and in the affidavit in reply, say that it is impossible for them to enter into an agreement with stipulations like those contained in the special agreement with the Ruabon Coal Company. Why it is impossible, they do not say. But, in the course of the argument, great stress was laid by their counsel upon the fact that there are several places within the distance of one hundred miles from Bullo and Lydney on the Great Western railway to which the complainants send their coals, and that the Ruabon Collieries are at a greater distance than one hundred miles from any of the places on the line to which they send their coals, and that consequently it was impossible for the complainants to stipulate for the sending of coals so as to take advantage of the diminished rate above the distance of one hundred miles.

It was strongly urged before us, that the reason for fixing upon the distance of one hundred miles was, because the railway company knew that the principal traffic of the Forest of Dean was not to London, which is beyond the hundred miles, but to the intermediate stations within that distance.

But it is to be remarked that no sentence of the complainants' affidavits is directed to that point: nor is there to be found in them an allegation that any large portion of their traffic lies within the hundred miles.

The learned counsel for the complainants relied on the 30th paragraph of Mr. Saunders's affidavit, from which, certainly, an inference to that effect may be drawn. The existence, however, of such a fact would only be material as tending to shew that the special [441] agreement made with the Ruabon company, and offered to all consignors of coals, was only a cloak for concealing undue favour and partiality to the Ruabon Coal Company in their coal-traffic.

Had the complainants intended to rely upon this point, they ought to have specifically referred to it in their affidavit, in order that an opportunity for explanation might have been afforded to the Great Western Railway Company.

If we could see clearly that a scale of rates with reference to distance had been framed with the view, and having the effect, of favouring the Ruabon coal-traffic, and prejudicing the Forest of Dean coal-traffic, we should hold it to be an undue preference within the act, in accordance with the decision of the court in *Ransome v. The Eastern Counties Railway Company*, 4 C. B. (N. S.) 135. But we have no sufficient evidence to lead us to such a conclusion: and, although the complainants may suffer by this scale of rates, in consequence of their local position, that is a matter which the court cannot interpose to remedy.

It was also contended by the learned counsel for the complainants, that it was impossible for them to accept the agreement in the terms offered, because they were unable to guarantee so large a traffic as would yield 40,000*l.* freight annually.

Now, according to the construction we put upon the act of 17 & 18 Vict. c. 31, it is no contravention by a railway company carrying at a lower rate in consideration of a guarantee of large quantities and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee.

[442] The result is, that this rule must be discharged, with costs.
Rule discharged, with costs.

ATKINSON, *Appellant*, SELLERS, *Respondent*. Nov. 30th, 1858.

[S. C. 28 L. J. M. C. 12; 5 Jur. N. S. 21. Applied, *Taylor v. Humphries*, 1864, 17 C. B. N. S. 550; *Penn v. Alexander*, [1893] 1 Q. B. 532.]

To constitute a "traveller" within the meaning of the 18 & 19 Vict. c. 118, s. 2, it is not necessary that the party should be journeying on business.

This was a case stated by two justices acting in and for the county of Lancaster, for the opinion of this court, in pursuance of the statute 20 & 21 Vict. c. 43.

The appellant, Matthew Atkinson, was summoned and appeared before the justices upon an information and complaint laid by the respondent, John Sellers, and which charged the appellant,—For that he, on the 6th of June, 1858, at the township of Garston, being then and there a housekeeper duly licensed to sell exciseable liquors by retail to be drunk and consumed in his house and premises there situate, and the said day being Sunday, did unlawfully open his said house for the sale of beer between the hours of three and five of the clock in the afternoon, to wit, at four o'clock in the afternoon of the said day, otherwise than to a traveller or to a lodger in the said house and premises, contrary to the form of the statute in such case made and provided.

The charge was made under the 18 & 19 Vict. c. 118, s. 2. The licence and other preliminaries to the alleged offence were duly proved.

The house kept by the appellant, and referred to in the information, is about five miles and a half from Liverpool, and is much resorted to by parties from Liverpool and the neighbourhood. It was proved on the part of the complainant (the now respondent) that a police-officer in private clothes, on the day in ques-[443]-tion, and within the hours mentioned in the information, entered the defendant's (the now appellant's) house. The door was closed, and the appellant looked through a trap-door at each party, but the officer did not hear whether he asked any questions or not. The officer found five men there: and it was proved, that beer was served to four of them. It was proved, on the part of the complainant, that none of the men lived in Garston or the neighbourhood. The evidence of the officer was admitted to be true by the appellant.

On the part of the appellant, the four persons to whom beer was served were called; and it was proved that they had come in two parties with ladies, who were in the grounds attached to the house. Each party had left Liverpool about two o'clock in the afternoon, for pleasure, in a vehicle, and had driven a round of eight to ten miles before arriving at Garston. They drove their horses and vehicles into the appellant's stable yard, and ordered meal and water for the horses, and then themselves went into the house for refreshments. It was proved that the fifth man was an inhabitant of Liverpool: no evidence was given as to how he got to Garston; but to him no beer had been supplied. It was proved that the appellant asked each of the four parties whether they were travellers, and admitted them on receiving an affirmative answer.

It was contended, on the part of the appellant, that the case against him was not proved, because it was not shewn that the parties to whom he had opened his house for the sale of beer were not "travellers" within the meaning of the exception in the act of parliament, and also because it was shewn affirmatively, as he argued, that they were "travellers" within such exception.

The case then proceeded as follows,—

"We thought we were bound to convict, and accord-[444]-ingly we convicted the appellant, and fined him 20s. and costs; and the grounds of our said decision were, that we thought, that, taking as we do take, the evidence on both sides to be true, we could not hold that there was any evidence that the parties to whom beer was supplied were travellers, or that there was any deficiency of proof on the part of the prosecution.

"The said Matthew Atkinson being dissatisfied with our determination, and having applied to us in writing, within three days (*a*) after such determination, to state and sign a case setting forth the facts and grounds of such determination, for

(a) See as to the computation of the three days, *Peacock, App., The Queen, Resp.*, ante, vol. iv., p. 264.

the opinion thereon of the court of Common Pleas, and having duly entered into the recognizance, and performed all the preliminaries required by the statute 20 & 21 Vict. c. 43; and we having first intimated our opinion, that under the 1st section of the lastly above-mentioned act, we had no power to grant a case, as we did not consider it a point of law, at the urgent request of the appellant and his counsel, and we being desirous of obtaining a decision as to who are travellers, we granted a case, and now hereby state the same, in compliance with such application, and request the opinion of the court, whether, upon the facts stated in this case, we were bound to convict the said Matthew Atkinson; and we pray the court to make such order therein as the court shall think right."

L. Temple, for the appellant (*b*). The question for [445] the decision of the court is, what is a traveller? [Cockburn, C. J. The object of the statute was, to prevent public-houses from being opened for the sale of beer and liquors between the hours of three and five on the Sunday afternoon. A man goes from Liverpool to a place of entertainment a few miles off for the mere purpose of being entertained,—is he a traveller!] The 2nd section of the 18 & 19 Vict. c. 118, the clause upon which this conviction took place, enacts that "it shall not be lawful for any licensed victualler, or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or any person licensed or authorised to sell any fermented or distilled liquors, or any person who by reason of the freedom of the mystery or craft of vintners of the city of London, or of any right or privilege, shall claim to be entitled to sell wine by retail, to be drunk or consumed on the premises, in any part of England or Wales, to open or keep open his house for the sale of or to sell beer, wine, spirits, or any other fermented or distilled liquor, between the hours of three and five o'clock in the afternoon, nor after eleven o'clock in the afternoon, on Sunday, or on Christmas Day, or Good Friday, or any day appointed for a public fast or thanksgiving or before four o'clock in the morning of the day following such Sunday, Christmas Day, Good Friday, or such days of public fast or thanksgiving, except to a traveller or a lodger therein." The words of the exception in the repealed act, 17 & [446] 18 Vict. c. 79, s. 1, were, "except as refreshment to a bona fide traveller or a lodger therein." This difference of language shews that the legislature did not intend that so strict a definition should be applied to the word "traveller" under the new act as under the old one. The real object of the statute was, to prevent tipping during the ordinary hours of Divine service: it never could have been intended to apply to one who is on a journey, whether of business or pleasure. Here it was proved that all the parties were strangers to the appellant; and, before any refreshment was supplied, they were severally asked whether they were travellers. [Cockburn, C. J. The mere fact of his having made that inquiry, per se, gives him no immunity. The 2nd section of the 18 & 19 Vict. c. 118, expressly prohibits the party from opening or keeping open the house during the time named, and upon that an exception is ingrafted. It lies upon the person who relies on the exception to shew that he falls within it. He must, if he chooses to do what the act of parliament prohibits, exercise due caution.] What more can he do than inquire whether the person who demands admittance is a traveller? If he refuses to open his door to a traveller, he is liable to be indicted: *Ree v. Ivens*, 7 C. & P. 213: and it is no defence for the innkeeper, that the guest was travelling on a Sunday, — travelling on Sunday not being illegal: *Sandiman v. Breach*, 7 B. & C. 96, 9 D. & R. 796. [Cockburn, C. J. Do you say that a mere inquiry of the party satisfies the exception?] It is submitted that it does. [Crowder, J. I do not see, I must confess, what other means the publican can have at the moment of ascertaining whether the person presenting himself is or is not entitled to refreshment. The only real distinction in my opinion is, between a man living in the neighbourhood or at a distance. Whether

(*b*) Welsby, for the respondent, claimed the right to begin, in accordance with the practice of the Queen's Bench and Exchequer: but the court disallowed his claim, at the same time intimating an intention to confer with the judges of the other courts upon the subject.

See *Garbier, App., Whitford, Resp.*, ante, vol. iv., p. 665, 672, where the court said they would adhere to the practice prevailing here in appeals from revising-barristers and from county-courts, of allowing the appellant to begin. The recent change in the constitution of the court may probably lead to an uniformity of practice in this respect. In county-court appeals, the appellant begins in all the courts.

he is travelling [447] for pleasure or upon business cannot make any difference.] Very little light is thrown upon the matter by the dictionaries. In the Imperial Dictionary, by Ogilvie, "to travel" is said to be, "to walk, to go or march on foot, to pass, to journey over;" and "travel" is, "a passing on foot, a walking; journey: a passing or riding from place to place;" and "a traveller" is defined to be "one who travels in any way." In Johnson, a "traveller" is described as "one who goes a journey," "a wayfarer," "one who visits foreign countries." In Richardson, "to travel" is defined thus,— "to go or pass a wearisome length of way; to take or make a toilsome or laborious journey; to journey, to go or pass (on foot or in carriage) along the way, the road, through a country,—over the sea." And in Webster, a "traveller" is described as "one who travels in any way; one who visits foreign countries."

Welsby, for the respondent. Who is a "traveller" within the meaning of this act of parliament, must be a question of fact for the justices to determine in each case. But it would be very desirable to have some sort of definition by which they may be guided for the future. The course of legislation upon this subject is somewhat curious. The 11 & 12 Vict. c. 49, contained a prohibition in substantially the same terms as that now in question, the exception being, "except as refreshment for travellers." Next came the 17 & 18 Vict. c. 79, s. 1, where the phrase is varied, "except as refreshments to a *bonâ fide* traveller, or a lodger therein." Then comes the present act, which leaves out the word "*bonâ fide*,"—"except to a traveller or to a lodger therein." [Williams, J. You surely do not mean to say that there is any difference between a "traveller" and a "*bonâ fide* traveller?"] At all events, it lies upon the publican to shew that the party is a traveller: [448] and it can hardly be said that a man who for mere pleasure drives four or five miles from his home is a traveller. [Crowder, J. Is a person the less a traveller because he travels for pleasure?] Each case must necessarily depend upon its own circumstances.

COCKBURN, C. J. As the legislature have thought fit to use an ambiguous term, and there is no explanatory section, we can only apply our minds to the facts submitted to us: and, upon these facts, it seems to me that the appellant ought not to have been convicted. Of course, a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But, if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, and the innkeeper is justified in supplying it. For these reasons, I think this conviction was wrong, and must be quashed, but without costs.

The rest of the court concurring,
Conviction quashed.

[449] THE MUTUAL LOAN FUND ASSOCIATION v. SUDLOW. Nov. 4th, 1858.

[S. C. 28 L. J. C. P. 108; 5 Jur. N. S. 338.]

A. obtained an advance of money from a loan society upon the security of the joint and several promissory-note of himself and the defendant (who to the knowledge and on the requirement of the society signed the same as surety) and of a bill of sale of A.'s furniture. Certain instalments of the note being in arrear, the lenders seized and sold the goods of A. under the bill of sale, and afterwards sued the defendant for the balance:—Held, that it was competent to the defendant to shew, by way of equitable defence, that, but for the mismanagement of the plaintiffs' agents, the goods of A. would have realized sufficient to satisfy the whole debt.

This was an action by the payees against the maker of a promissory note for 91l., payable by instalments.

The defendant pleaded,—fourthly, by way of equitable defence, that the said note was the joint and several note of the defendant and one Edward Tongue, in consideration of a loan by the plaintiffs to the said Edward Tongue on the security of the said note and a bill of sale by the said Edward Tongue to the plaintiffs of goods of the said Edward Tongue, with power to the plaintiffs to sell the said goods towards satisfaction of the moneys to become due on the said note, in case of default in payment thereof; that the defendant made the said note as aforesaid as surety for the said Edward Tongue to the plaintiffs, and not otherwise, whereof the plaintiffs had notice before and when they first received the said note from the defendant, and they took and

always held it with such notice, and upon the terms that the defendant should be liable to them thereon as such surety only; and that, after the said default, the plaintiffs took possession of the said goods under and in pursuance of the said bill of sale; and that, although they could and might and ought to have sold the same before this suit, and with and out of the proceeds arising from such sale, have fully satisfied and discharged the whole of the moneys due on the said note, and now sued for, yet, by and through the mere negligence, wilful default, and improper conduct of the plaintiffs in that behalf, the security of the said goods became and was wholly lost to the defendant, and insufficient to discharge the moneys now sued for. Issue thereon.

The cause was tried before Crowder, J., at the sit-[450]-tings in London after last Trinity Term. The facts were as follows:—In April, 1857, one Edward Tongue applied to the plaintiffs for a loan, which the plaintiffs consented to grant him upon the security of a bill of sale of certain household furniture, and the joint and several promissory note of the applicant and a surety. The defendant was offered as surety, and was accepted. The money was advanced, a bill of sale of Tongue's furniture being duly executed, and a promissory-note given to the plaintiffs in the following form:—

“£91 0 0.

“London, 28th April, 1857.

“We jointly and severally promise to pay the Mutual Loan Fund Association, or order, the sum of 91l., for value received, by instalments in manner following, that is to say, the sum of 11l. 7s. 6d. on the 28th day of July next, and 11l. 7s. 6d. on the 28th day in every succeeding third month until the whole of the said 91l. shall be fully paid: and, in case default is made in payment of any one of the said instalments, the whole of the said 91l. remaining unpaid shall become due and payable.

“EDWARD TONGUE.

“N. C. SUDLOW.”

Two instalments were duly paid: but, default being made in payment of the third, the plaintiffs took possession of Tongue's furniture under the bill of sale, and sold it, and, after giving credit for the 22l. 15s. paid and 37l. 9s., the net proceeds of the sale, brought this action to recover 30l. 16s., the balance of the promissory-note.

Evidence was given on the part of the defendant, that the goods of Tongue, but for the misconduct of the persons employed by the plaintiffs to sell them, would have produced enough to satisfy the entire balance due upon the promissory-note.

The learned judge left the evidence to the jury; and [451] they returned a verdict for the defendant upon the fourth plea.

Atherton, Q. C., now moved for a new trial, on the grounds of misdirection, and that the verdict was against the weight of evidence. Although the defendant was in one sense a surety for Tongue, it is clear from the case of *Strong v. Foster*, 17 C. B. 201, that the question whether he was principal or surety must be ascertained by the terms of the instrument itself, without the aid of extraneous evidence. [Byles, J. That case has been strongly observed upon in Chancery. Williams, J. And in the Queen's Bench also (a). The foundation of my opinion in *Strong v. Foster* was, that, assuming that the defendant was a surety, there was no evidence of time having been given by the bank to the principal debtor, so as to discharge the defendant: and I believe my Brother Crowder's opinion was given to the same effect. [Byles, J. The chief justice held that the defendant was not a surety at all.] This might be an answer as to Tongue, but not as to Sudlow. [Crowder, J. That is an objection to the plea.] It certainly was not decided in *Strong v. Foster* that the character the party filled must be ascertained only by looking at the instrument: but such evidently was the inclination of opinion of some members of the court. [Williams, J. The controversy is, whether the party is to be treated as a principal if he appears so upon the face of the instrument. In *Manly v. Boycot*, 2 Ellis & B. 46, the plea was held bad because it did not state that the plaintiffs accepted the defendant as surety; but it was not doubted, that, if both parties had agreed that the note should be received from the defendant in the character of surety, the latter would [452] have had all the rights of a surety, though upon the face of the note he did not appear to fill that character.] There is no doubt the defendant was accepted as surety: but it is submitted that the learned judge should have told the jury, that, inasmuch as the defen-

(a) See *Pooley v. Harradine*, 7 Ellis & B. 431; *Frazer v. Jordan*, 8 Ellis & B. 303.

dant appeared to be a principal on the face of the note, and not a surety, he must be treated as a principal.

COCKBURN, C. J. I am of opinion that there ought to be no rule in this case. As to the verdict being against the weight of evidence, the learned judge who tried the cause informs us that he is not dissatisfied with the verdict. There was evidence on both sides; and therefore we see no reason for quarrelling with the conclusion the jury came to. Then, as to the alleged misdirection,—as it appears from the evidence, and indeed was admitted, that it was known to all the parties at the time the promissory-note was given, that the defendant signed it as surety for the person to whom the advance was made, and it was found by the jury that the plaintiffs did in point of fact wastefully apply the proceeds of the effects of the principal debtor which had been conveyed to them for the purpose of securing the debt, I see nothing to prevent the now defendant, the surety, for setting that up as an answer to this action.

WILLIAMS, J. I am of the same opinion. Two points might have arisen in this case, upon which it is now unnecessary to pronounce any opinion. One is, whether, if it appeared that the defendant was in fact a surety, though the lender did not know it this sort of defence would be available: the other,—and it is one which is by no means concluded by the authorities,—is whether, if it were known to the lender at the [453] time that the defendant was a surety, he would be precluded from setting up the rights of a surety, merely by reason of the fact of his being such not appearing upon the face of the instrument itself. In the present case, however, it is clear that it was known to the lenders at the time the advance was made that the defendant signed the note as surety for Tongue. His suretyship was one of the conditions upon which the money was advanced to the borrower. The defendant, therefore, is not precluded from availing himself of his rights as surety.

BYLES, J. I also think the direction of the learned judge and the conclusion of the jury upon that direction were both right. As between the makers and the payees of the note, at law both the makers are principals, and evidence would not be admissible to shew that one of them signed the instrument as surety. But, in equity, if it be made to appear that the lender was cognisant of the circumstances, you may shew what the fact is. They become joint principals, or principal and surety, according to the facts.

CROWDER, J., said nothing.
Rule refused.

[454] BENJAMIN JOSH v. ISAAC JOSH. Nov. 2nd, 1858.

[S. C. 28 L. J. C. P. 100; 5 Jur. N. S. 225; 7 W. R. 122.]

Testator devised to a younger son, as follows,—“All that my messuage or dwelling-house and premises, with the piece of land thereto adjoining in T. St. L., with their respective appurtenances.” Upon a special case, it was stated, that, when the testator first became possessed of the property (40 years ago), there was no fence to part the garden (No. 566 on the plan) from the land, and the parts numbered 567 and 568 formed one field, which was then called “The five acres;” that, about 30 years ago, he planted across it a fence, and after that called 567 “The Pear Tree Piece,” and 568 “The Second Grass Piece;” that the other pieces were in like manner separated by fences, but there was a communication with all of them by means of gates: that the turnpike-road which separated 573 and 574 was made by the trustees under an act of parliament some time after the testator had become possessed of the property, the land being purchased by them of the testator for that purpose; and that the testator used to call the different pieces “grounds:” Held, that the devise was not confined to “The Pear Tree Piece,” but included the other contiguous closes up to the turnpike road. —Quere, whether it did not also include the piece beyond the turnpike-road.

This was an action of ejectment for the recovery of land in the parish of Tilney St. Lawrence, in the county of Norfolk, commenced by writ issued on the 20th of February, 1857: to which the defendant appeared and defended for the whole of the land therein mentioned. The cause came on to be tried before Lord Campbell, C. J.,

at the last Summer Assizes in and for the county of Norfolk, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:—

The plaintiff is a person described by the words "my son Benjamin Josh" in the will of Isaac Josh hereinafter set out; and the defendant is the eldest son and heir-at-law of the said Isaac Josh. The said Isaac Josh died on the 14th of October, 1856, having previously made his will in writing, bearing date the 23rd of July, 1856, and attested as required by law in that behalf. The said will and attestation are respectively in the following words:—

"I, Isaac Josh, of Tilney St. Lawrence, in the county of Norfolk, farmer, do hereby revoke all wills and testamentary dispositions made by me at any time heretofore, and do publish and declare this to be my last will and testament. I give and devise all that my message or dwelling-house and premises, with the piece of land thereto adjoining, in Tilney St. Lawrence afore-[456]-said, with their respective appurtenances, unto my son Benjamin Josh, his heirs and assigns, for ever: And I give and bequeath all my personal estate and effects of every kind unto my son Benjamin Josh, his executors, administrators, and assigns, absolutely: And, lastly, I nominate and appoint my said son Benjamin Josh and Henry Briggs of Clench-wharton, in the said county, farmer, executors of this my will. In witness whereof I the said Isaac Josh, the testator, have hereunto subscribed my name this 22nd of July, 1856.

"The mark of

X

"Isaac Josh.

"Signed, published, and declared by the said Isaac Josh, the testator, as and for his last will and testament, in the presence of us, who in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

"W. Eggett. { Clerks to Mr. Pitcher,

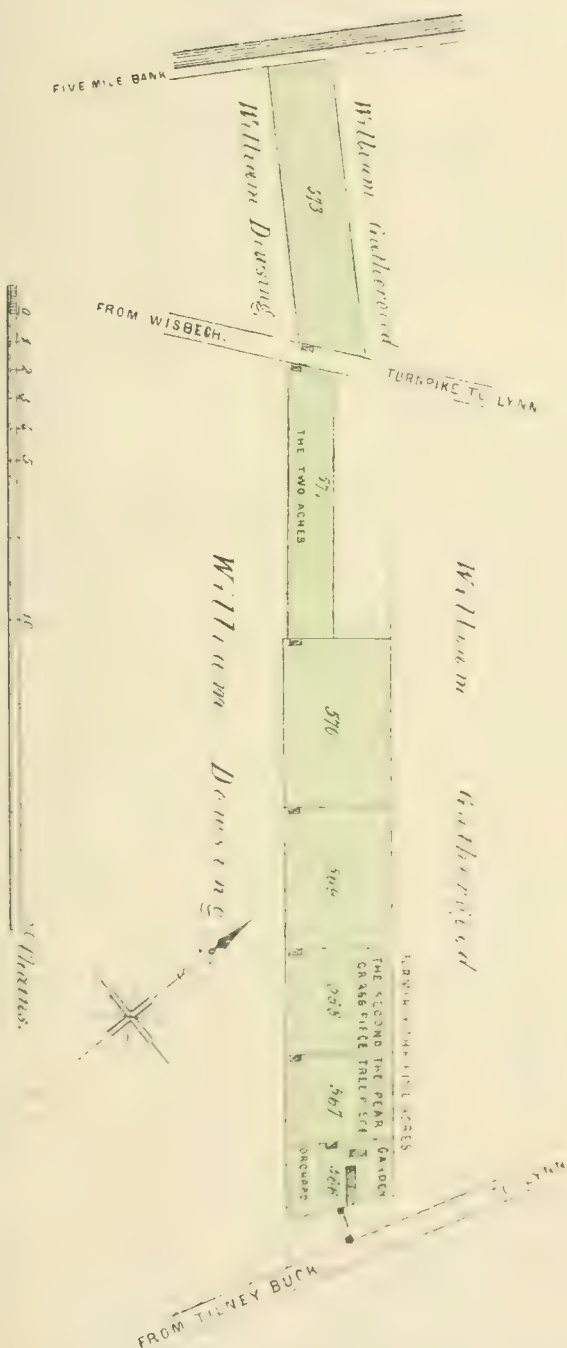
"W. B. Rackham, jun. { solicitor, Lynn."

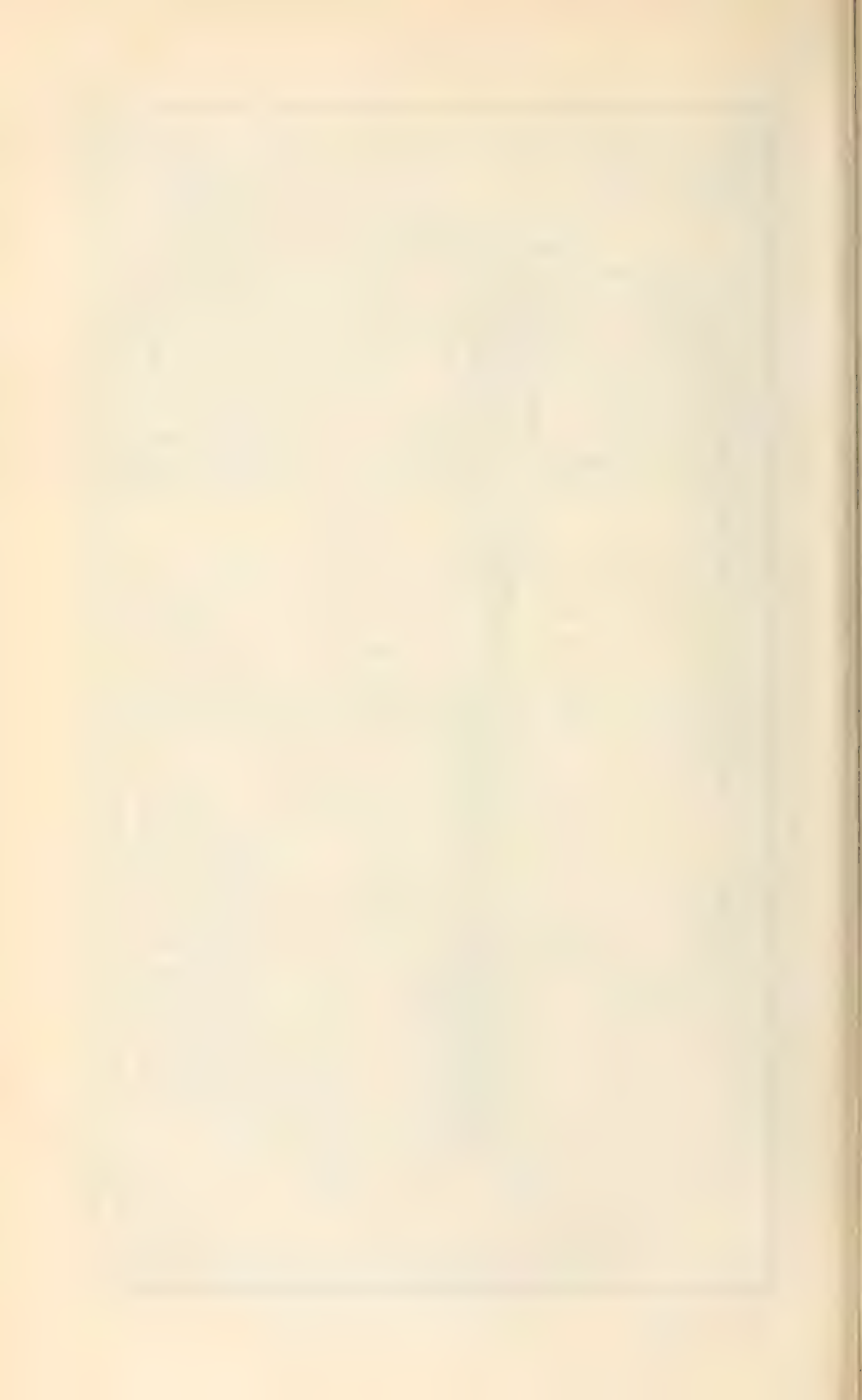
At the times of the making of the said will and at the death of the said testator, he was seised in fee of a message or dwelling house and land in the parish of Tilney St. Lawrence, in the said county, and delineated in the map or plan hereunto annexed and to be taken as part of the case, the said land being coloured green, and which map or plan is a copy of that part of the map or plan of the said parish of Tilney St. Lawrence made under the provisions of the Tithe Commutation Act (6 & 7 W. 4, c. 71) which relates to the said land,—the figures 566, 567, 568, 569, 570, 573, 574, being thereon affixed for the purpose of referring thereto in the instrument of apportionment made under the said act.

The testator became possessed of the said land upwards of forty years ago, and continued to occupy it [457] from that time until his death. When he first became possessed of the land, there was no fence to part the garden (566) from the rest of the land; and the parts numbered 567 and 568 formed one field, which was then called "The Five Acres." Nearly thirty years ago, the testator planted a row of plum-trees across "The Five Acres" as a fence; and, after that, 567 was called by the testator and by other persons "The Pear-Tree Piece," and 568 "The Second Grass Piece." The parts numbered 569 and 570 were formerly in one, and are arable land; and, between 568 and 569, there was formerly a ditch between eight and nine feet wide, and going all across, except where the gateway was. This ditch was filled up many years before the testator's death, and a substantial quick-fence was planted in its place, which has continued until the present time. The part numbered 574 went by the name of "The Two Acres," and was so called by the testator; and it was during all the time of the testator's occupation separated from 570 by a substantial quick-fence. The turnpike-road from Wisbech to Lynn, marked on the map, was made by the trustees under an act of parliament (4 G. 4, c. lv.) some time after the testator had become possessed of the property; the land being purchased by them of the testator for that purpose. Before that time, there was a little fence or grip, and a few stumps of bushes, and five or six old willow-trees between 574 and 573. The testator used to call the different pieces "grounds." During all the time the testator was possessed of the land, there was a road-way all along the south side, from 567 to the turnpike-road; and, for some time before and at the testator's death, there were gates between the different fields. The testator had no other land.

	4	7	7
566 <i>Base garden buildings</i>	0	2	7
567 <i>The Pear Tree Place</i>	1	0	25
568 <i>The second mess Place</i>	1	1	11
569 <i>Postern</i>	1	3	7
570 <i>Apple</i>	2	0	20
571 <i>Apple</i>	2	1	10
572 <i>The five Acres.</i>	1	1	10
	10	3	20

PLAN OF AN ESTATE,
the Town of Tilney, St Lawrence
 THE PROPERTY OF THE LATE
 ISAAC JOSSE.





By the writ, which was annexed to, and to be taken as part of the case, the land claimed was described as "all [458] that piece or parcel of land (portions of which were numbered respectively for the purposes of the Tithe Commutation Act for the parish of Tilney St. Lawrence, in the county of Norfolk, 568, 569, 570, 573, and 574), and which said piece or parcel of land adjoins and was used and occupied with a messuage and appurtenances by the late Isaac Josh, deceased, and situated," &c.

The plaintiff is in possession of a field next to the dwelling-house and garden numbered 567; and he claims under the said will the remainder of the said land between the house and the said road, he having at the trial abandoned the claim to 573.

The defendant is in possession of the land so claimed, and claims as heir-at-law to retain the same against the plaintiff, on the ground that it was not disposed of by the said will, and so descended to him.

The question for the opinion of the court was, whether the plaintiff was entitled to recover all or any part of the land claimed in the writ. If the court should be of opinion in the affirmative, the verdict was to be entered for the plaintiff as to so much of the said land as the court should think he was entitled to recover, and for the defendant as to the residue: and, if the court should be of opinion in the negative, the verdict was to be entered for the defendant.

David Keane, for the plaintiff. The description is sufficient to include the whole of the property, even the piece of land numbered 573 which was abandoned at the trial. The court is to construe the will so as to carry out the intention of the testator as expressed therein. Now, it clearly was not the intention of this testator to die intestate as to any part of the property which he possessed in Tilney St. Lawrence. If so, all up to and including No. 574 passed by the will. [Williams, J. The fact of your having given up No. [459] 573 removes your argument as to the testator's not intending to die intestate as to any part of his property.] It is as if we started by claiming less than the whole. [Williams, J. Your argument must be the same as if you claimed the whole.] No. 573 is only separated from the rest by a mere easement to the public. The whole unquestionably would have passed by this devise, if the words "with the piece of land thereto adjoining" had been omitted. Could the testator have intended to give 568, 569, and 570, and yet to shut out the plaintiff from all access to the direct road from Wisbech to Lynn? [Williams, J. The difficulty in your way is, that, taking the natural meaning of the words, there is one (No. 567) which exactly answers the description.] The whole, it is submitted, answers the description. [Byles, J. The expression is "piece of land," in the singular.] If the testator had intended to give the plaintiff "The Pear-Tree Piece" only, he would naturally have called it by that name. The circumstance of there being a communication all through by means of gates naturally suggested unity to the mind of the testator. A farm might well be described as a "piece of land." [Cockburn, C. J. The testator seems to have always treated the land as consisting of several pieces. When, therefore, he speaks of the "piece of land adjoining his dwelling-house and premises," how can we say that he means to include the whole? If he had so intended, he would naturally have used a more general expression.] In *Ricketts v. Turpin*, 1 House of Lords Cases, 472, a testator, who described himself as of "Ashford Hall, in the county of Salop," devised "all my estate in Shropshire called Ashford Hall," to trustees, for sale; and it was held that this description was not confined to the mansion-house so called, and the lands immediately adjoining, but extended to such [460] other lands in Shropshire as the testator possessed at the time of making his will. [Cockburn, C. J. There, the lands were all known as the "Ashford Hall estate."] This is not like the case of *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227; for, here, the internal communication is kept up by means of the gates. In *Doe d. Renow v. Ashley*, 10 Q. B. 663, in 1814, premises were purchased by the testator, which in the conveyance to him were described as containing by estimation 3 acres, 5 perches, and were of that quantity, or nearly so. They then consisted of a field, an orchard, and a house and garden, and so remained until 1838, when the house and garden and south part of the field were let. The testator then made a fence, which prevented all communication between the north and south parts of the field; and the tenant afterwards subdivided the south field into two. The premises continued in this condition until the testator's death: he occupying the north field and orchard, and the tenant holding the residue. The north field was at the north corner of the town of

M., and opposite a pond. In 1840, the testator devised "all that my messuage or dwelling-house, with the out-buildings, garden, orchard, and appurtenances thereto belonging," occupied by A. B., "situate on the east side of the town of M.," "and a close of land adjoining, being the close at the north corner of the town of M., and opposite the pond, and containing, with the garden and orchard, 3 acres, 5 perches, more or less," to his daughter in fee. By a codicil, in 1841, after reciting that he had given to his daughter "a close situate at M., being the close at the north corner of the town of M.," "and opposite the pond, and containing," &c. (as in the will), "and now in my occupation," he proceeded,—“Now, I do hereby revoke,” &c. the devise "of the said close to my said daughter:" and devised [461] "the same close, with the appurtenances," to another daughter: and, upon a question whether the two south fields passed by the codicil,—it was held, that the description by the testator's occupation was clear, that the description by quantity was uncertain, and that the north field only so passed. In *Goodtitle v. Badford v. Southern*, 1 Maw. & Selw. 299, the devise was of "all that my farm called Trogue's Farm, now in the occupation of A. C.," and it was held that this was not necessarily limited to the lands of Trogue's Farm in the occupation of A. C., but might be shewn by evidence to extend to other lands of Trogue's Farm not in his occupation. In *Doe v. Hemming v. Willets*, 7 C. B. 709, a testator, having four sons, A., B., C., and D., devised to his sons B., C., and D., "all those my five freehold messuages, tenements, dwelling-houses, and premises, with their appurtenances, at R., in the occupation of J. P. or his under-tenants, to hold to them, their heirs and assigns, for ever, as tenants in common." The property in the occupation of J. P. at the time of the making of the will, and of the testator's death, consisted of five cottages and about three acres of meadow-land adjoining: and it was held that the land passed to B., C., and D., as well as the cottages. In the course of the argument Wilde, C. J., says,—“Suppose you strike out the words ‘five freehold messuages and tenements,’ leaving it,—‘all those my premises, with their appurtenances, at Rowley Regis, in the occupation of James Priest,’—would not that pass the land, which was in the occupation of Priest? Is the effect of the word ‘premises’ circumscribed by the previous words?” So, here, strike out the words, “with the piece of land thereto adjoining,” and the words would amply suffice to pass the whole of this property.

Couch, for the defendant. The heir-at-law is not to [462] be disinherited, except by express words. These several pieces of land were always treated and dealt with by the testator as separate: and in the award of the commissioner under the Tithe Commutation Act, a separate rent-charge is put upon each. [Cockburn, C. J. Was that before the date of the will?] In all probability it was. The date of the award does not appear: but the will bears date in 1856. In 1 Jarman on Wills, 2nd edit. 676, it is said: “It is a well settled canon of construction, that, where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded: though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject.” *Doe v. Ashforth v. Bower*, 3 B. & Ad. 453, very closely resembles this case. There, the devise was, of “all my messuages situate at, in, or near a street called Snig Hill, in Sheffield, which I lately purchased of the Duke of Norfolk's trustees. The testator had four houses in Sheffield, about twenty yards from Snig Hill, and two houses about four hundred yards from it, in a place called Gibraltar Street, also in the town of Sheffield. He purchased all the houses by one conveyance, and redeemed the land-tax upon all by one contract. He had no other houses in Sheffield. It was held, that the terms “at, in, or near Snig Hill” did not apply to the houses in Gibraltar Street; and that, there being four houses which answered all the terms of the devise, it must be understood as meant to pass those, and not the two to which only part of the description applied. Parke, J., there says: “One rule of construction is, that an heir-at-law shall not be disinherited except by express words. And another, as stated by Lord Bacon, is, that, if there be [463] some land wherein all the demonstrations in a grant are true, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation, to pass only those lands wherein all the circumstances are true. Here, all the circumstances are true of the four houses, but not so of the two: these last are not ‘at, in, or near Snig's Hill,’ and they are in a place bearing a different name. And, if the

testator had intended by the devise in question to pass all these houses, why should he not have described them as all his houses in Sheffield (for he had no others)? or, all the houses which he bought of the duke's trustees?" [Willes, J. All these cases are explained in *Morrell v. Fisher*, 4 Exch. 591. You cannot reject part, where there is something which answers the whole description *Doe d. Ashforth v. Bower* falls under the rule that *falsa demonstratio non nocet*.] Here, "piece of land adjoining" are the only words that the land can pass under: reject them, and there is nothing to shew an intention to pass anything. As to the word "appurtenances," lands usually occupied with a house, will not pass under a devise of "a messuage, with the appurtenances," unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense: *Buck d. Whalley v. Norton*, 1 B. & P. 53. "Lands," says Eyre, C. J., "will not pass under the word 'appurtenances' taken in its strict technical sense: they will pass if it appears that a larger sense was intended to be given to it. If the court had always adhered to this line of construction, many reported cases would not now disgrace the books. Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in *Hobart*, 33, there be demonstration plain of an intent to use them in a different sense." There is nothing in the fact that there was a communication by [464] means of gates between them, to shew that the testator meant to describe all these several fields as a piece of land. In *Doe d. Parkin v. Parkin*, 5 Taunt. 321, the devise was of "all my messuages in T., and now in my occupation:" the testator had two messuages in T., of which he occupied only one; and it was held that only that one passed by the devise. In *Doe d. Riggall v. Bell*, 8 T. R. 579, it was held, that, by a devise of "all my copyhold estates situate in A., and which I became entitled to on the decease of my father," copyhold estates did not pass which the devisor's father had surrendered to him in his life-time, though the father retained possession of them to the time of his death, which happened prior to the will made by the son: there being other copyhold of the son answering the description in the will. Words may, no doubt, be rejected, where their retention renders it impracticable to put any sensible construction upon the devise as it stands. Here, however, there is no such difficulty. In *Doe d. Renow v. Ashley*, 10 Q. B. 663, Lord Denman, in giving judgment, says: "It is suggested that the three closes were considered by the testator as one; but there is no evidence to sustain that suggestion: and the fact that the testator substituted for the more temporary separation by posts and rails a permanent separation by a live hedge, leads to a contrary conclusion." So, here, the suggestion that the whole of these closes may be treated as one piece of land, is conclusively rebutted by the facts stated in the case, that thirty years ago the testator planted a fence across "The Five Acres," and afterwards called the two parts by different names. The decision in *Doe d. Hemming v. Willets*, 7 C. B. 709, did not turn upon the word "premises" only.

Keane, in reply, referred to *Ongley v. Chambers*, 1 Bingh. 483, 8 J. B. Moore, 665, where under a devise of [465] the rectory or parsonage of M., with the messuages, lands, &c., thereunto belonging, it was held that lands passed which had been acquired by the owners of the rectory between the 5th year of James I., and 1632, and had always afterwards been occupied with the rectory. [Cockburn, C. J. There is a marked distinction between the expressions "thereunto belonging" and "thereunto adjoining."] "Lying to," "usually occupied with," and "adjoining" are all synonymous.

The court suggested the propriety of the parties agreeing to a compromise. But this was not assented to.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court (a).

The testator devises to a younger son, the plaintiff, "all his messuage or dwelling-house and premises, with the piece of land thereto adjoining, in Tilney St. Lawrence, with their respective appurtenances."

Three constructions are possible,—first, that the devise includes, besides the dwelling-house, garden, and orchard, "The Pear Tree Piece" next adjoining, and no more. This is the construction contended for by the defendant, the heir at law. Secondly,

(a) The case was argued before Cockburn, C. J., Williams, J., Willes, J., and Byles, J.

that it comprehends, in addition to all these, the other contiguous closes of the testator up to the turnpike-road, the soil of which road had before the will been sold by the testator. This is the construction now contended for by the plaintiff, the devisee. Thirdly, that it further includes the small close, No. 573, lying on the other side of the turnpike-road. This is the construction origi-[466]nally contended for by the plaintiff, the devisee, but abandoned by him at the trial.

It is agreed by both parties, that, by the words "messuage or dwelling-house and premises, with their respective appurtenances," the house and curtilage pass, including therein the garden and orchard, but no more. Then comes the question now in controversy between them,—what is the meaning of the words "with the piece of land thereto adjoining?"

In construing these words, we are to apply them to the description and situation of the property at the date of the will, and, if possible, to give them, when so applied, their primary meaning.

The defendant says that the word "piece" primarily indicates a portion or fragment of some larger quantity; and, as the piece of land contiguous to the homestead had been fenced off by the testator, and was called by the testator and others "The Pear Tree Piece," he contends that that, and that alone, fits the strict primary meaning of the word "piece."

But we think that the question is not so much what might have been meant by the word "piece," standing alone, as what is meant by the expression "piece of land" used in the will. The expressions "piece of land" or "bit of land" are so familiar as to be almost colloquial. In ordinary language, they mean, a small portion of land. Nor is the primary meaning of the word "piece" departed from, when the expression "piece of land" is thus understood: for, "piece of land," in this sense, still imports a portion of land, as separated or distinguished from other land, not indeed, of the same owner, but of other owners. It may be added, that this sense of the word "piece" itself seems at least as consistent with the testator's language as the other, if not more so; for, he does not say, "the piece of my land," but simply "the piece of land;" and [467] the words "thereto adjoining" are as consistent with this construction as with that contended for by the defendant: for, the whole of the land up to the turnpike-road is in the strictest sense adjoining, for it is all contiguous. Besides, had the testator intended "The Pear Tree Piece" only, the more natural description would have been "the close," "the field," or "the ground," for it appears that he called the different fields "grounds."

As to the argument that the testator and others called the close nearest the homestead "The Pear Tree Piece," the answer is, that it is not so described in the will; and the absence of so familiar and unambiguous a designation tends to shew that the testator did not intend to confine his devise to that close alone.

For these reasons, we think that the plaintiff, the devisee, is entitled to recover at least all he seeks to recover in this action.

Judgment for the plaintiff.

[468] BROWN, *Appellant*, NICHOLSON, *Respondent*. Nov. 17th, 1858.

[S. C. 28 L. J. M. C. 49; 5 Jur. N. S. 99; 7 W. R. 88.]

A borough may be a "town corporate" within the licensing act, 9 G. 4, c. 61, s. 1, though it has no separate court of Quarter Sessions.—A licence was granted by the justices of the borough of M.,—a place having a separate commission of the peace, but no separate court of Quarter Sessions,—at a licensing-meeting held on the 7th of September, which had been duly appointed by them as they had always been accustomed to do:—Held, that the licence so granted was valid, notwithstanding that the justices for the county (who had concurrent jurisdiction in M.) had previously appointed a licensing-meeting for the 8th.

This was an appeal against a decision of two justices for the borough of Maidenhead, in the county of Surrey. The following case was stated for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43:—

On the 1st of February, 1858, Mr. William Nicholson, of the parish of Bray, in the said borough of Maidenhead, appeared before two justices of the peace for the

said borough, to answer the information of Joseph Brown, of New Windsor, in the county of Berks, bailiff, For that he the said William Nicholson, of the parish of Bray, in the said borough, did, in a certain house and premises there situate, in his occupation, on Tuesday, the 19th of January, 1858, permit a certain quantity of exciseable liquors, to wit, a quarter of a quartern of gin, to be sold by retail to the said informant, to be drunk or consumed in the said house and premises of him the said William Nicholson, he the said William Nicholson not having then and there a license to sell exciseable liquors by retail to be consumed on the said premises, authorising him so to do, contrary to the form of the statute in such case made and provided.

On the hearing of the information, it was proved, that, on the 19th of January, 1858, the appellant, Joseph Brown, went to the house of the said William Nicholson, situate in the borough of Maidenhead, and, on asking for a small quantity of gin, he was served by the said William Nicholson with a quarter of a quartern, which he (Brown) drank on the premises of the said William Nicholson, and for which he paid Nicholson 2d. It was further stated by Brown that William Nicholson had no license to sell spirits.

[469] William Nicholson then produced to the justices a license granted to him by the Excise (on the authority of three magistrates for the borough of Maidenhead, who had signed his license), for the sale of wines and spirits, which was not objected to as being other than what it purported to be, that is to say, a license granted by the Excise to the said William Nicholson for the sale of wines and spirits.

The complainant by his counsel contended that the license was bad, inasmuch as the justices who granted the license upon the authority of which the license to sell spirits was granted by the Excise Office, had no authority to grant such license, because, the borough of Maidenhead being one of the boroughs under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, and having a separate commission of the peace, but no separate court of Quarter Sessions, the borough justices had no power to grant alehouse-licenses, because the justices for the county of Berks acting for the Maidenhead division (in which division the borough of Maidenhead is situate,) had, as was admitted to be the fact, appointed their annual licensing-meeting by precept to the high constables before the justices for the borough of Maidenhead appointed theirs, and that therefore the borough justices had no power to appoint an annual licensing-meeting, but that the application of Mr. Nicholson for a license should have been made to the county justices, and that the borough justices might have sat with the county justices, and have jointly acted on the granting of the license to Mr. Nicholson.

It was contended by Mr. Nicholson that the first objection was invalid, inasmuch as the borough of Maidenhead was not a new borough created by the 5 & 6 W. 4, c. 76, but was an antient borough, acting under [470] antient Royal charters, and that the magistrates for the borough, before the passing of the said act, as well as since, had, as was admitted to be the fact, always granted the licences for the sale of exciseable liquors in the borough, and had never acted conjointly with the justices for the county in granting such licences.

It was also contended by Mr. Nicholson that the second objection was invalid; that he was by the 9 G. 4, c. 61, s. 10, compelled to give notices of his application for a license in the months of June or July, for three successive Sundays on the church door and the door of the house for which he intended to apply for a license, and that, in order to give this notice, he had to apply to the clerk of the justices of the borough of Maidenhead, to know the day on which it was proposed to hold the annual licensing-meeting for the borough; that the 7th of September was, as was admitted to be the fact, fixed for such meeting; and that, for three Sundays in the month of July, Mr. Nicholson was obliged to give notice on the church door and on the door of the house, stating that he would apply to the justices on the 7th of September; and that the county justices did not hold their annual licensing meeting till the 8th of September, as was admitted to be the fact, which was the day after that of the borough justices; and that, therefore the application was properly made.

The justices decided that Mr. Nicholson had not sold spirits without a license; and ordered the informant to pay the costs, amounting to 7s. 9d.

The question for the opinion of the court was, whether, upon the facts stated, the said determination of the justices was correct.

Manisty (with whom was Lawrence), for the appel-[471]-lant (*a*). The borough of

(*a*) The case was argued in last Trinity Vacation, before Crowder, J., and Willes, J.

Maidenhead was one of the boroughs existing at the time of the passing of the Municipal Corporation Act, 5 & 6 W. 4, c. 76. By the 1st section of that act, all grants and charters are repealed, and all boroughs are obliged to resort to the crown to obtain a separate court of Quarter Sessions. In many instances the crown granted separate commissions of the peace, and not separate Quarter Sessions. Maidenhead has a separate commission of the peace, but no separate court of Quarter Sessions. There are two sets of justices,—the county (Berks) justices, and others having a more limited jurisdiction. The borough justices have no power to grant spirit licences; and, at all events, the justices acting for the division of the county in which Maidenhead is situate having appointed their annual licensing-meeting for the 8th of September, it was not competent to the borough justices afterwards to appoint a licensing-day for the 7th. It is difficult to distinguish this from the case of *The King v. Sainsbury*, 4 T. R. 451, which has been acted on down to the present time. It was there held, that, where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale-licences, their jurisdiction attaches so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day: but if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licences, their proceeding is illegal, and the subject of an indictment. In giving judgment, Lord Kenyon says: "That the King may grant a commission of the peace for a county, and that the jurisdiction of such justices may pervade the whole county, cannot be doubted. Neither can it be disputed that he may grant commiss[472]ions of the peace for any particular district in the county, and that that subdivision may have justices of its own, exclusive of the jurisdiction of the justices of the county at large: but the latter can only be effected by a non-intromittent clause, prohibiting the county justices from interfering in that district. This doctrine was fully recognized in *Talbot v. Hubble*, 2 Stra. 1154, from a manuscript note of which it appears that it was there taken as a datum that the justices of the county would be excluded if there were a non-intromittent clause in the charter granted to the smaller district, but not otherwise. In one of the charters granted to the city of London, there is an express power of constituting the mayor and certain of the aldermen justices of the borough of Southwark; they are therefore charter justices of that district; and that jurisdiction has never, I believe, been doubted. But another question has arisen, and which is proper should be settled, whether it be legal (for, whether it be decent or decorous, no person can doubt,) for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these:—Some of the justices for the county of Surrey, having before them the statute 26 G. 2, c. 31, and knowing that the licences ought to be granted on a certain day and time, appointed a day, the 4th of September, for licensing ale-houses in this division; on which day they accordingly held their meeting: and certain of the magistrates of the city of London, who in general are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting, had attached before that time; not in-[473] deed, so as to exclude the city justices from acting at the first meeting, for, they might all have acted together: but it excluded the city justices of their jurisdiction to act on the subsequent day. On the general question, therefore, I am clearly of opinion that the Surrey justices and the magistrates for the city have a co-ordinate jurisdiction within this district; and that the meeting of the city justices in this case was illegal, the jurisdiction of the other magistrates having first attached." [Crowder, J. Can Mr. Nicholson be liable to a penalty when he has a licence granted to him by persons professing to have authority to grant it?] The licence being illegal, it cannot afford any protection against penalties: *The King v. Downes*, 3 T. R. 560. [Willes, J. Do you admit that the borough justices would have had power to appoint a licensing-day and to grant licences, if the county justices had done nothing?] The better opinion seems to be that the borough justices have nothing whatever to do with the granting of licences. The 1st section of the licensing act, 9 G. 4, c. 61, enacts, "that, in every division of every county and riding, and of every division of the county of Lincoln, and in every hundred of every county, not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, town, city, and town-corporate, in that part of the united

kingdom called England, there shall be annually holden a special session of the justices of the peace (to be called the general annual licensing-meeting), for the purpose of granting licences to persons keeping or being about to keep inns, ale-houses, and victualling-houses, to sell excisable liquors by retail, to be drunk or consumed on the premises therein specified: and that such meetings shall be holden in the counties of Middlesex and Surrey within the first ten days of the month of March, and in every other county on some day between [474] the 20th of August and the 14th of September, inclusive; and that it shall be lawful for the justices acting in and for such county or place assembled at such meeting, or at any adjournment thereof, and not (as thereafter) disqualified from acting, to grant licences for the purpose aforesaid to such persons as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper." At the time of the passing of that act, all towns-corporate had separate courts of Quarter Sessions, and therefore none others could have been contemplated; consequently the authority to grant licences so given by that act to the justices acting in and for such place, must be limited to justices acting in and for places having a separate court of Quarter Sessions. The 26th section enacts "that it shall be lawful for any justice before whom any penalty shall be recovered under the provisions of this act, to award, if he shall think fit, any portion of the same, not in any case exceeding one moiety thereof, to the use of the prosecutor, and the remainder to the treasurer of the county or place for which such justice shall then act; and the said treasurer shall place the same to the credit of such county or place, and shall duly account for the same." In *The Queen v. Dale*, Dears. & B. C. C. 37, 22 Law J., M. C. 44, the defendant, the clerk to the justices of Tynemouth, was indicted for a misdemeanour in having contemptuously and unlawfully neglected and refused to pay over to the treasurer of the county of Northumberland one moiety of a fine imposed under the above act by certain justices of the borough of Tynemouth,—a place which had a commission of the peace, but no grant of separate Quarter Sessions within the 5 & 6 W. 4, c. 76, and was found guilty: and, upon a case reserved, it was held that he was properly convicted, as penalties under that act imposed by the justices [475] of a borough so circumstanced, are payable to the treasurer of the county, and not to the treasurer of the borough. Assuming that the two sets of justices have concurrent jurisdiction within the borough of Maidenhead, they clearly cannot exercise the same jurisdiction in the same place at different times. Could it be legal, as Lord Kenyon asks in *The King v. Sainsbury*, for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? This is a statutory power, which, once exercised, is done with: and the statute requires it to be exercised at a particular time. Ashhurst, J., in *The King v. Sainsbury*, says: "There being no words of exclusion in the city charters, it follows as a consequence that the justices of the county have a concurrent jurisdiction in the borough of Southwark: if so, it also follows that the jurisdiction of holding the meeting directed by the 26 G. 2 attached in those magistrates who first gave notice of the meeting; and it was a breach of the law in the other magistrates to attempt to wrest the jurisdiction out of their hands." [Willes, J. All that amounts to is, that it is an indecorous and improper thing, and probably indictable. Nevertheless, I apprehend, the conviction would be held good.] It is submitted that the borough justices had no power to appoint a licensing-meeting at all, and that the meeting on the 7th, after the day had been duly appointed by the county justices, who alone had power to appoint a day, was not a legal meeting.

Griffiths, contra. Assuming that the borough justices had not the jurisdiction which they professed to have, the respondent, who could have no means of knowing whether or not the justices exceeded their jurisdiction, ought not to be made amenable. The point was not [476] argued in *The King v. Downes*, 3 T. R. 560. In *The King v. Bryan*, Andrews, 81, Page, J., says: "If a licence is granted improperly, as, by justices living out of the division, it is not void as to the person acting under it, who probably does not know the exact bounds of the division." And Probyn, J., says, that, "if this point was now in question, it would deserve consideration whether the justices can punish a man by this statute, who acts under a visible authority." That case was not referred to in *The King v. Downes*. [Williams, J. There was no positive decision in *The King v. Bryan*.] And in *The King v. Minshull*, 1 N. & M. 277, the court inclined to think that a licence to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the licence is granted; but that, at all

events, the party could not be fined for having acted *bonâ fide* under it. This is not the fit tribunal to try a question of this sort. If a licence is granted which is apparently good upon the face of it, the party ought to be protected by it until set aside by appeal, or by certiorari. But it is submitted that the Maidenhead justices were the proper persons to grant this licence. *The King v. Sainsbury*, 4 T. R. 451, is very different from the present case. There, a set of justices having jurisdiction in Southwark, duly held a meeting for the purpose of licensing, and rejected Hedger's application for a licence: and another set of justices, having concurrent jurisdiction in the same place, afterwards appointed a licensing-meeting, and granted Hedger a licence: and for this the last-mentioned justices were indicted, and convicted. This borough has by tacit understanding been treated as a sessional borough for all purposes. There is no statement here that there has been any division of the county under the 9 G. 4, c. 43, s. 1: but it may be [477] assumed that Maidenhead has been treated as a division for the purpose of licensing: and, if so, a special session might be appointed for the purpose of licensing. The circumstance of the Municipal Corporation Act having taken away the Quarter Sessions, cannot affect the right of the justices to hold a special session for this purpose. An appeal against the refusal of a licence would go, even if the borough had a separate court of Quarter Sessions, to the Quarter Sessions of the county: *The Queen v. Cockburn*, 4 Ellis & B. 265, 24 Law J., M. C. 43. The right of the borough justices to act in matters arising within the borough is recognized by several statutes: see 12 & 13 Vict. c. 64; 13 & 14 Vict. c. 91, s. 9. None can be so competent to grant licences as those living in the place, and having a local knowledge. *The Queen v. Dale*, Dears. & B. C. C. 37, does not affect this case. The only question there was, to whom the penalty was to be paid. If there was no treasurer for the borough, it may be that it was properly payable to the county treasurer. The Quarter Sessions will take judicial notice of the petty-sessional divisions of a county: *The Queen v. Whittles*, 13 Q. B. 248. All licences in Maidenhead have hitherto been granted by a special session for the borough: and the same course has been pursued in all other boroughs similarly circumstanced throughout the county. This jurisdiction of the county justices is now for the first time set up.

Manisty, in reply. If there had been any pretence for the sessional division suggested, this question never could have arisen. [Crowder, J. Why do the county justices now for the first time assume this jurisdiction.]. The difficulty has arisen from the case of *The Queen v. Dale*. [Willes, J. The proper mode of raising so important a question would have been by an indictment or by *quo warranto*.]

Cur. adv. vult.

[478] CROWDER, J., now delivered the judgment of the court (a):—

This was a case stated for the opinion of the court, by way of appeal from the decision of two of the justices for the borough of Maidenhead, refusing to convict the respondent upon the information of the appellant.

The information was laid by the appellant against the respondent for selling excisable liquors by retail, without being licensed pursuant to the statute 9 G. 4, c. 61.

It appeared on the hearing, that the respondent sold the liquor at his house in the borough of Maidenhead. He was licensed by the Excise and by the justices of the borough. It was contended that the license was void,—first, because the borough of Maidenhead has not a separate commission of the peace, and that only in boroughs having a separate commission of the peace can the justices grant licences,—and, secondly, because the justices for the division of the county in which Maidenhead is situated had appointed their annual licensing-meeting for the 8th of September, before the borough justices had appointed theirs for the 7th of September, on which day the license in question was granted by them.

With respect to the first objection, it is one which we ought not to sanction, without some strong ground either of authority or argument upon the construction of the statute. The borough of Maidenhead is an antient borough, and both before and since the Municipal Corporation Act the licences for the borough have always been granted in the same manner as in the present case. The argument for the appellant was chiefly rested upon the case of *The Queen v. Dale*, Dears. & B. [479] C. C. 37, which was said to have decided that a town though corporate, and so a "town

(a) The case was argued before Crowder, J., and Willes, J., only.

corporate" within the words of the act, was not within its true construction, unless it had a separate court of quarter sessions. The case, however, upon consideration, does not appear to us to bear that construction. The decision amounts simply to this, that "the place" to the treasurer of which the penalties under the 26th section of the licensing act are to be paid, is the place out of the rate upon which the costs of public prosecutions are to be defrayed. It is quite consistent with this that the borough justices should grant licenses for the borough, where they have jurisdiction, though the penalties imposed by them under the act should go in aid of the county-rate. In the course of the argument, indeed, Coleridge, J., is reported to have said that "town corporate" means a city or town having exclusive jurisdiction; but that is not relied upon in the judgment; and we have been unable to find any authority for so limiting the expression "town corporate."

Even since the Municipal Corporation Act, where a borough has a separate quarter session, the appeal is not to the recorder but to the quarter sessions of the county: *The Queen v. Cockburn*, 4 Ellis & B. 265.

The arguments for the appellant have failed to satisfy us that the long-established practice consistent with the language of the act of parliament, and which is in itself evidence of what was meant and understood by the act at the time it was passed, ought to be set aside by us in a case where there can be no appeal from our decision.

As to the second objection, it was attempted to be sustained in argument by reference to *The King v. Sainsbury*, 4 T. R. 451, where the justices of London, having jurisdiction in Southwark, appointed a day for granting licenses for that place, after that on which the [480] justices of Surrey, who had concurrent jurisdiction there, had previously appointed their meeting for the same purpose. In that case, a licence granted by the former justices after it had been refused by the latter, was held void, and the meeting of the former was held to be without jurisdiction, because otherwise there would have been two conflicting jurisdictions, instead of the one intended by the law. In this case, no such consequence would follow, because the notices required by the act, and which were not required by the 26 G. 2, c. 31, the act in force when *Ree v. Sainsbury* was decided, were given for the meeting appointed by the borough justices, and not for that appointed by the county justices. The matter to be adjudicated upon by each set of justices was not the same. Moreover, if the borough justices have jurisdiction, it is difficult to point out how they could otherwise have exercised it, and the course pursued was the usual and accustomed one, and no real interference with the county justices is suggested, nor did any exist in fact.

We may add, that it was peculiarly harsh to raise this question by a proceeding for a penalty against a private individual, instead of by *quo warranto* against the justices. The appeal is therefore dismissed with costs.

WILLIAMS, J. I heard a portion of the argument in this case, but not enough to make it right for me to take any part in the judgment.

Appeal dismissed, with costs.

[481] BURNS v. CHAPMAN. Nov. 9th, 1858.

[S. C. 28 L. J. C. P. 6; 5 Jur. N. S. 19; 7 W. R. 89.]

It is no ground for rescinding an order for a *capias* under the 1 & 2 Vict. c. 110, s. 3, that the plaintiff, when he comes to declare, may have to rely upon a cause of action different from that stated in the affidavit upon which the order was obtained. —The court will only interfere where it clearly appears that the obtaining the order is an abuse of its process. Quære, whether the 189th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), applies to a claim for wages earned on board an American ship?

A writ of summons issued against the defendant in this cause on the 8th of October, 1858; and on the same day the plaintiff obtained an order of Hill, J., for a *capias* under the 1 & 2 Vict. c. 110, s. 3, which order was obtained upon the following affidavit:—

"I, Robert Burns, of, &c., ship-steward, make oath and say,—1. That the above-named defendant, James Chapman, before and at the time of the commencement of this suit was, and still is, justly and truly indebted to me in the sum of 20l. 13s. 6d.

for work and labour done and performed by me and my wife Caroline Burns on board the ship "J. F. Chapman," for the defendant, at his request, as steward and stewardess thereof.—2. That the above-named defendant is an American, and is captain and part-owner of the said ship "J. F. Chapman," which said ship is now taking in ballast at the Commercial Dock, Rotherhithe, in the county of Surrey, and that the said ship is about to leave England for New Orleans, in America, and that the said defendant is going out in the said ship as captain thereof on Saturday morning, the 9th of October instant.—3. That, on Thursday, the 7th of October instant, I was informed by the mate of the said ship, and which information I believe to be true, that the said ship, with the above-named defendant as captain thereof, would leave England for New Orleans, in America, on Saturday, the 9th of October instant.—4. That for the reasons aforesaid, I verily believe that the above-named defendant intends to leave England for New Orleans, in America, and that I shall lose my said debt unless he be forthwith apprehended.—5. And that a writ of [482] summons in this action was issued out of this court, a true copy whereof is hereto annexed."

On the evening of the same day the defendant was arrested on a *capias* issued by virtue of this order, whereupon he deposited with the sheriff the sum of 20l. 13s. 6d., together with 10l. in lieu of a bail-bond, and afterwards paid the additional sum of 10l. into court.

On the 12th of October, a summons was taken out before the same learned judge, calling upon the plaintiff to shew cause why the above order should not be rescinded. The affidavit of the defendant filed upon that occasion stated that the defendant was master and part-owner of the ship "J. F. Chapman," which sailed from New York, in the United States of America, on the 13th of July last, for Port Neuf, in the river St. Lawrence, Lower Canada, and thence to the port of London; that the ship sailed under the defendant's command, under articles prepared and entered into at New York, dated the 10th of July last, by which she was empowered to sail to Port Neuf, and thence to London, with the privilege of four other foreign ports should the master require it, and back to a port of discharge in the United States; that the plaintiff and his wife both shipped under the said articles on or about the 10th of July, the plaintiff as cook, and his wife as stewardess, and both signed the articles, the plaintiff for 25 dollars per month wages, and the wife for 10 dollars per month, and that the plaintiff at the time of shipping received 12 dollars and his wife 5 dollars advance, pursuant to the articles; that, by the said articles, it was amongst other things agreed, "that, in consideration of the monthly or other wages against each respective seaman or other mariner's name thereunder set, they severally should and would perform the above-mentioned voyage, and the said master did agree [483] and hire the said seamen or mariners for the said voyage at such monthly wages or prices to be paid pursuant to that agreement and the laws of the congress of the United States of America;" that the said articles further contained a provision by which, in case of desertion, wages were to cease, and also the following provisions—"And it is further agreed that no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at the last above-mentioned port of discharge, and her cargo delivered;" and "that each seaman or mariner who shall well and truly perform the above-mentioned voyage (provided always that there be no desertion, plunderage, embezzlement, or other unlawful acts committed on the said vessel, cargo, or stores) shall be entitled to the payment of the wages or hire that may become due to him pursuant to this agreement, as to their names is severally affixed and set forth; provided, nevertheless, that, if any of the said crew disobey the orders of the master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of such disobedience or absence shall be forfeited;" that the said vessel arrived in the Commercial Docks in London on the 27th of September; that, on the 2nd of October, the plaintiff and his wife unlawfully deserted the ship without the defendant's sanction, and refused, although subsequently requested by him, to return to the ship, and they had not since returned, whereby any wages due to them became by the laws of the United States for the government of seamen, merchants, &c., indorsed on and referred to in the said articles, forfeited by them respectively; that certain sums had been advanced to the plaintiff or paid for him at his request during the voyage; that the whole of the wages of the plaintiff and his wife combined up to the time of their deserting the [484] ship as aforesaid, assuming they were entitled to claim the same,

after deducting the amounts advanced and paid as aforesaid, would not have amounted to more than 75 dollars, 15 cents, which, calculating the dollar at 4s. 2d., which is the full value thereof, amounts to 15l. 15s. 8d., and no more; that, if no payments had been made to or on account of the plaintiff and his wife, the plaintiff's claim in respect of himself and his wife together, at the time of their desertion as aforesaid, would not have exceeded 93 dollars, or 19l. 7s. 6d.; that the defendant is not and never was indebted to the plaintiff in 20l. 13s. 6d., as alleged in his affidavit, nor in 20l., and that, for the reasons stated in that affidavit he was not indebted to him in any amount whatsoever; that the "J. F. Chapman" is an American ship, and the defendant an American citizen domiciled in the United States, and that the plaintiff and his wife are Americans domiciled in the said United States; that the defendant verily believed that his arrest in this action was for the purpose of extortion; and that he was put to great inconvenience and expense by reason of his detention and that of his vessel in consequence thereof.

This summons was opposed, upon the affidavits of the plaintiff and his wife, and of a seaman on board the "J. F. Chapman," which stated in substance, that the plaintiff and his wife did not desert the ship, but, on the contrary, were dismissed from their employment by the mate (with the sanction of the defendant) on the second of October, from which day down to the 9th the plaintiff and his wife had been always ready and willing and offered to perform the duties for which they were engaged, but were not permitted to do so; that all the money received by the plaintiff or his wife on account of wages was 1l. 4d. paid to the latter, and given credit for, leaving the amount due as claimed [485] on the writ of summons; that the defendant was justly and truly indebted to him in the sum of 20l. 13s. 6d., the amount claimed, as follows,—

"10th July to 10th August, 1858, at 35 dollars per month . . .	£7	5	10
10th August to 10th September, 1858	7	5	10
10th September to 9th October, 1858	7	5	10
	<hr/>		
	£21	17	6
Cash on account	1	4	0
	<hr/>		
	£20	13	6"

and that the plaintiff was advised and believed that he could claim compensation for dismissal of himself and wife from the defendant's service without notice, and also for the detention of their clothes by him.

It was contended, on the part of the defendant, before the learned judge, that the affidavits sufficiently shewed that the defendant was not at the time of the issuing of the writ indebted to the plaintiff in the sum of 20l.; and that, the claim being for wages under 50l., the jurisdiction of the superior court was ousted by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, ss. 188, 189.

The learned judge refused to make any order.

T. Jones, on the first day of this term, moved for a rule to shew cause why the order of the 8th of October should not be rescinded, and the writ of *capias* issued thereunder set aside, and why the money paid to the sheriff and into court should not be repaid to the defendant. It is clear, upon his own shewing, that the plaintiff had not at the time of the commencement of the suit a cause of action to the extent of 20l., inasmuch as the three months in respect of which he claims wages did not expire until the 9th of October, [486] whereas the dismissal took place on the 2nd, and the writ of summons was issued on the 8th. Besides, by the terms of the articles under which the plaintiff and his wife shipped, the plaintiff's claim for wages could not arise until the arrival of the vessel at her port of discharge in the United States: *Cutter v. Powell*, 2 Smith's Leading Cases, 1. It may be that the plaintiff may have a cause of action for damages for his improper discharge from the defendant's service. Under the old law, where the defendant was arrested on *mesne* process, if the affidavit varied as to the cause of action from the declaration, the bail would be released: 1 Archbold's Practice, 9th edit., by Prentice, 699 (citing *Tetherington v. Goulding*, 7 T. R. 80, and *Wills v. Adeock*, 8 T. R. 27); ib. 732: and by analogy the same practice must prevail under the 1 & 2 Vict. c. 110. [Williams, J. The *capias* is not the commencement of

the action. Is it not enough that the affidavit discloses a substantial cause of action? The 188th section of the Merchant Shipping Act, 1854, enacts, that "any seaman or apprentice, or any person duly authorized on his behalf, may sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides,—or, in Scotland, either before any such justices or before the sheriff of the county within which any such place is situated,—for any amount of wages due to such seaman or apprentice not exceeding 50l. over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final." And the 189th section provides that "no suit or proceeding for the recovery of wages under the sum of 50l. shall be instituted by or on behalf [487] of any seaman or apprentice in any court of Admiralty, or Vice-Admiralty, or in the court of Session in Scotland, or in any superior court of record in Her Majesty's dominions, unless any owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any justices acting under the authority of this act refer the case to be adjudged by such court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore." This court, therefore, has no jurisdiction over the present cause of action, if it is an action for wages: and, if the plaintiff proceeds for damages for his improper discharge, he is not entitled to the security of the money paid into court. [Cockburn, C. J. The plaintiff's claim here arose on the high seas. Have our justices jurisdiction by the statute in such a case? Byles, J. In *Cope v. Doherty*, 27 Law J. Ch. 600, it was held by the Lords Justices, in affirmance of a decree by Vice-Chancellor Page Wood, that, excepting where foreign ships are expressly mentioned, the Merchant Shipping Act, 1854, applies only to British ships.]

Cur. adv. vult.

COCKBURN, C. J. On the first day of this term, Mr. Jones moved for a rule to shew cause why an order of my Brother Hill of the 8th ultimo, should not be rescinded, and the writ of *capias* issued thereon set aside, and why the sum of 30l. 13s. 6d. paid to the sheriff in lieu of a bail-bond, and 10l. paid by the defendant into court in lieu of bail, should not be paid out of court to the defendant. The rule was moved upon two grounds,—first, that the affidavit upon which the order for the writ of *capias* was obtained contained a statement of a cause of action which, when the cir- [488] cumstances came to be investigated, the plaintiff could not sustain,—secondly, that this court had no jurisdiction over the subject-matter of the action. As to the first ground, the facts appear to be these,—The plaintiff had applied for and obtained an order for the defendant's arrest, upon an affidavit alleging the cause of action to be a claim for wages due to the plaintiff and his wife, as part of the crew of an American vessel, for services rendered by them on board the vessel upon the high seas. An affidavit has been produced before us, from which it appears that an agreement had been entered into between the plaintiff and his wife and the defendant, the captain of the vessel in question, whereby the plaintiff and his wife were to perform certain services on board the vessel, in consideration of which they were to receive wages at so much per month, but were to be precluded from demanding payment until the termination of the voyage. On the part of the defendant, it was submitted, that, under these circumstances, the plaintiff could not recover in this action as upon a claim for wages, but must have recourse to a special action upon the contract for the improper discharge of himself and his wife before the arrival of the period at which the stipulated wages would be payable under the contract; and therefore the defendant calls upon us to order the restitution of the money paid by him as the condition of his liberation, on the ground of the analogy which is said to exist between this case and the old practice as to bail-bonds when arrest upon mesne process was allowed; and our attention was called to some authorities shewing that if a party had been arrested upon an affidavit disclosing one ground of action, and the plaintiff afterwards proceeded to declare for another and a different cause of action, the bail would have been relieved from their obligation on the bail-bond. Sup- [489] posing, however, we should be of opinion that there was any analogy between the two cases, there would be this obvious answer to the present application, viz that the motion is at all events premature; for, under the old practice, I take it, the court would not

have allowed the merits to be tried upon affidavit, and it could not appear that there was such departure from the original cause of action, until the plaintiff had proceeded in the cause. Now, at present, the plaintiff in this case has not declared; and we do not know with any degree of certainty how he will proceed. But then it is said that the statute 1 & 2 Vict. c. 110, requires something more, viz. that the judge shall be satisfied that there is a cause of action, and therefore that the defendant is entitled to go into the merits upon affidavit, and, if he can shew that the true cause of action is different from that which the plaintiff has alleged in his affidavit, he is entitled to all the advantage he would have had under the old law if the plaintiff had proceeded to declare for a different cause of action from that for which he had held the defendant to bail. The answer to that argument appears to me to be this,—that it is by no means clear and certain that the plaintiff will not proceed upon the cause of action stated in his affidavit; and it is possible that there may be some circumstances which may entitle him to maintain the action, although the contingency upon which the right to demand payment of the wages has not happened. It may be that the plaintiff is not bound to resort to an action for his improper discharge. And indeed it must be recollected that that doctrine is but of modern introduction; and the plaintiff may wish to have an opportunity of questioning it in a court of error: and I do not think we ought to interfere to deprive him of the opportunity of so doing. Independently, however, of that, even if the court were [490] prepared to say that the plaintiff's only remedy, under the circumstances is, by an action for wrongfully dismissing him, it seems to me that there is no reason why the court should interfere. All that is required under the statute 1 & 2 Vict. c. 110, is, that the judge shall be satisfied that there is a cause of action. I entertain a strong opinion, that, if the judge is satisfied that a cause of action exists, it is not for him to inquire into the particular form of action. And, even if it should appear to him that the plaintiff is about to pursue a mistaken or erroneous course of procedure, I think it is no part of the judge's duty to entertain that question. If satisfied that the plaintiff has a cause of action, all he has to do is, to afford him the remedy pointed out by the statute. Of course, the court will not stand by and see its process abused. It was upon that principle that this court proceeded in the case of *Stammers v. Hughes*, 18 C. B. 527. Being satisfied that there was no cause of action at all, and that its process was being abused for the purpose of oppressing and harassing the defendant, the court thought it fit to interfere for her protection. So, here, if the court were satisfied that this action was causelessly brought, and the arrest of the defendant vexatious, and an abuse of its process, it would not be slow to interfere to prevent injustice. But we are not at liberty, at this stage of the proceedings, to enter into a discussion upon the merits of the plaintiff's claim, or to speculate upon what may ultimately turn out to be the rights of the parties. All we have to see is, that there is a bona fide cause of action: and of this there seems no doubt, whatever may be the proper form of proceeding to enforce it. I think it would be highly inconvenient, and productive of the most mischievous consequences, if we were to take upon ourselves to determine what may turn out to be a nice and difficult [491] question of law, upon a summary application of this nature. Upon the first ground, therefore, I am of opinion that there should be no rule.

Upon the second ground relied on by the defendant, it is urged that the action is improperly brought in this court, because by the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), exclusive jurisdiction is given to another tribunal in all cases of dispute between the owners or master of a merchant ship and any of the crew, where the amount of wages is under 50l. The first observation which arises upon that is, that it may be a question whether the provisions of that act apply at all under the circumstances of this case; and that clearly is not a matter which ought to be decided upon a motion of this sort. And, in the next place, it is to be observed that this argument is founded upon the assumption that the plaintiff will resort to a claim for wages, and not proceed for damages for improper dismissal. It seems to me to be somewhat inconsistent for the defendant to urge these two lines of argument,—that he is entitled to relief because the plaintiff's claim for wages is untenable, — and that the court has no jurisdiction, because a claim for wages (to the amount here set up) must be enforced elsewhere. It is highly inconvenient to call upon us upon a motion of the sort to enter into these speculations. It is enough for us to say that

it sufficiently appears that the plaintiff has a cause of action, and that therefore we ought not to interfere to deprive him of that which the statute has given him.

WILLIAMS, J. I entirely concur in what has fallen from my Lord. All I wish to add is, that, in refusing this rule, we are not in any degree departing from the principle upon which this court acted in *Stammers v. [492] Hughes*. The court will not interfere unless it clearly appears that the plaintiff has no good cause of action, and that he is using the process of the court for the purpose of oppression and annoyance.

The rest of the court concurring,

Rule refused.

ADAMS AND OTHERS v. THE ROYAL MAIL STEAM-PACKET COMPANY.

Nov. 4th, 1858.

[S. C. 28 L. J. C. P. 33; 7 W. R. 9. Referred to, *Ford v. Cotesworth*, 1868-70, L. R. 4 Q. B. 135; L. R. 5 Q. B. 514; *Wright v. New Zealand Shipping Company*, 1879, 4 Ex. D. 170; *Postlethwaite v. Frodland*, 1880, 5 App. Cas. 619; *Hick v. Rodocanachi*, [1891] 2 Q. B. 636; [1893] A. C. 22; *Ardan Steamship Company v. Wear*, [1905] A. C. 512.]

By a charter-party, the vessel was to proceed with all convenient speed to Cardiff, and there load from the factors of the freighters a full cargo of coals, in the customary manner, no time being mentioned:—Held, that this meant a loading according to the usage of the port, and within a reasonable time, without reference to unforeseen casualties; and, consequently, the loading having been delayed for an unreasonable time, the freighters were not excused by reason of the delay having arisen from difficulties connected with the railway and the collieries, which were beyond their control.

This was an action for not loading a ship within a reasonable time.

The first count of the declaration set out a charter-party, dated the 11th of November, 1857, between the plaintiffs, the owners of the ship “Susan,” and the defendants, the Royal Mail Steam-Packet Company, by which it was, amongst other things, agreed that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Cardiff, or as near thereunto as she may safely get, and there load from the factors of the said company a full and complete cargo of coals, in the customary manner, but the charterers to have the option of employing labourers for trimming the cargo, at the wages of the port, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, [493] shall proceed therewith to St. Thomas’s, in the West Indies, and there deliver the same, &c.: Ten days on demurrage to be allowed the said ship over and above the said lying days, at 3l. per day (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage always excepted): Averment, that the plaintiffs did all things necessary on their part to entitle them to have the agreed cargo loaded, to wit, within a reasonable time in that behalf; that the time for so doing had elapsed before suit; yet that the defendants made default in loading the said cargo for a long and unreasonable time in that behalf although they were not prevented from loading as aforesaid by the act of God, the Queen’s enemies, or any other excepted cause as aforesaid.

There was also a count for demurrage.

The defendants pleaded, to the first count, that the defendants did load the said cargo within the time allowed by the said charterparty for so doing; and, to the second count, never indebted. Issue thereon.

The cause was tried before Watson, B., at the last assizes at Bristol, when the facts which appeared in evidence were as follows:—The “Susan” arrived at Cardiff on 17th of November, 1857. Messrs. Nixon, the coal-fitters there, who were employed by the defendants to load the vessel, had at that time twelve other vessels waiting to be loaded in turn according to the custom of the port before the “Susan.” In consequence, however, of a dispute between the Taff Vale Railway Company, along whose

line the coal had to be brought from the collieries to the place of loading, and the Messrs. Nixon and other coal-owners respecting the rates of carriage, a delay of several days occurred in the delivery of the coals; and, when this impediment was removed, further [494] delay was occasioned by a strike for wages amongst the colliers: the loading of the "Susan" was consequently not completed until the 26th of January, 1858. The plaintiffs claimed demurrage from the 1st of January. There was no time specified in the charterparty for the loading.

The learned judge told the jury, that, by the terms of the charterparty, the plaintiffs were entitled to have their vessel loaded within a reasonable time if the port was clear; and that they were not to take into their consideration the delay arising from the disputes with the railway company and the strike among the colliers.

The jury returned a verdict for the plaintiffs, damages 86l. 4s. 8d.

Montague Smith, Q. C., now moved for a new trial, on the ground of misdirection. By the terms of the charterparty, the defendants were to load on board the vessel at Cardiff a full cargo of coals in the customary manner, which must necessarily involve the customary manner of obtaining as well as of loading the coals. It was, therefore, misdirection on the part of the learned judge to tell the jury that they were not to take into their consideration, in determining whether or not the defendants had performed their contract, the circumstances which prevented them from completing the loading within a reasonable time. [Williams, J. The defendants undertake to load the vessel in a reasonable time for loading her in the customary manner. The circumstances relied on to excuse the breach are circumstances which impeded, not the loading, but the procuring the coals wherewith to load the vessel. Byles, J. It is the defendants' misfortune that they had no coals to put on board. Cockburn, C. J. The charterparty contemplates the ordinary state of [495] things. The defendants should have protected themselves against an extraordinary state of circumstances. Suppose the mines had been flooded, so that they could not be worked for a long time, would that have excused the defendants? You contract to have a loading of coals at Cardiff within a reasonable time. By a chain of unforeseen circumstances, you are prevented from performing that contract.] The nearest case to the present is that of *Harris v. Dreesman*, 23 Law J., Exch. 210. There, by a charterparty, the master of a vessel engaged to proceed therewith to a particular colliery, and there take on board from the freighter a full cargo of coal. Before the charterparty was signed, both parties knew that the colliery was not at work, an accident having happened to the steam-engine, and both were told that it would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, according to the practice of the port, which was, that ships were loaded in their regular turns as they were entered on the colliery books. The freighters had no control over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agents had led the parties to expect. It was held, that, if the steam-engine was repaired, and the colliery got to work in a reasonable time after the execution of the charterparty, and if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading. [Cockburn, C. J. There, both parties knew the state of things when the contract was entered into. Williams, J. Upon what does the court there found its decision?] Parke, B., says: "The vessel was to be loaded within a reasonable time under the circumstances. It is clear, therefore, that the defendants might give evidence of the [496] usage of the port as to the loading, that the vessel was to be loaded at a particular spout, that the boiler was out of repair, that the colliery in consequence was not at work, and that the defendants had no control over the colliery. The case, however, does not find whether the owner of the colliery repaired the boiler within a reasonable time, — though, if he failed to do so, I doubt whether the defendants would be responsible" (a). [Byles, J. Here there is an absolute engagement on the part of the defendants to load. Can it be any answer for them, that they have got no coals, without any default of their own?] Perhaps not. Upon the authority of *Harris v. Dreesman*, it is submitted, the defendants ought to have a rule.

COCKBURN, C. J. I am of opinion that the ruling of the learned judge was right, and that there ought to be no rule. The present case is clearly distinguishable from

(a) Alderson, B., observed that the Court were not unanimous on that question.

Harris v. Dreesman, because there the contract was entered into between the parties with full knowledge of the surrounding circumstances, some of which necessarily induced delay in the loading. The decision, such as it was, clearly proceeded upon that footing. Parke, B., says: "The vessel was to be loaded within a reasonable time under the circumstances. It is clear, therefore, that the defendants might give evidence of the usage of the port as to the loading, that the vessel was to be loaded at a particular spout, that the boiler was out of repair, that the colliery in consequence was not at work, and that the defendant had no control over the colliery." And the conclusion the court seems to have come to is, that it would be contrary to the sense of the contract to hold the defendants to be responsible for a state of things over which they had no [497] control. But here the parties have entered into a contract without any knowledge on the part of the plaintiffs to take the case out of the ordinary rule. They must be taken to have contemplated a loading within a reasonable time and under ordinary circumstances. It chanced that extraordinary circumstances arose which prevented the defendants from performing what they had undertaken. They should have taken care to protect themselves by some stipulation, if they contemplated relieving themselves from the consequences of fortuitous or unforeseen impediments to the due performance of their contract.

WILLIAMS, J. I am of the same opinion. The effect of the charterparty is, that the defendants undertake to have a cargo of coals to load on board the vessel within a reasonable time. They cannot relieve themselves from performing their contract by reason of the impossibility of performance: *Paradine v. Jane*, Aleyn, 26. In *Harris v. Dreesman*, 25 Law J., Exch. 210, the contract was framed with reference to the state of things at the colliery at the time. That, therefore, is a very different case from this.

BYLES, J. I am entirely of the same opinion. From the silence of the contract as to the time at which the loading was to be completed, it follows that the vessel was to be loaded within a reasonable time; and a reasonable time for loading must be a reasonable time under ordinary circumstances. The distinction between this case and *Harris v. Dreesman*, which has been pointed out by my Lord Chief Justice, relieves us from any difficulty in what would otherwise be a very plain case.

Rule refused.

[498] M'CALLUM v. COOKSON AND ANOTHER. Nov. 3rd, 1858.

[S. C. 28 L. J. C. P. 1.]

The plaintiff having obtained a verdict in a county court, the defendants gave notice of appeal under the 13 & 14 Vict. c. 61, s. 14, and, the parties being unable to agree upon a case, one drawn by each party was duly submitted to the judge to settle and sign, but, before this was done, the judge died. The court,—without deciding whether or not execution might issue,—refused to grant a prohibition to restrain the new judge from proceeding upon the judgment, or a certiorari to remove the cause.

On the 8th of May, 1858, a plaint was levied in the county-court of Newcastle, wherein the plaintiff sought to recover damages against the defendants for the breach of a contract for the sale and delivery of a quantity of sulphuric acid. The case was tried before Mr. Losh, the then judge, and a jury, in August last. Various objections to the plaintiff's right to recover were urged by counsel on the part of the defendants, but over-ruled by the judge, and a verdict was found for the plaintiff, damages, 50l.

Notice of appeal was duly given by the defendants pursuant to the 13 & 14 Vict. c. 61, s. 14, and the rules of practice made under the authority of the 19 & 20 Vict. c. 108, s. 32, and security given for the costs of the appeal and the amount of the judgment. A case was afterwards prepared by the defendants' counsel, and sent to the plaintiff's attorneys for approval: but, they not being satisfied with the statements therein, another case was prepared by them and submitted to the defendants' attorneys. This being also disapproved of by the defendants' attorneys, the two cases were transmitted to the judge, in order that he might settle the same pursuant to the 15th section of the 13 & 14 Vict. c. 61.

According to the practice of the county-court, rule 145, the case on appeal is to be

presented to the judge for signature at the court holden next after the expiration of twelve clear days from the day on which judgment was pronounced. But, in consequence of the illness of the judge (which ultimately terminated in his death), his signature could not be obtained: and, the gentleman who then presided as his deputy being ignorant of the facts, and therefore not in a condition to settle and sign the case, it was ordered, upon the application of the defendants' attorneys, that the matter should stand over until the 6th of November. The judge died on the 1st of October, and a new judge had since been appointed in his place. Under these circumstances,

Udall, for the defendants, applied for a rule to shew cause why a prohibition should not issue to the judge of the county-court, to restrain him from issuing execution upon the judgment, on the grounds that the steps taken towards the appeal had taken the case out of the court's jurisdiction; or why a certiorari should not issue to bring up the plaint to be retired in this court. The 14th section of the 13 & 14 Vict. c. 61, enacts, "that, if either party in any cause of the amount to which jurisdiction is given to the county-courts by this act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster: provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, and also give security, to be approved by the clerk [registrar] of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be defendant and the appeal be dismissed: provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the county-court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk [registrar] of the county-court in which such action shall have been tried, and the same [500] shall have been paid accordingly: and the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper: and such orders shall be final." And the 15th section enacts "that such appeal shall be in the form of a case agreed on by both parties, or their attorneys, and, if they cannot agree, the judge of the county-court, upon being applied to by them or their attorneys, shall settle the case and sign it; and such case shall be transmitted by the appellant to the rule department of the masters' office of the court in which the appeal is to be brought." [Williams, J. The case which has arisen is not provided for by the statute.] By the 139th rule it is provided, that "any party dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of evidence, may, before the rising of the court on the day on which judgment was pronounced, deliver to the registrar a statement in writing, signed by him, his counsel or attorney, containing the grounds of his dissatisfaction: and, in the event of no such statement being delivered, the successful party may proceed on the judgment unless the judge shall otherwise order; but the judge may direct proceedings to be taken on the judgment notwithstanding such statement has been delivered: provided that the party so dissatisfied may appeal on grounds different from those contained in such statement, and although he shall not have delivered any such statement." The 142nd rule provides, that, "if, before the notice of appeal is served upon the registrar, execution shall have issued, and the amount of the judgment and costs of execution shall have been paid into the hands of the bailiff, or levied and not paid over to the successful party, the same [501] shall remain in court to abide the order of the court." And the 143rd, that, "if, before an appealing party shall have given the required security, execution shall have issued, the registrar shall, upon the appealing party's giving security, forthwith send notice thereof, by post or otherwise, to the bailiff, and proceedings on such execution shall forthwith be stayed." The county court has no jurisdiction to go on, the execution being stayed until the appeal is determined. [Crowder, J. Provided all the steps requisite to the perfecting the appeal have been taken.] The appellants have taken all the steps which they could take to perfect the appeal. [Cockburn, C. J. If the delivery of the appeal case to the judge operates a stay of the proceedings, why are we to assume that the county court will proceed? There is nothing in the act to restrain the execution under the circumstances. You

say the practice rules have that effect. Why, then, are we to assume that the new judge will exceed his duty? Williams, J. The effect of a prohibition would be to deprive the plaintiff of the fruits of his judgment. Crowder, J. What is the consequence, in the superior court, of the death of the judge before sealing a bill of exceptions? This court decided in *Newton v. Boodle*, 3 C. B. 795, that, in that case, it is not competent to any other judge to affix the seal, but that the proper course was to direct a new trial, notwithstanding the lapse of time (a). In *Ex parte McFee*, 9 Exch. 261, it was held, that, where a county-court judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the county-court rules, and on that ground refuses to hear the claimant, prohibition lies to stay further proceedings under the execution, provided the particulars are such as ought to have been held [502] sufficient. Parke, B., there says: "The jurisdiction of the county-court judge to go on with the plaint is taken away as soon as the claim is properly put forward." [Williams, J. In that case, the judge ought to have interfered to prevent the execution.] At all events, the defendants are entitled to a certiorari, for the difficulties in point of law. That would have the effect of a new trial in this court. [Cockburn, C. J. The cause has been tried. Up to the present time nothing has been done wrong. The statute 13 & 14 Vict. c. 61, gives you an appeal, subject to certain conditions. Why should we have the proceedings brought up by certiorari?] It is difficult to see what other remedy there is.

COCKBURN, C. J. The question is, whether the appeal still continues, or whether the proceeding has not become abortive by the death of the judge. If the argument urged on the part of the defendants is right, we have no reason to presume that the new judge of the county-court will do other than his duty. The application for a prohibition, therefore, is too soon. A certiorari clearly is out of the question. It is doubtful at the present moment which party is in the better position. I think the motion fails on both grounds.

WILLIAMS, J. I do not say that the county-court judge ought to refuse to allow execution to issue upon the judgment. It may be, from the peculiar circumstances, and the event which has happened, that the parties are in the same position as if there had been no appeal at all. We must not be understood as giving any opinion upon that point.

CROWDER, J. I give no opinion as to whether or not execution should issue under the circumstances. It seems to me that the act of parliament, in providing [503] for the appeal, has not made any provision for the death of the judge before settling and signing the case. If we were to grant a rule nisi either for a prohibition or a certiorari, I do not see how we could make it absolute upon any of the grounds which have been urged. The death of the judge has prevented the defendants from bringing their appeal in the manner directed by the statute: therefore we cannot direct a new trial. And, by refusing the rule, we do not abstain from doing justice: for, we cannot see whether we should be doing justice or not. In whatever way, therefore, the case might be brought before us, we have no means of dealing with it.

BYLES, J. I also think there should be no rule. Nobody has done any wrong here. And, according to Mr. Udall's argument, the defendants cannot be hurt. I desire to be understood as declining to give any opinion as to whether or not it would be competent to the county court to issue execution under the circumstances.

Rule absolute.

[504] THE METROPOLITAN ASSOCIATION FOR IMPROVING THE DWELLINGS OF THE INDUSTRIOUS CLASSES v. PETCH. Nov. 2nd, 1858.

[S. C. 27 L. J. C. P. 330; 4 Jur. N. S. 1000. Discussed and principle applied, *Mayfair Property Company v. Johnston*, [1894] 1 Ch. 518.]

A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights, is sufficient if it shew an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right.

This was an action for an injury to the plaintiffs' reversionary interest, by the

(a) And see *Bennett v. The Peninsular and Oriental Steam Boat Company*, 16 C. B. 29.

erection of a "hoarding," whereby certain antient lights of the plaintiffs were obstructed.

The declaration stated, that, before and at the time of the committing of the grievances by the defendant thereafter mentioned, divers messuages or dwelling-houses, with the appurtenances, situate, &c., were respectively in the possession and occupation of certain persons as tenants thereof respectively to the plaintiffs, the respective reversions of and in the said messuages or dwelling-houses then and still belonging to the plaintiffs: and that, before and at the said times when, &c., there were, and still of right ought to be, in each of the said messuages or dwelling-houses, divers windows through which the light and air during all the times aforesaid ought to have entered, and until the committing by the defendant of the grievances therein-after mentioned did enter, and still of right ought to enter into the said messuages or dwelling-houses respectively for the more convenient and wholesome use, occupation and enjoyment thereof respectively; yet that the defendant wrongfully and injuriously erected a hoarding near to the said windows respectively, and kept and continued the same so erected from thence hitherto, whereby the light and air during all the times aforesaid were and still are hindered and prevented from entering through the said windows into the said messuages or dwelling-houses respectively, and the said messuages or dwelling-houses respectively had thereby [505] been rendered dark, close, uncomfortable, unwholesome, and unfit for habitation; and that, by means of the said several premises, the plaintiffs had been and were greatly injured in their respective reversionary estates and interests of and in the said respective messuages or dwelling-houses, with the appurtenances, so in the possession and occupation of the said respective tenants as aforesaid.

To this declaration the defendant demurred.

Josiah Wilkinson, in support of the demurrer. The declaration is bad, inasmuch as it does not disclose any injury to the plaintiffs' reversion. The word "hoarding" necessarily implies an erection of a temporary character. In Webster's Dictionary, the definition given of the word is, "a fence inclosing a house and materials which builders are at work upon." [Williams, J., referred to *Shadwell v. Hutchinson*, M. & M. 350.] In *Shadwell v. Hutchinson*, the erection complained of was a skylight, which was necessarily meant to be permanent. In *Bradlee v. The Mayor, &c., of London*, 5 Scott, N. R. 79, 4 M. & G. 714, a hoarding was treated as a mere temporary obstruction. The concluding allegation, that, by means of the premises, the plaintiffs were injured in their reversionary estates and interests, does not help. The plaintiffs seek to bring themselves within the case of *Kilgill v. Moore*, 9 C. B. 364, but that which they allege shews no cause of action. In *Jackson v. Pesked*, 1 M. & Selw. 234, Lord Ellenborough says: "The count does not import in terms that any act charged upon the defendant was injurious or to the damage of the plaintiff: the declaration does, indeed, contain the usual conclusion, 'wherefore the plaintiff saith he is injured and hath sustained damage, &c.': but this is not matter of charge in the declaration, it is only the resulting inference of damage drawn [506] by the plaintiff from the matter of charge; and, unless the count, which is the matter of charge, warrants such inference, it has no effect." So, here, the charge is of a temporary obstruction only; and therefore the resulting inference of damage to the reversion is idle. All the precedents shew an obstruction of a permanent character, so as to affect the plaintiff's reversionary interest: 2 Chitty on Pleading, 7th edit. 589, et seq. [Williams, J. You must shew that the thing complained of cannot possibly be an injury to the reversion.] In *Baxter v. Taylor*, 4 B. & Ad. 72, it was held that a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way: such an act during the tenancy not being injurious to the reversion. Patteson, J., there said: "To entitle a reversioner to maintain an action on the case against a stranger, he must allege in his declaration, and prove at the trial, an actual injury to his reversionary interest. It is said that this action is maintainable, because the plaintiff's title may be prejudiced by a trespass committed under a claim of right; but then for such an injury the action must be brought in the name of the tenant, who is the person in the actual possession of the land." And Parke, J., said: "To entitle him to maintain this action, it was necessary for the plaintiff to allege and to prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even

accompanied with a claim of right, is not necessarily injurious to the reversionary estate." In *Bower v. Hill*, 1 N. C. 549, 1 Scott, 526, Tindal, C. J., says: "The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evi[507]dence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner if allowed to bring his action for an obstruction apparently permanent to lights and other easements which belong to the reversion." In *Hopwood v. Schofield*, 2 M. & R. 34, it was held that a reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right. In *Mumford v. The Oxford, Worcester, and Wolverhampton Railway Company*, 1 Hurlst. & N. 34, it was distinctly held, that, in order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. Therefore, it was held that a reversioner could not maintain an action against a railway company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house, except at a lower rent. "A reversioner," says Alderson, B., "cannot maintain an action for an injury not necessarily permanent. This injury is not in its nature permanent." Here, the declaration does not shew an injury necessarily permanent. [Williams, J. It is consistent with this declaration that the defendant may have insisted on a denial of the right to the lights.] Hardly. In *Simpson v. Savage*, ante, vol. i., p. 347, Cresswell, J., in delivering the judgment of the court, says: "After considering the authorities, we are of opinion, that, since, in order to give a reversioner an action of this kind, there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character. The earliest instances of such an action are, cutting trees, subverting the soil, and erecting a dam across a stream so as to cause it to flow over the plaintiff's land. In the two former [508] cases, the thing done was not removable or remediable during the term: in the third it was; but, being of a permanent character, it was to be assumed that it would remain, and therefore was treated as an injury to the inheritance. The decision in *Jessor v. Gifford*, 4 Burr. 2141, falls within the same principle. A window was obstructed: the obstruction was of a permanent character, and would remain, unless something was done to remedy the evil. *Tucker v. Newman*, 11 Ad. & E. 40, 3 P. & D. 14, belongs to the same class." The case of *Kidgill v. Moor*, 9 C. B. 364, will probably be relied on by the other side. There, a declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way; and that, by means of the premises, the plaintiff was injured in his reversionary estate: and it was held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given. Cresswell, J., there says: "It is impossible to say that a gate may not be so fastened as to enure as an injury to the reversion." That case is totally beside the present

Kemplay, contra (with whom was Knowles, Q. C.), was not called upon.

COCKBURN, C. J. I am of opinion that our judgment in this case must be for the plaintiffs. I think the declaration is sufficient. It alleges, that, the plaintiffs being entitled to the reversion in certain messuages or [509] dwelling-houses in which there were divers windows through which the light and air entered and of right ought to enter, the defendant wrongfully and injuriously erected a boarding near to the said windows, whereby the light and air were prevented from entering, and the dwelling-houses became dark and unfit for habitation, and by means thereof the plaintiffs were injured in their reversionary estates in the said dwelling-houses. It has been contended on the part of the defendant, that this declaration is bad, on the ground that it shews only a temporary and not a permanent injury to the reversion. If it had appeared upon this declaration, as it did in many of the cases to which our attention has been directed, that the injury complained of was necessarily temporary, and could not be otherwise, I should have agreed with Mr. Wilkinson; it being clear, that, to entitle a reversioner to maintain an action of this sort, there must be an injury of a substantial and permanent character. It is contended that a "boarding," according to the defini-

tion given in Webster's Dictionary, where it is said to be "a fence inclosing a house and materials while builders are at work," must necessarily be understood to mean something of a mere temporary character. I do not, however, think that necessarily follows; and, however much one may respect that very learned work, we cannot hold ourselves bound by its authority. No doubt, a hoarding is a thing which is commonly put up for a temporary purpose; but it is impossible to say that a hoarding may not be erected which shall be of so permanent a character that the right of the reversioner may be thereby injured (*a*). It would, therefore, be [510] going too far to say that the nuisance complained of in this declaration could not be of such a nature as to be injurious to the plaintiffs' reversionary interest in the adjoining premises. The case of *Kidgill v. Moor*, 9 C. B. 364, which was referred to, shews that it is sufficient if the injury be of such a nature that it might be permanent. It is impossible for us to say that this may not be of that character, especially as the declaration avers that by means of the premises, that is, the erection of this hoarding, the plaintiffs had been and were injured in their reversionary estates and interests of and in the respective messuages, &c. Of course, it will be for the plaintiffs to establish that by evidence at the trial. Before they can recover, they must shew that the act of the defendant has operated a permanent injury to their reversionary interest. If they shew only a temporary injury or inconvenience, they will fail. But it is not for us at this stage of the proceedings to decide that they have not a cause of action.

WILLIAMS, J. I am of the same opinion. In considering this declaration, it must be borne in mind that there cannot be a special demurrer on the ground that the language in which the cause of action is described is not sufficiently explicit. It is enough if we see substantially that the facts stated, if proved, may operate injuriously to the reversion. The simple question, therefore, which we have to decide is, whether upon this declaration we can see that it is impossible that the hoarding can be otherwise than a temporary structure, and so not injurious to the reversion. If at the trial it appears that the thing complained of is of a [511] mere transitory character, the jury will come to the conclusion that it is not such an injury as to entitle the plaintiffs to maintain the action. But it may be that this hoarding may have been kept up in denial of the right of the plaintiffs to the windows in question; in which case, if acquiesced in by the plaintiffs for any length of time, it might furnish a serious body of evidence against them if ever their right should come to be contested. In *Simpson v. Savage*, ante, vol. i., p. 347, the question did not arise upon the form of the declaration, but it was whether or not the evidence in support of the plaintiff's complaint of injury to his reversion was such as ought to have been submitted to the jury. The court there thought that the making the fires and causing smoke to issue was not an act of a permanent nature, so as in itself to be an injury to the reversion. But there are abundant authorities to shew, that, though the thing complained of may not be of a permanent character, in the sense of lasting many years, yet it may be so set up as to be permanent in the sense of its enuring as an inquiry to the reversion. The cases cited by Mr. Wilkinson almost all of them contain some confirmation of that principle. In *Bover v. Hill*, 1 N. C. 549, 1 Scott, 526, the defendants having erected, on their own premises, a permanent obstruction to a navigable drain leading from a river through the defendants' premises to the plaintiff's close,—it was held, that an action lay for the plaintiff, notwithstanding the portion of the drain which passed through the plaintiff's close had for sixteen years been completely choked up with mud. In giving judgment Tindal C. J., said: "We think the erection of the tunnel is in the nature of, and, until removed, is to be considered as, a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he receive no immediate damage thereby. [512] The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belongs to the premises: *Jesser v. Gifford*, 4 Burr. 2141." So, in *Hopwood v. Schafeld*, 2 M.

(*a*) Many persons will doubtless recollect the "hoarding" which for considerably more than twenty years disfigured the principal entrance to the Inner Temple, and which was put by order of the benchers of that Honorable Society for the express purpose of permanently obstructing certain windows of the adjoining premises.

& Rob. 34, Patteson, J., puts it that a mere obstruction of a right of way may be an injury to the reversion. He says: "I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case: but *Jackson v. Pasked*, 1 M. & Selw. 234, and all the authorities, shew that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent which it is in evidence can be redressed in a few days? If, indeed, there had been any obstruction operating in denial of the right, it might have been different." So, in *Shadwell v. Hutchinson*, M. & M. 350, the action was brought for an injury to the plaintiff's reversion by obstructing an antient window: the obstruction was by means of a skylight placed over an area into which the window in question looked: it was objected, on the part of the defendant, that the nuisance complained of was not any present injury to the reversion, nor of a permanent nature: that in two or three days the premises might be put into the same situation as they were before that which gave rise to the action had been done; and that, long before the right of the reversioner accrued, the injury might cease to exist. But Lord Tenterden held, as to the first point, "that the action will lay, because the injury complained of was an injury to the right: and that, if a reversioner were to be prevented from bring-[513]-ing his action during the existence of the lease, the testimony of the witnesses who could speak to the window being an antient window, might be lost." Then there is the case of *Kidgell v. Moor*, 9 C. B. 364, which appears to me completely to govern the present case. There, a declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way: and that, by means of the premises, the plaintiff was injured in his reversionary estate: and it was held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given. There is no distinction now between the construction of a declaration before and after verdict. The obstruction here complained of may be an injury to the plaintiff's reversionary interest, and therefore we cannot consistently with the authorities hold the declaration to be insufficient.

WILLES, J. I am of the same opinion. The declaration in an action of this sort must either state something which is necessarily an injury to the reversion, as, the cutting down timber-trees, or the like: or, if it state something else which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured. Where that which is stated cannot be injurious to the reversion, the allegation that the reversion is thereby injured will not help the plaintiff. Where it must be an injury to the reversion, that concluding allegation is un-[514]-necessary. Here, the thing complained of may be injurious to the reversion, as, by affording evidence in denial of the right, and therefore we cannot say that the declaration is bad.

BYLES, J. I am of the same opinion. It seems to me, that, even adopting Mr. Wilkinson's argument, a "hoarding" is something that may or may not be an injury to the reversion. I therefore agree with the rest of the court in thinking that the declaration is sufficient.

Judgment for the plaintiffs.

BLATCHFORD, *Appellant*, COLE, *Respondent*. Nov. 30th, 1858.

[S. C. 28 L. J. C. P. 140; 5 Jur. N. S. 412.]

The remedy for double value given by the 4 G. 2, c. 28, s. 1, against a tenant willfully holding over after the determination of the term, and after demand and notice in writing, is given only to the lessor or landlord or the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term,—such new lessee having no estate, but a mere *interesse termini*.

This was an appeal from a decision of the judge of the county-court of Devonshire holden at Tavistock.

The action was brought to recover 37l. 2s. 6d., for double the yearly value of an inn, farm, and lands, situate within the district of the said county-court, which the defendant, as the plaintiff alleged, wrongfully held over from the 25th of March, 1858, until the commencement of this action, contrary to the statute 4 G. 2, c. 28, s. 1.

On the 12th of March, 1857, William Perkin, being possessed of the said premises for a term of years not yet expired, and determinable on lives still existing, let the same by parol to the defendant as tenant from year to year so long as both parties pleased, from the 25th of March, 1857, at the annual rent of 53l. The [515] defendant took possession of the premises under that argument.

On the 22nd of September, 1857, the said William Perkin served the defendant with a notice in writing, signed by the said William Perkin, requiring the defendant to quit and deliver up the possession of the said premises on the 25th of March then next ensuing, and now last past, being the end of the current year of the said tenancy, which notice was sufficient to determine the tenancy, and did determine it, unless waived by any re-letting by the said William Perkin of the premises, of which the judge refused to receive evidence, as hereinafter mentioned.

On the 6th of February, 1858, the said William Perkin, by lease under seal, demised to the plaintiff the said premises, to hold the same to the plaintiff from the 25th of March then next, and now last, for seven years thence ensuing, subject to a yearly rent of 48l. The said indenture of lease is still in force, and the defendant had notice of it before the said 25th of March last.

The defendant did not on the said 25th of March last, or at any other time, quit or deliver up possession of the said premises to any one, and has thence until the commencement of this action held over the same, notwithstanding the said determination of his tenancy, alleging that the said William Perkin had re let the said premises to him on the 9th of April, 1858, being subsequently to the execution of the said lease to the plaintiff; but the judge refused to receive evidence of such letting, being of opinion, that, if the plaintiff could maintain the action at all, nothing which occurred subsequently to the granting of the lease to him would affect his title.

The plaintiff has from the said 25th of March last been, and he still is, the person entitled to the possession of the said premises under the said indenture of lease so granted to him as aforesaid.

No rent has ever been paid by the defendant to the plaintiff, nor has any rent ever been demanded by him; nor has there been any demand in writing of possession given to the defendant by the plaintiff; nor has the defendant in any way recognized the plaintiff as his landlord.

The sum of 37l. 2s. 6d. is at the rate of double the yearly value of the said premises during the time the defendant has since the determination of his said tenancy held over and detained possession of such premises as aforesaid; the yearly value thereof being 53l.

The plaintiff brought this action to recover the said 37l. 2s. 6d. for and in respect of the defendant's said over-holding of the said premises.

The cause was heard on the 21st of August, 1858; and the learned judge of the county-court, on the 18th of September, 1858, delivered judgment, nonsuited the plaintiff, on the ground that he was not the proper person to bring the action; that he was neither reversioner, remainder-man, nor assignee, within the meaning of the statute 4 G. 2, c. 28, s. 1, and had only an *interesse termini* in the premises; and that the action was brought in the name of the wrong person, there being no privity between the plaintiff and the defendant.

The question for the opinion of the court is, whether the plaintiff is or is not the proper person to bring the above action.

Collier, Q. C., for the appellant. The plaintiff is clearly the proper person to bring the action. The 1st section of the 4 G. 2, c. 28, enacts, "that, in case any tenant or tenants for any term of life, lives, or years, or other person or persons who are or shall come into [517] possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with, such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto lawfully authorised, then and in such case such person or persons

so holding over, shall, for and during the time he, she, and they shall so hold over or keep the person or persons entitled out of possession of the said lands, tenements, and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of His Majesty's courts of record, by action of debt, wheremto the defendant or defendants shall be obliged to give special bail; against the recovering of which said penalty there shall be no relief in equity." [Cockburn, C. J. Unless the plaintiff is assignee of the reversion, what privity of contract is there?] The plaintiff is the assignee of the reversion: but it is not necessary to go that length: the statute requires no privity: it is enough to say that he is "the person entitled to the possession" of the land. [Cockburn, C. J. Assuming that the defendant will give up the possession of the premises at the expiration of his tenancy, Perkin grants a lease to the plaintiff, to commence from the time of the expiry of the defendant's tenancy, viz. the 25th of March, 1858. Crowder, J. The plaintiff was put into possession by the landlord from that day.] Yes. The simple question is, whether [518] the plaintiff is the person entitled to the possession, within the statute. [Cockburn, C. J. Are not the words of the statute to be construed with reference to the person entitled to the reversion?] The lessor is not entitled to the possession. [Cockburn, C. J. He is entitled to the possession for the purpose of delivering it to his lessee. A person coming into the rights of the landlord may avail himself of the remedies which the landlord would have had. But here the plaintiff stands in the place of the tenant, not in that of the landlord.] The landlord has parted with all his interest to the plaintiff for all purposes. [Cockburn, C. J. Except the remedy for double value.] The plaintiff has an *interesse termini* from the expiration of the defendant's term. [Williams, J. There is a precedent in Pearson's Chitty, p. 156, of a declaration against a tenant for not delivering up possession, whereby the superior landlord recovered double rent and costs against the plaintiff. Could the plaintiff have brought ejectment, before entry?] *Ryan v. Clark*, 14 Q. B. 65, shews that he could. Patteson, J., in delivering the judgment of the court, there says: "It is distinctly laid down in *Williams v. Bosanquet*, 1 Erod. & B. 238, 3 J. B. Moore, 500, that entry is not necessary to the vesting of a term of years in the lessee: the interest and the legal right of possession, where the term is to commence immediately, and not in future, vests in the lessee before entry: and, of course, the right of possession in the lessor is gone, though, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession." The same distinction is taken by Lord Denman in *Doe d. Parsley v. Day*, 2 Q. B. 147, 156, 1 Gale & D. 493, "In the present case," he says, "the action is not trespass, but ejectment: and, as the mortgagee, before entry into the leasehold part of the [519] premises, had an *interesse termini*, which was sufficient (Sheppard's Touchstone, p. 269, Co. Litt. 46 b.) to enable him to demise to John Doe, whose entry is admitted, any technical difficulty as to trespass not lying is avoided: and, with respect to the freehold part of the property, none ever existed." An *interesse termini*, after the term has commenced, becomes an actual estate. In *Saffin's case*, 5 Co. Rep. 123 a., a man made a lease for years of certain land, to commence after the determination of a prior term of years then in being; the first lease determined, the second lessee did not enter: he in the reversion entered, and made a feoffment, and levied a fine with proclamations: and afterwards five years passed without entry or claim by the second lessee: and it was held that the lessee was barred: for, when the lessee's future interest had commenced, then he had such an estate as might be divested. It was said at the bar, that, "until the second lessee enters, he has but *interesse termini*, as he had before the first lease determined." But it was answered by the court, that, "by the said feoffment, the second lessee had but a right, for, when his future interest had commencement, then he had such present estate in the land which might be divested, and which he might revest by his entry. As, if a man makes a lease for years, in this case, before the lessee enters he has an estate for years in the land, which he may grant." Williams, J. In *Doe d. Rawlings v. Walker*, 5 B. & C. 111, 118, 7 D. & R. 487, Bayley, J., says: "The right upon a lease to commence in presenti, is (except under the statute of uses), until entry, an *interesse termini*, and so is the right upon a lease to commence in futuro: and the same rules are applicable to both. Each is a right only, not an estate. The whole estate, notwithstanding such right, is in the lessor. In neither case will a conveyance

by the lessee to the lessor operate [520] as a surrender, nor will a release from the lessor to the lessee operate by way of enlarging the estate. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate: and the lessee may extinguish it by a release to the lessor, but it has all the properties and consequences of a right only, not of an estate." By whatever name it may be called, this is clearly an interest which would go to the executors. [Cockburn, C. J. The right to double rent is given to the person entitled to the reversion. A man possessed of a term demises from year to year, and, having given the tenant notice to quit, grants to another a lease for a term of seven years, carved out of his reversion. How can the lessee (who has never entered) be said to have a reversion?] It is submitted that the lessee is a "person entitled," within the meaning of the statute. If he had entered, he would have had an estate. Is he to be in a worse position quoad the tenant, because the latter has illegally kept him out of possession? [Crowder, J. Must not the person entitled to the profits at the time be the person entitled to the double value?] The person entitled to the profits at the time the liability for double value attached, was the lessee; he, therefore, must be entitled to the double value. [Crowder, J. The holding over is against the landlord.] The lessee is the only person who could bring ejectment. [Cockburn, C. J. Have you any authority for saying that the landlord could not bring ejectment? Could the tenant set up the lessee's title against him? He may shew that the landlord's title has expired. The landlord has as much parted with his right of entry by granting a lease for seven years, as if he had granted the reversion. [Cockburn, C. J. Does it lie in the mouth of a man who is insisting that his tenancy has not expired, to say that his landlord's title has expired?] The lessee, [521] it is submitted, is the only person aggrieved by the tenant's holding over.

Kingdon, contra. The plaintiff is not assignee of the reversion. In *Smith v. Day*, 2 M. & W. 684, A., being seised in fee, leased premises to B. for sixty-one years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-one years; and it was held, that, by the lease to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease. In the course of the argument there, Parke, B., says: "The second lessee has no interest whatever till the determination of the first lease, except a mere interesse termini. It is clear that no reversion could pass by that deed, since it is a mere interest in futuro." [Williams, J. There is no doubt about that. Cockburn, C. J. Who is to maintain ejectment?] The lessee having a mere interesse termini, the landlord alone had such an interest as to maintain ejectment. In Bacon's Abridgment, Leases and Terms for Years (M.), it is said, that, "at common law, no lease for years, whether it were with or without any reservation of rent, was looked upon to be complete till an actual entry by the lessee; for, though the lessor had done all on his part to perfect the contract, so that he could not afterwards in any way derogate from it or avoid it, yet, till there was a transmutation of the possession by the actual entry of the lessee, it wanted the chief mark and indication of his consent thereto, without which it might be unreasonable to adjudge him in actual possession to all intents and purposes; since it might so happen that such lease was made in his absence, and when he knew nothing of it, and perhaps might be so incumbered as to bring a load upon him rather than any advantage. For these reasons (amongst others), the law could not [522] cast the immediate and actual possession upon him *nolens volens*; and therefore it was, that, till actual entry, he could not maintain an action of trespass or ejectment, because those actions, complaining of an immediate violation of the possession, could not be proper for him who had no actual possession." That is a distinct authority to shew that the plaintiff could not have brought ejectment. If so, who could? Why clearly the lessor only. In *Doe d. Parsley v. Day*, 2 Q. B. 147, 1 Gale & D. 493, the difficulty was got over by the admission of the entry by John Doe. The defendant could not have maintained an action at common law for rent, before entry. That was decided by the case of *Turner v. Cameron's Colbrook Steam-Coal Company*, 5 Exch. 932, where it was held that trespass will not lie against the occupier of land, at the suit of the mortgagee, who has never been in actual possession or been seised of the land, and has not obtained a judgment in ejectment, either by default or verdict; and therefore he cannot in such case waive the tort, and maintain an action for use and occupation. Parke, B., in giving judgment, said: "We are all clearly of opinion that the plaintiff was not in a condition to bring an action of

trespass, inasmuch as he was mortgagee out of possession: he never had entered upon the property at the time of the trespass committed, and never was in actual possession. He could only have maintained one in case he had brought an ejectment and laid the demise at an antecedent period, and the defendants had either suffered judgment by default as tenants in possession, or there had been a verdict on the trial: and then the defendants would have been in the condition of admitting the lease, and consequent entry to make the lease, and therefore the plaintiff would have been in possession, by the fiction in ejectment, from the time of the demise. But here [523] no ejectment has been brought, and consequently the plaintiff never was in a situation to maintain an action of trespass at all." The fiction no longer existing, he would have no right to bring ejectment. [Crowder, J. The Common Law Procedure Act does not alter the law in that respect.] The question is, who was the person entitled to the possession at the time the notice to quit expired. Clearly the landlord. [Cockburn, C. J. The tenant by his contract engages to give up possession to the landlord. As against him, therefore, the landlord must be the person entitled to possession. The question is, whether, the statute having spoken of "the person to whom the remainder or reversion shall belong," that does not give the key to the meaning of the subsequent part of the enactment.] That view is fortified by the 11 G. 2, c. 19, which is in *pari materia*, the 18th section of which gives the right to recover double rent, where a tenant, having given notice to quit, holds over, to "the landlord or landlords, lessor or lessors."

Collier, in reply. The 4 G. 2, c. 28, s. 1, contemplates a case where there is no privity of contract. It purposely uses different language from that found in the 11 G. 2, c. 19, s. 11. The word "value" is used instead of "rent," apparently for the purpose of excluding the necessity of shewing the relation of landlord and tenant. The 4 G. 2, c. 28, gives the remedy to the person entitled to the possession: and, according to the judgment of the court of Queen's Bench in *Ryton v. Clark*, 14 Q. B. 65, "the right of possession in the lessor is gone" by the lease. He has parted with his right of entry for the seven years for which he has granted the premises to the lessee.

COCKBURN, C. J. I entertain no doubt whatever that [524] the decision of the judge of the county-court in this case was right, and that the plaintiff is not in a position to maintain the action. The statute 4 G. 2, c. 28, s. 1, was intended to give the action for double value against a tenant wilfully holding over after the determination of the term, and after demand made and notice in writing given for delivering the possession of the premises, to the landlord or lessor, or to any person standing in his place as reversioner or remainderman. Mr. Collier contends that the words of the statute, "the person or persons entitled," mean any one who may have derived a fresh title from the landlord. I am of opinion that that is not the true construction. As regards the tenant, the person entitled to the possession is the landlord, whether for the purpose of enjoying it himself or of giving the possession to a new tenant: and it is plain that it is to him that the remedy was intended to be given. The words are clearly capable of that construction. And, when we look at the words of the corresponding statute, 11 G. 2, c. 19, s. 18, whereby tenants holding over after having given notice to quit are made liable to double rent, the meaning of the former statute becomes quite clear. The mischief and inconvenience in both are the same: and it is evident that the legislature intended to apply the same remedy in the one case as in the other. No doubt seems ever to have been entertained until it is now for the first time raised, that it is the landlord and the landlord only to whom the remedy is given.

WILLIAMS, J. I am entirely of the same opinion. It is probable that this was one of the very cases contemplated by the legislature when passing the 4 G. 2, c. 28. When a lease is drawing to a close, the landlord naturally looks out for a new tenant: and, if [525] the old tenant, in defiance of his landlord's right, wilfully refuses to give up possession, such refusal is a grievance brought upon the landlord, for which the statute gives him a right to claim double value by way of compensation.

CROWDER, J. I am of the same opinion. I think the true construction of the statute 4 G. 2, c. 28, s. 1, is, that the person entitled to the possession, as between him and the tenant, must be the landlord or some person standing in the shoes of the landlord. I see no reason for giving a wider construction to the words. Take the case between landlord and tenant only, and the tenant holding over as against his landlord after notice,—who would be the person entitled to the possession? Clearly

the landlord. The person who stands in the relation of a reversioner is in the same position. I am of opinion, therefore, that the judge of the county-court was right, and that his decision must be affirmed, with costs.

Decision affirmed, with costs.

[526] OWEN v. WILKINSON. Nov. 22nd, 1858.

[S. C. 28 L. J. C. P. 3; 5 Jur. N. S. 102.]

A joint and several promissory note of A. and three others may be set off against a claim of A. in an action by him against the payee upon a money demand.

This was an action for money had and received and for money found due upon accounts stated. The defendant pleaded, amongst others, a set-off in respect of a promissory note dated the 24th of November, 1852, whereby the plaintiff and others jointly and severally promised to pay to the order of the defendant, on demand, the sum of 300l., and which note remained unpaid. The plaintiff took issue upon this plea.

The cause was tried before Willes, J., at the second sitting in London in this term. The note, which was put in, was in the following form,—

“£300 0 0.

“London, Nov. 24th, 1852.

“We, the undersigned, directors of the Counties Union Assurance Company, jointly and severally promise to pay to the order of Mr. Joseph Wilkinson, on demand, the sum of 300l., for value received.

“T. W. STRICKLAND.

“G. T. CONDY.

“HENRY OWEN.

“R. MANSON.”

On the part of the plaintiff, it was submitted that this note could not be made the subject of a set-off against a debt due to the plaintiff alone. The learned judge ruled that it might; and a verdict was entered for the defendant, subject to a motion to enter the verdict for the plaintiff (for an ascertained amount of damages), if the court should be of opinion the ruling was wrong.

Ballantine, Serjt. (with whom was W. R. Cole), now moved accordingly. The note upon the face of it purports to be the joint and several note of the makers, and [527] to have been given in satisfaction of a debt of the company. It is not a joint and several debt, but a joint and several engagement to pay a joint debt. The debts therefore are not mutual debts within the statutes of set-off (*a*). [Willes, J. In Pothier on Obligations, by Evans, vol. 2, p. 68, the learned author says: “I am not aware of any authority, that, if one debtor has actually set off a separate debt of his own against a joint and several debt of himself and others, that this could be taken advantage of by the others in any action instituted against them; although it is certainly reasonable that such a set-off should in all respects be regarded as a payment; and this observation applies more forcibly to the case where the creditor has set off the joint and several debt against a demand due from himself to one of the debtors.” That is referred to in Chitty on Contracts (6th edit. by Russell), 752. It seems to be taken for granted that this could be done. Crowder, J. I must confess I should have thought the set-off good. Have you any authority the other way? None. [Byles, J. The point does not seem to have been raised, because nobody thought it worth while.] There is no such mutuality as the statutes contemplated. It appears that Owen deposited a cheque with Wilkinson, and that Wilkinson received the money. Being sued by Owen, Wilkinson now seeks to set off a claim in respect of a joint and several promissory note of Owen and three other persons. [Willes, J. *Fletcher v. Dyer*, 2 T. R. 32, seems to be precisely in point. It was there held that, if two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with a condition for the due performance of the work or the payment of [528] the weekly sum, and the work is not finished by the time, —such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. Buller, J., rested his judgment

upon the fact that one only had executed the bond: but Ashhurst, J., says: "It would have been difficult for the jury to have ascertained what damages the defendant had really suffered by the breach of the agreement; and therefore it was proper for the contracting parties to ascertain it by their agreement. So that this is a case of stipulated damages, and it is not to be considered as a penalty. If so, and the parties have entered into a joint and several bond, it becomes the separate debt of both, and therefore may be set off against either. Then, it has been objected that there is no mutuality in the debts; because, first, it is a joint debt, and, secondly, that the plaintiff should have a compensation from the other party. As to the first, it is sufficient to say that this is a separate as well as a joint debt, and therefore may be set off." Byles, J., referred to *King v. How*, 13 M. & W. 494, where Parke, B. (p. 505), says: "The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that, if sued severally, and he does not plead in abatement, he is liable to pay the entire debt: but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee."]

CROWDER, J. I am of opinion that there ought to be no rule in this case. I cannot bring myself to enter [529]tain the slightest doubt upon the subject. The action is brought against Wilkinson for a debt due from him to the plaintiff: and the simple question is, whether Wilkinson is entitled to claim a set-off against Owen, in respect of a joint and several promissory note of Owen and three other persons, as the several debt of Owen. It seems to be clear that Wilkinson might have sued Owen separately upon the note. Why, then, should he not have a right to set it off in an action brought against him by Owen? There is no pretence for the objection.

BYLES, J. I am entirely of the same opinion. If we were to grant a rule in this case, we should be suggesting a doubt upon a matter which has hitherto been free from doubt.

WILLES, J. I am glad the rest of the court concur in the opinion I expressed at the trial. I reserved the point, not because I entertained the least doubt about it, but because I was told that there was no decision upon it. That, however, turns out to be an erroneous suggestion.

Rule refused.

[530] HASELER v. LEMOYNE AND ANOTHER. Nov. 5th, 1858.

[S. C. 28 L. J. C. P. 103; 4 Jur. N. S. 1279; 7 W. R. 14.]

A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorize him to seize, unless he ratifies the broker's act, with knowledge of what he has done; but he is responsible for any irregularity by the broker in dealing with the distress which he was authorized to make,—as for selling the goods without notice of the distress, and without appraisement.—A., who received the rents and generally managed the property of B., in B.'s name, but without authority from her, signed a warrant to distrain the goods of C., a tenant, for rent in arrear, and, after the goods had been distrained, informed B. thereof, who thereupon said that she should leave the matter in his hands:—Held, sufficient evidence that the distress was authorized or ratified and adopted by B.

The first count of the declaration charged the defendants with distraining and selling the plaintiff's goods for arrears of rent due to the defendant L^{dia} Catherine Lemoyne, without giving him notice of the distress; the second was for selling the distress without appraisement; and the third for converting the plaintiff's goods.

The defendants pleaded not guilty "by statute," the statute mentioned in the margin being the 11 G. 2, c. 19, ss. 20, 21.

The cause was tried before Cockburn, C. J., at the sittings at Westminster after last Trinity Term. The facts were as follows:—The defendant Miss Lemoyne was the owner of a house and premises in Alfred Road, Harrow Road, which was in the occupation of the plaintiff as tenant at the rent of 2l. 12s. per month. On the 25th of January, 1858, there being a sum of 17l. due from the plaintiff to Miss Lemoyne

in respect of this rent, one Alexander, who had been in the habit of receiving the rents and generally managing Miss Lemoyne's property, signed a warrant in Miss Lemoyne's name, but without any express authority from her, and employed the other defendant, Norden, a broker, to distrain the plaintiff's goods. Norden accordingly went upon the premises and made a levy, but he omitted to give the plaintiff notice of the distress, and also omitted to employ another appraiser to value the goods. On the 20th of February, the plaintiff's attorney wrote to Miss Lemoyne, complaining of these irregularities. Miss Lemoyne thereupon sent for Alexander, and, upon being informed by him that the goods had been distrained, and that they were about to be [531] sold, she said she would leave the matter in his hands. The goods were sold on the 26th of February.

On the part of the defendant Miss Lemoyne, it was submitted that she was not responsible for the irregularities committed by the broker, even if the warrant had been signed by her authority.

A verdict was taken for the plaintiff against both defendants (damages 8l. 2s. 2d.), under his lordship's direction; leave being reserved to enter a verdict for the defendant Miss Lemoyne, if the court should think that the evidence did not fix her.

F. Russell now moved accordingly. There was no evidence that Miss Lemoyne authorised anything that was done by Norden. The warrant was signed without her sanction. [Cockburn, C. J. There was evidence of a complete recognition by her of everything that was done by Alexander.] If Alexander himself had been the landlord, he would not have been responsible for the illegal acts of the broker. The authority given to the broker is, to take the necessary legal steps to distrain, appraise, and sell, not to sell the distress illegally and without appraisal. In *Lewis v. Read*, 13 M. & W. 834, the landlord authorized bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person (supposing them to be the tenant's) beyond the boundary of the farm. The cattle were sold, and the landlord received the proceeds: and it was held that the landlord was not liable in trover for the value of the cattle, unless it were found by the jury that he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts. Parke, B., there said: "There [532] is no doubt that the acts of the defendant Read, in directing, through his agent Owens, the sale of the sheep, and receiving the proceeds, were a sufficient ratification of the act of the bailiffs in making the distress, as to such of the sheep as were taken on the Penybryn sheep-walk, because the taking of them was within the original authority given to the bailiffs by Owens as the agent of Read. But, as to the others, which were not proved to have been taken on Penybryn, and as to which, therefore, the authority was not followed, Mr. Read could not be liable in trover, unless he ratified the act of the bailiffs, with knowledge that they took the sheep elsewhere than on Penybryn; or unless he meant to take upon himself, without inquiry, the risk of any irregularity which they might have committed, and to adopt all their acts." [Byles, J. The authority there was, to distrain on Whiteacre, and the brokers distrain on Blackacre. Cockburn, C. J. If your doctrine be true, the landlord never could be liable. Was there not enough here to shew that the landlady took upon herself, without inquiry, the risk of any irregularity the broker might commit? Crowder, J. In *Hamdell v. King*, ante, vol. iii., p. 59, A. authorized B., a broker, to distrain for rent due to him from C. B., having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory: and it was held that A. was liable, jointly with B., in trespass. I thought it was one of the first principles, that, if one employs another to do a certain thing, he is liable for all the acts of irregularity committed by that other in doing it.] That is contrary to the doctrine laid down by the court of Queen's Bench in *Fremson v. Rosher*, 13 Q. B. 780, that a principal is not liable in trespass for the act of his agent, unless he authorized [533] it before-hand, or subsequently assented to it, with knowledge of what had been done. Thus, where, in an action of trespass against a landlord, it appeared that he gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture, and paid the proceeds to the defendant, who received them without inquiry, but without knowledge that anything irregular had been done, it was held, that no such authority or assent appeared as would sustain the action. Patteson, J., in

delivering judgment, says: "It is clear that a principle is not responsible for a trespass by an agent, unless he gave a prior authority or subsequent assent. Here, the warrant was the only prior authority, and clearly did not extend to destroying a building or removing a fixture. The chief reliance was therefore placed on the receipt of the money as proof of a subsequent assent: but, as the defendant had no knowledge that a trespass had been committed, and received it in the belief that his warrant had been lawfully executed, the receipt under such circumstances is no evidence of assent." [Williams, J. In that case, the authority given was, to distrain "goods," and the broker distrained "fixtures." Cockburn, C. J. The point I meant to reserve was, whether Miss Lemoyne had sufficiently authorized the distress. Where a man authorizes another to do an act which involves certain things necessary to make it legal, he is bound to see that those things are properly done, otherwise he is responsible for the illegal acts of his agent.] In *Leachey v. Rowland*, 13 C. B. 182, it is laid down, that, if one employs another to do an act which may be done in a lawful manner, and the latter in doing it unnecessarily commits a public nuisance, whereby injury results to a third person, the employer is not responsible. [Cockburn, C. J. The landlady authorizes the seizure of the tenant's goods. She is entitled, under certain [534] conditions to sell them. The very goods are sold which she authorized to be seized. She can only justify the sale by shewing that the conditions which entitled her to sell have been fulfilled. The thing is as simple as possible, if you go back to first principles.] The power to sell the distress is only given by the statute 2 W. & M., sess. 1, c. 5, s. 2. The authority to the broker is, to distrain, and to sell the distress in the manner pointed out by the law, that is, to sell after due notice and due appraisement. Then, assuming that Alexander would have been liable, if he had been the landlord, for the acts of Norden, is there no distinction between his case and that of Miss Lemoyne? [Cockburn, C. J. None that I can see.] She could not be said to have ratified the irregular acts complained of; for, at the time her assent to the distress was given, no irregularity had been committed. The sale took place afterwards.

COCKBURN, C. J. I am of opinion that there ought to be no rule in this case. From the evidence of Alexander it appears, that, after the distress had been made, and the fact communicated to Miss Lemoyne, she said she would leave the matter in his (Alexander's) hands. From that moment the distress was authorized by her, and she became responsible for all that was done under her authority. As to whether a landlord is liable for irregularities committed by the broker in conducting the distress, for the reasons I threw out in the course of the argument, I am clearly of opinion that he is liable.

WILLIAMS, J. I am quite of the same opinion. Not only do I feel satisfied that there is nothing in the point which has been pressed by the learned counsel with so much zeal, but I must say, that, during a [535] pretty considerable experience of actions of this sort, I never heard it doubted. It is quite consistent with the view we take, that the landlord is not liable for the acts of the bailiff in distraining upon premises other than the demised premises, or for seizing things not by law distrainable. But where, as here, he takes the goods which it was meant he should take, the landlord is liable for any irregularity committed by him in the conduct of the distress.

CROWDER, J. I am of the same opinion. As to the point reserved, I understand it to be whether Miss Lemoyne was in the position of a landlady who had authorized a distress to be made. Looking at the evidence, it appears, that, after the goods had been distrained, Miss Lemoyne had notice of the fact, and she told Alexander (who signed the warrant for her) that she would leave the matter in his hands. It seems, therefore, that Alexander acted for her in the matter of the distress, and that she was dealt with as landlady. The other point is one that surprised me quite as much as it did my Brother Williams, viz. that a landlord who authorizes a distress is not responsible for any irregularity committed by the broker in conducting the sale. That which is complained of here is, an irregularity on the part of the broker in doing what it was the very object of the warrant that he should do. The broker has omitted to do something which the law required him to do to make the distress valid. In doing what he did, the broker was the servant of the landlady, and she is answerable for the irregularity.

BYLES, J. I am of the same opinion. Mr. Russell has failed to observe the distinction between matters done which are dehors the authority, such as, taking [536]

fixtures, or seizing goods in a different place from that to which the warrant addresses itself, and the case of an irregularity committed by the broker while acting within his authority. I cannot say that I never heard the point suggested before; but I may say that I never heard it received with any favour.

Rule refused.

EDWARDS v. EDWARDS. Nov. 17th, 1858.

Where a cause was referred by judge's order under the 3rd section of the Common Law Procedure Act, 1854, to a county-court judge,—Held, that the costs of the proceedings before him were taxable, not under the county-court scale, but in the same manner as if the reference had been to a master or to an arbitrator chosen by the parties.

This cause was referred by order of a judge under the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to the judge of the county-court of Liverpool. The action was upon a promissory note. A set-off having been pleaded, the plaintiff attended with his witnesses at the county-court for the purpose of meeting it, when a compromise was agreed to, the defendant to pay the plaintiff 255l., and costs as between attorney and client. The plaintiff's attorney afterwards sent in his bill to the defendant's attorney, claiming 14l. 14s. 11d. The defendant's attorney tendered 13l. 4s., which the plaintiff's attorney declined to accept. A judge's order was obtained for taxation of the bill, at the instance of the defendant, and it was accordingly taxed by one of the masters of this court on the county-court scale, and 11l. 3s. 9d. allowed. Among other items disallowed was, the attorney's fee for attending on the reference, because the order of the judge for that purpose had not been obtained: see the scale, Pollock & Nicol's County Court Practice, p. 165; Scott's Costs, 2nd edit. p. 403.

[537] Brett, on a former day in this term, obtained a rule nisi to review the taxation. He submitted that the reference to the judge under the 17 & 18 Vict. c. 125, s. 3, was not a proceeding in the county-court, and therefore not within the 33rd section of the county-court act, 20 & 21 Vict. c. 108. He referred to *Warden v. Stone*, 7 Ellis & B. 603, and *Wheatcroft v. Foster*, 27 Law J., Q. B. 277.

Edward James, Q. C., now shewed cause. The master was quite right in taxing the costs according to the county-court scale. [Williams, J. Surely the act of parliament, when it empowered the judges of the superior courts to appoint a judge of a county-court to be the arbitrator, never meant to interfere with the ordinary jurisdiction of the court as to costs.] The act impowers the judge to select the county-court judge in his character of judge, upon such terms as he may think reasonable. [Williams, J. The words giving him a discretion as to the costs would apply equally whether the arbitrator was a barrister, an officer of the court, or a county-court judge.] *Wheatcroft v. Foster*, 27 Law J. 277, is a distinct authority to shew that the master here has exercised a sound discretion: it was there held, that, where a judge makes an order under the 26th section of the 19 & 20 Vict. c. 108, that a cause commenced in a superior court shall be tried in a county court, and the order is silent as to what costs are to be allowed, the master of the superior court in his taxation may take the county-court scale of costs as his guide, so far as regards that part of the proceedings which took place in the county-court. Lord Campbell says: "The defendant is entitled to receive such costs as the law has provided for him. With respect to proceedings in county courts, he has a right to have his costs taxed on the scale provided in the county court. [538] It is allowed that the order was regularly made under section 26: either party might have applied to the judge to embody in that order terms that the costs should be taxed as in the superior court, for no order is made till both parties have had an opportunity of being heard. The judge, therefore, must be taken to have supposed that justice would be done between the parties by costs being taxed upon the lower and humbler scale; and the master acted very properly in looking at the scale of costs which had been prepared for proceedings in the county court." And the other judges express themselves to the same effect. Is there then any substantial distinction between a reference of a cause for trial to the county-court under the 19 & 20 Vict. c. 108, s. 26, and a reference to a county court judge under the 17 & 18 Vict. c. 125, s. 3? [Williams, J. I think decidedly

there is. In *Wheatcroft v. Foster*, the effect of the order was to make the cause for the purpose of trial a cause in the county-court: whereas, the reference under the Common Law Procedure Act is a mere step in ascertaining the damages. I can see no difference whether the person appointed arbitrator is a county-court judge or any one else.] The reference is not to A. B., but to the judge of the county-court. [Byles, J. He is acting as an arbitrator in a proceeding in the superior court.] The scale made under the 33rd section of the 19 & 20 Vict. c. 108, expressly provides for references. [Crowder, J. That scale applies to references in the county-court.]

WILLIAMS, J. I am of opinion that this rule should be made absolute. I do not at all mean to impugn the authority of the case of *Wheatcroft v. Foster*, 27 Law J., Q. B. 277. But that case only decides, that, where the trial is ordered to take place in the county-court under the 26th section of the 19 & 20 Vict. c. 108, the [539] 33rd section has operation. This, however, is not a proceeding in the county-court at all, but a proceeding in this court. A judge of this court has made an order under the compulsory clauses of the Common Law Procedure Act, 1854, appointing the judge of the county-court arbitrator. There is no distinction in this respect between a county-court judge or any other person who may be named as arbitrator. And there can be no different rule of taxation, whether the arbitrator appointed under the order be a county-court judge, or a barrister, or a master.

CROWDER, J. I entirely agree with my Brother Williams. The case of *Wheatcroft v. Foster* is clearly distinguishable from the present on the ground which he has stated. The three persons mentioned in the 3rd section of the Common Law Procedure Act, 1854,—an arbitrator appointed by the parties, an officer of the court, or (in country causes) the judge of any county-court,—are all precisely on the same footing. And it is obvious, that, when the judge, in exercise of the power given to him by that section, names the county-court judge as the referee, he does not mean to take the case out of the jurisdiction of the superior court. The proceeding, then, not being in the county-court, the costs ought not to be taxed upon the county-court scale.

BYLES, J. I am of the same opinion. The 3rd section of the 17 & 18 Vict. c. 125, provides that certain matters may be referred, *inter alios*, to the judge of any county-court: and it goes on to enact that “the award or certificate of such referee shall be enforceable by the same process as the finding of a jury upon the matter referred.” Suppose a cause referred, after writ, to the judge of a county-court, and the county-court judge gives [540] a certificate in favour of the plaintiff,—in which court is the judgment to be entered up or enforced? Clearly in this court. The cause was never removed out of this court, and consequently the costs must be taxed according to the practice of this court.

Rule absolute (a).

IN RE ANNA BOOTH AND OTHERS. Nov. 16th, 1858.

[S. C. 28 L. J. C. P. 138; 4 Jur. N. S. 1301.]

The court will enlarge the time for returning a commission for taking the acknowledgment of a married woman abroad, under the 3 & 4 W. 4, c. 74, where, by reason of the remoteness of the residences of the parties, the time allowed has proved too short.—A commission was directed to “William Bates, lawyer, John Howey, wholesale grocer, and Alexander Cummins, wholesale grocer, all of Debuque, in the state of Iowa, in the united states of America.” The certificate of acknowledgment was signed by “Andrew Cummins and John Hoey.” The affidavit of verification was made by Hoey, who described himself as one of the commissioners, and stated that the certificate was signed by Andrew Cummins, “the other commissioner.” An affidavit was produced, made by the solicitor who prepared and sent out the commission, who stated that “he verily believed that the said Andrew Cummins and John Hoey who signed the certificate of acknowledgment, and the said John Hoey who made the affidavit of the due taking thereof, were the persons to whom the commission was intended to be directed:”—The court refused to allow the documents

(a) The 5th section of the 21 & 22 Vict. c. 74, repeals so much of the 17 & 18 Vict. c. 125, as enables the superior courts, or a judge thereof, to refer any cause to the judge of any county-court

to be received and filed without a further affidavit by some person acquainted with the place, who could more clearly identify the parties for those intended.—It is no objection that the notarial certificate is on paper instead of parchment.—There being sufficient upon the documents reasonably to satisfy the court that the commission had been *bonâ fide* executed,—the court permitted them to be received, though the notarial certificate did not in terms verify the signature of the justice of the peace before whom the affidavit of verification purported to be sworn.

On the 21st of December, 1857, three commissions were sent out to the united states of America to take the acknowledgments of Mrs. Anna Booth, Mrs. Elizabeth Cock, and Mrs. Charlotte Foster, under the statute 3 & 4 W. 4, c. 74. The commissions were returnable on or before the 1st of October, 1858; but they were not in fact returned until the 29th of October.

Kinglake, Serjt., moved to enlarge the time for the return of the commissions, and that the registrar might be directed to receive and file the certificates of acknowledgment. The delay in returning the commissions was accounted for by the fact that Mrs. Booth, Mrs. Cock, and Mrs. Foster, the parties whose acknowledgments were to be taken, and who were all parties to the same conveyance, resided about fifteen hundred miles apart. The learned Serjeant submitted, upon the authority of *In re Darling*, 2 C. B. 347, that [541] the excuse was amply sufficient to warrant the court in enlarging the time for the return,

The above objection was common to the three cases: there was also an objection peculiar to each case.—

In re Anna Booth.

The commission was addressed to William Bates, lawyer, John Howey, wholesale grocer, and Alexander Cummins, wholesale grocer, all of Debuque, in the state of Iowa, in the united states of America. The certificate of acknowledgment was signed by Andrew Cummins and John Hoey. The affidavit verifying the certificate of acknowledgment was made by "John Hoey," who described himself as one of the commissioners, and stated that the certificate was signed by Andrew Cummins, "the other commissioner."

There was an affidavit explaining how this mistake arose. This was made by the solicitor who prepared and sent out the commission. It appeared that Thomas Porch, the brother of Anna Booth, from whom the deponent received his instructions, gave him the names of the commissioners as they were stated in the commission: that the deponent had since received a letter from Thomas Porch, in which he spelt the name of John Howey as "Hoey": and the affidavit went on to say, "that, on the 29th of October, 1858, the deponent received the said documents from America, and it appeared that the acknowledgment of the said Anna Booth had been taken by John Hoey and Andrew Cummins, and the deponent had no doubt, and he verily believed the same to be true, that the said [542] Thomas Porch, in furnishing the names of Hoey and Cummins to be commissioners, inadvertently spelt the surname of the former inaccurately, and by mistake called the latter 'Alexander' instead of 'Andrew'; that the said documents were sent out to the said Thomas Porch, and he attended to the matter, and the deponent believed the said Andrew Cummins and John Hoey who signed the certificate of acknowledgment by the said Anna Booth, and the said John Hoey who made the affidavit of the due taking thereof, were the persons to whom the said commission was intended to be directed; and that, in consequence of the distance the parties resided apart, and of the said Robert Porch having hesitated to execute the conveyance, more time was occupied in completing the acknowledgment than was expected."

Kinglake, Serjt. The affidavit, it is submitted, sufficiently explains how the mistake originated, and shews with reasonable certainty that the persons before whom the acknowledgment was taken were the persons to whom the commission was intended to be directed. The case of *In re Bingle*, 15 C. B. 449, is an authority to shew that the court will receive explanatory affidavits in such cases. In a case of *In re Price*, 17 C. B. 708, a similar mistake to this was allowed to be cured by affidavit. There, a commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to commissioners, one of whom was described as "Edward C. Jones," a collector and magistrate at that place. The acknowledgment

was duly taken by Mr. Jones and one of the other commissioners: but Jones signed the certificate and affidavit of verification "Edmund C. Jones." The court allowed the documents to be received and filed, upon the production of affidavits shewing that Edmund [543] C. Jones was the person to whom the commission was intended to go, that he had always been described in the register at the India House as "Edward C. Jones," and that there was no other collector of that name in the company's service (a). [Crowder, J. To be quite consistent with the case of *In re Price*, there should be something here to identify the persons who took the acknowledgment with the persons named in the commission. There is nothing to identify them, except the belief of the attorney. Williams, J. We should have an affidavit of some person acquainted with the place, that there are no others of the name there. Crowder, J. It is quite consistent with this affidavit that there may be another person of the name of Cummins at Debuque, whose Christian name is Alexander.] The question is, whether there is not upon the affidavit now before the court enough to satisfy them beyond all reasonable doubt that this commission has been executed before the proper persons.

In re Elizabeth Cock.

The additional objection in this case was, that the notarial certificate was on paper instead of on parchment.

Kinglake, Serjt. There was an old rule of Hilary Term, 14 G. 3, applicable to recoveries, which required all the proceedings to be on parchment. But that has long been departed from in cases under the 3 & 4 W. 4, [544] c. 74. It was so done, and allowed, in *Ex parte Carr*, 5 C. B. 496, in the case of an acknowledgment to bar dower. Wilde, C. J., there says: "The record of the transaction is the certificate of the acknowledgment, and that is upon parchment. The affidavit of the due taking of the acknowledgment, and the notarial certificate, are required by the court, to satisfy them that the acknowledgment has been duly taken. The affidavit being no part of the record, I do not see why it may not be upon paper. This being merely an acknowledgment taken to bar the party's right to dower, the reason for requiring parchment to be used does not apply, even if it were necessary in the case of an acknowledgment for the purpose of passing the fee." Mr. Serjt. Manning, in a note to *In re Letitia Millard*, 5 C. B. 753, shews that the ground of the decision in the case last cited applies in the case of an acknowledgment for the purpose of passing the fee.

In re Charlotte Foster.

The further objection in this case was, that the notarial certificate did not in terms verify the signature of the justice of the peace before whom the affidavit was sworn. The affidavit purported to be sworn before "William Adams Tozer, justice of the peace." The certificate was as follows:—"I, Samuel Walter Dickenson, a notary public, &c., do hereby certify that the foregoing affidavit by, &c., made before William Adams Tozer, who is an acting justice of the peace of, &c., was made in my presence this 4th day of October, 1858."

Kinglake, Serjt. All that the court requires is, to be satisfied that the affidavit is sworn before the person before whom it is represented to have been sworn, and that he was a person duly authorized to take the affidavit. [545] *In re Partridge*, 17 C. B. 18, is a much stronger case than this. There, the court allowed the certificate of an acknowledgment of a deed by a married woman, taken at Chippawa, in Upper Canada, under the 3 & 4 W. 4, c. 74, to be received and filed, although the affidavit of verification omitted to state the place where the acknowledgment was taken, —there being sufficient on the face of the documents to satisfy them that the commission had been *bonâ fide* executed beyond the seas.

WILLIAMS, J. With regard to the cases of Elizabeth Cock and Charlotte Foster, I think the documents may be received: but, as to the case of Anna Booth, I think,

(a) See *Ex parte Mann*, 7 Scott, 142, 5 N. C. 226. A commission for taking the acknowledgment of a married woman was addressed to "Judge M'Roberts and W. Pythian, Illinois, in the United States," and was returned certified by "W. Pythian and Samuel M'Roberts:" the court required an affidavit shewing the identity of Judge M'Roberts and Samuel M'Roberts.

for the reasons already stated by my learned Brothers and myself in the course of the argument, the objection cannot be got over.

CROWDER, J., and BYLES, J., concurring,
Rule accordingly (a).

[546] LEADER v. HOMEWOOD. Nov. 2nd, 1858.

[S. C. 27 L. J. C. P. 316 ; 4 Jur. N. S. 1062. See *Ex parte Brook*, 1878, 10 Ch. D. 109 ; *In re Glasdir Copper Works, Limited*, [1904] 1 Ch. 823.]

An outgoing tenant has no right to enter for the purpose of severing and removing fixtures after the expiration of his term, and a new tenant has been let into possession.—Quære, whether a tenant holding over at sufferance would be entitled to remove fixtures?

This was an action to recover the value of certain kitchen-ranges and other fixtures and effects, the first count of the declaration being for converting and the second for detaining them.

To the first count the defendant pleaded not guilty and not possessed, and to the second non detinet and not possessed ; whereupon issue was joined.

The cause was tried before Byles, J., at the sittings in Middlesex after last Hilary Term, when the facts appeared to be as follows :—The plaintiff had for several years been tenant of premises situate in Mount Street, Lambeth, under a lease expiring at Michaelmas, 1857. In January, 1857, the plaintiff, who was desirous of renewing his term, entered into a negotiation with the landlord for that purpose. The negotiation, however, failed ; and the landlord finally, by letter of the 17th of June, declined to grant the plaintiff a fresh lease. His term being ended, and the plaintiff at first declining to give up possession, he was on the 12th of October served with a demand under the 213th section of the Common Law Procedure Act, 1852, and on the following day he quitted, and was proceeding, with the landlord's consent, to remove his goods. Certain fixtures (some of which had been severed and others not) and other effects being still upon the premises, the plaintiff, on the evening of the 14th of October, went with a van for the purpose of taking them away, when he found the front door fastened. He then applied to the defendant,—who had formerly rented a portion of the premises under him, and had on that day taken possession of the whole under an agreement for a lease from the superior landlord,—for leave to enter and [547] take the goods. The defendant refused to allow him to do so, saying that if he attempted to enter he would give him into custody ; and accordingly this action was brought.

On the part of the defendant, it was submitted, that neither trover nor detinue would lie under the circumstances ; that neither would lie for fixtures not disannexed from the freehold (the presumption of law being, that, by leaving them on the premises at the expiration of his term, the tenant meant to abandon them to his landlord) ; that it lay on the plaintiff to shew that the fixtures in question had been disannexed ; and that no such evidence had been given : and, further, that there was no evidence that the defendant had been guilty of any conversion.

The learned judge left it to the jury to say,—first, whether the plaintiff had intentionally abandoned the fixtures in question, secondly, whether the defendant converted them, intending to deprive the plaintiff of the possession of them.

The jury found that the plaintiff had not abandoned the goods, and that the defendant had been guilty of a conversion, and they returned a verdict for the plaintiff, damages 117l., subject to be reduced upon a valuation ; and leave was reserved to the defendant to move to enter a verdict for him, or a nonsuit, or to reduce the damages, if the court should be of opinion that the plaintiff was not entitled to recover in respect of the unsevered fixtures.

Wordsworth, Q. C., in Easter last, moved accordingly, and also for a new trial on the ground of misdirection. He submitted that the plaintiff was under the circumstances perfectly justified in refusing to let the plaintiff in ; that it was a presumption of law, that, if the tenant omits to remove his fixtures during the term, he [548]

(a) The required affidavit was afterwards (in Hilary Term, 1859) produced, and the rule granted as to Mrs. Booth's acknowledgment also.

means to abandon them to his landlord, and therefore that point ought not to have been left to the jury : that there was no evidence to shew a conversion by the defendant ; and that, if there was any conversion at all, it was on the part of the landlord, in letting the premises to a new tenant with the fixtures therein. He referred to *Lyde v. Russell*, 1 B. & Ad. 394, *Minshall v. Lloyd*, 2 M. & W. 450, *Wilde v. Waters*, 16 C. B. 637, and to the notes to *Green v. Cole*, 2 Wms. Saund 259 b. c. [Willes, J., referred to *Roffey v. Henderson*, 17 Q. B. 574.]

COCKBURN, C. J. We think it was properly left to the jury to say whether the defendant intended to exercise dominion over the goods, and we think the jury properly found that he had been guilty of a conversion. But, as to the fixtures, and as to the mode of leaving to the jury the question of abandonment to the landlord, we think there should be a rule.

Parry, Serjt., and W. Pearce, in Trinity Term, shewed cause. It is said, that, the plaintiff's term having expired, and he not having removed his fixtures before its expiration, they became the property of the landlord, and trover will not lie for them ; and that the learned judge ought not to have left the question of intentional abandonment to the jury. The facts are shortly these :—The plaintiff had been tenant of the whole premises under a lease which expired at Michaelmas, 1857. Part of the premises had been sublet by him to the defendant ; and, when his term was about to expire, he entered into a negotiation for a renewal. This failed ; and the landlord entered into an agreement with the defendant, under which the latter was to become tenant of the entire premises, his tenancy to commence from Michaelmas, 1857. The plaintiff not quitting when his term expired, the land-[549]-lord on the 12th of October gave him notice and served him with a demand of possession ; and accordingly on that day he commenced removing his goods. On the 14th, the defendant obtained possession of the part of the premises which had been occupied by the plaintiff, and obstructed the latter in the removal of his goods, some of them consisting of fixtures, which were removable, but had not been actually severed from the freehold [Byles, J. He began removing on the 10th, and continued on the 11th and 13th.] That the plaintiff had a right to remove these fixtures is clear. The rule is thus laid down in the notes to *Elves v. Maize* (3 East, 38), in 2 Smith's Leading Cases, 4th edit. 153,—“In the very first case which established the tenant's right to remove fixtures under any circumstances, a limitation to the time during which that right endures was pointed out. That limitation still exists, and was asserted in one of the latest cases on the subject,—*Lyde v. Russell*, 1 B. & Ad. 394. The rule is, in the Year Book 20 H. 7, laid down in the following words :—‘During his term, he may remove them ; but, if he suffer them to remain fixed after the term, they belong to the lessor :’ and the same rule with respect to time is laid down in *Poole's case*, 1 Salk. 368, and several other cases : see *Ex parte Quincy*, 1 Atk. 477 ; *Dudley v. Ward*, Ambler, 113 ; *Lee v. Risdon*, 7 Taunt. 188 ; *Buckland v. Butterfield*, 2 B. & B. 54, 4 J. B. Moore, 440 ; *Colegrave v. Dias Santos*, 2 B. & C. 76, 3 D. & R. 255 ; *Lyde v. Russell*, 1 B. & Ad. 394 ; *Weeton v. Woodcock*, 7 M. & W. 14 ; *Roffey v. Henderson*, 17 Q. B. 574 ; and the principal case. In *Penton v. Robart*, 2 East, 88, this rule was somewhat enlarged ; for, in that case, it was decided that a tenant who had remained in possession after the expiration of his term had a right to take away fixtures which he might have removed during his term. ‘He was, in fact,’ said Lord [550] Kenyon, ‘still in possession of the premises at the time when the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them.’ These words, perhaps, cast some light on the principle which governs this subject. It will be remembered that the words of Lord Holt, in *Poole's case*, are, ‘After the term, they become a gift in law to him in the reversion, and are not removeable. It would seem, therefore, that the landlord's right to them depends upon a presumption of law that the tenant, quitting the premises at the expiration of the term, and leaving the fixtures behind him, intended to bestow them on his landlord, to whom they become a gift in law : and this, like some other legal presumptions, is perhaps not capable of being rebutted : but *Penton v. Robart* may be thought to shew that the presumption of gift arises, not immediately on the expiration of the term, but on the tenant's quitting the premises, leaving the fixtures behind him. The extension of the tenant's right allowed in *Penton v. Robart*, is qualified by the expressions of the court in *Weeton v. Woodcock*. ‘The rule,’ says Alderson, B., delivering the judgment of the court in that case, ‘to be collected from the several cases decided on

this subject, seems to be this,—that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant." [Williams, J. I do not think the court in *Weeton v. Woodcock* meant to qualify *Penton v. Robart*; but to adopt the doctrine there laid down, and to apply it to the circumstances of the case before them. Byles, J. If *Weeton v. Woodcock* be law, it would shew that the plaintiff's right to remove the fixtures in this case continued at all events until the 12th of October.] He was exercising control over the goods down to the [551] moment of the act which the jury have found to be a conversion on the part of the defendant. [Williams, J. Down to the time of *Penton v. Robart*, the tenant's right to remove fixtures was considered to be limited to his term. That case, however, and *Weeton v. Woodcock*, extend it to "such further period of possession by him as he holds the premises under a right still to consider himself as tenant." That I take to be the present state of the law upon the subject.] By his not taking any steps to remove him on the expiration of the term, the tenant had a right to consider that the landlord intended to allow him time to take away his fixtures. The question underwent discussion in *Hallen v. Rander*, 1 C. M. & R. 266, 3 Tyrwh. 959, *Davis v. Jones*, 2 B. & Ald. 165, *Elliott v. Bishop*, 10 Exch. 496, and *Bishop v. Elliott*, 11 Exch. 113.

Wordsworth, Q. C., and Petersdorff, Q. C., in support of the rule. The defendant had no right to consider himself in possession as tenant after the 29th of September, 1857. He chooses to remain in after his term had expired; he cannot say he is there under any colour of right. The learned judge ought not to have left the question of abandonment to the jury: he should have told them that the law presumed abandonment from the fact of the fixtures being suffered to remain upon the premises after the expiration of the term, unless there was evidence to rebut that presumption. The rule as laid down in the notes to *Greene v. Cole*, 2 Wms. Saund. 259 c. is as follows:—"Wherever things annexed to the freehold are removable, in favour of trade or otherwise, they must be severed during the possession of the party entitled: which severance may be made even after the expiration of his interest, if he have not quitted possession: *Penton v. Robart*, 2 East, 68. But, if he quit the premises, leaving the fixtures [552] annexed to the freehold, he cannot recover their value in trover, which lies only for goods and chattels: *Horn v. Baker*, 9 East, 215; *Davis v. Jones*, 2 B. & Ald. 165; *Colgrave v. Dias Santos*, 2 B. & C. 76, 3 D. & R. 255,—in which last-mentioned case, Abbott, C. J., cites the words of Gibbs, C. J., in *Lee v. Riston*, 7 Taunt. 188, 2 Marsh. 495, 'Unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of, that trover could be afterwards brought.' The rule to be collected from these and subsequent cases decided on this subject, seems to be, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant: *Lyle v. Russell*, 1 B. & Ad. 394; *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 186; per Parke, B., in *Weeton v. Woodcock*, 7 M. & W. 14." All the authorities shew that the party must be in possession under a right still to consider himself as tenant. In *Mackintosh v. Trotter*, 3 M. & W. 184, Parke, B., says: "The tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an exerescence on the term." And in *Roffey v. Henderson*, 17 Q. B. 574, 586, Patteson, J., says: "The general principle is, that, where the articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenants' fixtures, may remove them during the term, or during such time as he may hold possession after the term in the capacity of a tenant. [Williams, J. That is not inconsistent with a tenancy on sufferance.] This plaintiff was not even a tenant on sufferance. The defendant had been let into possession by the landlord.

Cur. adv. vult.

[553] WILLIAMS, J., now delivered the judgment of the court:—

This case was argued before the Lord Chief Justice, and my Brothers Williams and Byles. I was present during a part only of the argument, and therefore take no part in this judgment.

The court are of opinion that this rule ought to be made absolute, to reduce the damages by the amount applicable to the fixtures.

The law as to the limit of time within which a tenant is allowed to sever from the freehold the fixtures which are usually called "tenants' fixtures," is by no means

clearly settled. According to the older authorities, the rule was, that he must sever them during the term. But, in *Penton v. Robart*, 2 East, 88, it appears to have been considered that the severance might be made even after the expiration of the tenant's interest, if he has not quitted possession. However, in *Wetton v. Woodcock*, 7 M. & W. 14, the rule was laid down that the tenant's right continues only during his original term, and "such further period of possession by him as he holds the premises under a right still to consider himself as tenant." It is, perhaps, not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz. that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures; and that, consequently, the verdict of the jury, which has negatived any such intention, is conclusive in his favour. And it is unnecessary to consider the [554] import of the rule with reference to the right of a tenant at sufferance during the continuance of such tenancy; because the landlord, in the present case, had reentered and thereby put an end to the tenancy, before the plaintiff attempted to enforce his right. He cannot, therefore, sustain any claim for damages in respect of the defendant's having prevented him from severing the fixtures; for, at that time, the plaintiff had ceased to be a tenant of any kind, or to hold the premises under any right to consider himself as such.

Rule absolute accordingly.

SIMMONS v. HESELTINE. Dec. 8th, 1858.

[S. C. 28 L. J. C. P. 129; 5 Jur. N. S. 270; 7 W. R. 133. See *Stevens v. Austen*, 1861, 3 El. & El. 700; *Osborne to Rowlett*, 1880, 13 Ch. D. 797.

Where the ability of the vendor to make a good title to a portion of the premises sold depends on a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor and purchaser. Where, therefore, A. bought certain premises the description of which in the particulars included a stall, which was claimed by the purchaser of the adjoining house under the same vendor, and it was doubtful as a matter of fact whether the description had been corrected at the time of the sale to A. so as to exclude the stall, and as a matter of law whether the stall was included in the conveyance to the purchaser of the adjoining premises, and a court of equity had refused to decree specific performance against A.:—Held, that A. was entitled to recover back his deposit and interest, and the expenses of investigating the title, in an action against the vendor.

This was an action brought by the purchaser of a house in Queen Street, Hoxton, in the county of Middlesex, against the vendor, to recover the deposit-money and interest, together with the expenses of investigating the title, on the ground that the vendor had failed to make a good title to a portion of the premises comprised in the contract of sale.

The declaration contained counts for money received by the defendant to the use of the plaintiff, and for money found due from the defendant to the plaintiff upon accounts stated between them. There was also a special count stating, that, theretofore, to wit, on the [555] 8th of April, 1856, the defendant put up for sale certain tenements, described by him as a freehold estate, comprising a dwelling-house and shop, No. 1 Queen Street, Hoxton, with inclosed stall adjoining, fronting both Queen Street and Pitfield Street, under and subject to certain conditions, that is to say, &c. (setting them out); that the plaintiff became the highest bidder for and purchaser of the said tenement at and for a certain sum of money, to wit, 600l., under and according to the said conditions; and that the plaintiff and defendant then agreed that the defendant should sell and the plaintiff should purchase the said tenements, at and for the said price, under and according to the said conditions, and that each of them should perform all things in the said conditions contained on his part to be performed: Averment of performance by the plaintiff of all things necessary on his part to entitle him to have a good title to sell and convey the said tenements made out to him by

the defendant according to the said conditions, and that a reasonable time for the defendant to make out and have such title, had elapsed: Breach, that the defendant did not make out or have such title, but therein wholly failed and made default, whereby divers costs and expenses incurred by the plaintiff in investigating the title of the defendant, and in preparing to complete the said purchase on his part, became and were wholly lost to him, and he was deprived of the interest which he might and otherwise would have made of the deposit paid by him, according to the said conditions, and of the residue of the purchase-money which he had prepared and kept ready to complete the said purchase, and was also put to and incurred the costs of defending a suit in Chancery instituted by the defendant against him to enforce specific performance of the said agreement, and was and is otherwise injured. Claim, 400l.

[556] The defendant pleaded, amongst other pleas,—first (to the common counts), never indebted,—secondly (to the residue of the declaration), that the defendant did, pursuant to the said contract, make out to the plaintiff, and had, such a title as was contemplated and provided for by the said conditions of sale,—thirdly, that the plaintiff, under and according to the third condition, waived certain objections to the defendant's title, and that the defendant did in all other respects, pursuant to the said contract, make out to the plaintiff, and had, a good title to sell and convey the the said tenements,—fourthly, that the defendant did not agree as alleged. Issues thereon.

The cause was tried before Williams, J., at the first sitting in Middlesex in Easter Term last. The facts which appeared in evidence were as follows:—The house in question was No. 1 Queen Street, a street running at right angles with another street called Pitfield Street, the corner house of which last-mentioned street (No. 24) was partly in Queen Street and partly in Pitfield Street, but in front of that portion which faced Queen Street, there was an area or vacant space of the width of four feet two inches, running along that side of the premises, and lying between them and the foot-way of Queen Street. Upon this vacant space was a covered shed or stall.

The freehold of the premises No. 24 Pitfield Street, was put up for sale by the defendant at public auction, in September, 1854, when one Dr. Dawson became the purchaser.

The particulars of sale on that occasion described the property to be sold as “comprising a dwelling-house and shop No. 24 Pitfield Street, let on lease to and in the occupation of Mr. William Dawson for a term of twenty-one years from the 25th of March, 1849, at the rent of 45l. per annum, the tenant paying all [557] rates and taxes, whether parliamentary or parochial, including the land-tax and sewers-rate (property-tax only excepted), also insuring the premises, and doing the repairs.”

In William Dawson's lease, the premises were described thus:—“All that piece or parcel of ground, with the messuage or tenement and buildings thereon erected and built, situate, lying, and being in Pitfield Street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, with the appurtenances, and now in the possession of the said William Dawson, and which said messuage or tenement is numbered 24, and the site of which said piece or parcel of ground and premises, with the several dimensions thereof, be the same more or less, and the abutments thereof, are described in the ground-plan of the same drawn in the margin of these presents.”

In the indenture whereby the premises so purchased by Dr. Dawson were conveyed to him, and which indenture bore date the 17th of January, 1855, they were described as “all that piece or parcel of ground, with the messuage or tenement and buildings thereon erected and built, situate, lying, and being in Pitfield Street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, with the appurtenances, now or late in the occupation of William Dawson, and which said messuage or tenement is numbered 24, and the site of which said piece or parcel of ground and premises, with the several dimensions thereof, be the same more or less, and the abutments thereof, are described in the ground-plan of the same drawn in the margin of these presents; together with all buildings and fixtures in and about the same now belonging to the said W. K. Heseltine; and also all ways, lights, sewers, water-courses, rights, privileges, easements, advantages, and appurtenances whatsoever to the said hereditaments or [558] any part thereof appertaining, or with the same or any part thereof now or heretofore enjoyed, or reputed as part or member thereof, or as appurtenant thereto.”

In the particulars of sale, the lot purchased by the plaintiff was described thus,—“A valuable freehold estate, comprising a dwelling-house and shop most advantageously situate, No. 1 Queen Street, Hoxton, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, with inclosed stall adjoining, fronting both Queen Street and Pitfield Street, in the occupation of and held by Mr. James Orton, brush-maker, together with the inclosed stall at side, under a lease, for the term of twenty one years from Christmas, 1855, at the net rent of 45*l* per annum, the lessee paying all rates and taxes, whether parliamentary or parochial, including the land-tax and sewers-rate (property-tax only excepted), and insuring the premises, and doing the repairs. The house is brick-built, with front composed over, slated and tiled roof, having a shop-frontage, with the inclosed stall, of together 39 feet, and contains, &c., &c. Note: the above premises have very recently undergone extensive repairs, and the inclosed stall, and the piece of land on which the same stands, are subject to the existing lights of the adjoining house, in the occupation of Mr. William Dawson.”

The ground-plans in the margin of William Dawson's lease, and in the conveyance to Dr. Dawson denoted the slip of land in question by dotted lines. This piece was not coloured, whilst the rest of the premises were. The stall was erected on the slip of land by the defendant in 1855,—after the date of the conveyance to Dr. Dawson. There was evidence of William Dawson having received 5*l*. a year rent for the use of the slip of land, before the shed was erected, from the occupier of the house No. 24 Pitfield Street.

On the part of the purchaser, it was objected that [559] the inclosed stall, which formed part of the lot purchased by him, appeared to have been included in William Dawson's lease, and also in the conveyance made to Dr. Dawson in January, 1855: and Dr. Dawson having given the purchaser notice that he claimed the inclosed stall, the purchaser declined to accept the title.

A bill was thereupon filed against the purchaser (the now plaintiff) for a specific performance, and the matter was heard before Vice-Chancellor Kindersley on the 29th of January, 1858, when the bill was dismissed,—his Honour observing “that both plaintiff and defendant intended to do what was right, the one in filing the bill, and the other in resisting it. The only controversy was, as to whether the contract should embrace the piece of land in question: there being none as to the price or title. Dr. Dawson insisted that he was the owner of the land, and that the plaintiff had sold it to him, and, of course, if that were so, whatever the intention of the parties might be, the defendant had a right to say that he ought not to complete the purchase. The rule applicable to such a case was this,—If a third person, a stranger, and no party to the suit, was claiming to be owner of the property in dispute, the court was under the necessity of considering whether there was reason for coming to the conclusion that such claim was shadowy and frivolous,—whether there was any reasonable doubt, or whether there was any ground to suppose that the claim might succeed. There was no question more difficult to answer than this,—what degree of doubt do you entertain? Is your mind free from doubt? Is it slight? Is it strong? and, if so, is it very strong? It was necessary, however, to ask that question in all these cases of doubtful title. This was not the ordinary case arising upon documents of the vendor; but of a third person setting up a title by reason of an act [560] which did not and could not appear upon the abstract of the plaintiff. In the ordinary course, he (the Vice-Chancellor) should go through all the details minutely, and examine all the circumstances, and upon those state what degree of doubt they created upon his mind: but, if he did so here, the effect would be, that an opinion would be expressed either favorable or unfavorable to Dr. Dawson's claim, which, as he was not before the court, could not bind him. The issue here was between the vendor and purchaser: but the real question involved an issue, and a very important one, between the vendor and Dr. Dawson, or, if the purchase was to be completed, between the purchaser and Dr. Dawson. Under all these circumstances, without expressing the least opinion that Dr. Dawson, if he brought an action of ejectment, would or would not succeed, the court ought not to compel the defendant to take this title, that is, in fact, to undertake a lawsuit. Even if the court thought the purchaser would succeed in a law-suit, that would not be a reason. Unless, therefore, Dr. Dawson's claim was so shadowy and unsubstantial that it was impossible that he should succeed, could there be a decree for specific performance? It was impossible to say that there was not a reasonable doubt; and it would be a hardship upon the defendant to make him take this title.

The bill, therefore, must be dismissed, but, in consideration of the nature of the case, no costs would be given."

Evidence was given on the part of the defendant, that, before the commencement of the sale at which Dr. Dawson bought, in September, 1854, it was publicly announced by the auctioneer that there had been a mistake made in the plan annexed to the printed particulars, and that the mistake was rectified by dotted lines made in the plan, which was exhibited to the company, and was again shewn to the purchaser and [561] explained to him before his signature was taken by the auctioneer. This was altogether denied on the part of the plaintiff.

The learned judge left it to the jury to say,—first, whether they believed that William Dawson, the tenant, was in possession of the piece of ground in question as tenant of the house No. 24 Pitfield Street, at the time of the granting of the lease to him on the 5th of May, 1849. The jury found that William Dawson was in possession of the piece of ground in question as tenant at that time.

He then left it to them to say whether William Dawson was in possession and occupation of the piece in question as tenant from the date of that lease down to the 17th of January, 1855, the date of the conveyance to Dr. Dawson. The jury also found that in the affirmative.

The learned judge further left it to the jury to say whether that which had taken place at the sale of the property in September, 1854, had been correctly represented by the plaintiff's or by the defendant's witnesses. The jury found in favour of the plaintiff.

A verdict was thereupon taken for the plaintiff for 203l. 13s.—being 120l. the amount of the deposit, 12l. interest thereon, 48l. for interest on the balance of the purchase-money, and 23l. 13s. for the plaintiff's costs of investigating the title.

Lush, Q. C., in Easter Term, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, pursuant to leave reserved to him at the trial, on the grounds,—first, that, upon the true construction of the lease and conveyance (to Dr. Dawson), the stall in question did not pass,—secondly, that, pursuant to the third condition of sale, the objection must be taken to have been [562] waived (*a*): or to reduce the verdict by the sum of 48l., the amount of interest on the unpaid purchase-money (*b*): or for a new trial, on the ground that the verdict was against the evidence.

Edwin James, Q. C., Hawkins, and W. C. Harrison, in Michaelmas Term, shewed cause. Upon the true construction of those instruments, it is submitted that the slip of land in question passed by the lease to William Dawson of the 5th of May, 1849, and by the conveyance to Dr. Dawson of the 17th of January, 1855: and, further, it is submitted that, if the words there used are not sufficient to pass it, a court of equity would under the circumstances reform Dr. Dawson's conveyance, so as to make it include it. There was ample evidence to shew that the strip of land in question was reputed to be in the possession of William Dawson under the lease granted to him on the 5th of May, 1849; and if so, it passed by the conveyance to Dr. Dawson of the 17th of January, 1855. But, assuming that the words of the conveyance are not large enough to comprise the shed, Dr. [563] Dawson may now go into a court of equity to get the conveyance reformed, so as to make it conformable with the description in the particulars under which he purchased the property. In *Llewellyn v. The Earl of Jersey*, 11 M. & W. 183, a deed conveyed a piece of land, forming part of a close, by reference to a schedule annexed. The schedule described the land, in a column headed "No. on the plan of the Briton Ferry Estate," as "153 b.;" in a second

(*a*) Nothing turned on this.

(*b*) He also sought to reduce the verdict by the 12l. interest on the deposit. But this the court refused, referring to *Hodges v. Lord Litchfield*, 1 Scott, 443, 1 N. C. 492, and Sugden on Vendors and Purchasers, 11th edit. 809, where a distinction is taken between the case of an action against the vendor and against the auctioneer, the former being liable for interest, but the latter not: see *Harrington v. Hoggart*, 1 B. & Ad. 577.

See also Sugden's Vendors and Purchasers, 13th edit. p. 302, where it is said that the purchaser, on failure of the vendor to make a good title, is "entitled to interest on his deposit; and, if the residue of the purchase money has been lying ready without interest being made of it, he is entitled to interest on that,"—citing *Flureau v. Thornhill*, 2 Sir W. Bla. 1078, and *Hodges v. Lord Litchfield*.

column, headed "Description of premises," as "a small piece marked on the plan;" in a third column, as being in the occupation of J. E.; and in a fourth, as "34 perches." At the time of the contract, a line was drawn upon the plan as the boundary line dividing the piece 153 b. from the rest of the close of which it formed a part. The plan was drawn to a scale, but, upon measurement of the land, was found incorrect; and 153 b. contained, within the line so drawn, less than 34 perches according to the actual measurement on the plan, and 27 perches only according to the actual measurement of the land. It was held that the statement that the piece of land conveyed contained 34 perches, was merely falsa demonstratio, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan as measured by the scale. Where a title is so doubtful and obscure that a court of equity will not decree specific performance of the contract against the purchaser, the latter is entitled to recover back his deposit: *Jeakes v. White*, 6 Exch. 873. The majority of the court,—Pollock, C. B., Alderson, B., and Platt, B.,—there say: "We think, that, where a question arises between parties who are about to enter into the relationship of vendor and vendee, as to the meaning of a good or sufficient title, there must be such a title as the court of Chancery would adopt as a sufficient ground [564] for compelling specific performance; and that, by a stipulation for a good title, must be understood, not such a title as would support a verdict for the purchaser in an action of ejectment against a mere stranger, but such a one as would enable the purchaser to hold the property against any person who might probably challenge his right to it." Here, the matter has already been disposed of by the decision of Vice-Chancellor Kindersley. It is said that the objection was waived, because it was not made within the time required by the conditions of sale. But this is an objection that could not appear upon the abstract: and the plaintiff could not waive an objection of the existence of which he could not have been aware: *Hobson v. Bell*, 2 Beavan, 17, 24; *Blacklow v. Laws*, 2 Hare, 40, 47. As to interest, the purchaser is clearly entitled to demand interest on the residue of the purchase money which was lying idle, and of which fact the vendor had notice: *Sherry v. Oke*, 3 Dowl. P. C. 349. There is no pretence for saying that the verdict is against evidence. There was evidence on both sides; and the jury have thought fit to give credit to the plaintiff's witnesses, and to disbelieve those called for the defendant.

Lush, Q. C., and Joseph Brown, in support of the rule, were desired in the first instance to confine themselves to the question whether Dr. Dawson would be entitled in equity to have his conveyance reformed for the purpose of letting in the disputed slip of land. A court of equity will never reform a deed where there is a conflict of testimony as to what the parties intended. To induce the court to act, there must be a mistake common to both. The rule is so distinctly laid down by the Master of the Rolls (Sir John Romilly) in *Murray v. Parker*, 19 Beavan, 305, 308. "In matters of mistake," says his Honor, "the court [565] undoubtedly has jurisdiction, and, though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed as executed is not according to the real agreement between the parties. In all cases, the real agreement must be established by evidence, whether parol or written: if there be no previous agreement in writing, parol evidence is admissible to shew what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument. I agree, that, to justify the court in reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties, and that the agreement has been carried into effect by the deed in a manner contrary to the intention of both." [Williams, J. I doubt whether this case falls within that class of cases. The buyer insists that, by the contract which he entered into, the piece of land in question passed in equity, but the formal conveyance fails to carry that contract into effect. Byles, J. The question is, did the equitable interest in this piece of land pass by the contract of sale?] A court of equity will inquire into all the circumstances. [Williams, J. There is no evidence as to what passed between the parties during the interval that elapsed between the sale and the conveyance.] The issue here is, did the vendor deduce a good title or not. Assuming the existing state of things to continue the vendor has deduced a good title, equitable

as well as legal. [Cockburn, C. J. Assuming that, to induce the court of equity to interfere, there must be a common mistake,—where there is a contract in writing, you can only get rid of [566] the effect of that by positive evidence that it does not represent the real contract between the parties.] It is at least ambiguous; and the court will not go into parol evidence.] There is no doubt, that, when the particulars under which Dr. Dawson bought were framed, it was supposed that the piece of land in question was comprised in William Dawson's lease; and that the intention was to sell what was under lease to William Dawson. *Jeakes v. White*, 6 Exch. 873, does not present the true test. The court of equity constantly evades it. In a bill for a specific performance, the issue is not whether the title is good or bad: it is enough, they say, if a third person sets up a claim which the court cannot see to be idle and frivolous. Willes, J. Sir E. Sugden goes a very long way. He says,—Vendors and Purchasers, 11th edit. 505,—that, “to enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion; for, it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It hath, therefore, become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title; neither will he be forced to take an equitable title.” Cockburn, C. J. The important question here is, whether Dr. Dawson would have a right to relief in equity.] We do not know the circumstances under which Dr. Dawson took the conveyance. [Cockburn, C. J. If the slip of ground in question was included in the description of the lot bought by Dr. Dawson, but is not included in the conveyance to him, there has been a clear mistake in carrying out the intention of the parties.] The court has not all the facts before it that a court of equity would have. Besides, no equitable title will prevail against [567] a bona fide purchaser for value without notice. In Story's Equity Jurisprudence, 6th edit., vol. i., p. 194, § 165, it is said: “In all cases of mistake in written instruments, courts of equity will interfere only as between the original parties, or those claiming under them in privity, such as, personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment-creditors, or purchasers from them, with notice of the facts. As against bona fide purchasers for a valuable consideration without notice, courts of equity will grant no relief, because they have at least an equal equity to the protection of the court.” The contract here is ambiguous; and it is open to explanation by parol evidence. Then, the conduct of Dr. Dawson, and his delay in asserting his claim, if he had it, estop him from seeking any remedy in equity. The question is, not whether the title is such as a court of equity would compel an unwilling purchaser to take, but simply whether the defendant has or has not a legal title to convey. That was distinctly laid down by this court in *Boyman v. Gutch*, 7 Bingh. 379, 5 M. & P. 222, where Tindal, C. J., in delivering the judgment of the court, says,—“Whether a court of equity would compel a purchaser to accept such a title, is a question which we are not called upon to determine. All that we profess to determine is, the legal construction of the deed, which appears to us to negative the allegation above set forth in the declaration,”—that, at the time of the exposure of the property to sale, the defendant had not a good right or title to sell or assign, &c. That is controverted only by the case of *Jeakes v. White*, 6 Exch. 873: but, in that case, Martin, B., differed from the rest of the court, and the case of *Boyman v. Gutch* was not referred to either during the argument or by the court in giving judgment.

[568] Harrison afterwards referred to the following authorities, — Sugden's Vendors and Purchasers, 10th edit., vol. 2, p. 202, where the learned author lays down the rule thus: “After some difference of opinion, it appears to be settled, as, no doubt, the rule should be, that, even in a court of law, equitable objections to a title may enable a purchaser to resist a contract, or to rescind it,”—a passage which the learned author repeats in the 11th edit. vol. i., p. 532. *Hartley v. Peckall*, Peake's N. P. C. 131 (2nd edit. 178), where it was held that a man is not obliged to accept a conveyance where the title is doubtful; Lord Kenyon saying, “When a man buys any commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least in a court of law. No man is obliged to buy a lawsuit.” Lord St. Leonard's Handy Book, p. 32, where he speaks of oral corrections of the particulars at the time of sale. And Sugden's Vendors and Purchasers, 13th edit. 142, where it is said: “Equity corrects mistakes and fraudulent omissions in

agreements in deeds; for, if a mistake appears, it is as much to be rectified as fraud; but the difficulty to establish it is great. Where it was clearly shewn that a settlement was framed contrary to the intention, in consequence of a clerk mistaking the attorney's instructions, the court refused to rectify the settlement, as nothing appeared in writing under the hands of the parties to correct it by (*Harwood v. Wallace*, cited 2 Ves. Sen. 195; *Alexander v. Crosbie*, Lloyd & G., Cas. t. Sugden, 150; *Rogers v. Earl*, 1 Dick. 294). But, whatever difficulty there may be of admitting parol evidence singly, it is always admitted where it is corroborated by other evidence. And, if necessary, an issue may be directed to try the fact."

Cur. adv. vult.

[569] COCKBURN, C. J., now delivered the judgment of the court.

This is an action brought by the purchaser against the vendor of a house, to recover the deposit-money and the expenses of investigating the title, on the ground that the defendant was unable to make a good title to a portion of the premises comprised in the contract of sale, viz. a stall adjoining and described as a part of the house.

The objection to the title was, that the stall had been previously sold to a Dr. Dawson as part of the adjacent house, and had been conveyed to him. A bill in equity for a specific performance had been filed by the present defendant, and dismissed by Vice-Chancellor Kindersley, on the ground that Dr. Dawson had given notice to his defendant in equity (the present plaintiff) of his claiming the stall as part of the house already sold and conveyed to him; and his Honor considered, on perusing the conveyance, that there was reasonable doubt whether the stall did not pass thereby. It was therefore contended, that, according to *Jenkes v. White*, 6 Exch. 673, the plaintiff was entitled to treat the title as defective, and maintain this action. In that case it was held by the court of Exchequer (Martin, B., dissentiente), in an action of the same kind as the present, that, where a question arises between parties about to enter into the relation of vendor and purchaser, as to the meaning of a good or sufficient title, there must be such a title as a court of equity would adopt as a sufficient ground for compelling a specific performance.

It does not appear, however, that *Boymon v. Gutch*, 7 Bingh. 379, 5 M. & P. 222, was cited by either the counsel or the court. In that case, this court held, that, in such an action, the court ought not to consider [570] whether the title was of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply to determine whether the vendor had a good title or not.

The point in *Boymon v. Gutch* on which the ability of the vendor to make a good title depended, arose on the construction of a deed. and, if we were to be guided by that case, and were to decide the present simply with reference to the construction to be put on the terms of the actual conveyance to Dr. Dawson, we should decide in favor of the defendant, and make the rule absolute to enter a nonsuit; for, although we agree with the Vice-Chancellor that a doubt may well be entertained on the point, yet, if we are to express our opinion, it is that the stall did not pass by that conveyance.

A further question, however, was raised at the trial. It appeared that the printed particulars of sale by auction under which Dr. Dawson purchased his house, and which were duly signed on behalf of the vendor and purchaser, described that house in such a way as to leave no doubt that the stall was to form part of it. And, if this had been merely so, we apprehend that a court of equity would certainly reform the conveyance so as to make it duly effectuate the contract of sale; and that, consequently, there would be a fatal impediment to the defendant's making a good title to convey it to a subsequent purchaser.

But, at the trial, it was asserted, on behalf of the defendant, that, before the sale by auction began at which Dr. Dawson bought, it was publicly announced in the sale-room by the auctioneer, that there had been a mistake made in the plan annexed to the printed particulars, and that it had been rectified by dotted lines made in the plan, which was exhibited to the company, and which was again shewn to the purchaser [571]-chaser, and explained to him before his signature was taken by the auctioneer. This was altogether denied on the part of the plaintiff; and the case went on the most conflicting evidence to the jury, who chose to believe the witnesses for the plaintiff, and wholly to disbelieve those for the defendant, and to find as a fact that the alteration in the particulars of sale was not proclaimed at the auction, or in any way communicated to Dr. Dawson or his agent.

With respect to this finding, we were strongly urged to grant a new trial, on the ground that the verdict was unsatisfactory and against the weight of evidence; and, certainly, in an ordinary case, we should have felt inclined to submit this question of fact to another jury. But, in this case, we think we ought not to take such a course. The verdict already given at all events demonstrates that the ability of the defendant to make a good title to the stall depends on a doubtful question of fact as well as of law. In *Jeakes v. White*, 6 Exch. 873, the question on which the title depended was a question of fact, viz. whether the person through whom the defendant claimed filled the character of heir-at-law to a former proprietor: and, without giving any opinion whether the test proposed by the Barons in that case ought to be adopted in all cases, we agree with them in thinking, that, where the title is dependent on a question of fact which it is impossible to regard as reasonably certain, such a title ought not to be deemed a good or sufficient title as between vendor and purchaser. If we should hold that a purchaser in such a case cannot treat the title as insufficient, and recover back his deposit-money, we should, in effect, put him to his election either to forfeit his deposit, or (as Lord Kenyon expressed it in *Hartley v. Pehall*, Peake's N. P. C. 178,) to buy a lawsuit.

Supposing that a second jury in this case were to [572] find in favor of the defendant, yet their verdict would not bind Dr. Dawson, who might, perhaps, after the plaintiff had completed his purchase, file a bill against him, and in that suit establish as a fact, in accordance with the verdict already given, that the stall was included in the contract for the sale of the house between him (Dr. Dawson) and the defendant.

For these reasons, we think that we ought not to make the rule absolute either for entering a nonsuit or for a new trial.

Rule discharged.

End of Michaelmas Term.

[573] IN THE EXCHEQUER CHAMBER. MICHAELMAS VACATION, 1858.

TUFF v. WARMAN. 1858.

[S. C. 27 L. J. C. P. 322; 5 Jur. N. S. 222; 6 W. R. 693. Considered and followed, *Walton v. London, Brighton and South Coast Railway*, 1866, H. & R. 429. See *Fordham v. London, Brighton and South Coast Railway*, 1868-69, L. R. 3 C. P. 374; L. R. 4 C. P. 619. Approved, *Radley v. London and North Western Railway*, 1875-76, L. R. 10 Ex. 110; 1 App. Cas. 759. Discussed, *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company*, 1880, 5 App. Cas. 892; *The Vera Cruz*, 1884, 9 P. D. 93. See *The Bernina*, 1887-88, 12 P. D. 88; 13 App. Cas. 1. Discussed, *Boucher v. Clyde Shipping Company*, [1904] 2 I. R. 133. Referred to, *The Highland Loch*, [1911] P. 269; [1912] A. C. 312.]

In an action to recover damages for an injury occasioned by a collision between two vessels,—Held by the Exchequer Chamber, that the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened: in the first case, the plaintiff would be entitled to recover; in the latter not, as, but for his own fault, the misfortune could not have happened.—Mere negligence or want of ordinary care or caution will not, however, disentitle the plaintiff to recover, unless it be such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.—The plaintiff's compliance with the regulations of the 17 & 18 Vict. c. 104, ss. 296, 298, as to porting his helm, &c., is not in such a case a condition precedent to his right to recover.

This was an appeal from a decision of the court of Common Pleas discharging a rule for a new trial (moved on the ground of misdirection and that the verdict was against evidence) in an action against the defendant, a Trinity House pilot, for negligently

navigating a steam-vessel called the "Celt" in the river Thames, and running against and damaging the plaintiff's barge, the "Nancy."

The cause was tried before Willes, J., at the sittings in London after Hilary Term, 1857, when a verdict was found for the plaintiff for 106l., being the amount of the penalty of the bond given by the defendant and the sum payable to him for pilotage in respect of the voyage on which he was at the time engaged as pilot.

At the time the collision took place, the "Nancy" was sailing down the river with a fair wind; and the "Celt" was steaming up the river.

From the evidence of the plaintiff's witnesses, it appeared that there were only two persons on board the [574] "Nancy," one of whom was occupied in washing the deck, and the other steering,—the latter being in such a position as not to be able to see ahead (the sail being in the way) without stooping, that he had seen the "Celt" when more than half a mile off; as he stated, on the south side of the river, and that when he so saw her there was no likelihood of her coming into collision with the barge; that he had not seen her again until just before the collision, when he said he ported his helm, but that it was then too late to alter the course of the barge. He stated, that, if he had seen the steamer a few minutes before, he should have ported his helm, but that he should not have avoided the collision by porting his helm five minutes before; and that there was plenty of room on each side for the steamer to pass.

Two seamen who were in another vessel were called by the plaintiff, and stated that the "Celt" was about the middle of the river, but nearer to the north than to the south shore; that the "Celt" and the "Nancy" were for a quarter of a mile or more before the collision in a direct line; that the "Celt" did not port her helm; and that there was no difficulty in the steamer passing the "Nancy" on either side.

On the part of the defendant, witnesses were called to prove that the defendant was only one fourth of the width of the river from the north bank of the river; that he was keeping a look-out, and that he could not see whether any one was looking out on the barge; that, several minutes before the collision, he directed the helm of the "Celt" to be ported, and that this direction was obeyed; that this was done in time to avoid the collision, had the "Nancy" at the same time ported her helm also, or if she had even kept on her course; but that her steersman had starboarded his helm instead of porting it.

A number of pilots were called for the purpose of [575] proving that the defendant acted properly under the circumstances of the case: and they stated that they thought it would be the duty of the defendant to port his helm: and two of them said that it was the duty of the defendant to port his helm, whatever the consequences might be.

In his summing-up the learned judge told the jury that the plaintiff was not entitled to recover if it was an accident, or if the plaintiff by his negligence had directly contributed to the accident; and that, if the injury was occasioned by the negligence of both parties, the plaintiff had no remedy: and he asked the jury whether they thought the absence of look-out was an act of negligence on the part of the plaintiff; and, if so, they would have to take it into consideration in deciding whether, notwithstanding that, the defendant was liable: and he further told them, that, if the parties on one vessel had a look-out, and still persisted in a course which would inflict an injury, then they were liable, though there was no look-out on the other vessel, for that would not be the direct cause of the injury: and he referred to the case of *Davies v. Mann*, 10 M. & W. 546, by way of illustration. The learned judge further told the jury, that, if they thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that, if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover.

In the following Easter Term, a rule was obtained on the part of the defendant calling upon the plaintiff to shew cause why there should not be a new trial, on the ground that the learned judge had misdirected the jury, in this, that the ought to have told them, that, if the plaintiff by his negligence contributed to the occa-[576]-sioning of the accident, he could not recover, whether he contributed directly or indirectly; and that, even assuming negligence on the defendant's part, the plaintiff could not recover, if he might by the exercise of ordinary care have avoided the consequences of

the defendant's negligence; and that he should further have told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover.

Cause was shewn against this rule in *Trinity Term*, 1857, and the rule was discharged; but leave was given to the defendant to appeal, pursuant to the 35th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Vide ante*, vol. ii., p. 710.

If the court should be of opinion that the objections made to the ruling of the learned judge are unsustainable, the judgment below is to stand: if not, the judgment below is to be reversed, and a new trial ordered.

The case was argued on the 10th of May, 1858, before Wightman, J., Erle, J., Crompton, J., Watson, B., Bramwell, B., and Channell, B.

Collier, Q. C. (with whom was Digby Seymour), for the defendant (*a*). The 296th sect. of the Merchant Ship-[577]ping Act, 17 & 18 Vict. c. 104, enacts, that "when-ever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that, if both ships were to continue their respective courses, they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steam-ships and by all sailing ships whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command." The 297th section enacts, that "every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam-ship." And the 298th section enacts, that, "if, in any case of collision, it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals issued in pursuance of the powers hereinbefore contained (s. 295) or of the foregoing rule as to the passing of steam and sailing ships (s. 296) or of the foregoing rule as to a steam-ship keeping to that side of a narrow channel which lies on the starboard side (s. 297), the owner of the ship by which such rule has been infringed, shall [578] not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary." It is clear from the evidence that the collision in this case was occasioned by the "Nancy's" men not seeing the position of the "Celt," and not porting her helm until too late to avoid it. The plaintiff's own evidence shews that there was manifest negligence on his part. [Wightman, J. The only question we have to consider is, whether the summing up was correct.] The learned judge should have told the jury, that, if the plaintiff by the exercise of ordinary care on his part could have avoided the collision, he was not entitled to recover, and that the evidence shewed an entire absence of due care on his part. The law upon this subject was very much considered in *Butterfield v. Forrester*, 11 East, 60; speaking of which case, Parke, B., in *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244, says,—"The law is laid down with perfect correctness in the case of *Butterfield v. Forrester*: and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if

(*a*) The points marked for argument on the part of the defendant were as follows:—

"That, if the plaintiff's negligence contributed to the accident, whether he contributed directly or indirectly, the plaintiff was not entitled to recover: That, even assuming negligence on the defendant's part, the plaintiff was not entitled to recover, if by ordinary care he might have avoided the consequences of the defendant's negligence: That, if the accident arose directly or indirectly from the plaintiff's barge disobeying the statutory regulations, the plaintiff was not entitled to recover: And that the learned judge ought to have so directed the jury."

by ordinary care he might have avoided them, he is the author of his own wrong." That was followed by *Davies v. Mann*, 10 M. & W. 546, where the same learned judge says: "It appears to me that the correct rule concerning negligence is laid down in *Bridge v. The Grand Junction Railway Company*, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence." That case (*Davies v. Mann*) is supportable on this ground, that, [579] although the plaintiff was guilty of negligence in tethering the donkey and leaving it on the highway, he had no control over it at the time, so as to be able by the exercise of ordinary care to avoid the injury. This is not the case of a barge moored in the river, but of a vessel navigated by persons who may be presumed to know the statutory regulations, and of whom it may fairly be assumed that they will obey them. The rule of law is also affirmed in *Clayards v. Dethick*, 12 Q. B. 439, where it was laid down, that, in an action for damage occasioned by the defendant's negligence, a material question is, whether or not the plaintiff might have escaped the damage by ordinary care on his own part: but the defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger: the amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury. That question was not at all submitted to the jury here. [Wightman, J. The plaintiff may have been guilty of some negligence, and still it may not have contributed to the loss.] It should have been left to the jury to say whether the plaintiff had been guilty of negligence; and that would in a great measure be determined by the consideration whether he could by the exercise of ordinary care have avoided the accident. [Wightman, J. Even though it was impossible that that negligence could have contributed to the accident? Watson, B. The usual way of leaving such a question, I believe, has been, - Was the plaintiff guilty of negligence? and, did that negligence contribute to the injury complained of? This is not a case of antecedent negligence on one side or the other, but of concurrent negligence on the part of both. The plaintiff was not entitled to recover, if he might by the exercise of ordinary care have avoided the collision. [580] The next question is, whether the learned judge ought not to have told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover. The effect of the regulations was considered in *Dowell v. The General Steam-Navigation Company*, 5 Ellis & B. 195, where it was held that a plaintiff cannot recover at law for mischief done to his ship by its being struck by the defendant's ship, in consequence of the latter being improperly managed, if it appear that the plaintiff's ship was improperly managed, and that such improper management directly contributed in any degree to the accident, however much the defendant may also be in fault; though, if there be negligence on the part of the plaintiff only remotely connected with the accident, the question is whether the defendant by ordinary care and skill might have avoided the accident. So, in *Morrison v. The General Steam-Navigation Company*, 8 Exch. 733, it was held, that, where a vessel through sheer negligence injures another vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the Admiralty regulations, by not exhibiting a light, affords no justification under the act, where the absence of the light does not in any way contribute to the accident. In *Whittle v. Crawford*, 27 Law Times, 223, 2 Jurist, N. S. 742, Crowder, J., in his summing-up, referred to the 14 & 15 Vict. c. 79, s. 28, and the Admiralty regulations, and told the jury, that, if they thought the collision was occasioned wholly or in part by the non-observance by the plaintiff's brig of the regulations as to placing a light at the mast-head, the defendant was entitled to a verdict: and the Exchequer Chamber held the ruling good. In [581] the case of *The Mangerton*, 2 Jurist, N. S. 620, Dr. Lushington lays it down that "both parties are bound to act on the presumption that the statute must and will be obeyed. The vessel approaching is justified in supposing that the other will obey the statute." So, in *Connally v. Garner*, 1 C. & M. 21, Bayley, B., says: "The rule is, that the plaintiff could not recover, if his ship were in any degree in fault in not endeavouring to prevent the collision. Here, the plaintiff had a right to presume that the defendant's ship would do what she ought to do." In this case, it was quite clear that the plaintiff kept no look-out, and that he was guilty of negligence: as to that

there was no conflict of evidence. [Wightman, J. We have nothing to do with the evidence. The question is, whether the direction of my Brother Willes was correct in point of law. The main objection here seems to be the use of the word "directly." If by the exercise of ordinary care the plaintiff might have prevented the injury, he contributes to it, and therefore cannot recover. Crompton, J. The plaintiff cannot by his negligence cast upon the defendant the necessity of using extraordinary care. It is not enough to say that the defendant has been negligent: but it is no answer to say that the plaintiff has been negligent also, unless you go on to shew, that, but for the plaintiff's negligence, the accident would not have happened, or might have been avoided.] Referring to the argument that the omission to exhibit a light, in obedience to the Admiralty regulations, was the proximate cause of the collision, Lord Campbell, in *Dowell v. The General Steam-Navigation Company*, 5 Ellis & B. 195, says: "If it is a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. According to the rule which prevails in the court of Admiralty, in a case of collision, if both vessels are in fault, the loss is equally [582] divided: but, in a court of common law, the plaintiff has no remedy if his negligence in any degree contributed to the accident. In some cases, there may have been negligence on the part of a plaintiff remotely connected with the accident: and, in these cases, the question arises, whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case, *Davies v. Mann*, 10 M. & W. 546. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss." Upon the whole, it is submitted that the learned judge erred in omitting to draw the attention of the jury to that which all the authorities shew to have been the main and substantial question between the parties, viz. whether the plaintiff by the exercise of ordinary care and diligence might have avoided the collision, and also in omitting to tell them, that, by his failure to observe the statutory regulations, he himself was contributory to the loss.

J. Wilde, Q. C. (with whom was Honynman), contra (a). [583] The summing-up of the learned judge was perfectly unexceptionable. In substance, he tells the jury that the plaintiff is not entitled to recover if he by his negligence directly contributed to the accident, or if the injury was occasioned by the negligence of both,—that, if they thought the absence of look-out was an act of negligence on the part of the plaintiff, they must take that into consideration in deciding whether, notwithstanding that, the defendant was liable,—that, if the parties on one vessel had a look out, and still persisted in a course which would inflict an injury, they were liable though there was no look-out on the other vessel, for that (the want of look-out on the last-mentioned vessel) would not be the direct cause of the injury: and he concludes by saying, that, if the jury thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that, if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover. If there has been an antecedent act of negligence in the one party, the question arises whether the other might not by the exercise of ordinary care and skill have avoided the consequences. For instance, a man lies down to sleep on a highway: that is an antecedent act of negligence on his part; but it will not justify another in negligently

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That negligence on the part of a plaintiff does not disentitle him to recover, unless such negligence directly contributes to the accident: That, unless the negligence of the plaintiff occasions the accident, wholly or in part, it forms no answer to the plaintiff's claim: That the statute 17 & 18 Vict. c. 104, s. 298, introduced no change into the law, but was a mere parliamentary recognition of the common-law rule: That the learned judge did substantially leave to the jury the question whether by the exercise of ordinary care the accident might have been avoided: And that, upon the proper construction of the statute, the plaintiff's compliance with the rule relative to porting his helm, was not a condition-*precedent* to his right to recover."

driving over him. The real question in these cases is,—was the injury brought about by the [584] negligence, direct or indirect, of the plaintiff? If it was, he is not entitled to recover. [Watson, B. The solution of that question must depend upon the view which the jury may take of the evidence. In *Morrison v. The General Steam-Navigation Company*, 8 Exch. 733, the Lord Chief Baron says: "The point I left to the jury involved the question whether he himself did not contribute to the accident by his own carelessness. We are clearly of opinion that no change in the law has been effected by this regulation of the Admiralty; but that persons in navigating their vessels are still bound to keep a look out, just as they were before these regulations were made; and, if it could be clearly made out that a vessel having no light had been run down by another from sheer carelessness and negligence in not keeping a good look-out, we agree with Mr. Watson in thinking that in such a case the plaintiff would have had a right to compensation from the defendants." In *Whittel v. Crawford*, Coleridge, J., says: "The alleged ground of appeal is, misdirection of the judge; but his direction to the jury is in the very words of the statute. If they thought the collision was occasioned wholly or in part by non-observance by the plaintiff of the Admiralty regulations, that then the defendant was entitled to the verdict." That was the substance of the direction here. The jury were told that they must find for the defendant if they thought the accident was partly caused by the plaintiff's own negligence. The word "directly" was not used as contradistinguished from "indirectly." The jury had already been instructed as to the sense in which that expression was to be understood. [Crompton, J. The word "contribute" is a very unsafe word to use: it is much too loose.]

Collier, in reply. From beginning to end, the sum-[585]-ming up of the learned judge was eminently calculated to divert the minds of the jury from the real question they were to consider.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the court:—

It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.

This appears to be the result deducible from the opinion of the judges in *Butterfield v. Forrester*, 11 East, 60, *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 246, *Davies v. Mann*, 10 M. & W. 548, and *Dowell v. The General Steam-Navigation Company*, 5 Ellis & B. 206.

In the present case, the main objection taken to the summing-up was, that the judge left to the jury whether the plaintiff by his negligence "directly" contributed to the misfortune; and it was contended, for [586] the defendant, that, whether he directly or indirectly contributed, was immaterial, if he contributed to it by his negligence at all. But the direction to the jury must have reference to the evidence in the case; and, taking the whole summing-up together, in connection with the evidence, we do not think that the jury could have been misled by the use of the word "directly." The learned judge told the jury, that, if the absence of a look-out was negligence on the part of the plaintiff, still, if the defendant also had a look-out, and nevertheless persisted in a course that would inflict an injury, he would be liable, though the plaintiff had no look-out; for that neglect of the plaintiff's would not be the direct cause of the injury, that is to say, would not be a cause without which the injury would not have happened.

In this, which seems to be the obvious sense in which the word "direct" was used, we do not think there was any misdirection; and, in other respects, the summing-up does not appear to be objectionable, according to the rules to be adduced from the authorities referred to.

Upon the whole, then, we are of opinion that the judgment should be affirmed.
Judgment affirmed.

[587] SMITH v. LINDO. 1858.

[S. C. 27 L. J. C. P. 335 ; 4 Jur. N. S. 974 ; 6 W. R. 748.]

Although an unlicensed person who assumes to act as a broker (in London) in the buying of shares in a public company is, by reason of the statute 6 Ann. c. 16, incapacitated from suing for commission,—Held, by the Exchequer Chamber,—dissentiente, Crompton, J.,—that he may still recover money which by the usage of the share-market he has been obliged to pay to the seller as the price of the shares ; there being nothing to shew that the payment was made in pursuance of any illegal contract, or that it was a necessary part of the duty of a broker, as such, to pay the money.

This was an action for money payable for work done by the plaintiff for the defendant, at his request, as a broker, and for fees due and of right payable by the defendant to the plaintiff in respect thereof ; and for scrip and shares sold and delivered by the plaintiff to the defendant ; for money paid ; and for money found to be due on accounts stated. There was also a special count which stated that the defendant retained and employed the plaintiff, or such broker as aforesaid, to purchase for the defendant certain scrip-certificates of shares on the London Stock-Exchange, to be paid for by the defendant on the then next settling-day on the said exchange, for reward to the plaintiff ; and the defendant, on such retainer, authorized and requested the plaintiff to purchase the said scrip according to the usual terms of the said exchange, one of such terms being, that, in the event of the shares not being paid for at the time fixed for payment by the contract of purchase, the purchaser's broker should be liable to indemnify the seller in respect of such default ; that the defendant, on such retainer, agreed to save the plaintiff harmless in respect of such liability ; that the plaintiff accepted such retainer, and did purchase the said scrip for the defendant on the said exchange, to be paid for on the said day, and on the terms aforesaid ; and that the defendant did not, when the said day of payment (which had elapsed) arrived, save harmless, nor had he since saved harmless, the plaintiff in the premises, but the defendant made default in the payment for the said scrip, whereby the plaintiff became liable to the said seller as aforesaid, and the said seller had sued and recovered judgment against [588] the plaintiff in respect of the plaintiff's said liability, and the plaintiff had thereby been put to heavy expenses and liabilities.

The defendant pleaded, amongst other pleas,—fourthly, to the last count, as to so much of the residue of the declaration as related to work alleged to have been done and money alleged to have been paid by the plaintiff for the defendant, that the said work alleged to have been done by the plaintiff for the defendant was done by the plaintiff within the city of London, as a broker for the defendant, that is to say, in and about the purchasing and bargaining and making contracts for the purchase for and on behalf of the defendant of divers scrip-certificates purchased by the plaintiff for the defendant in a certain public company ; that the said money alleged to have been paid by the plaintiff for the defendant was money paid by the plaintiff within the said city of London, as such broker as aforesaid, as the price of the said scrip-certificates, in fulfilment and performance of the said contracts ; that the plaintiff made such payments in his own wrong, and without any express request whatever from the defendant to pay the same ; and that, except and by way of implication from the said retainer and employment of the plaintiff to purchase the said scrip-certificates thereinbefore mentioned, and from the usage and custom of the trade and business relating thereto, there never was any request whatever to the plaintiff to pay the said price of the said scrip-certificates ; that the said retainer and employment of the plaintiff in the last count mentioned was a retainer and employment of the plaintiff to act within the city of London as a broker, and to purchase as such broker the said scrip-certificates in the said last count mentioned for the defendant ; that the said alleged purchase of the said scrip for the defendant in the last [589] count mentioned was made by the plaintiff within the city of London, as a broker, and that the plaintiff was not at the several times of the doing of the said alleged work, and the payment of the said money alleged to have been paid, and of the said retainer, employment,

and purchase in the said last count mentioned, or either of them, a broker duly licensed, authorized, or empowered to act or practise as a broker in the premises, or any of them, within the said city of London, contrary to the form of the statute in such case made and provided.

A verdict having been found for the plaintiff, the court of Common Pleas, upon a motion to enter the verdict for the defendant upon the fourth plea, held that the evidence sustained the plea, but they directed judgment to be entered for the plaintiff non obstante veredicto on that plea, on the ground that, although the plaintiff was by the 6 Ann. c. 16, rendered incapable of suing for commission, by reason of his not being duly licensed as a broker, yet that he might recover from his principal the price which pursuant to a usage of the share-market he had been obliged to pay to the person from whom he purchased, the statute of Anne not making the contract void, but merely precluding the unlicensed broker from recovering any remuneration for his services in making it.

From this decision the defendant appealed, and the appeal came on to be argued in the Exchequer Chamber on the 18th of June, 1857, before Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B. and Hill, J.

Collier (with whom was Archibald), for the defendant. The 5th section of the 6 Ann. c. 16, imposes a penalty upon persons assuming to act as brokers within the city of London without being duly licensed: and [590] *Cope v. Rowlands*, 2 M. & W. 149, is a distinct authority that an unlicensed broker cannot maintain an action for work and labour and commission for buying and selling stock, &c. Parke, B., there says: "It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, *Bartlett v. Tinnor*, Carth. 252. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract." That has never since been questioned. The statute, then, having declared the act of an unlicensed person in buying and selling shares to be illegal, and so having disabled him from recovering commission, the question is whether he can recover moneys paid by him in pursuance of his illegal act. [Martin, B. As between the contracting parties, the contract for the purchase and sale of the shares is good. The statute disables him from recovering in respect of his work and labour as a broker.] And also, it is submitted, from recovering in respect of payments made by him in carrying out his illegal act. [Wightman, J. That is the question.] It is assumed in the judgment of the court below that this case is disposed of by *Pidgeon v. Burslem*, 3 Exch. 465, and *Jessopp v. Lutwyche*, 10 Exch. 614. But these two cases, it is submitted, are clearly distinguishable. [Crompton, J. The vice in the contract is, that the plaintiff under-[591]-takes the employment illegally. The consideration for the re-payment of the money to him is, his undertaking to do an illegal act. Wightman, J. Is it illegal to undertake to pay the money? If the plaintiff became liable to pay the money to the seller of the shares, and the defendant got the benefit of the payment, I do not see why he should not recover. Crompton, J. If there had been an express request, it might have been different. But the difficulty I feel is, whether the whole does not rest upon the illegal consideration.] The decision in *Pidgeon v. Burslem* turned upon the interpretation of the words of the plea, which alleged the payment of the money to have been made by virtue of the plaintiff's retainer as such broker, and as incidental thereto. It was pretty strongly intimated by the court, that, if the payment was a necessary part of the plaintiff's duty as broker, it could not be recovered. Parke, B., says: "It by no means follows from the use of this term in the plea, that the payment of these sums was a necessary part of his duty as broker. It may mean, and probably does, that, because he was employed as broker, it happened that he was also employed to pay the whole or part of the purchase-money of the shares for the defendant: but, if so, the plaintiff's disability to act as broker not rendering the contract void, but only disentitling him to any recompence for his services, there is no reason why he should not recover from the defendant the money he has paid at his request, express or implied." [Crompton, J.

If it had been part of the original contract, I could understand it. But I do not very clearly see the meaning of "part of his duty." Bramwell, B. The real question is, whether upon this record we can see that the payment of the money by the plaintiff was part of the contract.] There is but one contract here, and one consideration: the consideration being void, [592] the whole contract is void. *Jessopp v. Lutwyche*, 10 Exch 614, is equally inapplicable. There, to a declaration for money paid, and on accounts stated, the defendant pleaded,—first, that the causes of action accrued after the passing of the 8 & 9 Vict. c. 109, under and by virtue of certain contracts made between the plaintiff and defendant, by way of gaming upon the market-price of shares,—secondly, that the causes of action accrued to the plaintiff as a broker in the city of London, about the purchasing and selling for the defendant in the city of London of shares, and that the plaintiff was not duly licensed in pursuance of the statute: and it was held, upon the authority of *Pidgeon v. Burslem*, that both pleas were bad; Parke, B., saying: "It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence." Here, the whole consideration is, the undertaking of the plaintiff to do an act which the statute absolutely prohibits.

Bovill, Q. C. (with whom was Geary), *contra*. To make the plea good, it was necessary to shew how the money was paid. How does the defendant do that? By setting up the usage of trade: which is simply setting up a request to pay: it cannot be put higher. There is no allegation that the money was paid by the plaintiff as broker. [Crompton, J. How is the usage of trade binding? By its being imported into the original contract of employment. If you expand it, it is part of the contract. The consideration is, that the plaintiff is to act as a broker.] That a person who deals in this description of property is a broker, is clear: *Clarke v. Powell*, 4 B & Ad. 846; *Milford v. Hughes*, 16 M. & W. 174. No doubt, the plaintiff here [593] was employed as a broker to make the contract for the purchase of the shares; and it is equally clear that he was not in a position to claim commission. But the contract is not void: and the money having necessarily been paid by the plaintiff, in accordance with the usage of the trade, the two cases of *Pidgeon v. Burslem*, 3 Exch. 465, and *Jessopp v. Lutwyche*, 10 Exch. 614, distinctly shew that the plaintiff is entitled to call upon the defendant to reimburse him. The plea does not allege that the money was paid by the plaintiff in the course or by reason or in consequence of his employment as a broker; but that the payment was made by reason of the usage and custom of the trade and business. It is quite consistent with the plea, that the request to pay was contemporaneous with the payment of the money. In *Knight v. Cambers*, 15 C. B. 562, —where it was held to be no answer to an action for money paid by the plaintiff for the defendant's use, at his request, that the money was paid in respect of losses on wagering contracts made void by the statute 8 & 9 Vict. c. 109, s. 18,—Maule, J., says: "Assuming the original contracts to have been void, there is nothing to prevent the plaintiff from recovering money afterwards paid by him at the defendant's request." [Crompton, J. If the usage of trade does not bind the defendant by the original bargain, I cannot see how it can bind him at all. Bramwell, B. Suppose the plaintiff had refused to pay the money, and the seller of the shares had brought an action against him for the price, could he have defended himself by shewing that he was not a licensed broker?] Certainly not.

Collier, in reply. The usage of the trade must be part of the original contract. [Watson, B. Is it not consistent with the plea that there may have been two contracts,—the one, as broker, to buy the shares,—the [594] other, on an implied request arising out of the usage of the business, to pay the money?] The plain and obvious meaning of the plea is this, that the plaintiff is not entitled to recover at all, the money not having been paid at the defendant's request, unless the whole was one contract. This was the ground upon which *Taylor v. Stray*, ante, vol. ii., p. 175, proceeded. The payment was made in pursuance of the original contract; it was a necessary consequence of the direction to the plaintiff to buy the shares.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the majority of the court:—

The question in this case is, whether the plaintiff (below) is entitled to judgment, notwithstanding the verdict of the jury upon the fourth plea.

That plea is pleaded as an answer not only to the demand of the plaintiff in respect

of the work and labour of the plaintiff, but also of the money paid by him on account of the defendant.

The court of Common Pleas were of opinion that the plea, being pleaded not only to the charge for work and labour, but also to that for money paid, gave judgment for the plaintiff in the action non obstante veredicto: and we are of opinion that that judgment is right.

The plea states that the work was done by the plaintiff within the city of London, as a broker, for the defendant, in and about the purchasing, and making contracts for the defendant for the purchase, of scrip-certificates in a public company, and that the money alleged to have been paid by the plaintiff for the defendant, was money paid by the plaintiff within the city of London, as such broker, as the price of the [595] scrip-certificates, in fulfilment of the said contracts, and without any express request from the defendant to pay the same; and that, except and by implication from the said retainer and employment of the plaintiff to purchase the said scrip-certificates, and from the usage and custom of the trade and business relating thereto, there was never any request whatever to the plaintiff to pay the price of the scrip-certificates. It is then averred, that, at the time of the alleged work any payment of the money, the plaintiff (below) was not a broker licensed to act as a broker in the premises within the city of London, contrary to the statute.

In *Pidgou v. Burslem*, 3 Exch. 470, the court of Exchequer held, that, in such a case as the present, the plaintiff's disability to act as a broker not rendering the contract void, but only disentitling the plaintiff to any recompense for his services, there was no reason why he should not recover from the defendant the money he had paid at his request, express or implied.

The case differs from those in which the contract is illegal, or where the purpose for which the money is paid is illegal. In the present case, the contract was perfectly legal; and we are not aware of any legal objection to the contract being fulfilled. In *Taylor v. Stray*, ante, vol. ii., pp. 175, 197, it was held by the Exchequer Chamber, that the defendant, by directing the plaintiffs to purchase shares, necessarily gave them authority to pay for them according to the rules of the Stock-Exchange. In the present case, the plea states that the plaintiff had no request from the defendant to pay the price of the shares, except by implication from the usage and custom of the trade and business relating thereto. This, we think, is sufficient to raise and implied authority from the defendant to the plaintiff to pay for the shares which he authorized him to purchase,—according to the case already cited, of *Taylor* [596] v. *Stray*. Such a payment made by the plaintiff under the implied authority would be good, as it is not made in pursuance of any illegal contract; nor does it appear to be a necessary part of the duty of a broker, as such.

We are, therefore, of opinion that the judgment of the court of Common Pleas should be affirmed.

My Brother Crompton does not agree in this judgment, as he is disposed to think that the payment of the commission and the re-payment of the price both stand on the same footing, and that the promise to pay the one and re-pay the other arise out of one and the same contract; and that the doing the work, which was illegal, on the part of the plaintiff, was the consideration for the promise both to pay the commission, and to re-pay, or indemnify the plaintiff against, the price of the shares, if he had to pay for them. The plea seems to him to negative any request to pay, except that which arises from the retainer and employment, and from the usage, which is incorporated with and part of the contract of retainer.

Judgment affirmed (a).

[597] JOHN BOYD AND ANOTHER v. JOSEPH ROBINS AND NATHAN LANGLANDS. 1859.

[S. C. 28 L. J. C. P. 73; 5 Jur. N. S. 915; 7 W. R. 78.]

In July, 1850, A. and B. gave C. a guarantee (continuing) for 200l., for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of

(a) See the judgment of the court below, ante, vol. iv. p. 395.

this guarantee, and a balance exceeding 200l. was due in respect thereof. In June, 1853, B. became bankrupt, and duly obtained his certificate:—Held by the Exchequer Chamber, reversing the judgment of the court of Common Pleas, that B.'s liability upon this guarantee was not a "contingent liability" within the 178th section of the 12 & 13 Vict. c. 106, and consequently that his certificate was no bar to a claim in respect of goods supplied to D. after the bankruptcy of B.

In this case the defendant Robins suffered judgment by default, and the defendant Langlands and the plaintiffs agreed to state a case for the opinion of the court of Common Pleas upon the construction of the guarantee upon which the action was brought. The case was argued in Trinity Term last, and the court, after time taken to consider, gave judgment in favour of the defendant Langlands. See vol. iv. p. 749. Upon this judgment the plaintiffs brought a writ of error, which was argued before Pollock, C. B., Wightman, J., Erle, J., Watson, B., Channell, B. and Hill, J.

C. W. Wood, for the plaintiffs. The plaintiffs' claim is in respect of goods supplied to Kerr after the bankruptcy and certificate of the defendant Langlands, and consequently is not discharged by the certificate. The liability of Langlands was not a contingent liability within the 178th section of the 12 & 13 Vict. c. 106: the bankrupt law was never intended to relieve a trader from such a liability as this,—a liability the continuance of which might at any time be determined by his own act. The cases of *Warburg v. Tucker*, 5 Ellis & B. 384, *Young v. Winter*, 16 C. B. 401, *Maples, App., Pepper, Resp.*, 18 C. B. 177, *Ex parte Todd*, *In re Williamson*, 24 Law J., Bankruptcy, 20, and *Ex parte Barwis*, *In re Strahan*, 25 Law J., Bankruptcy, 10, were cited and commented upon.

Aspland, for Langlands (a). The primary object of the [598] bankrupt laws is to free the trader from all his liabilities. The 178th section was intended to embrace every description of contingent liability to pay money. A case is not excluded from its operation merely by reason of a difficulty in estimating the value of the contingency. Under the 174th section, the value of policies of insurance of various kinds may have to be proved,—such as, insurance against frauds by collectors of rates, &c., against cattle dying, accidents to plate-glass, railway accidents, and various other contingencies. The contingency here,—that goods are supplied, and that the person to whom they are supplied fails to pay for them,—is just as susceptible of valuation as any of those. [Hill, J. Suppose a man contracts to supply a trader with goods for five or ten years at a fixed price, and the trader within the period becomes bankrupt and obtains his certificate, and goods afterwards continue to be supplied on the terms of the contract, could not the person supplying them recover the value of the goods so supplied?] No doubt he could. It would be a new contract. *Lane v. Burghart*, 3 M. & G. 597, 4 Scott, N. R. 287, *Abbott v. Hicks*, 5 N. C. 578, 7 Scott, 715, *The South Staffordshire Railway Company v. Burnside*, 5 Exch. 129, and *Hankin v. Bennett*, 8 Exch. 107, were referred to.

Wood was heard in reply.

POLLOCK, C. B. All we have to consider in this case [599] is, the claim of the plaintiffs to be repaid by Langlands for the goods supplied to Kerr after the bankruptcy and certificate of Langlands. We are of opinion that the 178th section of the 12 & 13 Vict. c. 106, does not apply to a case like this, and that a liability upon a guarantee under which goods are supplied after the bankruptcy is not discharged by the certificate of the surety. We arrive at this conclusion without reference to the power which the surety had to put an end to his liability under the guarantee by giving notice. The judgment of the court of Common Pleas cannot be sustained.

Judgment reversed.

(a) No final judgment having been entered against the defendant Robins, it was objected that the record was incomplete, and therefore error could not be brought. Reference was made to the 42nd and 46th sections of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, and the 32nd section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, and also to the case of *Tolson v. Kaye*, 6 M. & G. 536, 7 Scott, N. R. 222. The court, however, expressed no opinion upon the point.

[600] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in banc in this Term, were,—Cockburn, C. J., Williams, J., Crowder, J., and Willes, J.

MEMORANDA.

In the Vacation preceding this Term Benjamin Bridges Hunter Rodwell, Esq., of the Middle Temple, George Markham Giffard, Esq., of the Inner Temple, and Henry Hawkins, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the Law.

They were accordingly called within the Bar on the first day of Term.

[601] BALFOUR AND ANOTHER, *v.* ERNEST, Official Manager of the Sea Fire Life-Assurance Society. Jan. 24th, 1859.

[S. C. 28 L. J. C. P. 170; 5 Jur. N. S. 439; 7 W. R. 207.]

The Port of London Shipowners' Loan and Assurance Company was amalgamated with the Sea Fire Life-Assurance Society by a deed which was subsequently judicially declared to be illegal and void. By the deed of settlement of the latter company, the directors were authorized to draw and accept bills for the purposes of the company. The plaintiffs had before the so-called amalgamation effected a policy with the Port of London Company, upon which they sustained a loss, in satisfaction of which the directors of the Sea Fire Life Society, after the amalgamation, gave them a bill drawn by them upon their cashier:—Held, that the latter company were not liable upon this bill, it not having been drawn for the legitimate purposes of the company, and the plaintiffs being bound to take notice of the contents of the deed of settlement, and therefore cognisant of the want of authority in the directors to draw the bill.

This was an action of debt originally brought against the Sea Fire Life-Assurance Society on the 19th of January, 1850.

The declaration alleged, that, on the 1st of November, 1849, the society made their bill of exchange in writing, and directed the same to a person described therein as the cashier, marine department, Sea Fire Life-Assurance Society, and thereby required the said cashier sixty days after the date of the said bill (which period had elapsed before the commencement of this suit) to pay to the plaintiffs, or their order, the sum of 500*l.*, but that the said cashier did not pay to the plaintiffs the sum of 500*l.*, or any part thereof, although the said bill was duly presented to him when it became due,—of which the said society had due notice.

There were also counts for money had and received to the plaintiffs' use, and for money due on accounts stated.

The society denied the making of the alleged bill of exchange, and pleaded never indebted to the residue of the declaration: on which pleas issue was joined.

A suggestion was afterwards entered on the record, shewing (as the fact was) that an order absolute had been made under the Joint-Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45), for winding up the said company under the provisions of that act, and that Henry Ernest had been duly appointed official manager of the company; and the said official manager was thereby duly substituted as the defendant in the action in the place of the said society.

The cause came on for trial at the London sittings after Michaelmas Term, 1857, before Crowder, J., when a verdict was taken by consent for the plaintiffs for 69*l.* 7*s.* 6*d.*, the amount mentioned in the alleged bill of exchange, with interest thereon, subject to the opinion of the court upon the following case:—

The plaintiffs are iron-founders and merchants carrying on business at Leven, near Glasgow; and the said Sea Fire Life-Assurance Society was, on the 1st of November, 1849, a joint-stock company completely registered under the provisions of the 7 & 8 Vict. c. 110, and carrying on business at No. 31 Cornhill, London.

The said society was provisionally registered on the 16th of July, 1849, and completely registered on the 8th of October following; and it was constituted by and under a deed of settlement dated the 31st of October, 1849, whereby,—after reciting the provisional registration of the society,—it was covenanted and agreed that the shareholders, who were upwards of in number, should be and did constitute a joint-stock company within the meaning of the said last-mentioned act, to be called “The Sea Fire Life-Assurance Society:” and, with regard to the business of the company, and the powers of the directors, the only provisions contained in the said deed were as follows:—

“2 Business.—That the business of the company shall be, in the first place, generally, to insure against the perils of the seas, fire, men of war, rovers, reprisals, and all other risks of the like nature incident to the seas, ships, vessels, and craft, of all descriptions, and also the goods, freight, merchandize, cargo, earnings, and property whatsoever in or on board of the same, whether the property of shareholders in the [603] capital stock of the company or otherwise howsoever, so far as the same may be effected or made according to law; and also to insure all other matters and things which lawfully may or can be from time to time insured, or be the subject of insurance, against perils of the sea; and also to advance to any person or persons whatever, whether a shareholder or shareholders in the capital stock of the company or not, any sum or sums of money by way of a loan, to be secured by mortgage, upon any ship, vessel, or craft, whether in a state of completeness for prosecuting any voyage or undertaking, or not; and also generally to carry on commission business, and all other branches and departments of the above business of marine insurance and loans on ships, vessels, or craft, or any of them, or in anywise connected therewith or incidental thereto; and also to make and effect all insurances on lives or survivorships, or on all or any contingencies, incidents, or accidents and casualties whatsoever relating to or connected with lives or survivorships which may be effected according to law; and also to grant and to purchase and sell indowments and annuities either for lives or for years or on survivorships, and either immediate, deferred, reversionary, or contingent, and also life, reversionary, and other estates and interests real or personal; and to advance money by way of loan or mortgage or other security; and for other purposes to acquire and hold such lands, hereditaments, and real estate as may be requisite, and to carry on the business of life-assurances generally, and of any annuity, indowment, loan, and reversionary association in all their respective branches or departments, or of such of the same branches and departments respectively as may be expedient or advisable; and also to make or effect assurances against loss or damage by fire to all kinds and descriptions of property whatever; and to carry on the [604] business generally of a fire-insurance office so far as the same may be done according to law; and also to make, issue, and effect policies of insurance needful for the purpose of securing the fidelity of persons in situations of trust; and generally to carry on the business of a guarantee association in all its branches, so far as the same may be done according to law.

“28. Quorum of board of directors.—That, except the managing officer, who, whether a director or not, shall always be entitled to be present at the board of directors, no person not a director shall be present at the board of directors: that three or more directors shall constitute a meeting, and shall be competent to exercise the several powers and authorities hereby conferred on the directors generally, or on the board of directors.

“31. General power of directors.—That the directors shall cause the company forthwith to be completely registered under the registration act, and shall thereupon be entitled to all the powers and authorities conferred on the directors of a completely registered company by the same act, but subject as hereinafter provided; and that, in and about effecting the incorporation and registration of the company, they shall be authorized and empowered to liquidate and defray such preliminary expenses as may have been incurred prior to the complete registration thereof, not exceeding the sum of 1000l., which said sum of 1000l., or any lesser sum, shall be chargeable against the company, and paid out of the capital stock and corporate funds of the same; and also that the directors shall have at any time after complete registration full power and authority to purchase or lease, as may seem expedient, at such price and on such terms and conditions as may be lawfully imposed, the business of any other fire, life, or marine insurance company, and [605] for that purpose to enter into and rescind or

modify contracts or agreements in the name of the Sea Fire Life-Assurance Society, and of the shareholders thereof.

"32. Powers of the directors to contract loans.—That the directors shall have full power and authority from and at any time or times after the complete registration of the company, to contract such loan or loans, and borrow such moneys at such rate or rates of interest, and upon such security, whether of debentures, bonds, or mortgages of the property of the company, or otherwise, on behalf of and for furthering the objects and business of the company, as to the said directors shall seem fit, provided that the aggregate amount of such loans do not at any time exceed the sum of 1,000,000*l.* sterling; and that the directors may have power to pledge the credit and capital, and mortgage the property and effects, whether real or personal, of the company, for securing the re-payment of such loans and interest in such manner as they shall in their absolute discretion think most proper and advantageous; and that the moneys so borrowed shall be employed, until the repayment thereof, in the manner thereafter provided.

"33. Power of directors to conduct business.—That the directors shall have full and absolute power, authority, and discretion to conduct and manage, and in and about conducting and managing, the affairs and business of the company, and therein at any time after the complete registration of the company to prepare and issue, and cause to be prepared and issued, all such policies of assurance on such life or lives, and to grant such indowments, annuities, and loans, and to purchase and sell such reversionary and other contingent interests, whether real or personal, and such interests in stock, or in mortgage debts or other personalty, legacies, post-obit bonds, or annuities, and generally to [606] do and engage in such other acts, transactions, matters, and things in the line of the company's business, in such cases and on such applications, and on such contingencies and risks, at such rates, and on such terms and securities, and at such premiums, whether in a gross sum, or payable monthly, quarterly, half-yearly, or yearly, or on any half or whole credit system, or on any ascending or descending scale or otherwise, and generally in such manner and in such form and on such conditions, or in different forms, as shall to the said directors, or to the managing officer duly authorized and empowered in that respect, in their or his absolute discretion, seem expedient; and also to prepare and issue, or cause to be prepared and issued, such policies of assurance against risk of or loss or damage by fire as may be usual or necessary for the business of a fire-assurance office, on such conditions and subject to such regulations as to the said directors in their absolute discretion shall seem expedient; and also to prepare and issue, and cause to be prepared and issued, all such policies of assurance for assuring the absolute fidelity of persons in situations of trust, as may be usual or necessary for a guarantee association, subject to such regulations as to the said directors in their absolute discretion shall seem expedient: Provided always that the moneys payable in respect of such life or fire-policy of assurance shall be borne and satisfied, as hereinafter provided, only out of the accumulated premiums, contributions, and receipts (however arising), moneys, property, and effects accruing from or belonging to that particular branch of the business in which any such claim or claims may arise, and shall in no case be chargeable on or payable out of or borne by such portion or portions of the capital stock and corporate fund of the company as may be accumulated or accrue from payments made in respect [607] of shares subscribed for in the capital of the company, or for the sale of any stock which shall have been purchased by or forfeited to the company and afterwards sold, or from the produce of premiums, profits, and receipts accruing and to be received in respect of any marine policies of assurance, or of any of the commission or loan branches connected therewith or incidental thereto, or of the guarantee branch of the business of the said company; and provided also that, in case either one or more of the after-mentioned funds directed to be formed cannot be made available in time, or shall be insufficient to satisfy its own losses and its share of the expenses of the outfit, establishment, and management, a competent part shall be borrowed from all or any one (as to the directors may seem expedient) of the other funds hereinafter described, and applied to meet such exigency and deficiency; the sum or sums so borrowed to be re-paid, with interest at 5 per cent. per annum, out of the fund on account of which such amount shall have been borrowed.

"39. Power of directors to pay moneys assured. That the directors shall have full power and authority to pay and discharge all claims arising from any policies, whether

of fire, life, marine, or guarantee assurance, granted by the company under any clause of these presents or otherwise howsoever, upon such evidence of the said claims as to the said directors may appear sufficient, and with or without personal indemnity of any person or persons with whose character and responsibility the said directors shall be satisfied; and, in case, upon the application of any person or persons who at the time of making such application shall to the satisfaction of the said directors prove himself or themselves rightfully entitled to receive the sum or sums assured by any policy issued by the company [608] which shall have become payable, such person or persons shall be unable to produce the policy, or, whether producing or not producing the same, shall be unable to establish a complete legal title to such policy, or to give a discharge at law for the sum thereby assured or payable thereunder, then and in either of the said cases, if the directors shall be satisfied that the failure to produce the said policy has been occasioned by the loss or mislaying of the same, and that such defect in the legal title of such person or persons, or his or their inability to give such discharge at law, does not extend to or affect his or their actual right to the said policy, or to the money to become payable thereon, it shall be lawful for the said directors, if they shall in their discretion think fit, to pay the sum or sums which shall or may become payable under or by virtue of such policy of assurance, with or without the personal indemnity of any person or persons with whose character and responsibility the said directors shall in their discretion be satisfied.

"43. General power of directors as to their business. — That the directors shall have full power and authority, where these presents are silent or omit to provide the requisite particulars, to conduct and manage the affairs of the company in the prosecution of the business of the same as hereinbefore defined, and shall in particular be and they are hereby authorized to carry on all such branches of the aforesaid business or otherwise as they may think fit, and shall have power to do such other acts, matters, and things as may be requisite for effecting the objects or carrying on the business of the company, upon such terms and conditions as they shall think expedient; and shall also have power, where these presents do not regulate any salary of any officer of the company, to fix and regulate the salaries of any clerks, officers, and servants of the company [609] whom they may appoint, or who may be appointed by any general meeting; and shall also have power, with the sanction of a general meeting, but not otherwise, to apply for and obtain any letters-patent or act of parliament for conferring additional powers on the company and limiting the liabilities of the shareholders, or otherwise, as it shall be thought desirable or can be procured; and generally to act in the management and superintendence of all the concerns of the company in such manner as they shall think most conducive to the interest of the company, but subject, nevertheless, to the whole of the aforesaid powers, to the rules and restrictions by these presents imposed, and to the consent of a general meeting, where such consent by these presents is made necessary, and subject also to any restrictions hereafter to be imposed by any general meeting, ordinary or extraordinary, pursuant to the powers hereinbefore given to such meeting.

"44. Directors to accept bills or notes. — That the directors shall and they are hereby authorized to make and issue, indorse, and accept in the name of and on account of the company, such bills of exchange and promissory notes as they may think expedient; provided that the total amount of such bills and notes due (1) at any one time shall not exceed the sum of 100,000*l.*: and all such bills and notes, and no other, shall be so made and issued, indorsed, or accepted, as to be binding on the company, and on the shareholders, and each of them, to the extent of the respective shares held by them in the capital stock of the company, and no further or otherwise.

"45. Limitations of directors as to borrowing moneys and contracting liabilities. — That it shall not be lawful for the directors to borrow any sum of money on behalf of the company, except under the 32nd clause of these presents; and that, in contracting debts and [610] liabilities on behalf of the company, the directors shall not exceed the usual period of credit according to the customs of the several trades or businesses with which the directors shall from time to time deal, contract with, or be engaged in."

A copy of this deed of settlement was deposited with the registrar of joint stock companies, pursuant to the provisions of the last-mentioned act.

Before the formation of the said society, there existed a joint stock company consisting of upwards of members, called the Port of London Ship Owners'

Loan and Assurance Company (hereinafter called, for brevity, the Port of London Company), established for the purpose of marine insurance; which company was provisionally registered on the 24th of February, 1847, and completely registered on the 22nd of April, 1847, pursuant to the provision of the last-mentioned act.

By the deed of settlement of this company, the business of it was declared to be, to insure against the perils of the seas, fire, and all such other risks as the directors should think fit, the ships, goods, freight, &c., of the shareholders and others, and all other matters which might lawfully be insured against such perils, and to advance money on bottomry and respondentia, and to carry on commission business on all other matters connected with ships or incidental thereto.

There was no power in the deed to carry on the business of fire and life-assurance, nor was there any clause therein authorizing the directors or the managing or other officers of the company to sell or dispose of the business of the company, or any part thereof.

Augustus Collingridge was by the 53rd clause of the deed appointed the managing officer of the company. The managing officer might or might not be a director. [611] His duties were, to keep the books, to keep the common seal of the company, and, when thereto required by the directors, and in the presence of any two of them, to countersign cheques on the company's bankers, and to affix the seal of the company to instruments requiring the same, and to receive and prepare, and, if necessary, present to the proper parties, all writings required in transacting the business of the company.

In February, 1849, the said Mr. Collingridge and Mr. Alands, the chairman of the Port of London Company, gave instructions to Mr. Chapple, the solicitor of that company, to prepare a deed for the amalgamation of the Port of London Company with the Sea Fire Company; and afterwards, in September, 1849, by direction of Mr. Collingridge alone, Mr. Chapple prepared a deed for that purpose.

By an indenture dated the 11th of October, 1849, and expressed to be made between the Port of London Company of the one part, and the said society of the other part, under the seals of the said company and society, it was witnessed that the Port of London Company assigned to the said society all the trade and business of general marine assurance, and all other the trade or business, if any, of the Port of London Company, and the goodwill and capital stock and book and other debts and property and effects thereof respectively, and all benefit and advantage thereof respectively, and all books, papers, and accounts of and relating to the said business; and the Port of London Company covenanted to give public notice of the assignment thereby made, and that the said company and their successors would not at any time thereafter carry on the business of marine insurance in any of its branches: and, in consideration of the said assignment and covenant on the part of the Port of London Company, it was witnessed in and by the same deed that [612] the said society covenanted to indemnify the Port of London Company, and the past and present shareholders therein, and the estate and effects of such shareholders, against all actions, suits, costs, charges, damages, expenses, and consequences whatsoever which then were, or should or might thereafter be instituted, prosecuted, sustained, or occasioned, or which the said last-mentioned company, or any of the shareholders thereof, should be put unto by reason of any claim or demand which was or might thereafter be made against the said last-mentioned company, whether in respect of any policy of assurance and promissory or credit note respectively made and issued by them, or on any other account or pretence whatsoever.

This deed was ingrossed in duplicate, and the duplicates were interchanged. The Sea Fire Society's duplicate bore the signatures "Alexander Davis" and "William Ogilvie," who were described as, and were in fact, directors of the Sea Fire Life-Assurance Society; and the seal of that society was impressed upon the deed in the presence of the said Augustus Collingridge, who was one of the directors and the managing officer of the Sea Fire Society.

The Port of London Company's duplicate was executed by two of the directors of that company, of whom the said Augustus Collingridge was one; but there was no board meeting, or any other meeting of the company or of the directors at the time of execution.

No instructions were ever given by the directors of the Sea Fire Company to their solicitor to prepare or approve that deed, or any other instructions in reference thereto;

and no meeting of directors was ever held after the complete registration of the said society and before the said execution of the said deed.

In June, 1849, before the provisional registration of the Sea Fire Company, the said Augustus Collingridge [613] directed Mr. Ashford, the accountant of the Port of London Company, to change the name of that company into the Sea Fire Company, and to transfer the balances in the books to the account of the Sea Fire Company: but no meeting of the Port of London Company was ever held with reference to this change of name or transfer of the business; nor was any meeting ever held of the Sea Fire Company's directors, to sanction this step,—the whole business being managed by Collingridge alone.

None of the facts hereinbefore mentioned were known to the said plaintiffs when they received the instrument declared on, as hereinafter mentioned.

The plaintiffs, as such merchants as aforesaid, effected a policy of assurance with the said Port of London Company on the 22nd of August, 1848, on a ship called the "Atlantic"; and, previously to the month of June, 1849, a sum of 500*l.* had become and was then due to the plaintiffs from the said Port of London Company in respect thereof.

On the 12th of June, 1849, the plaintiffs applied by letter to the said Port of London Company for payment of the said debt; and, in answer thereto, they received from Collingridge, the managing director of the said Sea Fire Company, a letter, as follows:—

"Messrs. Balfour & Co., Leven.

"Sea Fire Life-Assurance Office,
"31 Cornhill, London.

"Gentlemen,—In reply to your letter of the 12th instant, I have the pleasure to inform you that the directors of the Port of London Assurance Company have passed the claim per 'Atlantic,' subject, as there is a deficiency of legal proofs (although there can be little question as to the merits) to the confirmation of the Sea Fire Life-Assurance Office, to whom the whole business is in course of immediate transfer. I have no [614] doubt that the board will, under the peculiar circumstances, deal with the case in the same spirit, and consent to have it included in the list of payments to be made out of the funds appropriated for the discharge of all obligations arising upon Port of London policies; and, as the managing director, I shall feel myself bound to recommend their so doing. "AUGUSTUS COLLINGRIDGE, Managing Director."

In consequence of this letter, the plaintiffs made several applications to the Sea Fire Life-Assurance Society for payment of the said debt; and, in October, 1849, and in the beginning of the following month of November, they informed the said society that legal proceedings would be immediately taken to enforce payment thereof: and, on the 5th of November, 1849, the plaintiffs received from the said society on account and in payment of the said debt, a document of which the following is a copy:—

"Marine Department Sea Fire Life-Assurance Society.

"To the Cashier.

"31 Cornhill, Nov. 1st, 1849.

"No. 4020. £500 0 0.

"Sixty days after date, credit Messrs. Balfour & Co., or order, with the sum of five hundred pounds, claim per 'Atlantic,' in cash, on account of this corporation.

"Entered, T. F. A., Acct.

"ALEX. DAVIS, } Directors."
"W. OGILVIE, }

This is the document upon which the first count of the declaration and the count on an account stated are founded. It was sealed with the seal of the society, and was signed by Alexander Davis and Sir William Ogilvie, two of the directors thereof, being the same Alexander Davis and William Ogilvie mentioned in the former part of this case. The initials T. F. A. in the left-hand corner of it, were those of Thomas Frede-[615]rick Ashford, who, on the 1st of November, 1849, and for some time before and since that day, was the secretary of the said society. The said document was on the day of the date thereof duly entered by him in the books of the society.

At the date of the said document, and for more than sixty three days continuously afterwards, Mr. ——— was and acted as the cashier of the society, and was the person to whom the said document was addressed.

The said Alexander Davis was at and before the time of the formation of the said society, and from thence until and after he signed and issued the said document, a director and shareholder in the said Port of London Company, and had duly executed the deed of settlement thereof, and had been duly returned, and during all the time last aforesaid was registered, as such director and shareholder, pursuant to the provisions of the said last-mentioned act: but the plaintiffs were not aware of these last-mentioned facts when the said document was made and delivered to them, nor until after the present action was brought.

Before and at the time of the registration of the said society, and from thence until and at the time when the said document was made and issued, the said Port of London Company was insolvent and unable to discharge its liabilities. The said Sea Fire Society, during the same period, was solvent, and continued so to be for some months after the making and issuing of the said instrument.

It was agreed that none of the facts or documents appearing in this special case should affect either party upon the argument of the case, unless the court should be of opinion that the same would have been receivable in evidence under the issues joined in this action.

The court was to be at liberty to draw any inferences of fact which a jury might properly draw from the [616] facts above stated which would have been so receivable, and was to have all the powers of amendment and otherwise of a judge sitting at Nisi Prius. The pleadings were to form part of the case.

The question for the opinion of the court is,—whether the plaintiffs are entitled to recover. If the court should be of opinion that they are so entitled, the verdict for the plaintiffs is to stand, and judgment is to be entered for the amount thereof, and costs. If the court should be of a contrary opinion, judgment is to be entered for the defendant.

Phipson (with whom was G. Tayler), for the plaintiffs (*a*). It has already been decided in this court that the instrument upon which this action is brought may be declared on either as a bill of exchange or as a pro-[617]-missory note: *Ellison v. Collingridge*, 9 C. B. 570, *Allen v. The Sea Fire Life Assurance Company*, 9 C. B. 574; and *Aggs v. Nicholson*, 1 Hurlst. & N. 165, and *Lindus v. Melrose*, 2 Hurlst. & N. 293, shew that the company are liable upon it, and not the persons who signed it. The substantial question then is, whether this is a bill or note which is binding on the company as a corporation, looking to the circumstances which may legitimately be given in evidence. That depends mainly upon the construction to be put upon the 45th section of the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110, and the 44th clause of the deed of settlement of the Sea Fire Life-Assurance Society. The 45th section enacts, “with regard to bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or indorsing the same, and to the liability of any such company thereon, that, if the directors of the company be authorized by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company on whose behalf

(*a*) The points marked for argument on the part of the plaintiffs, were as follows:—

“1. That the instrument of the 1st of November, 1849, signed by Alexander Davis and William Ogilvie on account of the Sea Fire Life-Assurance Society, is properly declared on as a bill of exchange: and that, under the circumstances mentioned in the case, the said instrument was a bill of exchange binding on the said society:

“2. That the bill of exchange being given by the Sea Fire Life-Assurance Society for a cause in respect of which the plaintiffs had a right to require payment, there was a valid and sufficient consideration for the said bill, binding on the said society as the drawers of the bill:

“3. That the bill was one, under the circumstances of this case, which the directors signing it were authorized to draw on behalf of the society:

4. That, in any event, the directors of the said society having authority to draw bills, the bill in question is binding on the society in the hands of the plaintiffs, who had no notice of any want of authority in this instance:

“5. That the plaintiffs are not affected by any failure of consideration as between the Port of London Company and the said society.”

or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company: and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the company on whose behalf the same is expressed to be made or accepted; and that every bill of exchange so made as aforesaid, or received by or on behalf of the company, may be indorsed in the name of the company by any officer authorized by deed of settlement or bye-law in that behalf; and that every such bill of exchange [618] or promissory note so made, accepted, or indorsed as aforesaid, shall, immediately after the making, accepting, or indorsing of the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted, or indorsed, and such last-mentioned officer shall enter the same in proper books to be kept for that purpose; and that, if any such bill of exchange or promissory note be not so reported and entered, then the officer by whose default such bill or note shall not be so reported or entered shall be liable to repay to the company the amount which the company shall pay or be liable to pay in respect of such bill or note: Provided always, that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon, except as shareholders of the company; and that every such company on whose behalf or account any bill of exchange or promissory note shall be made, accepted, or indorsed in manner and form aforesaid, shall and may sue and be sued thereon as fully and effectually, and in the same manner, as in the case of any contract made and entered into under their common seal." Here these directions have been studiously complied with. The 44th clause of the deed of settlement expressly authorizes the directors to draw, accept, and indorse bills and notes, so that the total amount due at any one time shall not exceed 100,000*l.* Questions have arisen, both at law and in equity, as to the meaning of this clause, inasmuch as it professes to limit the liability of the shareholders: and it has been held that its application was confined to the shareholders themselves: *Peddell v. Gwyn*, 1 Hurlst. & N. 590; *Gordon v. The Sea Fire Life-Assurance Society*, 1 Hurlst. & N. 599; *In re the Sea Fire Life-Assurance Company (Green-wood's case)*, 3 De Gex, M'N., & G. 459. This instrument, then, is properly declared upon as a bill of exchange, and has been drawn in conformity with the 45th section of the 7 & 8 Vict. c. 110, and the shareholders are liable upon it notwithstanding the limitation sought to be imposed by the 44th clause of the society's deed of settlement. But it will be said that the bill is void by force of the 29th section of the 7 & 8 Vict. c. 110, because Davis, one of the directors of the Sea Fire Life-Assurance Society, who signed the bill, was also a director of the Port of London Company, and therefore "interested in the contract." That section enacts, amongst other things, that, "if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers,) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders, to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of the votes of the shareholders present at such meeting." The facts are these:—The plaintiff effected a policy with the Port of London Company: a loss happened; and their claim was admitted: the Port of London Company transfer their business, with its liabilities, to the Sea Fire Life-Assurance Society; and the latter company settle the claim by giving a bill. {*Cockburn, C. J.* Did the loss occur and was the claim admitted before the amalgamation? It would seem so, though that is left somewhat ambiguous. This is clearly not the case of a contract within that section. It is a contract made [620] by the company with strangers. It is a fallacy to say that Davis had such an interest as the statute contemplated. The validity of the deed professing to amalgamate these companies came under discussion before the Lords Justices on an appeal against a decision of Vice-Chancellor Stuart, in the case of *The Port of London Assurance Company*, 5 De Gex, M'N., & G. 465, and afterwards on appeal to the House of Lords in *Ernest v. Nicholls*, 6 House of Lords Cases, 401, where it was held that there can be no remedy against a company registered under the 7 & 8 Vict. c. 110, on any contract in which a director

of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed. There, the two companies were dealing with each other; and both must be taken to have been cognizant of all the circumstances. The House could not fail to see that Collingridge was acting altogether beyond the scope of his authority. The two cases, it is submitted, are manifestly distinguishable.

Bovill (with whom was Garth), *contra* (a). It is not [621] proposed to ask the court to overrule the decisions in *Ellison v. Collingridge*, 9 C. B. 570, and *Allen v. The Sea Fire Life-Assurance Company*, 9 C. B. 574: as to the form of the instrument, they are not to be distinguished. Nor is it proposed to ask the court to put a construction upon the 44th clause of the deed of settlement different from that which was put upon it in the case of *Gordon v. The Sea Fire Life-Assurance Society*, 1 Hurlst. & N. 592. [Willes, J. And by the Lords Justices in *Greenwood's case*, 3 De Gex, M'N., and G. 459.] The Lords Justices do not profess to [622] decide the question. The first point meant to be insisted upon on this occasion is, that the only power to issue bills and notes given to the directors of the Sea Fire Life-Assurance Society by the deed of settlement is, to issue them for the purposes of the company, and that the bill in question was not issued for any legitimate purpose of this company. The bill was issued by Davis to the plaintiffs in satisfaction of a debt due from Davis to the plaintiffs. Davis, therefore, was a person interested in the contract within the 29th section of the 7 & 8 Vict. c. 110, and the contract, not having been attended with the formalities prescribed by that section, was not binding on the shareholders. As between the plaintiffs and the Sea Fire Life-Assurance Society, there was no consideration for the giving of the bill: and this defence is open to the defendants under the plea denying the making of the bill: *Jones v. Corbett*, 2 Q. B. 828, 2 Gale & D. 308. The bill was not drawn for the purposes of the Sea Fire Life-Assurance Society. Under the deed of settlement, the powers of the directors are defined. [Cockburn, C. J. I

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the instrument dated the 1st of November, 1849, upon which the declaration is founded, is not a bill of exchange:

"2. That the plaintiffs cannot recover upon the said instrument under the common counts, inasmuch as it is not an account stated with the company, nor is it an account stated in form: nor was there any consideration for it as between the plaintiffs and the society:

"3. That the directors of the society had no power by law to draw bills of exchange either under their deed of settlement or otherwise:

"4. That the 44th clause of the deed of settlement does not give the directors power to issue bills of exchange at all, or at any rate not in the form in which the said instrument is framed:

"5. That even supposing the directors had power to issue bills of exchange, they could only do so for proper purposes, and for carrying on the proper business of the said society; and that the instrument in question was not so issued:

"6. That the consideration for the said instrument was, a debt due to the plaintiffs (as they well knew) from the Port of London Company, and has nothing to do with the business of the Sea Fire Society:

"7. That the supposed deed of amalgamation of the two companies is utterly void, inasmuch as neither company had power to enter into such a deed; that, even if such a power existed, it was not properly exercised; that the persons professing to act in the execution of the deed were legally disqualified from so acting; and that the said deed has been pronounced by the House of Lords to be absolutely void: see *Ernest v. Nicholls*, 6 House of Lords Cases, 301:

"8. That the said Alexander Davis was disqualified from acting as a director in making the said alleged bill of exchange, inasmuch as, being a member of the Port of London Company, as well as a director of the Sea Fire Society, he was directly interested in the making of such bill: see the 7 & 8 Vict. c. 110, s. 29:

"9. That, at the time of the making of the said alleged bill, the said Sea Fire Society was solvent, and the said Port of London Company was insolvent; and therefore the said Alexander Davis had a direct interest transferring his liability as a member of the Port of London Company to the Sea Fire Society."

suppose we must assume that there was no authority to amalgamate the two companies?] That is agreed. [Cockburn, C. J. The shareholders can only be liable in respect of bills which it was competent to the directors to draw. Phipson. The bill in question was given in respect of a loss upon a policy. Cockburn, C. J. Upon a policy effected with another company. Suppose, there having been no attempt made to amalgamate, the directors of the one company, for sinister purposes, accepted bills for the other company,—surely you would not contend that they could bind their shareholders. Phipson. No. But, suppose the one company adopts a policy of another company,—a matter which is within the ordinary scope of the business of an insurance society,—must they not take [623] the obligation with the benefit? Williams, J. We know from the statements in the case, that the consideration for the giving of the bill was the so-called amalgamation. Phipson. It is the usual course of business for insurance-offices to take up and continue the policies effected in offices which cease to exist. Williams, J. That may be a legitimate mode of doing business; but it is not what the parties have been doing here. Cockburn, C. J. An amalgamation was contemplated and attempted to be carried out. The bill in question was given as part of that arrangement. It turned out that the whole thing was *ultra vires*. The result is, that the directors have given a bill for a matter which was without the scope of their authority. I do not see how that is to be got over. If the act of the directors had been sanctioned and adopted by a general meeting of the shareholders, that might have been a different thing. But here, the directors, *proprio motu*, do an act which the shareholders think fit to repudiate, as they have a right to do. Phipson. The directors having by the deed of settlement a general power to draw and accept bills, the person who takes the bill is not bound to look to the authority, though it would be otherwise if they had only a special and limited power. Willes, J. Every person dealing with the company is bound to know the contents of the company's deed of settlement: *The Royal British Bank v. Turquand*, 5 Ellis & B. 248, 6 Ellis & B. 327. Cockburn, C. J. If it were otherwise, the deed would be wholly useless for the purpose of controlling the acts of the directors.]

COCKBURN, C. J. I am of opinion that our judgment in this case must be for the defendants. It is conceded by Mr. Phipson, that, looking to the terms of the deed of settlement of the Sea Fire Life-Assurance Society, [624] there was no authority in the directors to make the bill upon which the action is brought: but it is contended, that, notwithstanding such absence of authority in the directors, the plaintiffs not being aware of the want of authority when they took the bill, they are entitled to treat it as if it were a bill issued by one partner assuming to exercise his ordinary authority, which, though issued in fraud of his co-partners, would, nevertheless be good in the hands of a *bonâ fide* holder for value without notice. But there is this plain and manifest distinction between the case thus put and the present, *viz.* that there the party taking the bill would have nothing to lead him to believe that it was drawn or accepted for other than partnership purposes; whereas, here, the bill was taken by the plaintiffs in discharge of a liability in respect of which they knew it was not within the ordinary scope of the powers of the directors of the Sea Fire Life-Assurance Society to draw a bill. Their authority to draw or accept bills is limited and regulated by the deed of settlement under which the society was constituted, to which all the world could have access. The case of *The Royal British Bank v. Turquand*, 5 Ellis & B. 248, 6 Ellis & B. 327, shews that the plaintiffs must be assumed to have knowledge of a deed of this description. The court of error in that case, in giving judgment affirming that of the court of Queen's Bench, distinctly say, that "parties dealing with the directors of these joint-stock companies are bound to read the deed or statute limiting the directors' authority." Having no power under the deed of settlement of the society to draw bills for the purpose for which this bill was drawn, they could not by their act bind the funds of the society.

WILLIAMS, J. I am of the same opinion. The case [625] depends upon two questions, one, whether the directors of the Sea Fire Life Assurance Society, when they drew this bill, had authority to draw it so as to bind the funds of the society,—the other, whether, supposing them to have had no authority, whether the plaintiffs knew or had the means of knowing of such want of authority. With respect to the first question, it is clear from the facts stated in the special case, and from the course of the argument, that, unless such power was conferred upon them by the 4th clause of the deed of settlement, the directors had no authority to draw bills other than in

furtherance of the ordinary business of the society. Now, the authority given to the directors by the 44th clause is, to make and issue, indorse, and accept bills and notes for the purposes of the society, not in satisfaction of the liabilities of any other company. The amalgamation of the Port of London Company with the Sea Fire Life-Assurance Society was void, having been made without the consent of the general body of shareholders of each: consequently, the bill in question was not drawn for a purpose which was within the scope of the authority of the directors. As to the second question, I think the plaintiffs must be taken to have had notice of the absence of authority on the part of the directors when they took the bill. They are bound, according to the authorities, to know of the existence and of the contents of the deed of settlement: and they knew they were taking from the directors of the Sea Fire Life-Assurance Society a bill in satisfaction of a claim which they had against the directors of another company.

CROWDER, J. I am of the same opinion. I think the bill was drawn without authority. It is contended on the part of the plaintiffs that the general words of the [626] 44th clause of the deed of settlement gave the directors authority to make and issue bills in the name and on account of the company. But we must take the whole of the deed together: and, looking at the general scope of the deed, I think it cannot be doubted that the power given to the directors by the 44th clause was only to make and issue bills for the business of the company. It is clear, therefore, that this bill was drawn without authority. If that were not so, this consequence would follow, that, although the amalgamation with the other company was illegal and void because the general body did not assent to it, yet the directors, having amalgamated the two companies without authority, might still do all that was necessary to carry out such amalgamation: which would be manifestly absurd. As to whether the plaintiffs were bound to know that the bill was unauthorized,—it appears that they took it in satisfaction of a claim they had upon another company; and it is laid down by Parke, B., in *Ridley v. The Plymouth Grinding and Baking Company*, 2 Exch. 711, that persons dealing with joint-stock companies are bound to take notice of the powers conferred upon the directors by the deed of settlement. He says: “The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of such a joint-stock company until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock-companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are: and any person may find in the deed the duties of the directors and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority.”

[627] WILLES, J. I also am of opinion that our judgment must be for the defendants. The plaintiffs take a bill which is drawn by procuration. Unless, therefore, the person sought to be made liable upon it authorized its drawing, the plaintiffs cannot recover. One might conceive that a case might have arisen which might have been more favourable to the plaintiffs: it might have been that the plaintiffs had advanced their money upon a bill which the directors had represented themselves to have authority on behalf of the company to draw. This, however, is not a case of that sort, but the bare case of one taking a bill from company A. in respect of a debt due from company B., there being nothing in the deed (which must be taken to have been known to the plaintiffs) to confer upon the directors authority to make it.

Judgment for the defendants.

NEWTON AND OTHERS v. CUBITT AND OTHERS. Jan. 29th, 1859.

In an action for an evasion of the plaintiffs' antient ferry, by carrying passengers across the river near thereto,—the court refused to allow the defendants to add a plea alleging a variety of circumstances to shew, that, from the altered state of the neighbourhood, public convenience required that which the defendants had done,—holding that the plea was clearly bad, and at the most amounted to a plea of not guilty.

This was an action for an alleged disturbance of the plaintiffs' ferry.

The second count of the declaration stated, that the plaintiffs, before and at the

time of the committing of the grievances thereafter mentioned, had been and still were possessed of a certain antient ferry, called Potter's Ferry, for the carriage and conveyance of foot-passengers, and goods belonging to such foot-passengers, across and over the river Thames, from the [628] Isle of Dogs, in the parish of St. Dunstan, Stebonheath, in the county of Middlesex, to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers over and across such ferry in any boat or boats kept by or by the authority of the plaintiffs for that purpose certain reasonable freights and ferryages; nevertheless the defendants, knowing the premises, but contriving to injure and disturb the plaintiffs in the peaceable and legal enjoyment of the said ferry, on divers days and times before the commencement of this suit, whilst the plaintiffs were so entitled, wrongfully, unlawfully, and for the purpose of evading the plaintiffs' antient ferry, and against the will of the plaintiffs, carried and conveyed, in a certain boat of the defendants, divers foot-passengers for hire over and across the said river Thames, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry of the plaintiffs, whereby the plaintiffs had lost divers profits which otherwise would have arisen to them from the enjoyment of the said ferry, and had been and were disturbed in the possession thereof and in their right therein.

To this count the defendants pleaded not guilty, and a traverse of the plaintiffs' possession of the ferry; and on a former day in this term,

Lush, obtained a rule nisi to add the following:—

“And for a fourth plea, the defendants, as to the said second count, say, that the said ferry in the declaration mentioned was and is an antient ferry, from a certain public landing-place in the said Isle of Dogs over and across a certain public navigable river, to wit, the said river Thames, to Greenwich, in the county of Kent: that the said public landing-place in the said Isle of Dogs leads to and communicates with [629] a certain public highway in the said Isle of Dogs, which said public highway did at the time of the grant of the said ferry, and long before the said grievances, or any of them, lead to a certain antient vill called Poplar, in the said Isle of Dogs; that there never was nor is any landing place in the said Isle of Dogs connected with or belonging to the said ferry other than the said public landing-place above in this plea mentioned; that the said Isle of Dogs, except a small portion thereof on the north side thereof, was at the time of the grant of the said ferry bounded by the said river Thames; that the said Isle of Dogs, except the said vill of Poplar, was, at the time of the grant of the said ferry, and from thence for many years, uninhabited, and the only public highway therein was the said public highway leading from the said landing-place to Poplar as aforesaid; that the said Isle of Dogs on the east side of the said landing-place and of the said public highway continued so uninhabited until the same was built upon as thereafter mentioned, the said part of the said Isle of Dogs consisting of marsh land used only for the grazing of cattle; that, within the last few years, and long after the grant of the said ferry, and before the committing of the alleged grievances, a certain part of the said marsh on the east side of the said landing-place and of the said highway, was drained and embanked, and houses, warehouses, factories, and a church were built and are still standing thereon; and the said houses, warehouses, and factories became and were and still are occupied and inhabited, and an entirely new town and neighbourhood have sprung up there; that many of the said buildings of the said new town and neighbourhood were and are adjacent to the banks of the said river Thames, and the only convenient means of access to the other side of the said river for the inhabitants of the said new town and neighbourhood, and per-[630]sons having occasion to go and return therefrom, is by proceeding from a pier across the said river Thames; that it was and is necessary for the inhabitants of the said new town and neighbourhood that a pier should be constructed, and means of passage across the said river from the said new town and neighbourhood be provided; that a pier has been constructed in the said new town, distant, to wit, three quarters of a mile, from the said landing-place of the plaintiffs, and to and from which pier a steam-boat of the defendants has been accustomed to run across the said river, for the convenience of the inhabitants of the said new town and neighbourhood; that such pier has been constructed, and such steam-boat worked and used, bona fide for the convenience of the inhabitants of the said new town and neighbourhood, and persons resorting thereto, and not with the intention of infringing or evading the said right of ferry in the declaration mentioned; and that the said

conveyance by the defendants of the said inhabitants and other persons from the said pier to Greenwich, was and is the carriage and conveyance by the defendants in the declaration mentioned, whereof the plaintiffs have above complained.”

Pigott, Serjt., shewed cause. If the proposed plea be worth anything, it amounts only to not guilty. There is, therefore, no pretence for asking to have it put upon the record. Its only object can be to raise an immaterial issue, and so prejudice the plaintiffs’ case with the jury. The count is almost identical with that which was held good in *Blacketer v. Gillett*, 9 C. B. 26. [Cockburn C. J. The proposed plea rather looks like an argumentative traverse of the plaintiffs’ right to a ferry at that place. Williams, J. If put as a plea of insufficient accommodation, it might possibly be a good plea: *The Islington Market Bill*, 3 Clark & F. 513. [631] Here, admitting the invasion of the ferry, the defendants say that the convenience of the public requires it. That clearly is a bad plea.]

Lush, in support of the rule. The substance of the plea is, that the acts complained of by the plaintiffs are justified by the insufficiency of the accommodation afforded by them to the public. [Crowder, J. You do not in terms allege want of sufficient accommodation.] The declaration does not state that what was done by the defendants was in fraud of the plaintiffs’ rights. [Williams, J. The allegation is substantially the same as in *Blacketer v. Gillett*, 9 C. B. 26.] The question whether the facts stated in the plea afford the defendants any justification, must arise after the trial, and therefore it was thought more convenient if it could at once be put upon the record.

COCKBURN, C. J. I think this plea, being objected to, cannot be allowed, inasmuch as, if the matters therein alleged amount to a defence at all, they may be given in evidence under not guilty. The count alleges that the plaintiffs are possessed of an antient ferry, and that the defendants, knowing the premises, but contriving to injure and disturb the plaintiffs in the peaceable and legal enjoyment of the said ferry, wrongfully and unlawfully, and for the purpose of evading the plaintiffs’ antient ferry, carried passengers for hire over and across the river near to the part where the plaintiffs’ ferry was, and so disturbed them. The defendants propose by the plea which they seek to plead to shew that the plaintiffs have not a right to an exclusive ferry, because a new state of things has arisen, to which that right is not applicable. If that be so, if the defence amounts to anything at all, it may be [632] proved under not guilty. I do not see how the defendants can be prejudiced by our refusal to allow the proposed plea.

The rest of the court concurring,
Rule discharged, with costs.

SMITH v. MANNERS AND ANOTHER. Jan. 24th, 1859.

[S. C. 28 L. J. C. P. 220; 5 Jur. N. S. 549.]

To a common indebitatus count, the defendants pleaded, as to 10l., parcel, &c., that they were always ready and willing to pay the same, and before suit tendered and offered to the plaintiff to pay the same, &c.—Replication, that the said sum of 10l. brought into court by the defendants was not sufficient to satisfy the claim of the plaintiff in respect of the matter to which the plea was pleaded:—Held, that the replication was bad, and the plea good.

The declaration contained a count for wrongful dismissal, a count for dismissal without notice, and a count for money payable by the defendants to the plaintiff for the work and labour, care, diligence, journeys, and attendances of the plaintiff by him done, performed, and bestowed as the traveller and collector for the defendants, and at their request, and for commission due and of right payable to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work and labour, for the defendants and at their request, and for money paid by the plaintiff for the use of the defendants at their request, and for money received by the defendants for the use of the plaintiff, and for wages of the plaintiff due from the defendants to the plaintiff as the hired servant of the defendants, and for money found to be due from the defendants to the plaintiff on accounts stated between them.

Seventh plea,—as to the third count of the declaration, except as to 10l., parcel of

the money claimed [633] thereby, the defendants say they never were indebted as alleged.

Eighth plea,—and for a further plea as to the said third count, except as to the said sum of 10l., parcel, &c., the defendants say, that, before action, they satisfied and discharged the plaintiff's claim in the said third count mentioned, except as aforesaid, by payment.

Ninth plea,—and for a further plea to the said third count, except as to the said 10l., parcel, &c., the defendants say that the plaintiff at the commencement of this suit was, and still is, indebted to the defendants in an amount equal to the plaintiff's claim in the said count mentioned, except as aforesaid, for money payable by the plaintiff to the defendants for money lent by the defendants to the plaintiff, and for money received by the plaintiff for the use of the defendants, and for money paid by the defendants for the plaintiff at his request, and for money found to be due from the plaintiff to the defendants on accounts stated between them, which amount the defendants are willing to set off against the plaintiff's claim in the said third count mentioned, except as aforesaid.

Tenth plea,—and as to the said sum of 10l., parcel, &c., the defendants say that they were always ready and willing to pay the same, and that before suit they tendered and offered to the plaintiff to pay the same to him, but he refused to receive it; and the defendants bring into court the said sum of 10l., ready to be paid to the plaintiff.

Second replication to the tenth plea,—and for a second replication as to the tenth plea of the defendants, the plaintiff says that the said sum of 10l. brought into court by the defendants is not sufficient to satisfy the claim of the plaintiff in respect of the matter to which the said tenth plea is pleaded.

Demurrer, the ground stated in the margin being [634] “that the plea contains no allegation as to the 10l. being sufficient to satisfy 10l.; and the replication tenders an issue of immaterial matter, 10l. being in fact sufficient to satisfy 10l.” Joinder.

Phipson, in support of the demurrer (*a*). The replication is no answer to the plea. [Willes, J. The replication is clearly a bad replication to a plea of tender.]

Grant, *contra* (*b*). Assuming the replication to be bad, the tenth plea cannot be supported: it alleges merely a tender before suit, whereas, to be a good plea, it should have alleged a tender on the day the debt became due. [Willes, J. *Tout temps prist* is the ordinary form of a plea of tender. The plea of tender assumes that a debt is due generally. When a man professes that he was always ready to pay, he admits that there existed a debt which he was bound to pay.] In *Dixon v. Clark*, 5 C. B. 365, 5 D. & L. 155, where the subject was much discussed, Wilde, C. J., says: “Besides the averment of readiness to perform, the plea must aver an actual performance of the entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain, that, where, by the terms of it, the money is to be paid on a future day certain, this branch of the plea can only be satisfied [635] by alleging a tender on the very day. And this is the principle of the decisions of *Hume v. Peploe*, 8 East, 168, and *Poole v. Tumbridge*, 2 M. & W. 223. It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist*. Consequently, a plea by the acceptor of a bill, or the maker of a note, of a tender *post diem*, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always ready to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*), but also from the time when the bill or note became payable.” [Willes, J. If the plaintiff intended to rely upon this being a debt payable on a particular day, he ought to have replied it. It is not unlike the case of an action for a negligent or a voluntary escape, where

(*a*) The points marked for argument on the part of the defendants were as follows:—

“1. That it is no answer to a plea of tender to a specific sum of 10l., that 10l. is not sufficient to satisfy 10l. 2. That the replication tenders an immaterial issue, and is no answer to the plea. 3. That it should have shewn in what respect or how the 10l. tendered was not sufficient.”

(*b*) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the replication is a sufficient answer to the tenth plea. 2. That the objection to the replication is merely one of form.”

the replication usually alleges that the defendant of his own wrong permitted the escape: see a form, 3 Chitty on Pleading, 7th edit., by Greening, 466.] The debtor is bound to pay his debt the moment the debt is due. It is no answer for him to say he was always ready and willing to pay it.

Phipson. In *Dixon v. Clark*, 5 C. B. 365, 5 D. & L. 155, the point was raised by the replication.

COCKBURN, C. J. This is a plea of tender in the common and ordinary form, pleaded to a general indebitatus count: and, though there may be some debts to which it would not be a good answer, there is nothing to shew that that is so here. If the debt to which it is pleaded had been a debt payable on a particular day, the plaintiff should have replied it. I think our judgment must be for the defendants.

[636] WILLIAMS, J. I have looked and listened in vain to discover what objection can be made to this plea. It is in the form which has been in use for centuries. The plea of tender only bars the damages. Unless it appears that the money was payable on some particular day, and therefore that the defendant has been guilty of a breach of contract, it clearly is a good answer to the action. In *Johnson v. Clay*, 7 Taunt. 486, where, in covenant for rent, the defendant pleaded a tender, it was contended that a plea of tender after the day, in covenant for the payment of money, was bad: but Gibbs, C. J., said: "I should be sorry that it should be doubted for a moment, that, where there is a mere dry covenant for payment of money, it may not be tendered. Suppose a covenant for rent, and three or four quarters due, it might always be said than an action had accrued." And Burrough, J., said: "A tender always admits the cause of action: it only goes in bar of damages." The count here being general, there is nothing to shew that the sum tendered does not constitute the entire debt.

CROWDER, J., and WILLES, J., concurred.

Judgment for the defendants.

[637] BAGGALLAY AND OTHERS v. PETTIT AND OTHERS. Jan. 24th, 1859.

[S. C. 28 L. J. C. P. 169; 5 Jur. N. S. 868.]

By an agreement between the plaintiffs of the first part and the defendants of the second part, the former agreed, that, upon payment to them by the latter of 1440l. by instalments on certain days, they would grant the defendants a lease of a certain parcel of land; and the defendants agreed to accept such lease and execute a counter-part thereof. A declaration, after setting out the agreement verbatim,—alleged that all things and conditions had happened and had by the plaintiffs been observed and performed which were necessary to entitle them to be paid by the defendants the several sums on the days named, and that the said several days had elapsed before the suit: and assigned for breach non-payment of the moneys or any part thereof:—Held, that the declaration disclosed a sufficient cause of action,—the granting of the lease not being a condition-*precedent* to the plaintiffs' right to demand payment of the money.

The declaration stated that an agreement was theretofore made by and between the plaintiffs of the first part, and the defendants of the second part, which said agreement is signed by the plaintiffs and the defendants, and is in the words and figures following, that is to say,—"Memorandum of agreement made this 4th day of August, 1856, between R. Baggallay, of, &c., C. S. Butler, of, &c., and J. H. Wilson, of, &c., for themselves, their heirs and assigns (hereinafter called the parties of the first part), of the first part, and W. Pettit, of, &c., G. T. Smith, of, &c., J. W. Legge, of, &c., C. Hack, of, &c., C. T. Smith, of, &c., and J. J. Burton, of, &c. (hereinafter called the parties of the second part), of the second part: Whereas, the parties hereto of the first part have agreed to allow the parties hereto of the second part, out of the purchase-money of 1560l., the sum of 120l. for completing the messuages hereinafter described; and the said parties of the first part agree, that, upon payment to them by the said parties hereto of the second part of the sum of 1440l. and interest in manner hereinafter mentioned, that is to say, 40l. on the 24th of February next, 50l. on the 25th of March next, 50l. on the 24th of June, 1857, and 1300l., being the balance of the said purchase-money, on the 29th of September, 1857, with interest at the rate of 5l. per cent. per annum on the same sums respectively, they will grant to the said parties

of the second part a lease of all that piece or parcel of land or ground situate, lying, and being at Rhodeswell, in the parish of St. Dunstan, [638] Stepney, in the county of Middlesex, on the east side of the road called St. Ann's Road, with the thirteen messuages or tenements and premises thereon erected and built, and which said piece of land and premises, with the abutments and boundaries thereof, are more particularly described at the foot hereof, and therein coloured pink, to hold the same from the 29th of September, 1857, for the term of ninety-nine years, at the yearly rent of 3*l.* 14*s.* 6*d.* for each of the said messuages and premises, to be paid quarterly, on the usual quarter-days in every year, clear of all deductions for sewers-rate and all other outgoings whatsoever, the land-tax, which has been redeemed, tithes, or rent-charge in lieu of tithes, and the property-tax, only excepted,—the first quarterly payment to be made on the 25th of December, 1857. The said parties of the second part also agree to accept such lease or leases, and execute a counterpart or counterparts thereof, and to pay the solicitors of the said parties hereto of the first part the sum of 8*l.* 8*s.* for preparing every such lease and counterpart, exclusive of the ad valorem duty, but inclusive of maps or plans drawn thereon. And the said parties hereto of the first and second parts respectively mutually agree that such lease shall contain all such covenants, clauses, and agreements as are mentioned and set forth in the draft of a lease already prepared, approved, and signed by or on the part of the said parties of the second part. Provided, and it is hereby agreed between the said parties, that, if the said parties of the second part shall require a lease of any one or more of the said thirteen messuages (not being one lease for the entirety of the said premises), then and in that case the said parties of the first part agree to grant to the said parties of the second part, or to any other person or persons they may direct, such one or more leases; in which case, [639] each of such leases lastly mentioned shall contain the same covenants, clauses, and agreements as are hereinbefore provided in respect of the lease of the entirety of the said premises: and that the production of the title of the said parties of the first part, or any title whatsoever to grant such lease, shall not be required by the said parties of the second part:” Averment, that the plaintiffs are the same persons who were and are the parties to the said memorandum of agreement of the first part; and that the defendants are the same persons who were and are the parties thereto of the second part: And that all things and conditions have happened, and have by the plaintiffs been observed and performed, which were necessary to entitle them to be paid by the defendants the said sum of 40*l.* on the 24th of February next after the making of the said agreement, and the said sum of 50*l.* on the said 25th of March then next, and the said sum of 50*l.* on the 24th of June, 1857, and the said sum of 1300*l.*, being the balance of the said purchase-money, on the 29th of September, 1857, with interest at the rate of 5*l.* per cent. per annum; and the said several days had elapsed long before this suit: yet the defendants had made default in paying to the plaintiffs the said sums of 40*l.*, 50*l.*, 50*l.*, and 1300*l.*, or any of them, or any part thereof, or any interest thereon; and the said sums, and a large sum for the said interest, was due and payable by the defendants to the plaintiffs.

To this declaration the defendants demurred,—the ground of demurrer alleged in the margin being, “that the declaration shews no agreement or promise by the defendants to pay the moneys claimed.” Joinder.

Gray, in the support of the demurrer. The question is, whether, upon the true construction of the agreement declared on, the grant of the lease is not a con-[640]-dition precedent to the right of the plaintiffs to demand payment of the several sums therein mentioned. This is not simply a covenant to pay money. [Cockburn, C. J. The plaintiffs agree that they will grant a lease to the defendants upon their paying them certain sums, and the defendants agree to accept the lease and to execute a counterpart. Is not that an agreement to take the lease with the condition of paying the money?] The breach assigned is, simply the non payment of the money. The question is, whether upon the agreement as set out in the declaration there is a covenant to pay the money. It is submitted that there is not. [Williams, J. We do not know the facts: but, must we not assume that the lease has been granted?] No lease has been tendered; nor have the defendants refused to accept a lease. [Cockburn, C. J. Then, you should have traversed the general allegation that all things and conditions had happened and been performed to entitle the plaintiffs to be paid the several sums. Willes, J. If the lease has not been granted, but has been tendered, the vendors are not entitled to the price, but only to damages for not performing the contract. The

estate remains in the vendors, until the lease is actually granted. In *Sibthorpe v. Brunel*, 3 Exch. 826, a deed executed by the plaintiff and defendant, —after reciting that a company had been formed for the purpose of constructing a railway which would pass through the plaintiff's estate, and that an application to parliament for an act of incorporation was then pending, — contained a covenant by the defendant, that, within six months from the time of the passing the proposed bill, and before the company should enter upon, take, or use the estate, except for the purpose of setting out and ascertaining the land required, the defendant should pay to the plaintiff the sum of 4000l. for the purchase of the [641] estate as thereafter described. There was also a covenant, that, on payment by the defendant of the said sum of 4000l. and interest after the expiration of six months after the passing of the said bill to the day of payment of the said sum, the plaintiff should convey to the defendant so much of the estate as should be required for the construction of the railway. In an action on the covenant, for the non-payment of the purchase-money after six months from the passing of the bill, it was held that the covenant to pay the purchase-money, and that to convey the property, were independent covenants.]

Bovill, Q. C., *contra*, was not called upon (a).

COCKBURN, C. J. We think the declaration is good, and consequently that the plaintiffs must have judgment upon this demurrer. But, if the defendants wish to withdraw the demurrer, and traverse the general averment, they may apply for leave to amend. If no application for that purpose be made at Chambers within a week, there will be judgment for the plaintiffs.

Rule accordingly.

[642] CHOPE AND ANOTHER v. REYNOLDS. Jan. 24th, 1859.

[S. C. 28 L. J. C. P. 194 ; 5 Jur. N. S. 822 ; 7 W. R. 208.]

Where "profits" are insured against perils of the sea, the liability of the underwriters do not attach unless the goods themselves are lost by a peril insured against.—A. bought goods of B., to arrive at Bristol by the ship "James Daly," from the West coast of Africa, and effected an assurance with C. against the ordinary perils, with a memorandum indorsed on the policy, declaring the insurance to be "on profit on palm-oil, valued at, &c., per 'James Daly.'" The "James Daly," while on her voyage to Bristol with the oil on board, was lost by a peril insured against, but the oil was brought home undamaged by another vessel, and was sold by B. to a third person:—Held, upon the authority of *The Royal Exchange Assurance v. McSwiney*, 14 Q. B. 646, that there had been no such loss of the subject-matter of insurance as was contemplated by the policy.

This was an action upon a policy of insurance on "profits," for a total loss.

The declaration stated, that, before the making of the policy of insurance therein-after mentioned, certain persons carrying on business under the firm of R. & W. King bargained and sold to the plaintiffs divers tons of palm-oil, at a certain rate or price then agreed upon between the said persons and the plaintiffs, to arrive by certain ships, to wit, the "James Daly" and other ships, at the port in the said policy of insurance and thereinbefore mentioned, which said ships before the making of the bargain and sale had been and were engaged upon a trading voyage to and from the West Coast of Africa for the said Messrs. R. & W. King, and were expected to arrive at Bristol, or some port or ports of discharge in the united kingdom, with cargoes on board thereof respectively, comprised, amongst other things, of palm-oil; and that, at the time of the said bargain and sale, and of the making of the said policy of

(a) The points marked for argument on the part of the plaintiffs, were,—“That, on the true construction of the whole agreement, which is set out in the declaration verbatim, there is an express or at any rate an implied promise to pay the sums of 40l., 50l., 60l., and 1300l.: That the grant of a lease was not a condition precedent to the right to be paid the said sums, at any rate the first three of them, which were to be paid on days anterior to the granting the lease: And that, if the defendants relied on the non-granting of the lease, or the non-observance of any condition, they ought to have pleaded the defence specially.”

insurance, the plaintiffs had reason to expect that they would make great gains and profits, to the amount of the sum insured as hereinafter mentioned, in case the said tons of palm-oil so bargained and sold as aforesaid should arrive by the said ships : That, after the said bargain and sale, the defendant, in consideration of 31l. 10s. then paid to him by the agents of the plaintiffs in that behalf thereafter mentioned, as and for the premium and at and after the rate of three guineas per cent. for the insurance of 1000l. upon the premises mentioned in the policy thereafter mentioned, became and was [643] an insurer to the plaintiffs of 1000l. upon the said premises, and as such insurer for the said sum subscribed on the 12th of February, 1857, a certain policy of insurance caused to be made on the 11th of February aforesaid by certain agents of the plaintiffs in that behalf carrying on business under the firm of Bushbys & Lee, purporting thereby and containing therein that the said persons carrying on business under the firm of Bushbys & Lee, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance and cause themselves and them and every one of them to be insured, lost or not lost, at and from the West coast of Africa, during the vessel's stay and trade there, and from thence to Bristol or any port or ports of discharge in the united kingdom, and with liberty to proceed in any rotation to all or any ports or places, rivers, or islands of Africa, including Madeira, Canaries, Cape de Verde, and the islands in the Atlantic, or off the coast of Africa, for the purposes of trading, bartering, and exchanging property, for information or refreshment, or for any other purposes of trade whatsoever, without being deemed any deviation, and with liberty to be towed by steam-vessel or vessels, and to dock, heave down, to load, unload, or re-load, to sell, barter, or exchange all or either goods or property with any ships, boats, craft, or factories wheresoever they may call at and proceed to, and also with liberty to take on board and land passengers without being deemed any deviation, without prejudice to that insurance, including all sorts of craft, trading, and unloading, re-loading, and trans-shipment, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance munitions, artillery, boat, and other furniture of and in the good ship or vessel called the ships named, whereof [644] was master under God for this present voyage, &c., or whosoever else should go for master in the said ship, or by whatever other name or names the same ship, or the master thereof, was or should be named or called ; beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship as above, upon the said ship, &c., and so thence continue and endure during her abode there, upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandize whatsoever, should be arrived at as above ; upon the said ship, &c., until she should be moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same should be there discharged and safely landed : and it should be lawful for the said ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever for any purposes, being deemed no deviation from and without prejudice to that insurance : the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at as under. Touching the adventures and perils which they the assurers were contented to bear and did take upon them in that voyage, they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainerments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariner, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof ; and, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, [645] labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandizes and ship, &c., or any part thereof, without prejudice to that insurance, to the charges where they the assurers would contribute each one according to the rate and quantity of his sum therein assured : And it was agreed by them the insurers that that writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made in Lombard Street or in the Royal Exchange or elsewhere in London ; and so they the assurers were contented, and did thereby promise and bind themselves each one

for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that insurance by the assured, at and after the rate of three guineas per cent. In witness whereof they the assurers did subscribe their names and sums assured, in London, the 11th of February, 1857: And that by a certain memorandum thereon written, corn, salt, fruit, flour, and seed were warranted free from average unless general or the ship should be stranded; also sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5l. per cent.; and all other goods, and also the ship and freight, were warranted free from average under 3l. per cent. unless general or the ship should be stranded: And by a certain other memorandum written in the margin thereof, the said ships were warranted free of capture and seizure, and the consequences of any attempt thereat: And also by a certain other memorandum thereunder written it was declared that the said insurance was on profit on palm-oil, valued at 3000l., by order of the plaintiffs, in respect of the ships whereof the names were thereunder written, and to the amount [646] of the sums set against the names of the said ships, being the same ships as engaged and so expected to arrive as thereinbefore mentioned; which said names and sums were and are as follows,—“James Daly,” 450l.; “Chalco,” 400l.; “Warrior,” 200l.; “Glenely,” 250l.; “Packet,” 450l.; “Elizabeth Emily,” 600l.; “Dehomey,” 200l.; “Stedfast,” 250l.; “Arab,” 100l.; “Jane Black,” 100l.,—as by the said policy of insurance and memoranda, reference being had thereto, will more fully and at large appear: That, after the said ship called the “James Daly” had arrived at the West coast of Africa, and while she was prosecuting the voyage and trading as aforesaid, divers large quantities of palm-oil were loaded and shipped, and thenceforward until the loss thereafter mentioned continued on board the said vessel for and on account of the said R. & W. King, to be conveyed thence to Bristol, or some port of discharge in the united kingdom, for the said Messrs. R. & W. King, and from the time of such loading became and from thence until the loss thereafter mentioned were part of the palm-oil so bargained and sold to the plaintiffs as aforesaid: That the plaintiffs were interested in the profits to arise and be made from the sale and disposal of the said palm-oil, to wit, to the amount of all the money by them ever insured or caused to be insured thereon: That afterwards the said ship called the “James Daly,” during her stay on the West coast of Africa, and while she was endeavouring to prosecute her voyage from thence to Bristol aforesaid, or some port of discharge in the united kingdom, was, with the said palm-oil on board thereof, by perils and dangers of the seas, utterly lost, and never did arrive at Bristol aforesaid, or any port of discharge in the united kingdom, whereby the expected profits of and from the sale of the said palm-oil, which the plaintiffs averred that they might or could and would have made if the same had arrived at Bristol aforesaid, or [647] any port of discharge in the united kingdom, were lost to the plaintiffs: And that they the plaintiffs had done, and always been ready and willing to do, all things on their part necessary to be done, and which they ought to be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle them to be paid by the defendant the said loss, and that a reasonable time for payment had elapsed, and the defendant had not paid the same.

Sixth plea—to the first count,—that the defendant became an insurer by a policy in writing, and not otherwise, which policy was in the words and figures following [setting out the policy, with the several memoranda indorsed thereon]: Averment, that the palm-oil shipped on board the “James Daly” as in the first count mentioned, and in the profits whereof the plaintiffs were alleged to have been interested, was not, nor was any part of it, lost or damaged by perils of the sea or other perils insured against, and was safely shipped on board other vessels, and was disposed of by the said Messrs. R. & W. King.

Second replication to the sixth plea,—that, by the usage of trade, the plaintiffs were not, under their said contract, entitled to have the said palm-oil, unless the same should arrive by the said “James Daly,” and that they did not have the same.

Demurrer thereto,—the ground stated in the margin being, “that the insurance is a contract to indemnify the assured against damage or loss to the palm-oil on board the ship, and is not a contract to indemnify the assured against any loss arising from the ship not arriving with sufficient palm-oil on board to entitle the assured to claim it.”

Blackburn, in support of the demurrer (a). The [648] question is, what is the meaning of the contract between the underwriter and the plaintiffs. There is no averment on the record that the former had any notice of the contracts with Messrs. King: all they knew was, that the plaintiffs were desirous of insuring profits expected to be made on palm-oil expected to arrive at Bristol from the West coast of Africa, in certain ships to be named. There can be no doubt as to the meaning of that. Where a man insures goods on a voyage, he is supposed to insure their value at the port of shipment. He may if he pleases further insure the profits of the venture. But in both cases the event is precisely the same. He does not insure the ship or the voyage: but he insures against the non-arrival of the goods at their destination by reason of a peril insured against. The event which happened here gave rise to no loss upon the goods themselves: all that is alleged is, that the ship was lost. It is plain, upon the decision of the Exchequer Chamber, in *MSweeney v. The Royal Exchange Assurance*, 14 Q. B. 646, that this was not such a loss as the underwriter intended to indemnify the plaintiffs from. In that case, the plaintiff, in London, contracted to buy of D. 6000 bags of rice, to arrive from Madras by the ship "E. B." before the end of May; and he contracted with W. to sell him [649] the same rice, to arrive as above, at an advanced price. The plaintiff then effected an insurance at and from Madras to London, on profit on rice, loaden or to be loaden, and also upon the body, tackle, &c., of the ship "E. B.," beginning the adventure upon the goods from and immediately after the loading thereof aboard the said ship at Madras: the ordinary perils were insured against: premium, 2l. 10s. per cent. The rice was all ready to be shipped on board the "E. B.," and conveyed to London for plaintiff's vendors, and 1200 bags were actually on board, when, by perils of the sea, the ship was disabled, and prevented from performing the voyage, and the rice on board spoiled: the plaintiff's contracts both of purchase and sale became inoperative. In an action on the policy for a total loss in respect of 4800 bags, the insurers having settled for the 1200, the court of Queen's Bench held, that the plaintiff's expected profit was an insurable interest, and well insured by this policy; and that it was not necessary to the plaintiff's right of recovery that the 4800 bags should have been actually on board; the ship having been at Madras ready to take in the cargo, and having been disabled from so doing by no cause but peril of the sea. This judgment, however, was reversed by the Exchequer Chamber, who held that the plaintiff's interest in profit, though insurable, was not properly insured by a policy in this form, except as to the rice actually put on board; and that, if the rice on shore could have been considered a subject-matter of the insurance under this policy, the loss in respect of such rice was not occasioned by peril of the sea, within the meaning of the policy, but was only consequential upon other loss occasioned by such peril. The reasons given by Parke, B., in that case, p. 661, are closely in point here. "Upon the face of the policy," he says, "giving full effect to the written part of it, we think that the [650] plaintiff is to be considered in the same situation, as to the liability, as if he had insured the ordinary profits of a parcel of rice shipped on board the particular vessel, that is, the additional value which it was expected to acquire at the termination of the voyage, and against the losses specified. If so, we think it clear that the policy attached only to such rice as was actually on board. The adventure begins on the said goods from and immediately after the loading on board: and we think the insurance on the profit or the additional value of the goods cannot begin at a different time; and, further, that the losses insured against by this policy are only the losses by perils of the seas directly affecting the goods, and consequently the profit on the goods." Unless the

(a) The points marked for argument on the part of the defendant, were as follows:—

"That the contract between the underwriter and the plaintiffs, being contained in the written policy of insurance set out in the sixth plea, cannot be varied in its construction by the contracts between the plaintiffs and Messrs. R. & W. King, even if the defendant had at the time of the making of the policies known of these contracts, which is no where alleged: and that the policy in this case is 'on profit on palm oil,' and that, in the language of the judgment of the court of Exchequer Chamber in *The Royal Exchange Assurance Company v. MSweeney*, 14 Q. B. 661, the losses insured against by this policy are only the losses by the perils of the seas directly affecting the goods, and consequently the profits on the goods."

casualty be such as would have rendered an underwriter upon goods liable, the underwriter upon profits cannot be liable.

DAVID KEANE, *contra* (a). The decision of the court of Queen's Bench in *M'Swiney v. The Royal Exchange Assurance*, 14 Q. B. 634, is in favour of the plaintiffs, viz. that, under circumstances like those of this case, the policy attached. The extent to which that judgment is reversed by the Exchequer Chamber is, that [651] the risk does not commence until the goods are actually on board. That language of the judgment which is relied on by the other side, is applicable to a totally different state of facts. In *Anderson v. Wallis*, 2 M. & Selw. 240, 247, Lord Ellenborough says: "I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner, a total loss of cargo may be effected, not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage." [Cockburn, C. J. That was a case of insurance on goods, not on profits. The judgment of the Exchequer Chamber in *The Royal Exchange Assurance v. M'Swiney* goes the length of saying, that, unless there be direct bodily damage to the goods, there can be no loss of profit within the meaning of such a policy as this. Williams, J. In *Hulhead v. Young*, 6 Ellis & B. 312, the case of *The Royal Exchange Assurance v. M'Swiney* was treated as having proceeded entirely on the ground that the policy never attached, the adventure had not begun. That case, however, did not turn exclusively on that. Cockburn, C. J. I think we must hold ourselves bound by the decision of the Exchequer Chamber in *The Royal Exchange Assurance v. M'Swiney*, though I must say I should not feel disposed to carry that case any further. There is one ground upon which that decision proceeded which is clearly applicable here.] The real point upon which it was there held that the assured was not entitled to recover was, that the rice had not been shipped. That clearly is a good ratio decidendi. However important and instructive the other point thrown out may be, the court is not bound by it. [Williams, J. Baron Parke says,—"The adventure begins on the said goods [652] from and immediately after the loading on board: and we think the insurance on the profit or the additional value of the goods cannot begin at a different time; and, further, that the losses insured against by this policy are only the losses by perils of the seas directly affecting the goods and consequently the profit on the goods."'] What is the meaning of a loss by perils of the seas directly affecting the goods?

COCKBURN, C. J. I think we cannot get over the decision of the Exchequer Chamber in *The Royal Exchange Assurance v. M'Swiney*. Two reasons are given for the judgment of the court, one of which is directly applicable to the case now before us. And, when we see that the court of error proceeded upon a principle, clearly enunciated, which necessarily involves the question we are dealing with, we must hold ourselves bound by it.

WILLES, J. I may say that it was not by my advice that the case of *The Royal Exchange Assurance v. M'Swiney* did not go to the House of Lords.

Judgment for the defendant.

[653] MORGAN AND OTHERS, Assignees of James Sebastian Yeats, Deceased, a Bankrupt, v. TAYLOR. Jan. 24th, 1859.

[S. C. 28 L. J. C. P. 178; 5 Jur. N. S. 791; 7 W. R. 285.]

A solicitor, pending a suit in Chancery, received from A., his client, in 1846, his bill

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

"1. That the replication answers the plea: 2. That the plea does not answer the declaration, and is bad in substance: 3. That the contract of insurance in this case is one to indemnify the assured against the loss by the perils insured against of the profits to arise from the arrival of the goods at the destined port of discharge by the ships named: 4. That the contract in this case is one to indemnify against any damage to or loss of the profits by reason of any of the perils insured against, and not merely against the particular damage to or loss of the profits which might result from the goods being damaged or lost on board the ship."

for costs already incurred, upon an agreement with A., to refund the amount to him in the event of his obtaining a decree for costs in the suit. A. became bankrupt in 1847, and shortly after obtained his certificate, and died. The suit proceeded (the assignees not interfering) and a decree was pronounced under which the costs were awarded to A., and were received by the solicitor.—In an action against the solicitor by the assignees of A.,—Held, that the contingent right to have the amount advanced by him for costs repaid under the agreement (which was a valid agreement, and made upon a sufficient consideration), was an interest in A., which on his bankruptcy passed to his assignees; and consequently that the latter were entitled to recover the sum so paid by A. as money received to their use.—*Quære*, whether A. at the time of his bankruptcy had such an inchoate or contingent interest in the costs of the suit, as such, as would pass to his assignees?—By the decree, the solicitors, in addition to the sum paid to him by A. in 1846, received a further sum for costs due to a former solicitor in the suit:—Held, that the assignees were not entitled to recover this sum,—although it appeared that no claim had been made thereto by such former solicitor.

This was an action brought by the plaintiffs as assignees of James Sebastian Yeats, deceased, a bankrupt, against the defendant, for the recovery of 341l. 18s. 4d alleged to be due by the defendant to the plaintiffs, as assignees, as money had and received by the defendant to the use of the plaintiffs, as assignees, under the following circumstances; and by consent, and by judge's order under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 42), the following case was stated for the opinion of the court, without pleadings:—

In the year 1835, the bankrupt, on behalf of himself and his infant children, who were annuitants under the will of James Yeats, deceased, instituted an administration suit in Chancery for the purpose of securing their annuities.

Mr. Fearon, of the then firm of Clutton & Fearon, solicitors, was the solicitor originally employed by the bankrupt in that suit, and he took certain proceedings therein: but the suit was allowed to slumber; and in the year 1843 the solicitor in the suit was changed, and the defendant then became solicitor therein for the bankrupt and his children in lieu of Mr. Fearon, upon an understanding between Mr. Fearon and the defendant, that, when a taxation of the costs of the suit should be directed by the court, the costs of Messrs. [654] Clutton & Fearon should be included, and the defendant should pay over to them such portion of the costs which he should receive as was due to them at the time of the aforesaid change of solicitors taking place.

Mr. Clutton, of the aforesaid firm of Clutton & Fearon, has since died.

The defendant has since prosecuted the suit as the solicitor on behalf of the said bankrupt and his children; and the same is still pending.

In the year 1846, the bankrupt, requiring a loan, applied to the defendant; and the defendant advanced to him the sum of 1380l. upon a mortgage by him and his two eldest children of the arrears then due to them in respect of the aforesaid annuities, and to which arrears the bankrupt was then entitled (the bankrupt being entitled to his children's annuities during their minorities, and his said children being then still infants): and after the said advance to the bankrupt of the said sum of 1380l., and out of the same moneys, the bankrupt paid to the defendant the bill of costs due to him up to that time, including in such payment the costs then incurred by the defendant in the said suit,—upon the understanding and agreement, that, if any portion of those costs were afterwards ordered to be paid in the suit, the defendant should pay back the amount he might receive to the bankrupt.

In November, 1847, the said James Sebastian Yeats became a bankrupt, and in the same year obtained his certificate. He died in the year 1857.

In the year, 1856, an order was made in the suit, for the first time, for a taxation of the costs of all parties to the said suit; and, in July, 1857, an order was made for their payment.

The defendant by his agent and partner has since received his taxed costs in the said suit, out of a fund [655] in the said court of Chancery; and in the amount which he so received is included 282l. 7s. 11d., being the amount paid to him by the bankrupt in 1846 as aforesaid; and the defendant has also received out of the said fund the amount of the taxed costs due to Messrs. Clutton & Fearon up to 1843, when Mr. Fearon ceased to be such solicitor in the said suit as aforesaid.

The last-mentioned amount is 59l. 10s. 5d.; but no part of that sum was included in the sum paid by the said James Sebastian Yeats to the defendant in the year 1846.

Mr. Fearon makes no claim against the defendant in respect of the said costs so due to the said Messrs. Clutton & Fearon as aforesaid.

The question for the opinion of the court is,—whether the moneys so received by the defendant out of the court of Chancery in respect of taxed costs as aforesaid, or any part thereof, belong to the plaintiffs as such assignees as aforesaid, and whether the plaintiffs, as such assignees as aforesaid, are entitled to recover the same, or any part thereof, in this action.

If the court shall be of opinion that the plaintiffs, as such assignees as aforesaid, are entitled to recover the said sum of 282l. 7s. 11d. and the said sum of 59l. 10s. 5d., or either of those sums, or any part thereof, then judgment is to be entered up for the plaintiffs for the said sum of 282l. 7s. 11d. and the said sum of 59l. 10s. 5d., or so much of the said sums respectively as this court shall be of opinion that the plaintiffs, as such assignees as aforesaid, are entitled to recover.

If the court shall be of opinion that the plaintiffs, as such assignees as aforesaid, are not entitled to recover any part of the said several moneys respectively, then judgment shall be entered for the defendant.

Scotland (with whom was Phipson), for the plain-[656]-tiffs (*a*)¹. The whole sum of 341l. 18s. 4d. passed to the plaintiffs as assignees of Yeats, as a contingent right to [657] have repaid to him costs which he had disbursed before his bankruptcy. The moment the money came to the hands of the defendant, it became money had and received to the use of the assignees. Costs are in general payable to the client, irrespective of the attorney's claim: Archbold's Practice, 10th edit. 124. The court called upon

Phear, for the defendant (*a*)². There was no valid contract between the defendant

(*a*)¹ The points marked for argument on the part of the plaintiffs were as follows:—

“The plaintiffs will contend, that they are entitled to recover the sum of 282l. 7s. 11d., as a sum which accrued due from the defendant after the bankrupt obtained his certificate, upon an agreement made by the defendant with the bankrupt before his bankruptcy, the interest in which agreement passed to his assignees as part of his estate applicable to the payment of his debts: and that, when such sum was received by the defendant, it became assets of the bankrupt's estate, to which they were entitled for the benefit of his creditors, and in point of law must be considered as having been received by the defendant for their benefit:

“The plaintiffs will also contend that they are entitled to recover the sum of 59l. 10s. 5d. mentioned in the special case, on the ground that the costs in the chancery suit, for the payment of which an order was made as therein mentioned, were in point of law the costs of the bankrupt as plaintiff in that suit, and not the costs of his late attorneys, Messrs. Clutton & Fearon; and that, as such, they were under the said order payable to the bankrupt, and, when received by the defendant as his attorney, would, if no bankruptcy had happened, have been money received by the defendant for the bankrupt's use, and subject to any lien which the defendant, as solicitor in the suit, might have had upon them; that, as the defendant does not claim any such lien, the amount, being received after the bankruptcy and certificate of the bankrupt, must be considered as received for the benefit of his assignees, as a sum in which at the time of the bankruptcy the bankrupt had an existing interest, and to which he had an inchoate right, and which interest and right passed to the plaintiffs as part of his estate; and that this right of the plaintiffs as assignees is not interfered with by the arrangement made by Messrs. Clutton & Fearon with the defendant when the latter became the solicitor in the suit, inasmuch as Mr. Fearon, who now represents the firm of Clutton & Fearon, makes no claim to this sum, and it must therefore be taken that his claim for costs has been satisfied.”

(*a*)² The points marked for argument on the part of the defendant, were as follows:—

“1. That the plaintiffs as assignees are not entitled to recover the said sums of 282l. 7s. 11d., and 59l. 10s. 5d., or either of those sums, or any part thereof:

“2. That the said sums of 282l. 7s. 11d. and 59l. 10s. 5d. do not, nor does either of them, or any part thereof, form any part of the estate and effects of the said bankrupt:

“3. That, the said James Sebastian Yeats having become bankrupt and obtained

and the bankrupt at the time of the payment of the money in 1846: it was without consideration. The attorney, having been paid his costs at the time they were incurred, has since the bankruptcy and certificate of his client received the amount under a decree made in the suit. Can it be said that the bankrupt had any right to that money at [658] the time of his bankruptcy? [Cockburn, C. J. The defendant undoubtedly might have kept this money if his costs had not been paid in 1846. But, having been paid then under an agreement to refund the money if he should obtain his costs by a decree of the court, the bankrupt might, but for the bankruptcy, have maintained an action against him to recover it back.] The question is whether the assignees have any claim after the bankrupt has obtained his certificate. [Cockburn, C. J. Why should not the assignees take the benefit of the contingency?] There being no valid contract founded upon a good consideration, the money cannot be said to have been property or effects of the bankrupt either in possession or in action at the time of his bankruptcy. [Williams, J. You agree that this money was not a fruit fallen at the time of the bankruptcy, but only an inchoate right, which might ripen into fruit. Whether there was an agreement or not, cannot, I think, make any difference. The solicitor is bound to re-pay advances made to him in the progress of the suit. Suppose the plaintiff in an administration suit dies indebted to his solicitor for costs in the suit, and costs are afterwards decreed to him, the solicitor would not in respect of those costs stand in the position of an ordinary creditor,—*Lloyd v. Mason*, 4 Hare, 132,—otherwise, specialty creditors would be paid before him.] The costs of the suit are so completely in the discretion of the court of Chancery that the mere hope or expectation of costs would be too shadowy to pass to the assignees. This is more like the case of a money demand barred by the statute of limitations, which, if paid to the bankrupt after certificate, could not be claimed by the assignees (a). The question of inchoate [659] right to costs pending suit was discussed in *Smedley v. Philpott*, 3 M. & W. 573. There A. had commenced a suit in Chancery for an account under a will, in which she employed as her solicitors, first B., then C., who successively gave up the suit, and then D., who continued to conduct it till her death in 1829. After her death, E., her executor, filed a bill of revivor, and D. continued to conduct the suit for him. In 1833, a decree was made, whereby it was ordered that the master should settle the costs of all the parties, and that the same, when taxed and settled, should be paid out of the fund in the following manner, viz. the plaintiff's costs (consisting of the costs of both A. and E.) to D., his solicitor, and the costs of the defendants to their several solicitors. The plaintiff's costs were taxed, and certain sums in respect of them were paid to D. C. sued E., as executor of A., for the amount of his bill, and had judgment of assets *quando acciderint*. He afterwards brought another action on the judgment, and had given notice of trial: and it was then agreed between them, that, on C.'s withdrawing the record, E. would then pay him 100l. on account of his bill, and the remainder out of the assets which should first come to his hands as executor of A.; and the record was accordingly withdrawn. A further sum was afterwards paid out of the court of Chancery to D. in respect of the same costs: and it was held by Parke, B., and Alderson, B. (Lord Abinger, C. B. dissentiente), that this sum was assets in the hands of E. within the meaning of the agreement. In the course of his judgment, Lord Abinger says: "The fallacy of the [660] argument on the other side appears to turn upon the supposition that Jane Carter, the deceased,

his certificate before the said moneys were received by the defendant, the plaintiffs, as such assignees as aforesaid, have no claim to them, or any part of them:

"4. That the said moneys, having come to the hands of the defendant as the solicitor in the said suit in Chancery, are retainable by him, and may be applied pro tanto in satisfaction of his loan to the bankrupt:

"5. That, at all events, the said sum of 59l. 10s. 5d., being the amount due to Messrs. Clutton & Fearon for their costs in the chancery suit due to them at the time of the change of solicitors, is properly retained by the defendant for such costs, and the plaintiffs as assignees are not entitled to recover any part of it."

(a) Quære. The statute of limitations bars the remedy only, not the debt: *Hegburn v. Scott*, 2 B. & Ad. 413. The statute, at all events, would be no bar to an application by a client to the summary jurisdiction of the court against an attorney for moneys recovered for him in an action or suit brought on his behalf: *Ex parte Sharp*, W. W. & D. 354, 1 Jurist, 405.

had in her life time some sort of interest in these costs, because she was indebted to her attorney in respect of them, and that this interest became vested in the plaintiff as her personal representative. But she had no such interest: she had no inchoate right to costs out of the funds in court: it was purely in the judge's discretion whether the costs incurred by her should be paid out of that fund or not paid at all; or even whether the costs of other parties should not be paid by her, or out of her assets, if she had any. It could not therefore be said, till the Chancellor pronounced his decree, that any person had a right to receive those costs, or an inchoate interest in them. As Jane Carter had no such right or interest, none such could vest in her personal representative." That is precisely the argument which it is proposed to urge here. [Cockburn, C. J. It is true, the costs in equity are in the discretion of the court; but that is not an arbitrary discretion: it is to be exercised with due regard to the rights and equities of the parties in the suit.] If the costs had been ordered to be paid by Yeats, the plaintiff in the suit, would the inchoate right to such costs have been a claim which would have been barred by his certificate? [Crowder, J. The right to the fruits, or proceeds of the suit would go to the assignees (a). Why not the right to the costs?] The statute (12 & 13 Vict. c. 106, s. 153) enables the assignees to continue the suit. [Crowder, J. No man can predicate the certain issue of any suit either at law or in equity: but I must confess I cannot see any difference between a contingency as to costs and as to the subject matter of the suit. Willes, J. To succeed in your argument, you must make out that [661] there was no legal consideration for Taylor's promise to the bankrupt. Cockburn, C. J. Independently of the agreement, the party who obtains the judgment of the court is entitled not only to the principal subject-matter of the suit, but also to the costs, if costs are awarded,—subject, of course, to the lien of the attorney. If he gets rid of the attorney's lien, he is entitled to the whole subject-matter of the suit and also to the costs. So, here, if the assignees had a right to take up the suit and recover the principal subject-matter, the costs as an accessory must follow.] The assignees here took no part in the suit. [Crowder, J. It was not necessary: there remained nothing for them to do.] The agreement goes no further than what the law would have implied without it. As to the 59l. 10s. 5d., it appears upon the face of the case that there was an agreement with respect to Mr. Fearon's costs on the change of solicitors: and, under that agreement, the defendant would be responsible to Mr. Fearon for those costs. [Willes, J. Taylor received this sum of 59l. 10s. 5d. with notice of Fearon's claim, which is not stated to have been waived. Taylor cannot part with that sum to the plaintiffs, without running the risk of being called upon to pay it over again to Mr. Fearon.] That is precisely what Lord Abinger says in *Smalley v. Philpot*.

Scotland, in reply. [Willes, J. As to the 282l. 7s. 11d., the court is with you. But the assignees can have no right to the other sum.] They are the plaintiff's costs, unless the solicitor demands them. From the statement in the case, it must be assumed that Mr. Fearon has given up his claim. [Willes, J. The 59l. 10s. 5d. is not within the alleged agreement. As to that, the money has got into Taylor's hands stamped with the right of Mr. Fearon. The assignees can only recover [662] what the bankrupt was entitled to at law and in equity.] In the absence of a claim by Mr. Fearon, as between these parties the plaintiffs must, it is submitted, be entitled to the whole of the money. The defendant clearly has no right to retain it.

COCKBURN, C. J. I am of opinion that the plaintiffs are entitled to judgment in respect of the 282l. 7s. 11d. I think they are entitled to recover that sum under the agreement, in which the bankrupt had a beneficial interest which passed to his assignees. It is said that agreement was without consideration: but I do not think that is so: for, though true it is that the defendant, as the solicitor in the suit, was entitled to the costs, still he was not entitled to be paid them by the bankrupt at that time. A solicitor is not entitled absolutely to demand the costs from his client until the end of the suit, though he may refuse to proceed with it unless furnished with funds. The result of the facts stated in the special case is, that the defendant, the solicitor for the bankrupt in a suit pending in Chancery, having incurred costs to the extent of 282l. 7s. 11d. on his own account, and having undertaken to satisfy Messrs. Clutton & Fearon's claim for costs to the amount of 59l. 10s. 5d. incurred by them before he (the defendant) came into the suit, and being about to raise a loan of 1380l.

(a) These, it was stated, had been received by the assignees.

for the bankrupt, stipulates for payment by him of his costs at once without waiting for the termination of the suit. To this the bankrupt accedes, upon the understanding that the defendant was to repay him the amount in the event of his obtaining the costs by a decree in the suit. The defendant, therefore, received his costs before he would in the ordinary course of things have been entitled to them, upon an express promise to refund the amount to his client in the event of their being ultimately [663] awarded to him by a decree of the court. That clearly was an agreement made upon a good consideration. The defendant, having afterwards obtained a decree for costs, would certainly have been bound to hand over the amount to his client pursuant to that agreement, if he had not become bankrupt: and, if so, it is equally clear, that, upon his bankruptcy, the right to call for the amount passed to his assignees. I also entertain a strong opinion that the assignees, if entitled to the benefit of the judgment in the suit, were likewise entitled to the costs as accessory and incidental to the suit, though it is not necessary to found our judgment upon that. As to the 59l. 10s. 5d., it is only necessary to say that it does not appear from the case that Mr. Fearon has released his claim to these costs. There is nothing shewn which would be a bar to any claim which may at a future time be made by Mr. Fearon or his representatives upon the defendant for this money. In respect of this sum, therefore, our judgment must be for the defendant.

WILLIAMS, J. I am entirely of the same opinion. It has long been settled that the object of the bankrupt law is, "to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate:" per Lord Tenterden, in *Wright v. Fairfield*, 2 B. & Ad. 727. The question here, as regards the 282l. 7s. 11d., is, whether the right to have recourse against the defendant upon the agreement stated in the special case was a beneficial matter belonging to the bankrupt's estate. It appears to me that it was so. It was a chose in action vested in the bankrupt at the time of his bankruptcy. He might before his bankruptcy have maintained an action for this money. It is impossible, therefore, to say that it is not a right which passed to his assignees upon his [664] bankruptcy. I think, upon the facts stated in the special case, the agreement to repay the money was a valid agreement the contingent benefit of which the bankrupt was entitled to immediately after it was made. We do not know very accurately the circumstances under which the payment of the costs was required by the defendant. Having no present right to demand them, it seems that the defendant induced the bankrupt to pay them, upon his promising to repay him the amount in the event of his obtaining a decree for costs in the suit. I think that was a valid contract, the interest in which passed to the plaintiffs as assignees. With respect to the 59l. 10s. 5d. received by the defendant on account of Mr. Fearon's costs, I agree with my Lord that the plaintiffs cannot make any valid claim to that sum. The defendant holds it as trustee for Mr. Fearon or his representatives.

CROWDER, J. I am of the same opinion. The question is, whether, at the time of the mortgage in 1846, the bankrupt had a right under the agreement upon which the costs were paid to the defendant that would vest in his assignees, — a right which he might have enforced by action. It seems to be quite clear that the 282l. 7s. 11d. was paid to the defendant under an express agreement by which the money was to be handed back to the client in case a judgment should be obtained in the suit by which he would be entitled to costs. If the bankrupt would have had a right to maintain an action upon that contract if the event upon which the money was to be repaid had happened before his bankruptcy, I see no reason why that right should not pass to his assignees. It is said there was no consideration for this contract, inasmuch as the defendant's promise compelled him to do nothing but what the law would imply. The statement in the case, however, does not seem to me to lead to that con-[665]clusion: the solicitor obtained his costs at a time when he was not in a position to enforce his claim to them: and that, I think, was ample consideration for the promise to repay the money in the event of a decree being obtained. There was, therefore, a valid agreement founded upon a good consideration, on which a right of action vested in the bankrupt before the bankruptcy, and which on the bankruptcy passed to his assignees as part of his estate. As to the 59l. 10s. 5d., however, I think the plaintiffs have no claim to that sum. These were costs due to Mr. Fearon. Upon the change of solicitors, it was agreed between the defendant and Mr. Fearon that the latter should receive the amount at the termination of the suit. For anything that appears,

Mr. Fearon may now call upon the defendant for that sum. All that is stated in the case is, that "Mr. Fearon makes no claim against the defendant in respect of the said costs." There is no pretence for saying that the plaintiffs have any right to the money.

WILLES, J. I am of the same opinion. The question is, whether either of the two sums mentioned in the special case constituted part of the personal estate and effects of the bankrupt at the time of his bankruptcy, within the 141st section of the 12 & 13 Vict. c. 106 (*a*). Mr. Phear very properly directed our attention in the [666] first instance to the consideration whether there was any valid agreement between the bankrupt and the defendant before the bankruptcy, to repay the first of these sums. He perceived that that was the real point in the case, and accordingly he made the best argument that could be made upon it. The case states an agreement between Yeats and the defendant, that, if Yeats would presently pay him the amount of his costs then incurred in the Chancery suit, he, the defendant, would, in the event of a decree being obtained in Yeats's favour for costs in that suit, repay him the sum so advanced. Upon this state of facts, it seems to me that there was a valid agreement founded upon a sufficient consideration: and the right of the bankrupt under that agreement unquestionably passed upon his bankruptcy to his assignees. This is not unlike the case of the life-policy, in *Schouller v. Wace*, 1 Campb. 487, where it was held that a policy of insurance effected by a bankrupt upon his own life at an annual premium, passes to his assignees, however small the apparent value of it may be at the time of his bankruptcy, and although there are considerable arrears of premiums then due upon it; and if, instead of delivering it up as part of his effects, he secretly assigns it to another person, who pays the arrears of the premium, and upon the death of the bankrupt receives the sum insured, such sum, deducting the amount of the arrears so paid, may be recovered by the assignees as money had and received to their use. Lord Ellenborough there says: "This was a possibility of benefit, to which the assignees were entitled as part of the effects of the bankrupt." So, the right to this money under the agreement was a contingent right of the bankrupt, which passed to his assignees as part of his effects. As to the 59l. 10s. 5d., I also agree with the rest of the court in thinking that the plaintiffs cannot recover [667] that. The rule, as stated by Willes, C. J., in *Scott v. Surnan*, Willes, 403, is, that "nothing vests in the assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts." The assignees clearly have no equitable right to this sum. Our judgment, therefore, must be for the plaintiffs as to the 282l. 7s. 11d., and for the defendant as to the 59l. 10s. 5d.

Judgment accordingly.

LLOYD v. OGLEBY. Jan. 11th, 1859.

Where a plaintiff has died since the trial,—semble, that a rule for a new trial cannot be moved for without letters of administration being first taken out.—The mere fact of a man's driving on the wrong side of the road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot.

This was an action charging the defendant with having so negligently driven a carriage along a public highway as to knock down and severely injure the plaintiff. The cause was tried before Willes, J., at the sittings at Westminster after last Term, when a verdict was found for the defendant. Since the trial the plaintiff had died from the injuries he sustained.

Parry, Serjt., on behalf of the plaintiff's widow, who had not taken out letters of

(*a*) Which enacts, "that, when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment."

administration, prayed leave to move for a new trial, on the ground that the verdict was against the evidence. He submitted, that, in the event of the court refusing the rule, if the widow were required first to take out administration, that expense would have been needlessly incurred. [Cockburn, C. J. The same consideration should induce us to hear the argument on the rule. You had better state the facts.] The facts are shortly these:—On the 23rd of [668] September last, between seven and eight o'clock in the evening, the defendant was driving with his wife along High Street, Mary-le-bone, at the rate of about seven or eight miles an hour, in a carriage so peculiarly constructed that the driver could only see straight before him. The defendant was on the wrong side, within five or six feet of the kerb, the road being thirty-two feet wide. The plaintiff was crossing the road, when the defendant ran against and knocked him down. It was conceded that there was no other vehicle in the way, to justify the defendant's position: and the defendant (who with his wife had previously to their departure for Australia been examined upon interrogatories) stated that he had deviated from his proper side of the road in order to get out of the way of a crowd opposite a public music hall. [Crowder, J. What has the right or wrong side to do with the case of a foot-passenger?] The fact of the defendant's being on the wrong side, it is submitted, is some indication of careless driving. [Crowder, J. There is no suggestion that the defendant was driving furiously. Whose duty is it to look out?] The vehicle came upon the unfortunate man at a spot where he had no reason to expect a carriage to be.

COCKBURN, C. J. It was peculiarly a case for the jury. There was evidence on both sides; and the learned judge who tried the cause does not intimate any dissatisfaction with the verdict. It is not, therefore, a case for a new trial.

WILLIAMS, J. There would have been a difficulty in granting a rule without administration having been taken out, inasmuch as there would have been nobody before the court to represent the plaintiff.

The rest of the rule concurring,
Rule refused.

[669] GARTON AND ANOTHER v. THE GREAT WESTERN RAILWAY COMPANY.
Jan. 29th, 1859.

[S. C. 28 L. J. C. P. 158; 5 Jur. N. S. 685. Followed, *Garton v. Bristol and Exeter Railway*, 1859, 6 C. B. N. S. 651. Adopted, *Parkinson v. Great Western Railway*, 1871, L. R. 6 C. P. 562.]

The court confirmed their decision in *Basendale v. The Great Western Railway Company*, (*Reading case*), ante, p. 336, though it appeared by affidavit that no profit was made either by the company or by the carrier upon the charges for collecting and delivering goods for their customers at the respective stations.

Collier, Q. C., in Michaelmas Term last, obtained a rule on behalf of the plaintiffs, carriers, against the Great Western Railway Company, calling upon the company to shew cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854, injoining them to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and delivering, for themselves or other persons, of goods and parcels under 500 lbs. weight, or in their charges for the same, over the complainants in the carrying of such goods and parcels for the complainants; and injoining the said railway company not to subject the complainants to any undue or unreasonable prejudice or disadvantage in the charges made to them for carrying such goods and parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such goods and parcels as aforesaid, with costs.

The motion was founded upon an affidavit which stated in substance as follows:—
1. That the Great Western Railway Company are the proprietors of a railway from Paddington, in the county of Middlesex, to Bristol, and are in the habit of carrying goods from London to Bristol, such goods being designated by them as first class goods, second-class goods, third-class goods, fourth-class goods, and fifth class goods respectively; and the said company have a distinct rate or charge for each of the said classes of goods, which rate or charge includes cartage from the residence or place of

business of the sender in London aforesaid to the [670] railway station there, together with carriage on the railway from the station at Paddington to the station at Bristol, and also cartage from the last-mentioned station to the residence or place of business of the consignee at Bristol: 2. That the said railway company's rates from London to Bristol, including the said cartage, were for some time previous to and in the month of April last, and still are, as follows,—for consignments above 500 lbs., in weight, 22s. 6d. per ton for first-class goods, 27s. 6d. per ton for second-class goods, 35s. per ton for third-class goods, 40s. per ton for fourth-class goods, and 45s. per ton for fifth-class goods; and for consignments above 1 cwt. and under 5 cwt. in weight, the like charges of 22s. 6d. per ton for first-class goods, 27s. 6d. per ton for second-class goods, 35s. per ton for third-class goods, 40s. per ton for fourth-class goods, and 45s. per ton for fifth-class goods; and for consignments under 1 cwt. in weight, in all classes alike for and under 56 lbs. 1s. 3d., above 56 lbs. and not exceeding 84 lbs. 1s. 11d., and above 84 lbs. and not exceeding 112 lbs. 2s. 6d.: 3. That, if goods are delivered to the company at the Paddington station, the company are thereby saved the expense of carting to the said station, and, on all consignments above 500 lbs. in weight, they deduct 3s. 4d. per ton from the said respective rates in respect of such cartage; and, if goods are received by the consignee at the Bristol station, the said company are thereby saved the expense of carting to the residence or place of business of the consignee in Bristol, and on all consignments above 500 lbs. weight, they deduct 1s. 6d. per ton from the said respective rates in respect of such last-mentioned cartage: 4. That, if consignments under 500 lbs. in weight are delivered to the said company at the Paddington station and received by the consignee at the Bristol station, there is the same saving to the company in respect of cartage as is mentioned in the last paragraph [671] in reference to consignments above 500 lbs. in weight; and, previously to the month of April last, the company deducted the said several sums of 3s. 4d., and 1s. 6d. per ton from their aforesaid respective rates for consignments above 1 cwt. and under 500 lbs. in weight, and the sum of 3d. for each package of goods under 1 cwt. in weight, in respect of the aforesaid cartage: 5. That the complainants had been previously to and since the said month of April last, and still are, in the habit of collecting goods consigned in quantities under 500 lbs. in weight, as well as above that weight, from their customers in London, required to be forwarded to Bristol, and delivering them to the railway company at their station at Paddington, consigned to their firm of Garton & Stone at the Bristol station, where their firm received the said goods so as aforesaid consigned in quantities under 500 lbs. in weight, and delivered them in Bristol according to the directions of the sender, paying the said railway company their said respective rates mentioned in the second paragraph of the affidavit for the carriage of such goods consigned in quantities under 500 lbs. in weight, from station to station, and, since the 19th of April last, without the aforesaid or any other deduction in respect of cartage: 6. That, on the 12th of April last, the complainants' firm received notice from the said company that they would no longer make any deduction from their aforesaid respective rates; and, since the 19th of April last, they had paid, and still continue to pay to the said company, for goods consigned in quantities under 500 lbs. in weight, the respective rates set forth in the second paragraph of this affidavit for the carriage of such goods from the station at Paddington to the station at Bristol; and the complainants charge their customers, or the consignees of the said goods consigned in quantities under 500 lbs. in weight, the same respective rates which the said railway [672] company charge the complainants, with a loss to the complainants on consignments above 1 cwt. and under 500 lbs. in weight, of the said sums of 3s. 4d. and 1s. 6d. per ton, and, on consignments under 1 cwt. in weight, of the said sum of 3d. on each package of goods, for the expense of the aforesaid cartage to the Paddington station and from the Bristol station: 7. That the company so refused to make any deduction in respect of cartage on and from the 12th of April last as aforesaid, as the deponent believed, for the purpose of compelling persons desiring to have their goods conveyed by their railway to employ the railway company to collect and deliver such goods, and thus to secure this business, and the profits upon it, to the company, and to exclude the complainants from competing with them in that department of business; and that such refusal made and gave an undue and unreasonable preference or advantage to and in favour of the company, and subjected the complainants to an undue and unreasonable prejudice and disadvantage. [The eighth paragraph referred to a list (marked A.) of goods con-

signed in quantities under 500 lbs. in weight, with the amounts paid by the complainants to the company for carriage of the same from Paddington station to Bristol station, from the 19th of April to the date of the application.] 9. That the company had from the 19th of April last to the present time charged, and still charged, all persons sending goods from London to Bristol, for goods consigned in quantities under 500 lbs. in weight, in the same several classes and of the same several kinds and descriptions as those mentioned and set forth in the list marked A., the same charges, including cartage from the residence or place of business of the sender in London and cartage from the station at Bristol to the residence or place of business of the consignee in Bristol, as the charges made to and paid by the complainants and set [673] forth in the said list marked A., for the said goods therein specified, for the carriage thereof from station to station only : [The tenth paragraph verified a list of consignments to several persons named, to whom the charges mentioned in the preceding paragraph had been made]: 11. That the complainants had forwarded, and continued to forward, goods of the first, second, third, fourth, and fifth classes, consigned in quantities under 500 lbs. in weight, and for which the company professed to charge, including the cartage from the residence or place of business of the consignor in London to the company's station at Paddington, and from the station at Bristol to the residence or place of business of the consignee in Bristol, the several and respective rates specified in the second paragraph of the affidavit; and that the company charged the complainants the same several and respective rates for the carriage of such goods consigned in quantities under 500 lbs. in weight from the station at Paddington to the station at Bristol, without doing any cartage for them. The affidavit then went on to shew the relative quantities of goods consigned by the complainants, and verified a list of the classification of goods made by the company.

Montague Smith, Q. C., and Field, now shewed cause, upon an affidavit stating, amongst other things,—that the change of system made by the company in April last was not adopted for the purpose of securing profits upon the business of collection and delivery of small parcels to the company, and to exclude the complainants from competing with them in that department, but was so adopted for the purpose of restoring and securing to the company their fair and legitimate profits as owners of and carriers upon their lines of railway, of which they had been and to a great extent still were deprived by the practices of the complain[674]ants and other carriers,—packing and aggregating small parcels in the manner detailed in *The Reading case*, ante, p. 336 : That the complainants and other carriers gained so much by this system of packing that they could afford to underbid the company in their rates, and to carry parcels for less than the company's charge would be for the same parcels if carried by them direct : That the complainants and other carriers were in the habit of aggregating parcels without packing them into one bag or hamper, that is to say, they put their own address over that of the ultimate consignee, and they brought up small parcels into a weight entitling them to be carried at a less proportional charge, and which they charged the sender or consignee for at the higher rate of charge, the parcels so aggregated having been collected from different persons and sent to different consignees : That, in all these cases, the complainants and other carriers collected the parcels as separate parcels, either by the sender taking them to their receiving-offices, or from door to door, by sending round carts for that purpose, and they delivered the parcels packed or aggregated at, and received them from, the stations of the railway, claiming the deductions formerly allowed for collection and delivery : That the complainants and other carriers, as a mode of bringing up the weights of their goods, in giving to the company a list of the goods sent for carriage declared a great number of goods under the general term of “manufactured goods,” which was a term used in the company's act of parliament, and the complainants claimed to have all such goods charged in the aggregate as one consignment, though each package might be of a totally different kind or character : That there was formerly allowed to carriers and the public alike, in all cases where goods were delivered to and received from any of the stations of [675] the railway, and whether they were small parcels or not, 3s. 4d. a ton, or at that rate, in London, and 1s. 6d. per ton at country stations; that the sums so allowed were not fixed upon with a view to a profit being made upon collection and delivery respectively, but the company were willing to collect and deliver goods for those sums as representing about the actual cost of the services performed, they looking then, as they did now, to making their profit on the

railway, and merely performing those services as subsidiary thereto; and that it was believed that the complainants and other carriers did not make any profit out of the allowances so given to them, but that they made their profit out of booking-fees, and by means of their being able to use the railway by packing and aggregating goods, and the other practices above mentioned: That the company were advised that the practices of the carriers as above mentioned were authorized by law, and that the company were bound to receive the parcels from the carriers so packed or aggregated, as if they were persons in trade, and as if the parcels were really sent by them in that way to other persons in trade; and that, in consequence of the continued practice of the complainants and other carriers to pack and aggregate in the manner above mentioned, and their rivalry against the company, and especially in consequence of the complainants declaring their goods under the general term of "manufactured goods," which was of very recent adoption, the company considered that they could afford to forego the whole or a portion of their charge for collecting and delivery of smalls, by offering inducements to the public to send such parcels to them direct, instead of their passing through the hands of carriers, and that the company would in that way gain more, by being able to charge for the carriage on their railway for parcels received from the [676] public separately, than they did formerly, when they made a charge for the collecting and delivery: That the company therefore determined, in April last, to make no charge for the collecting and delivery of parcels under 500 lbs. weight, or, in other words, to make the charge from station to station on the railway the same as the charge from or to the company's receiving-houses or the sender's door to and from the consignee's door; but, inasmuch as the system of packing or aggregating was not adopted (as being of no advantage to the carriers) when applied to parcels or packages other than "smalls," the company had not altered their system in respect to those parcels or packages: That the company had for some time established receiving-houses in several parts of London, and in all large towns and places where their lines of railway touch, at convenient spots for collection of goods, and thereby and by offering inducements to deal with them direct, they obtained, but in a fair way of business, the direct delivery of smalls to them at such receiving-houses, instead of having them packed or aggregated at the stations by the carriers; that, if there were no such receiving-houses, all the small parcels would be handed to the carriers who have depôts or receiving-offices, as, though large packages are often sent to the stations by the senders in their own carts or waggons, they seldom, if ever, send small parcels there, and did not do so when the allowance as aforesaid was made; and that the difference of profit earned by the company upon their lines of railway in respect of small parcels delivered at their receiving-houses, or collected by them from door to door, was enough to render it well worth their while to collect and deliver such parcels to and from the stations, without any charge at all for such collection and delivery: and that the receiving-offices also tended to [677] draw to the company goods generally, some of which would be sent by the carriers by other lines of railway than the Great Western railway, where two or more lines compete: That the complainants and the other carriers were, under the circumstances aforesaid, rival and competing carriers on the railway, and the company were acting in the premises bona fide with a view to their legitimate and fair profits as carriers on their railway: That the company charged the same rates to everybody as well as to the complainants and other carriers, and they had at all times been and were ready and willing to collect and deliver for them on the same terms and in the same way as they did for the public generally: And that it was the general practice of nearly all the railway companies who collected and delivered goods, including those who employed Messrs. Pickford & Co. as agents for the purpose, to refuse to make an allowance for collection and delivery on parcels below a certain weight, or, in other words, they collected, carried, and delivered goods for the same charge as they made for the carriage from station to station, and bore the cost themselves of the collection and delivery.

[Cockburn, C. J. Is there any distinction between this case and *Baxendale v. The Great Western Railway Company* (*The Reading case*), ante, p. 336?] There is a distinct statement here that no profit is made by the company upon the collection and delivery of small parcels: but that this service is gratuitously performed by them as ancillary to the carriage from station to station. [Cockburn, C. J. That was carefully concealed from us in *The Reading case*.] The affidavits on the part of the complainants

there did not assert that profit was made upon the collection and delivery: it was unnecessary, therefore, to negative it. [Cockburn, C. J. It was part of the Attorney-General's argument that it [678] was competent to the company to make profit either on or off their line.] It is somewhat hard upon the company to hold them to be bound by an admission made by counsel. [Cockburn, C. J. The court founds its judgment upon the facts which are sworn to and assumed. It is hard upon the court to be told afterwards that the admission was improvidently made. Our decision, however, was not based merely upon the undue preference. Independently of that,—assuming that the company derived no benefit from the collection and delivery, still the complainants incurred a disadvantage or undue prejudice from being charged the same for the carriage of their goods as if they availed themselves of a service which they did not require at the hands of the company.] The charge is made to all alike. [Cockburn, C. J. The effect is this, that, in order to compete with the carrier, the company make a man who has his own waggons and horses, and therefore does not require them to collect and deliver for him, pay more than he ought to pay for the transit on the railway. It is clearly a case of undue prejudice against the person not wanting the accommodation. If the company feel aggrieved, they must go to the legislature. I must confess I have always felt that the packed-parcel system operates hardly upon the railway. If it were a mere question between the company and the carrier, I should have thought the case required great consideration. But still the other question remains: there is a large class of the public who are as much prejudiced as the carrier.] Our affidavits shew that small parcels are seldom sent to the station by the general public: but that these usually come from the receiving-houses. It is substantially a question between the railway company and the carrier. To bring the case within the statute, it must be shewn that the preference or the prejudice is undue. That [679] cannot be fairly said to be undue which is the result of bonâ fide competition. The public do not complain of any prejudice here: it is only the carriers who complain. [Cockburn, C. J. The company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services which they do not desire to avail themselves of. That is not a legitimate mode of getting rid of the contest with the carriers.] *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77, was referred to.

Per Curiam. We must adhere to our former decision: and therefore the rule must be made absolute, with costs.

Rule absolute, with costs.

PELLEY v. SIDNEY. Jan. 31st, 1859.

[S. C. 28 L. J. C. P. 182; 5 Jur. N. S. 793.]

A. having an estate for sale which he conceived might be more advantageously disposed of in connection with a patent-right possessed by B., a negotiation took place between them which resulted in the following proposal from B.:—"I give A. full liberty to make use of my patent-right for the jug, in his advertisement for the sale of the Arley works, upon the recognized condition, that, if the works are sold, I am to receive 1000l." &c. This proposal was assented to by A., and the patent was tendered to him, but he required an assignment, and B. not being willing to make an assignment, the negotiation went off. The estate without the patent-right was afterwards conveyed to a company which A. was instrumental in forming, and in which he became a shareholder:—Held, that the event upon the happening of which B. was to be entitled to the 1000l. had never happened.—B. requiring an advance of 50l. to pay the stamp-duty on the patent, and one S. being willing to lend him that sum if A. would become surety for it, A. wrote as follows:—"If B. will get his friend S. to advance the 50l. for the completion of the patent, I will give him or S. the 50l. on the patent being handed over to me." The 50l. was accordingly advanced by S., and the patent was afterwards tendered to A., but he declined to accept it; and, S., having sued him for and recovered the 50l., he brought an action against B., for money paid to his use:—Held, that A. was entitled to recover the 50l.; and that

the refusal of the judge to put it to the jury whether the money was advanced by S. for the joint purpose of A. and B., did not amount to misdirection.

This was an action for money lent and money paid for the defendant at his request.

The defendant pleaded never indebted, and a set-off [680] amongst other things for money payable by the plaintiff to the defendant in respect of the defendant's having at the plaintiff's request given liberty to the plaintiff to make use of and advertise a certain patent-right of the defendant for a jug, in divers advertisements, &c., and for and in respect of a sum of 1000l. by the plaintiff, by an agreement between him and the defendant for a good and sufficient consideration in that behalf agreed to be paid to the defendant, on the sale of certain pottery works of the plaintiff called the Arley works, for an exclusive license to be given and granted by the defendant to the plaintiff, or to him and such parties or persons as he might direct, for the use by him or them to work and use in earthenware a certain patent-right belonging to the defendant, there having been a sale of the said works, and the defendant having been always ready and willing to give and grant the said licence, and he having in other respects done and performed all things, and all things having happened, to entitle him to payment of the said 1000l.

The cause was tried before Byles, J., at the second sitting in London in this term. The plaintiff sought to recover 80l., of which 30l. was claimed as money lent to the defendant, and 50l. as money paid to his use under the following circumstances:—

In the year 1856, the defendant possessed a patent for the manufacture of a peculiar description of jug. The plaintiff, being then about to dispose of an estate called "The Arley Estate," the soil of which was adapted for pottery-works, and conceiving that it might be more advantageously disposed of in connection with a right to use the defendant's patent, entered into an arrangement for that purpose, which was contained in the following correspondence through one Collinson, a mutual friend of the parties:—

[681] "8 Copthall Court, May 7th, 1856.

"My dear Collinson,—In reference to our conversation, I give Captain Pelly full liberty to make use of my patent-right for the jug, in his advertisement for the sale of the Arley works, upon this recognized condition, that, if the works are sold, I am to receive 1000l., and such further royalty for an exclusive licence to work my patent in earthenware, as we may in a friendly and fair spirit of business, or by reference, agree upon.

"GEORGE SANDS SIDNEY."

To this letter the plaintiff replied as follows:—

"4 Fenchurch Street, May 8th, 1856.

"My dear Collinson,—Mr. Sidney's letter to you is quite satisfactory between two gentlemen, and I am sure you will think so.

"R. W. PELLEY."

The plaintiff advertized the estate for sale; the advertizement stating that the proprietor had the exclusive right of manufacture of a very valuable pottery patent.

It being necessary to pay a sum of 50l. to secure the validity of the patent, the defendant applied to one Sim to advance the 50l. for that purpose, and proposed to the plaintiff to become surety to him for its re-payment. The plaintiff thereupon addressed a letter to Mr. Collinson, as follows:—

"4 Fenchurch Street, June 13th, 1856.

"My dear Collinson,—I have been thinking over Mr. Sidney's patent; and, if he will get his friend Mr. Sim to advance the 50l. for the completion of it, I will give him or Mr. Sim the 50l. on the patent being handed over to me, as I prefer this to being surety to another party.

"R. W. PELLEY."

[682] This letter was handed by Mr. Collinson to the defendant, who took it to Mr. Sim, who thereupon advanced the money for the duty. The patent was subsequently tendered to the plaintiff, but he required an assignment; and, this not being made, he refused to re-pay Sim the 50l. An action was afterwards brought against the plaintiff by Sim, who obtained a verdict against him.

It was contended on the part of the defendant, that the plaintiff was equally

interested with the defendant in getting the patent stamped, and that the 50*l.* advanced by Sim for that purpose was as much lent to the former as to the latter, and consequently that, in paying Sim, the plaintiff was paying his own debt, and not paying money to the defendant's use.

It was further contended for the defendant, that he was entitled to set off the 1000*l.*, which, it was alleged, had become due from the plaintiff to the defendant by reason of the sale of the Arley works.

As to this, the evidence was, that the plaintiff sold the Arley estate in February, 1857. The evidence as to this was, that a company was formed to work the estate in which the plaintiff took shares himself and induced other persons to take shares; but this was without any reference to the defendant's patent-right, which he had some time previously declined to have anything further to do with.

The learned judge intimated an opinion that the plaintiff had only a contingent interest in the patent-right when the 50*l.* was advanced by Sim for the purpose of stamping the patent, and that the money was lent to the defendant only; and that, in point of law, there had been no such sale of the Arley works in conjunction with the patent-right as to entitle the defendant to claim the 1000*l.* under the agreement: but he left it to the jury to say whether or not there had [683] been such sale in point of fact; and, at the request of defendant's counsel, he also asked the jury whether the 50*l.* advanced by Sim had been advanced for the joint purposes of the plaintiff and the defendant.

The jury said they had a difficulty in answering this last question, and the learned judge, telling them that it was in his judgment immaterial, withdrew it; as to the other question, the jury found there had been no sale of the estate with the patent-right, and they accordingly found a verdict for the plaintiff, damages 80*l.*

Shee, Serjt., on a former day in this term, moved for a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence. He submitted that the plaintiff and the defendant had a common interest in the patent, and that the evidence shewed that Sim made the advance as much for the one as the other, and therefore the question was a material one, and ought not to have been withdrawn from the jury. [Crowder, J. The money could only have been useful to the plaintiff provided he got a legal right to the patent.] The exclusive use of the patent-right was important to recommend his estate. Then, as to the set-off. The proof of the sale of the Arley works was this,—that the plaintiff procured a company to be formed, took shares in it himself, and got other persons to take shares. The learned judge said that this was no sale, and that alone disentitled the defendant to rely upon the set-off. It is submitted, however, that that was a sale within the meaning of this agreement: the plaintiff by this transaction ceased to be the master of the estate, and the company became the owners of it.

COCKBURN, C. J. We will speak to my Brother Byles.

Cur. adv. vult.

[684] WILLIAMS, J., delivered the judgment of the court:—The first objection made to the summing-up in this case was, that the learned judge should have required the jury to answer a question which was put to them at the instance of the defendant's counsel, and which he insisted was a material question, but which the jury declined to answer, viz. whether the 50*l.* advanced by Sim was advanced for the joint use of the plaintiff and the defendant. We think that point was wholly immaterial, and that the view taken by the learned judge was correct. In the result, it was perfectly clear that the money was advanced to the use of the defendant. The second objection urged upon the motion was, that my Brother Byles told the jury, that, in his opinion, there had been no such sale of the Arley works as was contemplated by the agreement, so as to entitle the defendant to the 1000*l.*, and that the learned judge was wrong in coming to that conclusion. We are of opinion that the 1000*l.* was to become payable only in the event of the Arley works being sold with the patent-right annexed to them: and, as it is clear upon the evidence that the works were not sold with the patent-right so annexed, there is no pretence for saying that the event had happened upon which alone the defendant was to become entitled to the 1000*l.* in respect of which the set-off is claimed. There will therefore be no rule.

Rule refused.

[685] THOMPSON AND OTHERS v. PARISH. Jan. 28th, 1859.

[S. C. 28 L. J. C. P. 153; 5 Jur. N. S. 986; 7 W. R. 210.]

Taking the defendant in execution is not an absolute extinguishment of the debt, so as to preclude the plaintiff from applying to the equitable discretion of the court to set off interlocutory costs due to the defendant in the same suit; though (semble) costs due to the defendant in a separate and distinct action cannot be so set off.—The plaintiffs obtained judgment against the defendant, and took him in execution. The defendant applied to a judge to discharge him from custody on the ground of irregularities in the plaintiffs' proceedings; and the plaintiffs obtained a cross-summons for leave to amend. The two summonses were heard together, and the judge made an order "that the plaintiffs be at liberty to amend, and that they should pay to the defendant his costs of and occasioned by the application to amend, and also by the defendant's application to set aside the proceedings." The court, in the exercise of its equitable jurisdiction, ordered that the costs payable to the defendant under the judge's order (which they held to be "interlocutory costs" within the 63rd rule of Hilary, 1853), should be set off against the plaintiffs' judgment,—dissenting from the law as laid down by Littledale, J., in *Beard v. McCarthy*, 9 Dowl. P. C. 136, and holding *Peacock v. Jeffrey*, 1 Taunt. 426, and *Simpson v. Hanley*, 1 M. & Selw. 696, to have been over-ruled by *Taylor v. Waters*, 5 M. & Selw. 103.

In the year 1857, the plaintiffs, as executors of Alfred Batson, deceased, commenced an action against the defendant to recover arrears of rent due from the defendant to their testator at the time of his decease; and they at the same time commenced another action against him as devisees in trust of the said Alfred Batson for other arrears of rent which became due to them as such devisees in trust since the death of the testator. The two actions were referred under the 17 & 18 Vict. c. 125, s. 3, to an arbitrator, who, on the 27th of August, 1857, certified in favor of the plaintiffs in each action,—in the first for 110l. 11s. 10d., and in the second for 50l. 5s.; and he directed that the defendant should in each action pay to the plaintiffs the costs of the reference, and that the defendant should bear and pay the costs of the award, and that, if the plaintiff should pay the costs of the award, the defendant should re-pay them the sum they should so pay. The defendant applied by summons to have the award or certificate referred back to the arbitrator; but the summons was dismissed with costs.

The costs of the first action were taxed at 8l. 16s. 2d., and the costs of the second action at 74l. 3s. 9d., and judgment was signed in each action on the 11th of November, 1857. On the 14th of December, a ca. sa. issued upon the judgment in the first action, and the defendant was arrested thereon. A ca. sa. also issued [686] against him in the second action, and notice thereof was given to the sheriffs. On the 7th of April, 1858, a summons was taken out, at the instance of the defendant, in each action, calling upon the plaintiffs to shew cause why the ca. sa. should not be set aside, and the defendant should not be discharged from the custody of the sheriffs of London, on the ground "that no judgment at the suit of the plaintiffs was entered up against him on the 11th of August, 1857, that the sheriffs of London had been directed in the writ to levy more than the plaintiffs were entitled to claim, viz. interest from that day, and that the writ was not tested in the name of the Chief Justice of the court of Common Pleas," and why the plaintiffs should not pay the costs of the application. On the following day, the plaintiffs' attorneys took out a summons to amend in each action. The four summonses were heard together before Pollock, C. B., on the 9th of April, when an order was made that the plaintiffs should be at liberty to amend the judgments and writs, and that they should pay to the defendant his costs of and occasioned by the applications to amend and also by the defendant's application to set aside the proceedings. These costs, as taxed, amounted in the aggregate to 24l. 16s. 6d.

On the 27th of November last, a summons was taken out on behalf of the plaintiffs in each action, calling upon the defendant to shew cause "why the plaintiffs should not be at liberty to set-off or deduct from the judgment in the first-mentioned action, or in equal or other portions from the judgment in each, the sum of 24l. 16s. 6d., the taxed costs under the order of the 9th of April, and why those costs should not

thereby be deemed satisfied, and why all further proceedings on the said order should not be stayed." These summonses came on to be heard before Byles, J., on the 30th of November, when his Lordship declined to [687] make any order, but stayed the proceedings until the fourth day of the present term, to enable the plaintiffs to make an application to the court.

No payment had been made by the defendant to or towards satisfaction or discharge of the judgments or either of them, but the whole of the above sums remained unpaid, together with an arrear of interest which had accrued due on the judgments respectively; nor had the defendant paid the costs of the order dismissing his application to refer the award back to the arbitrator (a).

Hawkins, Q. C., accordingly, on the fourth day of this term, obtained a rule nisi in the terms of the summons of the 27th of November. He referred to *Beard v. McCarthy*, 9 Dowl. P. C. 136, *Peacock v. Jeffery*, 1 Taunt. 426, *Simpson v. Hanley*, 1 M. & Selw. 696, and *O'Hare v. Reeves*, 13 Q. B. 659. [Willes, J., referred to *Taylor v. Waters*, 5 M. & Selw. 103.]

Couch now shewed cause. There are two objections to this rule. The first is, that the plaintiffs, by taking the defendant in execution under the ca. sa., have precluded themselves from any other remedy; the judgment is satisfied: per Parke, B., in *Morgan v. Cubitt*, 3 Exch. 612, 615. In *Beard v. McCarthy*, 9 Dowl. 136, it was held, that, where a defendant is taken in execution for the debt and costs recovered in an action, he is entitled to interlocutory costs in that section, which have not been set off on taxation. In that case, the plaintiff had commenced an action by writ of summons, and by a judge's order the service was set aside for irregularity, with costs. A fresh service of the writ [688] was effected, and the plaintiff proceeded with the action, obtained judgment therein, and took the defendant in execution. The defendant then sought to enforce payment of the costs due to him under the judge's order: the plaintiff applied to set off those costs against the debt and costs recovered by the judgment: and, after time taken to consider, Littledale, J., said,—“It seems to me that taking the defendant in execution is the same as if the defendant had paid the debt and costs: and, consequently, that the defendant is not bound to allow his costs to be set off against the debt and costs recovered by the judgment.” That is an express authority to shew that the plaintiffs cannot set off these costs: and it is put by the court upon the ground that the taking the defendant in execution is tantamount to payment of debt and costs. In *Taylor v. Waters*, 5 M. & Selw. 103, where it was held that B. cannot, in an action brought against him by A., set off a judgment recovered by him against A., for which A. is charged in execution, Lord Ellenborough says: “The taking of the body in execution does not extinguish the debt, but it bears the remedy against the debtor; and in like manner precludes a set-off against him.” And Bayley, J., says: “The taking him in execution destroys all remedy against him during his life.” These two cases of *Taylor v. Waters*, and *Beard v. McCarthy*, are treated as leading authorities upon this subject in Archbold's Practice, 9th edit., by Prentice, 650, and Gray on Costs, 517. In *Bevan v. Robins*, 8 D. & R. 42, the plaintiff, being nonsuited, was taken in execution by the defendant for the costs, and, whilst in execution, brought another action for the same cause, and the court refused to stay further proceedings in the second action until the costs of the first were paid. And Abbott, C. J., said,—“I think the objection to this rule is unanswerable. Here [689] the plaintiff is actually in execution for the costs of the former action: you can have no more than his body.” The case of *Metrille v. Leeson*, 27 Law J., Q. B. 318, which was referred to before the learned judge, to shew that the costs in question were interlocutory costs, and therefore the subject of a set-off under the 63rd rule of Hilary, 1853, is clearly distinguishable, inasmuch as there the defendant had been discharged from execution, and therefore it was the same as if he had never been taken in execution at all. The next objection is, that, the payment of the costs of the application at Chambers, though not strictly made a condition of the plaintiffs' being allowed to amend their proceedings, was in effect a condition. It was, to use the language of Tindal, C. J., in *Doe d. Hope v. Carter*, 1 M. & Scott, 516, 8 Bingh. 330, “a bargain between the parties by which the plaintiffs have obtained an advantage.”

(a) It appeared from the affidavit in answer that these costs were included in the judgment under which the defendant was detained.

To allow this set-off, would be to relieve the plaintiffs from performing the bargain on which the amendment was allowed.

Hawkins, Q. C., in support of the rule. The main question is whether these interlocutory costs,—which according to *Melville v. Leeson*, 27 Law J., Q. B. 318, they clearly are,—can be set off against the judgment for which the defendant is in execution in the same action. No laches can be imputed to the plaintiffs; for, as soon as the costs were taxed, they applied to a judge at Chambers to do that which is now sought by this motion. In *Beard v. McCarthy*, 9 Dowl. 136, the costs payable to the defendant under the judge's order had been taxed and were payable before the judgment was signed in the action, and the plaintiff had omitted to set them off at the proper time. Besides, that case can hardly be considered to be law. *Taylor v. Waters*, 3 M. & Selw. 103, only goes to this extent, that the [690] taking the body in execution bars the remedy against the debtor. The plaintiffs here are not seeking to enforce the judgment, but merely to protect themselves from a demand for costs in the same action, whilst a larger sum is due to them upon the judgment. In *Peacock v. Jeffery*, 1 Taunt. 426, it was distinctly held that taking the person in execution does not satisfy the debt so as to extinguish it; but it may still become the subject of a set-off. And that was acted upon in *Simpson v. Hawley*, 1 M. & Selw. 696. [Williams, J. Neither of those cases was referred to in *Beard v. McCarthy*. *Peacock v. Jeffery* is clearly not law: the set-off there was of an independent cause of action.] *O'Hare v. Leves*, 13 Q. B. 659, is also an authority in favor of the position that the taking the defendant in execution does not extinguish the debt. [Crowder, J. None of the cases were cited there. Cockburn, C. J. The ground of the decision was, that the plaintiff frustrated the execution by taking the benefit of the 48 G. 3, c. 128, s. 1. He does that subject to the condition that the debt shall be kept alive against his goods. Williams, J. It seems hard that a person who has a claim for interlocutory costs should be in a worse position than one who has a judgment. Although *Peacock v. Jeffery*, seems to shew that an independent judgment may be set off, although the party has been taken in execution upon it, yet there are two clear authorities that there can be no plea of set-off where the plaintiff has been taken in execution upon the judgment sought to be set off. That was expressly decided in *Taylor v. Waters*, 5 M. & Selw. 103. Willes, J. If it cannot be set off by plea, what authority is there for saying that it may be set off on motion.] The authorities are, no doubt, most conflicting; but it must be borne in mind that set-off is a strict legal right, and a plea of set-off is only allowed where the demands are mutual; [691] whereas, this is an application to the equitable jurisdiction of the court, who will not allow its process to be abused for purposes of injustice. [Cockburn, C. J. If the defendant had been discharged from the execution on the ground of irregularity, the plaintiffs would have issued an execution afresh having first deducted these costs. You say that they are substantially in the same position as if that course had been pursued?] Precisely so. I ask the court to give the plaintiffs the benefit of its equitable jurisdiction over the proceedings in this action.

COCKBURN, C. J. I am of opinion that this rule must be made absolute. The case of *Melville v. Leeson* establishes that these costs are interlocutory costs in the cause; and there is no doubt that the court, in the exercise of its equitable jurisdiction, may allow interlocutory costs accruing antecedently to the judgment to be set off against the judgment. The only difficulty here is that these costs were incurred subsequently to the judgment. I agree with my Brother Williams that the case of *Peacock v. Jeffery*, 1 Taunt. 426,—where it was held that a defendant might set off against a debt due to him from the plaintiff a judgment upon which he had taken the plaintiff in execution,—cannot be maintained as law. But there is an obvious distinction between that case and the present, inasmuch as here the costs sought to be set off are costs in the cause, though posterior to the judgment (*a*). In such a case it [692] seems to me that the court has a discretionary power to allow the set-off, and is bound to see that its process is not abused. I think it would be a gross abuse of the process of the court,

(*a*) Not strictly and technically "costs in the cause," but costs incurred in the action. "Costs in the cause," properly so called, are those costs only which the successful party in the suit would be entitled to on taxation, in the absence of an order to the contrary in the particular proceeding; and this necessarily excludes costs incurred subsequently to final judgment.

if an execution-creditor, having taken his debtor and having him in execution for a large sum, were to be compelled to hand over to his debtor (his claim being unsatisfied) a smaller sum which has become due to the latter for interlocutory costs in the same action. No doubt, there is a case which directly militates against the course we propose to take, viz. *Beard v. McCarthy*, 9 Dowl. P. C. 136. Although I entertain the most profound respect for the learned judge who decided that case, I cannot help thinking that he went further than can be supported by any authority or any principle, when he said that "taking the defendant in execution is the same as if the defendant had paid the debt and costs." I agree that it discharges the debtor so far as to prevent his creditor from pursuing any further remedy against him: but it is too much to say that it is equivalent to payment of debt and costs. The effect of taking the debtor in execution is, to suspend all other remedies against him for the debt. The creditor could not set it off against an independent claim for damages or costs in another action: but, where the debtor is in execution, and the creditor's claim unsatisfied, if a conflicting claim for costs arises in the particular cause, it seems to me that it is within the equitable jurisdiction of the court to see that in working out its process injustice is not done. It cannot be said that the debt is so far extinguished by the defendant's being taken in execution, as to preclude the court in its discretion from allowing the set-off here prayed. Look at the circumstances. The defendant says, that, by reason of certain irregularities in the plaintiffs' proceedings, he is entitled to be discharged from custody. The plain-[693]-tiff applies to a judge to be allowed to amend; and an order is accordingly made that the plaintiff amend his proceedings on payment of the costs occasioned by the alleged irregularities. The whole practically amounts to this,—that the defendant has been discharged from the first process, and taken in execution again under the amended process. If that had in reality been done, these costs might have been set off at once, and then the defendant would have been charged in execution for the debt and costs minus the amount now in question. Practically, no injustice has resulted from the course pursued, for the defendant has never sought to be released upon payment of the debt and costs less the costs payable under the order of the 9th of April. And the plaintiffs have been guilty of no laches, but made this application as soon as the costs were taxed. I therefore think we are bound to exercise our equitable jurisdiction in favour of the plaintiffs, and to allow the set-off.

WILLIAMS, J. I am of the same opinion, though I have felt no little doubt during the argument; and I must confess that my doubts are not entirely removed, though they are not important enough to induce me to differ from my learned Brothers. The first topic urged by Mr. Couch against the rule was, that the Lord Chief Baron never could have intended that these costs should be made the subject of a set-off; but that the order to amend was really meant to be conditional on payment of the costs of and occasioned by the irregularities. But, upon consideration, it seems to me that that is mere matter of surmise; and that, if the matter had been brought to the attention of the Lord Chief Baron at the time, he would have directed the costs of the amendment and of the summonses to discharge the defendant to be deducted from the amount [694] for which the defendant was to be detained in execution. All that, however, is mere conjecture: we can only act upon the order as we find it. Then, according to *McNellie v. Leeson*, if there had been no execution in this case, the costs in question would have been interlocutory costs, and might have been set off against the judgment debt due to the plaintiffs; and the question simply is, whether the set-off is precluded by reason of the debtor having been taken in execution. The authorities upon the subject are apparently conflicting: but, when looked at narrowly, none will be found important except *Beard v. McCarthy*, 9 Dowl. 136. I think *Taylor v. Waters*, 5 M. & Selw. 104, has established, on a satisfactory ground, not that the taking the debtor in execution extinguishes the debt, but that it bars the remedy, and so precludes the right of set-off in respect of a separate and distinct matter. If that be the true view of the law, it follows that the cases of *Pracock v. Jeffery*, 1 Taunt. 426, and *Simpson v. Hanley*, 1 M. & Selw. 696, which was founded upon it, are not good law. They are inconsistent with, and are in effect overruled by, *Taylor v. Waters*. I take it, then, to be clear that a judgment debt, for which the debtor has been taken in execution, cannot be directly or indirectly made the subject of a set-off by the judgment creditor against a claim arising out of a separate and distinct matter. In the case now under consideration, the costs which are sought to be set off arise in the same cause: and the question is, whether inter-

locutory costs (which these must be taken to be), can be set off after the defendant has been taken in execution. Independently of authority, I certainly feel some difficulty in saying that this set-off can be allowed, because it may be said that here the creditor, during all the time which elapsed between the original taking of the defendant in execution and the time at [695] which it was sought to set off these costs, has had the body in execution for the entire debt. It does not, however, appear that the defendant has been at all prejudiced by that here. If it had appeared that the defendant could or would at any time during that interval have paid the difference between the judgment and these costs, I think the case would have stood in a very different light. The question, however, must after all turn upon the discretion of the court over its own process. The difficulty I feel in saying that these costs can be set off is, that it seems to be an infringement of the rule laid down in several cases,—by Bayley, J., for instance, in *Taylor v. Waters*. Then, again, I cannot without hesitation give an opinion contrary to the considered opinion of that very eminent judge, Mr. Justice Littledale, who was peculiarly conversant with this subject; though I feel the less difficulty in disagreeing with him, because in his judgment in that case I think he puts it too high: the taking the defendant in execution does not amount to payment. In fact our decision in this case is little short of overruling the case of *Beard v. McCarthy*. Upon the whole, I agree with the rest of the court in thinking that the proper ground of our decision is, that we will not lend our aid to the defendant to take these costs out of the pocket of the plaintiffs, who have so large an unsatisfied claim against the defendant. I think the rule should be made absolute. As to the argument of hardship upon the attorney to allow these costs to be set off, I cannot help adverting to the distinction between interlocutory costs and the judgment-debt. For some reason or other, it has been thought right to provide, that, although no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, yet interlocutory costs in [696] the same suit may be deducted from the general costs, even though the attorney's lien may be prejudiced thereby.

CROWDER, J. I also am of opinion that this rule must be made absolute. The order of the 9th of April does not make the payment of the costs a condition of the amendment being allowed: it is simply an order that the amendment shall be made, and that the costs shall be paid: and, according to *Melville v. Leeson*, these are interlocutory costs, which clearly upon the authorities might have been set off against the judgment if the defendant had not been taken in execution. The only question is whether, the defendant having been taken in execution, he is to receive the costs under the order, whilst he has not otherwise satisfied the debt and costs in the action than by remaining in prison. *Taylor v. Waters*, 5 M. & Selw. 103, is an authority only for this, that there can be no set-off, where the subject-matter of the claim sought to be set off arises in a distinct action. But that does not apply where, as here, the subject-matter of set-off arises in the same action. It seems to me that it would be the grossest injustice to allow the defendant to receive costs from the plaintiffs under such circumstances; and I think we have ample power to interfere to prevent it. I agree that this is an application to the equitable discretion of the court: and, if it could have been shewn that the defendant had sustained prejudice by being kept in custody for the larger sum, when he was prepared to pay the smaller, there might be some reason for our declining to accede to this application. But nothing of the sort is suggested here. It seems to me that we have the power, in order to prevent an abuse of our process, to say that the set-off claimed may be allowed. With respect to [697] the case of *Beard v. McCarthy*, 9 Dowl. P. C. 136, I entirely agree with the observations of my Brother Williams. I should be very slow to overturn a case in which the very learned judge who decided that case had given a deliberate judgment: but, looking at the reasons he there gave, I must say that I think he lays down a proposition which cannot be supported, when he says that “taking the defendant in execution is the same as if he had paid the debt and costs.” That is directly opposed to what was said by Lord Ellenborough in *Taylor v. Waters*, 5 M. & Selw. 103, that “the taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor.” That seems to me to be the more correct statement of the law. The remedy is suspended so as to preclude a set-off of costs accruing in an independent action, but not so as to preclude a set-off of costs accruing in the same action.

WILLES, J. I am of the same opinion. The plaintiffs had no opportunity of setting off these costs before the present application. It appears that they are interlocutory costs incurred in the same suit as that in which the judgment against which it is sought to set them off has been recovered, and not costs incurred in another action. We are here dealing with proceedings in the particular suit: and it is our duty as well as we can to see that complete justice is done between the parties. That requires that the creditor should be satisfied the amount of his judgment for debt and costs: and it would certainly be great injustice if the defendant, when he is obliged to go to gaol because he is unable or unwilling to pay his creditor, should still have power to compel the latter to pay him a sum of money in respect of costs incurred in the course of the same proceedings. It would need some very strong [698] authority to induce us to come to such a conclusion. Mr. Couch says that the taking the debtor in execution under a ca. sa. is an extinguishment and satisfaction of the debt. That, however, clearly is not so. In *Foster v. Jackson*, Hob. 52, 59, where the origin of the execution by ca. sa. is given in the course of a very learned and elaborate judgment, it is expressly laid down that the taking the debtor under a ca. sa. is not an actual satisfaction. If a person taken on a ca. sa. died in execution, the plaintiff had no further remedy, because he had determined his choice by this kind of execution, which, affecting a man's liberty, was esteemed the highest and most rigid in the law. So, if a party taken on a ca. sa. escaped, or was rescued, the plaintiff could not sue out a new execution. But that was set right by the statute 21 Jac. 1, c. 21. It comes, then, to this, that the creditor, having elected to take his remedy against the body of his debtor by ca. sa., cannot afterwards have recourse to any other remedy against his lands or goods. Here, the plaintiffs have their debtor in execution upon a judgment obtained against him; and an order has been made in the same suit, under which the defendant has become entitled to a small sum for costs. The parties are still before us. We think it would be manifestly unjust to allow the defendant to obtain money from the plaintiffs under that order whilst their larger claim against him remains unliquidated. I quite feel, that, in so deciding, we are differing from the decision come to by Littledale, J., after deliberation, in the case of *Beard v. McCarthy*, 9 Dowl. P. C. 136, and that our judgment cannot be carried to a court of error. But, notwithstanding these circumstances, the parties are entitled to have our opinion. And the best opinion that I can form is, that the set-off claimed ought to be allowed. In saying that taking the debtor in execution under a ca. sa. is not a satisfaction of the [699] debt, I do not mean to say that in no case can it so operate: for instance, in a case where the debtor has been discharged by consent (*a*), a different question might arise; for, there, the creditor would have had complete satisfaction, and the debt would be extinguished. I did not advert to that, because the question could hardly arise in the same suit.

Rule absolute.

ANTONIO ROSSI v. GRANT. Jan. 19th, 1859.

The plaintiff having brought an action for wages as a seaman to an amount less than 50*l.*, together with a claim for damages for an alleged assault, the court allowed the defendant (upon terms) to plead, in addition to others, a plea founded upon the 188th and 189th sections of the Merchant Shipping Act, 17 & 18 Vict. c. 104.

The declaration in this case contained three counts for three several alleged assaults, a count for not supplying the plaintiff, a mariner, with proper food whilst on board the defendant's ship, and for non-payment of wages, and also a count upon an account stated.

W. Williams moved for leave to add a plea, which had been disallowed by Byles, J., at Chambers, that the action was brought for the recovery of wages under 50*l.*, and the plaintiff was therefore precluded by the 188th and 189th sections of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, from maintaining an action in the superior court. The 188th section enacts that "any seaman or apprentice, or any person duly authorized on his behalf, may sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at

(a) See *Catlin v. Kernot*, ante, vol. iii., p. 799.

which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides,—or, in Scotland, either before [700] any such justice, or before the sheriff of the county within which any such place is situated,—for any amount of wages due to such seaman or apprentice not exceeding 50*l.* over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final.” And the 189th enacts that “no suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted by or on behalf of any seaman or apprentice in any court of Admiralty or Vice-Admiralty, or in the court of Session in Scotland, or in any superior court of record in Her Majesty’s dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any justice acting under the authority of this act refer the case to be adjudged by such court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.” [Cockburn, C. J. I think this is a question which the defendant ought to have an opportunity of raising.]

Brett, shewed cause in the first instance. The question is, whether the plaintiff is to have part of his cause of action tried before the magistrate, and the other part here. [Cockburn, C. J. If the statute has clearly and absolutely deprived the superior court of jurisdiction, we must allow the plea. Williams, J. Assuming that the statute is imperative, can a party give himself a right to sue for wages in the superior court, by adding counts for an assault or any other cause of action? We must not assume that the assaults will be proved. Cockburn, C. J. I must confess I do not see why the defendant should not put this matter upon [701] the record.] This is a plea to the jurisdiction, and therefore too late. [Willes, J. It has been held to be a plea in bar.] It is submitted that the 189th section is applicable only where the claim is for wages simpliciter, and not where another cause of action is added. [Williams, J. Before the Common Law Procedure Act, these causes of action could not have been joined. Willes, J. The real question is, whether this is not a plea which the judge might in his discretion decline to allow, upon the ground that it is vexatious.]

COCKBURN, C. J. I think it would be hard upon this man, if he has well-founded causes of action, that he should be compelled to separate them, and to sue for one before the magistrates and for the others in the superior court. But still I think it is a question which the defendant has a right to raise, and that the proposed plea is not so frivolous or vexatious that he ought not to be allowed to plead it. The trial, however, must not be delayed.

WILLIAMS, J. I also think the proposed plea should be allowed. The principle by which I have always been guided in these matters is, that the defendant should be permitted to set up any reasonable defence. I think we have no discretion to disallow a plea because it sets up an unworthy ground of defence. I express no opinion as to the validity of the plea.

CROWDER, J. I also think the plea should be allowed. On the assumption that the plea is a valid one, I should not consider that I had a discretion to refuse to allow it, on the ground that I disapproved of it morally. Whether the case is within the meaning of the statute is a matter that is very fit to be considered; and it [702] will undergo full consideration if brought before us on demurrer. The point is certainly open to much argument.

WILLES, J. I must own that I should have taken the same view of this matter that my Brother Byles took. This, as it seems to me, is a dilatory plea, which the judge may in his discretion decline to allow with others. I do not think we ought to assume that the counts for the assaults were put into the declaration for the purpose of evading the statutory prohibition. It is unnecessary to discuss the matter: all I mean to say is, that I should have taken the same view that my Brother Byles took. I think, however, that Mr. Brett will do well to consider whether he should not traverse that this is a suit for wages within the meaning of the statute. He might be beaten upon a demurrer, inasmuch as the court could only look at that particular breach.

COCKBURN, C. J. All difficulty may be obviated by giving the plaintiff leave to reply and demur, as a judge at Chambers would do.

The rule was drawn up as follows,—“That the defendant be at liberty, before 12 o'clock to-morrow, to plead a plea on the 17 & 18 Vict. c. 104, ss. 188, 189, in addition to the pleas already pleaded in this cause; the plaintiff being at liberty to reply and demur thereto, to amend the record and pleadings if necessary, and to enter his record for trial with the associate on Saturday afternoon next, —the defendant by his counsel hereby undertaking to accept such notice of trial for the next sitting as the plaintiff shall be enabled to give.”

[703] THE WOLVERHAMPTON NEW WATERWORKS COMPANY v. HAWKSFORD.
Jan. 29th, 1859.

[S. C. 28 L. J. C. P. 198.]

Interrogatories under the Common Law Procedure Act, 1854, as to the contents of a lost document supposed to have been executed by the party interrogated, allowed, upon a *prima facie* case of loss being made out by affidavit,—subject to the probably unnecessary condition that the answers were not to be used at the trial unless such evidence was given of the loss of the document as to make secondary evidence of its contents admissible.—In an action for calls by a public company, the plaintiff was allowed to interrogate the defendant as to “whether and when he received from A. B. any writing relating to his becoming a director or shareholder, and what had become of it, and when and where he last saw it,”—the description of the writing being nothing more than was necessary for its identification.

This was an action brought to recover the amount of calls upon the defendant in respect of one hundred shares in the Wolverhampton New Waterworks Company, of which he was alleged to be the holder. The defendant having pleaded, amongst other things, that he was not a subscriber to the undertaking, application was made to Byles, J., for leave to deliver interrogatories to the defendant under the 51st section of the Common Law Procedure Act, 1854, of which the following, amongst others, were disallowed by the learned judge, on the ground (as was alleged) that it is not permitted to an interrogator to inquire into the contents of a written document, or as to whether the defendant executed any, without producing it,—

“No. 6. Did you subscribe or authorize any one to subscribe for you for 6000l. to the undertaking of the said company? and did you sign or execute, or authorize any one to sign or execute for you, a subscription-contract, or document as the subscription-contract required to be made before the company could go to parliament to obtain their act of parliament?”

“No. 7. Did you know Robert Baker, who was a clerk to Mr. Corser & Underhill. Did you execute the said contract in his presence?”

“No. 22. Did you ever, and when, receive from George Holyoake any writing relating to your becoming a director or shareholder? If yea, what has become of it? and when and where did you last see it?”

Mellish, on a former day in this term, obtained a [704] rule calling upon the defendant to shew cause why the above interrogatories should not be allowed. The affidavit of the plaintiff's now attorney, upon which the rule was moved, after stating that the deponent, who had succeeded a Mr. Underhill, the former attorney of the company, never had the subscription contract delivered up to him, and that he had been unable to obtain it or to discover in whose possession it was, proceeded thus,—“That the original subscription-contract was supposed to be in the possession of Mr. Underhill, the late solicitor to the said plaintiffs, or of the parliamentary agents, or of Mr. George Holyoake, the late chairman and a director of the company: that notice was given to the said defendant to admit the printed copy of the said contract filed in the Private Bill Office, but the said defendant neglected or refused to admit the same: that the best information the plaintiffs could obtain of the last possessor of the said original contract was, that the same had been in the parliamentary agent's office for comparison with the copy filed, and that the same had been seen afterwards in the office of the said Mr. Underhill, and that the said Mr. Underhill denied the possession or knowledge of it at the time he was served with the subpoena, and he did on the 7th of January instant repeat such denial to the deponent.” The affidavit further stated that the defendant's name was advertized in the prospectuses issued by the company both

before and after their act of incorporation (18 & 19 Viet. c. cli.) was obtained, as one of the directors; that the act of parliament required that the qualification of a director should be the possession of one hundred shares in his own right; and that the defendant's name appeared in the act as one of the directors.

Phipson shewed cause. The interrogatories in ques-[705]-tion relate to the contents of a written document. They are matters as to which the defendant could not be examined at the trial. The ground upon which it is sought to have these interrogatories administered is, that the document to which they relate is supposed to be lost. Assuming that it is lost, that is no ground for this application. It may be found before the trial. The plaintiffs can only give secondary evidence of the contents, on proof to the satisfaction of the presiding judge that due search has been made for the instrument, and that it cannot be found. [Crowder, J. If such evidence is given at the trial, I do not see why the defendant's answers should not be relied on as secondary evidence.] The legislature never meant by these provisions to alter the rules of evidence. The proper course for the plaintiffs to pursue will be, to subpoena the defendant, and, the judge being satisfied that secondary evidence ought to be received, to examine him as to the contents and execution of the deed. To allow this will be establishing a dangerous precedent. What is there to prevent the plaintiffs from giving the defendant's answers in evidence against him as an admission, upon the principle of *Slatterie v. Pooley*, 6 M. & W. 664, without any proof of the loss of the deed? As to the twenty-second interrogatory, the objection to that is, that it is seeking to obtain the contents of a written document, without producing it. The interrogatory goes far beyond what is necessary for the identification of the document interrogated to.

Mellish, in support of his rule. The objection to the sixth and seventh interrogatories is clearly untenable. The plaintiffs would not be entitled to use the answers at the trial, unless they shewed that they had put themselves in a position to give secondary [706] evidence of the contents of the instrument. [Williams, J. Like the examination of a person who is ill, under the 1 W. 4, c. 22: before the party can avail himself of the evidence, it must be shewn that the witness is ill at the time of the trial. Willes, J. Cannot the defendant, as they do in Chancery, for further certainty refer to the deed? Cockburn, C. J. We can limit the rule, that the interrogatories shall be read only on proof given of the loss of the deed.] That will meet one of the defendant's difficulties. If the plaintiffs prove at the trial that the subscription-contract is lost, or give reasonable evidence of an unsuccessful search for it, that will let in secondary evidence, and then the defendant's answers to these interrogatories will be admissible; for, that would bring the case within the express words of the 51st section of the 17 & 18 Viet. c. 125, inasmuch as the defendant would be liable to be called and examined as a witness upon such matter. It is material for the plaintiffs to be informed before-hand whether or not the defendant did execute the contract. The very object of the statute was to enable the plaintiff thus to test his opponent's knowledge. The twenty-second interrogatory is framed in very general terms. It does not ask as to the contents of any letter, but merely whether any relating to the matter in dispute has been received by the defendant. It was cautiously worded in order to avoid extracting any admission from the defendant.

COCKBURN, C. J. The only difficulty in this case is as to the admission of secondary evidence of the contents of the document in question without proper proof of its loss. A *prima facie* case of loss having been made out by the affidavit, I see no reason why the sixth and seventh interrogatories should not be allowed, care being taken that no use is made of them at the trial [707] without previous proof of the loss of the subscription-contract, so as to entitle the plaintiffs to give secondary evidence of its contents. It must be made a part of the rule that the defendant's answers should not be read unless a foundation be first laid for the admission of secondary evidence. As to the twenty second interrogatory, that seems to be in the ordinary form, to found an application to a judge for discovery under s. 50.

WILLIAMS, J. The twenty-second interrogatory does not, I think, go beyond what is necessary for identifying the letter or writing as to which the defendant is interrogated. With respect to the sixth and seventh, I do not see why the benefit of the act should not be extended to a case of this sort, when satisfactory evidence is given of the loss of the instrument the contents of which are sought to be proved by

secondary evidence. Probably, if we made no special order upon the subject, it would be taken to be an implied condition that the defendant's answers to these interrogatories should not be available unless ground were previously laid for the admission of secondary evidence. But, with that restriction, I am clearly of opinion that the interrogatories should be allowed.

CROWDER, J., and WILLES, J., concurring,

Rule absolute (a).

[708] BECKH v. PAGE AND ANOTHER. Jan. 24th, 1859.

[Affirmed in Exchequer Chamber, 7 C. B. N. S. 861.]

The defendants contracted to buy of the plaintiff "115 bales, containing 18,440 (or any less number that may arrive) East India hides, shipped per 'Ontario,' Calcutta to Hamburgh, and to be delivered at 11½d. per lb. round, but the wrappers to be charged at 8d. per lb." The ship having been compelled by stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, and were sold. The remaining 97 bales arrived, but the defendants refused to accept them:—Held, that the words "or any less number that may arrive," applied to the number of bales, and not merely to the number of hides, and consequently that the defendants were liable for not accepting the 97 bales.

This was an action brought to recover damages from the defendants for an alleged breach of contract in not accepting and paying for certain East India hides.

The first count of the declaration stated, that, by an agreement made between the plaintiff and the defendants, it was mutually agreed between them that the plaintiff should sell to the defendants, who should buy from the plaintiff, one hundred and fifteen bales, or any less number of bales that might arrive, of hides, in the said agreement described as East India hides, said to be very good Patna, and shipped in the ship "Ontario" at Calcutta, to Hamburgh, and to be delivered in London, at 11½d. per lb. round, but the wrappers to be charged at 8d. per lb.: That it was by the said agreement further agreed that the said hides were to be taken by the defendants with all faults and defects, but that the defendants were to have the benefit of any claim that might be recovered on the original policy of insurance between Calcutta and Hamburgh, or on the policy to be effected between Hamburgh and London; and that the said hides were to be invoiced at the landing weights from the Queen's beam, and to be at the risk and expense of the defendants from the time of being weighed, the weight of wrappers to be averaged by weighing those from a few bales, and the tare for rope to be estimated by stripping a few bales, and the usual draft to be allowed: That it was thereby further agreed that, if the said ship should be lost, or should the ship bringing the hides from Hamburgh be lost, the contract was to be null and void: That it was further agreed that any question or dispute that might arise upon that contract should be settled and [709] decided by the selling brokers: That it was thereby also further agreed that the price of the said goods was to be paid in cash on delivery, or within twenty-eight days from the last day of landing, allowing a discount of 2½ per cent.: Averment that neither of the said ships was lost, and that the said one hundred and fifteen bales of hides arrived by ship at London aforesaid, where the plaintiff was ready to deliver the same to the defendants on the terms aforesaid, whereof the defendants had notice; whereupon a question and dispute arose between the plaintiff and the defendants upon the said contract, which the plaintiff within a reasonable time in that behalf was willing to refer, and requested the defendants to refer, to the settlement and decision of the said selling brokers, and the said brokers were willing to settle and decide the same: and all things had happened and been by the plaintiff observed, which were necessary to entitle the plaintiff to

(a) The rule was drawn up as follows,—“that the plaintiffs be at liberty to deliver to the defendant, or to his attorney, the interrogatories in writing as originally numbered 6, 7, and 22, that were disallowed by Byles, J.,—the answers to the said 6th and 7th interrogatories to be given in evidence upon the trial of this cause, in the event only of the said plaintiffs being in a position to give secondary evidence of the subscription-contract therein mentioned or referred to.”

have the said question and dispute settled and decided by the said brokers: Yet the defendants had wholly neglected and refused to allow the said question and dispute to be settled or decided by the said brokers, whereby the settlement and decision of the said question and dispute had been greatly delayed, and could only be obtained at a much greater expense than if the same had been referred to the settlement and decision of the said brokers; and the plaintiff had also for a long period been deprived of the use of a large sum which he was and is entitled to according to the said contract; and that all things had happened and had by the plaintiff been observed and performed which were necessary to entitle the plaintiff to have the said bales of hides accepted and received and paid for by the defendants according to the said agreement, and the time for the defendants' so doing had elapsed before this action; yet the defendants had made de-[710]-fault in accepting, receiving, and paying for the said bales of hides, or any of them, and the defendants had wholly neglected and refused so to do, whereby the plaintiff had incurred great expense in warehousing and taking care of the said bales, and by the fall in the market-price and value of hides the same had become of less value to the plaintiff than the price so agreed to be paid for the same by the defendants.

There were also counts for goods bargained and sold, and for money found due upon accounts stated.

The defendants pleaded,—first, to the first count, that they were induced to make the said contract in that count mentioned, by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him,—secondly, to the first count, that the hides, the subject of the said contract, did not arrive as alleged,—thirdly, as to so much of the first count as alleged that the defendants neglected and refused to allow the question and dispute to be settled or decided by brokers, that no question or dispute arose between the plaintiff and the defendants upon the said contract, within the true intent and meaning of such contract,—fourthly, as to so much of the first count as in the introductory part of the last plea mentioned, that the plaintiff did not request the defendants to refer the said question and dispute to the settlement and decision of the said brokers, as alleged,—fifthly, as to the residue of the declaration, that they never were indebted as alleged,—sixthly, as to the residue of the declaration, that the defendants were induced to contract the debts therein mentioned by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Issue thereon.

The cause came on to be tried before Cockburn, C. J., at the sittings in London after Hilary Term, 1858, when a verdict was found for the plaintiff: [711] but leave was reserved to the defendants to move to enter the verdict for them upon the construction of the contract. The following were the facts proved so far as they were material to raise the point reserved:—

The plaintiff is a merchant in London; and the defendants are hide and leather-merchants in London.

On the 21st of February, 1857, the defendants entered into a contract with the plaintiff for the purchase from him of certain East India hides, as follows:—

“Messrs. Page & Welch.

“London, 21st February, 1857.

“Gentlemen,—We have this day bought, by your orders and for your account, of Messrs. E. Beekh & Co.

“P. B. 326/425, 100 bales, containing 15,600
H. B. 1 15 15 „ „ 2,340

(or any less number that may arrive) East India hides, said to be very good Patna, shipped per ‘Ontaria,’ Calcutta to Hamburg, and to be delivered in London, at 11½d. per lb. round; but the wrappers to be charged at 8d. per lb. The hides to be taken with all faults and defects, but the buyers to have the benefit of any claim that may be recovered on the original policy of insurance between Calcutta and Hamburg, or on the policy to be effected between Hamburg and London: to be invoiced at the landing weights from the Queen's beam, and to be at the buyer's risk and expense from the time of being weighed; the weight of wrappers to be averaged by weighing those from a few bales. Tare for ropes to be estimated by stripping a few bales. Usual draft to be allowed.

"Should the above-mentioned vessel be lost, or should the ship bringing the hides from Hamburg be lost, this contract to be null and void.

"Any question or dispute that may arise upon this contract, to be settled and decided by the selling brokers.

[712] "Payment, cash on delivery, or within twenty-eight days from the last day of landing, allowing a discount of $2\frac{1}{2}$ per cent. "ANNING & COBB."

The ship "Ontaria" mentioned in the said contract originally sailed from Calcutta on or about the 12th of July, 1856, having on board one hundred bales of hides marked respectively P. B. 326/425, and fifteen bales of hides marked respectively H. B. 1/15.

The ship was compelled by stress of weather to put back to that place on or about the 9th of August, 1856, with damage to herself and cargo, including a portion of the hides so shipped as already mentioned.

The cargo was thereupon re-landed, and a portion thereof sold as damaged. Amongst the portion so sold were sixteen of the said bales marked P. B. and two of the said bales marked H. B.

The ship "Ontario" sailed again from Calcutta on or about the 21st of November, 1856, having on board the residue of the said one hundred and fifteen bales, that is to say, eighty-four bales marked P. B. and thirteen bales marked H. B.; and the said eighty-four bales and thirteen bales respectively arrived in London about the 7th or 8th of May, 1857, and were tendered by the plaintiff to the defendants.

The plaintiff himself proved that the defendants at the time of making the contract were informed of the original shipment of the one hundred and fifteen bales, and that the plaintiff at that time was aware of the ship having put back to Calcutta with heavy average.

The defendants, at the close of the plaintiff's case, on these facts, contended that they were not bound to accept the said eighty-four bales and thirteen bales respectively, on the ground that, by the terms of the contract, they were not bound, under the circumstances, to accept any less number than one hundred and fifteen bales.

[713] The Lord Chief Justice declined to nonsuit, but reserved leave to move.

The defendants then gave evidence, amongst other things, that, at the time of the contract, they were not aware of the ship having put back.

At the close of the whole case, leave to move to enter a verdict for the defendants on the traverse of the agreement and plea of never indebted was reserved,—the court to have power to make any amendments in the pleadings which the judge *ad nisi prius* ought to have made. The other points in the case were left to the jury, who found a verdict for the plaintiff, which was entered accordingly, subject to the above-mentioned leave reserved.

J. Wilde, Q. C., in Easter Term last, pursuant to the leave reserved, obtained a rule *nisi* to enter a verdict for the defendants "on the construction of the contract," or for a new trial on the ground that the verdict was against the evidence.

Montague Smith, Q. C., and Unthank, shewed cause. The contract is correctly described in the declaration: the words "or any less number that may arrive" apply to the "bales," and not to the "hides"; and the seller was under no obligation to deliver more bales than actually arrived. A "bale" is a thing well known in the trade as containing a definite number of hides, viz. 156. If there were any less number in a bale, it would be mere *falsa demonstratio*, and immaterial. The bales bought are ear-marked, and to be paid for at per lb. The words "or any less number that may arrive" certainly apply as much to the bales as to the hides. [Williams, J. There is a difficulty in your construction, if you construe the language of the contract grammatically: the description of the subject [714] matter of the contract begins with the word "containing," and ends with "hides," the parentheses being in the middle of the sentence.] The language certainly is not free from ambiguity: but, upon the whole, it is submitted that the construction contended for on the part of the plaintiff is the more reasonable one. There is no pretence for saying that the verdict was against the evidence.

J. Wilde, Q. C., and Honeyman, in support of the rule. According to the correct grammatical construction of the contract, the words "or any less number that may arrive" apply to the hides, and not to the bales. It was an absolute contract for the sale of one hundred and fifteen bales, to contain an uncertain number of hides, about

17,940; and the defendants were not bound to accept any less number of bales. The verdict was clearly against the weight of evidence.

COCKBURN, C. J. I am of opinion that this rule must be discharged. Although the language of the contract is not free from ambiguity, and perhaps according to its strict grammatical construction, the words within the parentheses, "or any less number that may arrive," should be applied to the immediate antecedent, viz. the number of hides, yet, upon the whole, it seems to me to have been manifestly the intention of the parties that those words should apply to the entire subject-matter of the contract,—the bales and their contents: and consequently there is no ground for the contention of the defendants, that they were not bound to accept the less number of bales which arrived. As to the other ground of the motion, viz. that the verdict was against the weight of evidence, the whole matter seems to have been left to the jury in a manner which is not complained of, and I see no reason for being dissatisfied with the conclusion at which the jury arrived.

[715] WILLIAMS, J. I incline to think, that, according to the grammatical construction of the contract, the words "or any less number that may arrive," are applicable to the number of hides and not to the number of bales. The contract begins with specifying the number of bales, and then proceeds to describe the contents; and, in the course of that description, after giving the number of hides which the bales are supposed to contain, the words within the parentheses occur. It seems to me that these words of limitation or condition were intended to apply to the number of hides, and not to the number of bales. My lord and my learned Brothers, however, have come to a different conclusion: and certainly the language the parties have used is not in any point of view susceptible of a strictly grammatical construction; they use the word "containing," which is more properly a word of present description, and is not properly applicable to that which is matter of contingency. The contingency of arrival is certainly more applicable to the bales than to the hides. Upon the whole, therefore, I concur with the rest of the court that the non-arrival of a portion of the bales did not justify the defendants in declining to accept those which did arrive. Upon the other point also, I concur in thinking that we ought not to disturb the verdict. There was evidence on both sides, and the direction is not complained of.

CROWDER, J. I am of opinion that this rule should be discharged. The first objection is to the language of the contract, whereby the plaintiffs agree to sell to the defendants "115 bales containing 17,940 (or any less number that may arrive) East India hides:" and it is said, that, according to the grammatical construction of the contract, the words "or any less number that may arrive," apply to the hides, and not to the [716] bales. That seems to me to be a very strange proposition. There could be no doubt as to the meaning of the parties if the words were transposed, and the contract made to read thus,—“115 bales, containing 17,940 East India hides, or any less number that may arrive.” I think it is plain that the parties meant “115 bales, to arrive, or any less number that might be on board.” In holding that the words in question apply to the bales, I do not think we do any violence to the language of the parties. As to the other point, I agree with the rest of the court in thinking that there is no ground for our interference.

WILLES, J. I am of the same opinion. As to the construction of the contract, I entirely concur with what has fallen from my Lord and my Brother Crowder,—“or any less number that may arrive” applies to all that is before enumerated, whether bales or hides.

Rule discharged (a).

[717] LANCASTER AND ANOTHER v. EVE AND ANOTHER. Jan. 26th, 1859.

[S. C. 28 L. J. C. P. 235; 5 Jur. N. S. 683; 7 W. R. 260. Discussed, *Parsons v. Hind*, 1866, 14 W. R. 861. Applied, *Hoare v. Metropolitan Board of Works*, 1874, L. R. 9 Q. B. 300. Applied, *Moody v. Steggles*, 1879, 12 Ch. D. 265. Distinguished, *Hobson v. Goringe*, [1897] 1 Ch. 182. Approved, *Philpot v. Bath*, 1905, 21 T. L. R. 635.]

The presumption that that which is annexed to the soil becomes part of the soil, may

(a) This judgment was affirmed by the Exchequer Chamber, on appeal.

be rebutted by circumstances shewing the intention of the parties to the contrary. —The plaintiffs were possessed of a wharf on the Thames, in front of which was a pile which had more than twenty years ago been driven into the bed of the river by the then occupiers of the wharf, and had remained there without interruption from the Crown or the conservators of the river, and which was essential to the use and enjoyment of the wharf :—Held,—the fact of the ownership not being disputed, —that the court were justified in presuming that the pile had been placed there in virtue of an easement, with the consent of the owners of the soil, and that a sufficient possession remained in the plaintiffs to entitle them to maintain an action against the defendants for negligently running against and destroying the pile.

This was an action for an injury done to a pile, the property of the plaintiffs, in the river Thames.

The declaration stated that, at the time when, &c., the plaintiffs were possessed of a wharf near to and adjoining the river Thames, and of a certain pile of wood lawfully driven into the ground near thereto and in and by the side of the said river ; and that the defendants were possessed of a barge, and had by their servants the care, direction, and management of the same, and were navigating and using it on the said river ; yet that the defendants, by their said servants, took so little and such bad and improper care of their said barge, and governed, managed, navigated, and directed the same in so careless, negligent, and improper a manner, that the same, by and through the carelessness, negligence, unskilfulness, misdirection, mismanagement, and improper conduct of the defendants, by their said servants in that behalf, then with force and violence came and ran foul of and upon and against the said pile, and thereby broke, damaged, and injured the said pile, whereby the plaintiffs were put to and incurred great expense in repairing the said damage and injury, and in placing and fixing a new pile in the ground in lieu of the said pile so broken and damaged as aforesaid, and they were and are otherwise injured thereby.

The defendants pleaded,—first, not guilty,—secondly, that the plaintiffs were not possessed of the said pile,—thirdly, that the pile was at the said time when, &c. [718] unlawfully driven and fixed into the soil and bed of the said river Thames, the same being a public and common navigable river and a common highway, and into and on a part thereof where the said river was so public and common and navigable and such common highway as aforesaid, and where all the liege subjects of our lady the Queen at the said time when, &c. had a right to and lawfully ought to and might pass and repass with and navigate and conduct their vessels and barges at their free will and pleasure at all times of the year ; that the said pile of wood so driven and fixed was unlawfully and improperly obstructing the passage of the said part of the said river and highway ; that the defendants, having occasion for their said barge to pass in and along the said part of the said river, as they were lawfully entitled to do, the said barge, against the will of the defendants and their said servants, was carried and driven by the force and pressure of the tide and stream there upon and against the said pile of wood so there unlawfully being, and, the same then being old, infirm, and decayed, and unfit to be left in that position by the plaintiffs,—of which the defendants and their said servants had no notice,—the same became and was broken and injured as in the declaration mentioned ; and that the damage and injury arose and was occasioned by means of the premises in that plea mentioned, and not otherwise.

The plaintiffs joined issue upon each of these pleas.

The cause was tried before Crowder, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence :—The plaintiffs were possessed of a wharf on the Surrey side of the river Thames, opposite to which, about fifty yards from the shore, was a pile firmly driven about eight feet into the bed of the river. It did not appear by whom the pile was originally so fixed : but it was [719] proved that, about twenty years ago, the then occupiers of the plaintiffs' wharf had either repaired it or renewed it, and that it was exclusively used by the occupiers of the wharf, and was necessary to the enjoyment of the wharf in the mooring and navigating of craft into the wharf for the purpose of loading and unloading, and that nobody had ever interfered with it. It was also proved that there were many other such piles on both sides of the river, which were used by other persons for similar purposes. The defendants' servants, in navigating their barge, negligently ran against and carried away the pile ; and this was the injury complained of.

On the part of the defendants, it was submitted that the case came within the maxim "*Quicquid plantatur solo solo cedit*," and therefore that the plaintiffs or their predecessors had, by permanently fixing the pile to the soil of the river, abandoned all property in it, if ever they had any, to the owners of the soil, and consequently that the defendants were entitled to a verdict on not possessed.

For the plaintiffs it was insisted that there was ample evidence to warrant the jury in inferring that the pile was placed in its present position with the consent of the Crown or the conservators of the river, for the more convenient use by the plaintiffs of their wharf, and so remained their property.

The learned judge, who was not required by either side to leave anything to the jury, reserving the point of law, directed a verdict to be entered for the plaintiffs for the value of the pile.

Dowdeswell, in Michaelmas Term last, moved to enter a verdict for the defendants upon not possessed, or a nonsuit, or for a new trial. There was no evidence to warrant the assumption that the pile in ques-[720]-tion was the property of the plaintiffs. It was not shewn that they placed it where it stood: and, even if it had been, by the act of fixing it permanently in the soil of the river, their property in it was altogether abandoned and gone. The law is thus laid down in *Amos & Ferard on Fixtures*, 2nd edit. p. 9,—“It is a maxim of law of great antiquity, that, whatever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties. By the mere act of annexation, a personal chattel immediately becomes part and parcel of the freehold itself: *Quicquid plantatur solo solo cedit*. This proposition the reader will find laid down as a general principle in almost every one of the cases to which it will be necessary to refer in the course of the present work: and, indeed, many of the decisions proceed exclusively upon it. It is recognized in particular in the following authorities,—Year Book, 10 H. 7, fo. 2, 20 H. 7, fo. 13, 20 H. 7, fo. 26, Co. Litt. 53 a., *Herlakenden's case*, 4 Co. Rep. 63, Bul. N. P. 34, *Lord Dullegh v. Lord Warde*, Anbl. 113, *Lawton v. Lawton*, 3 Atk. 13, *Elwes v. Maw*, 3 East, 50, *Lee v. Risdon*, 7 Taunt. 190, *Minshall v. Lloyd*, 2 M. & W. 459. Now, every case in which there is a right of severing a thing from the freehold by virtue of the law of fixtures, is considered as an exception from this general rule. And the manner in which the law of fixtures operates in these cases may be explained in two ways,—either on the supposition that the chattel nature of the thing is still preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty. It will be found, upon an inspection of the cases, that, for some few purposes, as, in favour of creditors, the chattel nature of the thing is retained after its annexa-[721]-tion; but that, for most purposes, its personal character is lost, and it becomes strictly freehold. The circumstance of the property being subject to a right of removal, and of being re-converted to a personal chattel, does not affect the nature and condition it has acquired of being incorporated with the realty.” In Brooke's Abridgment, Trespass, pl. 23, it is laid down, that, “if a piece of timber, which was illegally taken from J. S., has been hewed, trespass does not lie against J. S. for re-taking it. But, if a piece of timber which was illegally taken have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be re-taken, the nature of the timber being changed: for, by annexing it to the freehold, it becomes real property.” In *Spark v. Spicer*, Lord Raym. 788, 1 Salk. 648, it is said by Holt, C. J., “If a man be hung in chains upon my land, after the body is consumed I shall have gibbet and chain.” Again, in *Masters v. Pollie*, 2 Rolle, 141, it is said, “If A. plants a tree in the land of B., the tree shall belong to B.” So little property have the plaintiffs in this pile, that the conservators of the Thames might remove it at any time (a). [Cockburn, C. J. It appears from the evidence that this pile was essential to the enjoyment of the plaintiffs' wharf. Might not the owners of the soil grant to the owners of the wharf a right to fix the pile therein under circumstances such as would enable the latter still to retain the ownership of the pile?] That would be an easement. There was no evidence here that the pile was the plaintiffs' or that they had anything to do with the placing it where it stood. [Crowder, J. I do not think there was any doubt about the ownership. Whatever be the rights and powers of the court of con-[722]-servancy,

(a) See the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii.

as between these parties the defendants were wrong-doers. Williams, J. It is a fallacy to talk of easements. If an action is brought for the disturbance of stake-nets, it is founded upon the easement; but, if they are carried away, the owner may maintain trespass.] The stake-nets never ceased to be the property of the owner: there is no permanent annexation of them to the soil. [Cockburn, C. J. In *Wood v. Hewett* 8 Q. B. 913, it is laid down, that, when a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder: but, whether, in a particular case, it has become so or not, may be a question on the evidence; and a jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again.] That was the case of a moveable fender in a mill-stream. [Cockburn, C. J. I think it is impossible for the court here to say that there was not some evidence of ownership to go to the jury. You yourself insisted at the trial that it was a question for the judge.] It was for the plaintiffs to insist upon the matter being left to the jury. [Crowder, J. You never suggested that there was not exclusive possession in the plaintiffs in point of fact, or that you had any other defence than this point of law.]

Cockburn, C. J. There is no pretence for a new trial upon the facts: but the rule may go as to the point of law.

Lush, Q. C., and T. Salter, now shewed cause. The proposition contended for on the other side is, that, if the owner of a wharf drives a pile into the soil of a [723] navigable river, although it remains there for more than twenty or even forty years, and is necessary for the carrying on the business of the wharf, the pile has ceased to be the property of the person who placed it there, and becomes the property of the Crown or of the person in whom the soil of the river is vested. That is a proposition which is not tenable. The soil of the river is vested in the Crown for the benefit of the public. An individual may prescribe for property or an easement in the soil as against the Crown. The mere fact of its being placed in the soil of another does not make a chattel cease to be a chattel; otherwise, what becomes of gas or water mains (a)? *Prima facie*, that which is planted in or annexed to the soil becomes part of the freehold; but that is only a presumption. [Cockburn, C. J. Is not the presumption rather in favour of an easement?] The owners of the soil do not interfere. If the plaintiffs cannot sue for the injury to the pile, who can? Cockburn, C. J. Will not an easement answer your purpose? Yes. [Cockburn, C. J. I think we must assume that the plaintiffs placed the pile in the soil of the river for their own purposes, and that it has remained there for the long period shewn by the evidence with the consent of the Crown or of those in whom the right to the soil is vested. I think we must hear what can be said in support of the rule.]

Pigott, Serjt., and Dowdeswell, *contra*. By being annexed to the soil, the pile in question became part of the soil, by whomsoever placed there. In *Amos & Ferard*, p. 12, it is said: "It is observed by Britton, in treating of the right of property by accession, c. 33, [724] that 'property accrues from the fraud and folly of another: as, where persons, with an evil intent, or through ignorance, build with their own timber on another's soil. The same may be applied to those who plant or engraft, also to those who sow their grain on another's land without the leave of the owner of the soil. In such cases, what is built, planted, and sown, shall be the owner's of the soil, upon presumption that they were given to him. For, in these cases, it would be a great encouragement to such builders, planters, or sowers, if what was built, planted, and sown, was not to belong to the owners of the soil, and especially if such structures are fixed, or the plants and seeds have taken root or nourishment.'" Whilst, therefore, this pile remained fixed to the soil, in the permanent manner described, it clearly belonged to the owners of the soil. What evidence was there here to justify the court, or a jury, in presuming a licence to fix and a licence to remove it? If the argument on the other side be sustainable, the defendants might be liable to two actions, one by the owner of the soil, the other by the persons entitled to the supposed easement. The only question is, who was the owner of the pile. It could not belong to both. [Lush. It is only the point of law that is reserved, that the plaintiffs were not possessed of the pile, it being in the soil of the Crown.] This is not in the nature of

(a) These are invariably laid down under the authority of acts of parliament.

a tenant's fixture: if it had been driven into the soil of the wharf, though for the more convenient use of the wharf, it could not have been removed. [Cockburn, C. J. I am unable to distinguish the reasoning of the court in *Wood v. Hewett*, 8 Q. B. 913, from the circumstances of this case. In the course of the argument for the defendant there, it was said, that, "if a man plants a tree in another's soil, or builds a wall upon it, the tree or wall becomes the property of the [725] land-owner (*Empson v. Soden*, 4 B. & Ad. 655): and the same principle applies here." Upon which Coleridge, J., asks, "Why may not there have been, when the mill was built, a concession of rights by the owner of the meadow, which would make the fender to all purposes the property of the miller? Might not he acquire the easement of having his fender on the defendant's land?" And Lord Denman adds,—“It might have been understood by both parties that the fender should be considered a separable chattel. That is less likely to be the case with a tree, because the tree could not be removed without probably destroying it.” And his Lordship, in giving judgment, says.—“The question is whether, because the fender in this case had been placed on the defendant's soil, it became his property as a necessary consequence of its position. I am of opinion that such a consequence never follows of necessity, where the chattel is separable. This appears sufficiently from *Rier v. Otley*, 1 B. & Ad. 161. The decision in *Munt v. Collins*, 8 Q. B. 916, is so far an authority in point of law, as it shews, that, in a case of this kind, it is always open to inquiry how the article came to be in the place in which it is found, and what the parties intended as to its use: and the respective rights may be determined by the evidence on these points. In the present case, there were circumstances from which the jury might infer that the plaintiff had become entitled to have a fender, his own property, standing in the soil of the defendant; and there was no proof that the defendant had asserted any right derogatory to this privilege in the plaintiff. The argument from the nature of the thing decides nothing: the manner of its becoming connected with the soil may be merely accidental. If a heavy stone basin is placed on a man's land, it is not a fixture. If it sinks into the soil, and in that manner becomes [726] fixed, is it therefore a fixture? The rights in such a case must always be subject to explanation by evidence.” And Patteson, J., says—“The general rule respecting annexation to the freehold is always open to variation by agreement of parties: and, if a chattel of this kind is put up so that the owner can remove it, I do not see why it should necessarily become part of the freehold, or why it should not be removable when the owner thinks fit, if it appears to have been so agreed.”] There, the fender was severable without altering the nature or character of the thing to which it was annexed. [Willes, J., referred to *Grymes v. Boveren*, 4 M. & P. 143, 6 Bingh. 437, where it was held that a pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use or convenience.] A mill-stone, though capable of being removed without injury to the mill, has been held to be irremovable (a). [Cockburn, C. J. We must look at the common sense of the thing. The pile was driven into the bed of the river, not for the benefit of the owners of the soil, but for the more beneficial use of the plaintiffs' wharf. It was essential to the navigation of the river.] It was for the plaintiffs to give evidence to rebut the necessary presumption arising from the pile being fixed to the soil, the ownership of which was not in them. This they altogether failed to do.

COCKBURN, C. J. I am of opinion that this rule should be discharged. Of course I do not mean to controvert or question the general proposition, that, whatever is annexed to the freehold becomes part of the freehold. But there may be circumstances to take a [727] case out of the general rule, as, for instance, where the thing is so annexed as to be severable without injury to the soil, and where there may have been an agreement between the owners of the soil and the owner of the chattel, that the chattel should be severable at the will and pleasure of the latter. I think there are circumstances here from which we may properly draw the inference that the pile in question was not placed in the bed of the river with a view to its permanent annexation to the freehold so as to become part of the freehold; but that it was placed there by virtue of an easement granted by the Crown or whoever had the right to grant it, to the occupiers of the adjoining wharf, for the more convenient use and

(a) See *Martyr v. Bradley*, 2 M. & Scott, 25, 9 Bingh. 24. That, however, turned upon the construction of the covenant.

enjoyment thereof. It seems to have been admitted at the trial that the plaintiffs or their predecessors in the enjoyment of the wharf had fixed the pile where it stood, and had had the use and benefit of it for a long series of years without there ever having been any interruption or any assertion of right to it by the Crown or by the conservators of the river. The fair inference, therefore, is, that the pile was driven into the bed of the river in the exercise and enjoyment of a right or easement, and that it never was intended that the Crown or any other body or person should acquire any right or property in it, but that it should continue the property of the occupiers of the wharf, with the right to remove it at their pleasure. I therefore think the plaintiffs' claim in this action is not impeded by the plea of not possessed.

WILLIAMS, J. I am entirely of the same opinion. No doubt the maxim "*Quicquid plantatur solo solo cedit*" is well established: the only question is, what is meant by it. It is clear that the mere putting a chattel into the soil by another cannot alter the ownership of the [728] chattel. To apply the maxim, there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil. The evidence shewed that these piles were essential to the beneficial navigation of the river by persons passing up and down to the several wharves. I am not aware that there is anything contrary to law in those who possess wharves on the banks of the Thames driving piles or stakes into the bed of the river adjacent thereto, for the more convenient enjoyment of their right to navigate and use the river. It is unnecessary, however, to consider that. I entirely agree with the Lord Chief Justice in thinking that there was abundant evidence here to warrant the conclusion that the pile in question was planted in the soil of the river by the plaintiffs' predecessors,—though at what time did not distinctly appear,—with the consent of the Crown or the conservators of the river, not for the benefit of the soil, but in order to the more commodious enjoyment of the advantages of the wharf; and that it was so placed, not upon the terms that it should be considered as annexed to or incorporated with the soil, but for the purposes of navigation. That necessarily involves the conclusion that the owners of the pile are not bound to keep it there altogether, but that they may remove it at their free will and pleasure. The case falls within the principle of *Wood v. Hewett*, 8 Q. B. 913. The circumstances clearly shew that this pile, like the fender there, was placed in the soil of the river, not for the purpose of incorporating it therewith, but for the more convenient use of the plaintiffs' wharf. I therefore think the plaintiffs are entitled, as in common justice they ought to be, to maintain an action and to recover damages for an interference with that which is indispensable to the enjoyment of their wharf.

[729] CROWDER, J. There was ample evidence to shew that the pile was placed in the bed of the river for the purpose of the more convenient enjoyment of the plaintiffs' wharf,—for mooring and assisting barges coming to and going from the wharf for the purpose of loading and unloading. It appeared that more than twenty years ago there had been a pile there which had become decayed, and the pile in question had been substituted for it by the plaintiffs or the former tenants of the wharf. The point taken at the trial was, that, by whomsoever placed there, the fact of its being permanently fixed to the soil caused it to become the property of the owners of the soil, and to cease to be the property of the plaintiffs. I reserved the point: and I must own that I entertained considerable doubt upon it. I now, however, entirely agree with the Lord Chief Justice and my Brother Williams in thinking that it is by no means a necessary consequence of the pile's being fixed to the soil of the river, that it ceased to be the property of the plaintiffs, and thereby became the property of the owners of the soil. There was evidence that numerous piles were placed up and down the river for the same purposes. There was, therefore, ample ground for inferring that there was an easement to place this pile in the river for the use and convenience of access to the plaintiffs' wharf. The plaintiffs, therefore, did not lose their property in it by placing it in the soil, inasmuch as it was placed there for their own purposes, and not for the purpose or with the intention of making it part of the soil.

WILLES, J., concurred.

Rule discharged.

[730] TOWNE v. THE LONDON AND LIMERICK STEAM-SHIP COMPANY (LIMITED).
Jan. 15th, 1859.

Service of a writ of summons upon a director of a joint-stock company (limited), registered under the 19 & 20 Vict. c. 47, is not good service,—writs of summons not being within the 53rd section of that act, but the service thereof upon joint-stock companies being regulated by the 16th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.

A writ of summons was issued against the defendants, the London and Limerick Steam-Ship Company (Limited), a joint-stock company completely registered under the 7 & 8 Vict. c. 110, and subsequently registered with limited liability under the 19 & 20 Vict. c. 47.

The writ was served on the 19th of November upon one Francis William Russell, one of the directors of the company, in London, and judgment was signed, for want of appearance, on the 23rd of December.

Honyman moved for a rule to shew cause why the judgment should not be set aside, on the ground that there had been no due service of the writ upon the company. The motion was founded upon an affidavit which stated, amongst other things, that the defendants are an Irish incorporated company carrying on their business at Limerick, in Ireland, where the office of the company is situated; that the company have not any office or place of business in England; that the business of the company is entirely carried on and conducted in Ireland; that the officers of the company were at the commencement of this action and still are daily to be found at the office of the company at Limerick; and that the company is solvent and has ample funds to meet all demands upon it.

The defendants being an incorporated company, the service upon one of the directors was no service. The mode of service in such a case is pointed out by the 16th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, which enacts that "every writ of [731] summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town-clerk, treasurer, or secretary of such corporation." The company having no office or place of business in England, are not within the jurisdiction of the English courts,—*Ingate v. The Austrian Lloyd's*, ante, vol. iv., p. 704; and therefore the service should have been on the secretary at the office of the company at Limerick,—*Evans v. The Dublin and Drogheda Railway Company*, 14 M. & W. 142. [Holl, who was instructed to shew cause in the first instance, stated that he should rely upon the 53rd section of the 19 & 20 Vict. c. 47, which enacts that "any summons or notice requiring to be served upon the company, may, except in cases where a particular mode of service is directed, be served by leaving the same, or sending it through the post, directed to the company at their registered office, or by giving it to any director, secretary, or other principal officer of the company."] A "writ of summons" is not a "summons" or "notice" within the meaning of that section. And, if it were, the present case would fall within the exception, it being a case in which "a particular mode of service is directed," viz. by the 15 & 16 Vict. c. 76, s. 16. The word "summons" may be satisfied by applying it to proceedings before justices under ss. 31 and 56. The 54th and 55th sections conclusively shew that a "writ of summons" could not have been within the contemplation of the legislature. The 54th section enacts that "notices by letter shall be posted in such time as to admit of the letter being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice; and, in proving such service, it shall be sufficient to prove that such notice was properly directed, and that it was put in the post-office in such time as aforesaid." And the 55th section enacts that "any summons notice, writ, or proceeding requiring authentication by the company, may [732] be signed by any director, secretary, or other authorized officer of the company, and need not be under the common seal of the company; and the same may be in writing or in print, or partly in writing and partly in print." [Willes, J. What is meant by a "writ requiring authentication by the company? Williams, J. It is singular that the 53rd section, which applies to service of "summonses and notices," makes no mention of "writs," whilst the 55th section, which can have nothing to do with writs, does. The 153rd section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, which relates to

service of notices upon a joint-stock company, provides that "any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the company;" and the 139th section, which corresponds with the 55th section of the 19 & 20 Vict. c. 47, omits the word "writ." It would seem that the word "writ" has by mistake been inserted in the 55th section of the 19 & 20 Vict. c. 47, instead of the 53rd section. Cockburn, C. J. The 8 & 9 Vict. c. 16, furnishes a strong argument that "summons" in the 53rd section of the 19 & 20 Vict. c. 47, does not mean "writ of summons." In *Garton v. The Great Western Railway Company*, 27 L. J., Q. B. 375, which is the only authority bearing upon the subject, it was held that the service of a notice of action upon the superintendent of an office of a railway company at a traffic station, was not good service within the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. [733] c. 20, c. 138 (a). At all events, the 53rd section of the 19 & 20 Vict. c. 47, does not apply here, because "a particular mode of service" is directed by the 15 & 16 Vict. c. 76, s. 16, for the service of a writ of summons upon a company, and therefore the case is within the exception in the 53rd section of the 19 & 20 Vict. c. 47.

Holl, *contra*. The word "summons" in the 53rd section of the 19 & 20 Vict. c. 47, is sufficient to include a "writ of summons." The analogous process for the commencement of a suit in the county-court would clearly be within that section: and it can hardly be supposed that the legislature meant to make any distinction in this respect between the process in the superior and the inferior courts. The mere fact of the word "writ" being found in addition to "summons" in s. 55, does not warrant the conclusion that "summons" in s. 53, does not include "writ of summons." A writ of summons is not the only writ known to the law: or it may be that that word is inadvertently inserted in s. 55. As to the argument that a particular mode of service of process upon a public company is directed by the 16th section of the Common Law Procedure Act, 1852,—the obvious answer is, that that act is not incorporated with or made part of the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, or the 19 & 20 Vict. c. 47; and the 53rd section could only be intended to apply to cases where a particular mode of service is directed by that act or some act in *pari materia* with it. Besides, the 16th section is permissive only, not obligatory. [Willes, J. The mode of proceeding at common law to compel a corporation to appear to process was, by serving the mayor or other head officer; and, if no appearance [734] were entered, the next process was a distringas to distrain them by their lands and goods: and, if they had no land or goods, there were no means of compelling them to appear: see Tidd's Practice, 9th edit. p. 121. To remedy that inconvenience, the 16th section of the 15 & 16 Vict. c. 76, enacts that "every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town-clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred or other like district, or some peace officer thereof."] If the legislature had intended by the exception in the 53rd section of the 19 & 20 Vict. c. 47, to refer to the 16th section of the 15 & 16 Vict. c. 76, it is not reasonable to suppose that such intention would have been left to mere inference and conjecture.

COCKBURN, C. J. I am of opinion that this rule must be made absolute, on the ground that the service of the writ of summons upon Mr. Russell, one of the directors, was not a good service. The 16th section of the Common Law Procedure Act, 1852, authorizes the service of a writ of summons issued against a corporation aggregate to be made on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation. Here, the service was effected by delivering the writ personally to one of the directors. It is, however, contended that the 53rd section of the 19 & 20 Vict. c. 47, authorizes service of a writ against an incorporated and

(a) Which is in the very words of the 135th section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.

registered joint-stock [735] company, "by giving it to any director." But that section, when examined, will be found to apply only to "summonses and notices;" and there are summonses referred to in other parts of the act to which the words of the 53rd section are more properly applicable. Independently of the 135th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16,—which is almost identical with the 53rd section of the 19 & 20 Vict. c. 47,—I think the last-mentioned clause should be held not to embrace writs of summons issuing out of the superior courts. But, when I find that the 135th section of the 8 & 9 Vict. c. 16, makes express provision for the service of writs, as distinguished from summonses,—shewing that the legislature, when they meant to include writs, did so by apt and express words,—and when I find the 53rd section of the 19 & 20 Vict. c. 47, adopting the very language of the former provision, with the single exception of the word "writ," I think it is impossible to hold that they could have meant that a writ of summons should be included under the word "summons." It may be that the legislature purposely made this distinction because of the more serious consequences to the corporation of the one process over the other. For these reasons, I think the writ in this case has not been well served, and consequently that the proceedings should be set aside; but, as the point is one of novelty and some nicety, I think there should be no costs.

WILLIAMS, J. I am of the same opinion. The service of the writ in this case is clearly bad unless justified by the 53rd section of the 19 & 20 Vict. c. 47. The question, therefore, is, whether a "writ of summons" is within the language of that section. I am of opinion that it is not. The word "summons" may be satisfied by applying it to the ordinary proceeding [736] to bring the parties before justices. If the 53rd section stood alone, I think it would be difficult to say that "summons" could mean "writ of summons." But there are other reasons why it should not comprehend it here. The 55th section introduces the word "writ": and, though it is not easy to say what is the meaning of a "writ or proceeding requiring authentication by the company," still it is evident that something different from a "summons or notice" is meant. It is to be observed, too, that the statute affects to follow some systematic arrangement: and this series of clauses is introduced under the head of "notices," and not in the division headed "legal proceedings." It would seem, therefore, to be clear that the legislature had no intention by the 53rd section to alter or interfere with the mode of service of legal process which had already been provided by a statute more appropriately adapted to it, viz. the Common Law Procedure Act.

CROWDER, J. I am of the same opinion. Seeing the position which the 53rd section occupies in the scheme or arrangement of the statute, and that it commences with the words "summons or notice," the natural conclusion would be that it was not meant to include a "writ of summons" for the commencement of an action in the superior court. And I cannot help thinking it would be somewhat singular if it did, seeing that the 16th section of the Common Law Procedure Act, 1852, had already provided for the service of writs of summons upon corporations; and there is no reason for supposing that the legislature meant to alter that by the later act. Besides, the 53rd section of the 19 & 20 Vict. c. 47, expressly excepts from its operation "cases where a particular mode of service is directed." Now, the section of the Common Law Procedure Act to which I have adverted does direct a par-[737]-ticular mode of service of writs upon corporations. It uses, it is true, the word "may": but that is directory as well as permissive. I am of opinion, therefore, that the service upon Mr. Russell was not such a service as is warranted by law, and consequently that the proceedings taken upon it must be set aside.

WILLES, J., concurred.

Rule absolute, with costs.

STUART AND ANOTHER v. CAWSE AND ANOTHER. Jan. 15th, 1859.

[S. C. 28 L. J. C. P. 193; 5 Jur. N. S. 650; 7 W. R. 187.]

The defendants, being indebted to the plaintiffs to the amount of 6l. 8s. 6d., but insisting that they owed only 6l. 3s. 6d., sent them a banker's draft for the latter sum payable at seven days' sight. The plaintiffs procured the draft to be accepted, but wrote to the defendants, demanding the additional 5s., and telling them, that, unless it was paid, they would return the draft. The defendants still refusing to

pay the 5s., the plaintiffs, retaining the draft, issued a writ for the 6l. 8s. 6d. The court stayed the proceedings on payment of the 5s., without costs.

The plaintiffs, dealers in London, in April, 1858, sent goods to the defendants, who were milliners at Plymouth, to the amount of 9l. 3s. 6d. Of this sum 3l. was remitted by the defendants; and, in October, the plaintiffs wrote to the defendants demanding the balance, claiming 6l. 8s. 6d., which included 5s. charged for a packing-case, which the plaintiffs alleged had not been returned. The defendants, insisting that the case had been returned, sent the plaintiffs, by return of post, a draft for 6l. 3s. 6d. upon Sir John Lubbock & Co., bankers, London, payable seven days after sight, which was presented by a clerk of the plaintiffs on the 1st of November, and duly accepted by the bankers. The plaintiffs on the same day wrote again to the defendants demanding the additional 5s., and stating, that, unless it were paid, they would return the draft. The defendants declined to pay the 5s., whereupon the [738] plaintiffs, without returning the draft, brought this action to recover the 6l. 8s. 6d.

Application was made, on behalf of the defendants, to Willes, J., at Chambers, to stay the proceedings on payment by the defendants of the 5s. without costs. His Lordship, however, declined to make any order.

Watkin Williams, in Michaelmas Term last, upon the authority of *Wellington v. Arters*, 5 T. R. 64, obtained a rule nisi in the terms of the rejected summons; against which

Raymond now shewed cause. The proceedings in *Wellington v. Arters* were stayed upon an affidavit by the defendant (which was contradicted by the plaintiff) that the debt did not amount to 40s. Here, however, there was an admitted debt of 6l. 3s. 6d., independent of the disputed item of 5s. [Crowder, J. The 6l. 3s. 6d. had been paid by a draft which the plaintiffs had procured to be accepted.] The affidavits shew that this was done by mistake, and that they have in fact repudiated the payment. At all events, the plaintiffs are entitled to have the opinion of a jury upon that. No case can be found in which the court has interfered to stay proceedings when it has been a matter of controversy whether the debt was under 40s. or not.

CROWDER, J. I am of opinion that this rule should be made absolute. The action is in reality brought to recover 5s. only; and it is the duty of the court to stay the proceedings, it being obviously beneath its dignity to entertain a suit for so trifling an amount. The plaintiffs contend that the action is really brought to recover the whole debt, viz. 6l. 8s. 6d. The facts appear to be these:—The defendants remitted to the [739] plaintiffs a draft on Lubbock & Co.'s for 6l. 3s. 6d., insisting that that was the entire debt. The plaintiffs' clerk took the draft (which was at seven days' sight) to Lubbock's for acceptance, and got it accepted; and, before it was due, the plaintiffs issued a writ for the full amount, 6l. 8s. 6d., without returning the draft. Under these circumstances, I cannot say that more than 5s. was due at the time of the commencement of the action.

WILLES, J. I also think this rule should be made absolute. I had in mind the case of *Hough v. May*, 4 Ad. & E. 954, 6 N. & M. 535, when the matter was before me at Chambers. There, however, the defendant had sent his own cheque (a). In the present case, the defendants remitted a draft on a banker, and the plaintiffs, by obtaining the banker's acceptance, have bound the money in the banker's hands. It is said that the plaintiffs repudiated the payment: but still they kept the draft: and it is by their actions not by their declarations or their intentions that men must be judged. The plaintiffs' right of action in respect of the 6l. 3s. 6d. [740] was clearly suspended during the currency of the draft; consequently, the action is in reality

(a) To assumpsit for work and labour in making a railing, the defendant pleaded, that, before the action, he had paid to the plaintiff the sum of 8l. 11s., and the plaintiff had received and accepted the same, in payment and discharge of 8l. 11s. The plaintiff replied that the defendant did not pay the plaintiff the said sum of 8l. 11s. in manner, &c. It was held that the defendant did not support his issue, by shewing, that, before the action, he had sent the plaintiff a cheque on his banker for 8l. 11s., stated in the body of the cheque to be "balance account railing:" and that the plaintiff held such cheque at the commencement of the action. A cheque so delivered, to operate as payment, must at any rate be unconditional. And (per Littledale, J.) a party to whom a cheque is sent may commence an action before he sends it back.

brought only for the 5s. As, however, this is an appeal from the decision of a judge at Chambers, the rule must be absolute without costs.

Rule absolute without costs.

End of Hilary Term.

[741] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, IN HILARY VACATION, IN THE TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banc at these sittings, were,—Williams, J., Crowder, J., Willes, J., and Byles, J.

LEGG v. CHEESEBROUGH AND ANOTHER. Jan. 12th, 1859.

To an action against them as the acceptors of a bill of exchange, the defendants pleaded a plea founded upon a deed of arrangement made by the defendants with their creditors, under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which had not been signed by the plaintiff, but which was said on the part of the defendants to be nevertheless binding on him by reason of its being executed by six sevenths in number and value of their creditors.—The instrument was not a composition-deed: but it contained a clause by which each of the creditors parties to or bound by the deed covenanted not to sue, impede, or molest the defendant: and then followed another clause, to the effect, that, if any creditor by whom or on whose behalf the deed should have been actually executed, should act contrary to that covenant, the defendants should be absolutely discharged from all claims and demands both at law and in equity, by such creditor:—Held, that this latter clause was not binding upon the plaintiff,—it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general.

This was an action by the indorsee against the acceptors of two bills of exchange, each for 1000l., drawn by one Edward Smith.

[742] Plea,—that the said bills of exchange were before the making of the deed thereafter mentioned respectively accepted by the defendants for and on account of the sums of money therein respectively mentioned, and had been and were before then respectively indorsed to the plaintiff, who was at the time of the making of the said deed the holder thereof respectively: That, before and at the time of the making of the deed thereafter mentioned, and for six calendar months and upwards next immediately before the suspension of payment thereafter mentioned, the defendants, carrying on business under the firm of William Cheesebrough & Son, were respectively traders liable to become bankrupt under the bankrupt laws and within the meaning of the statute thereafter mentioned: That, before and at the time of the making of the said deed, the defendants were indebted to the parties of the third part to the deed thereafter mentioned, and to divers other persons, in divers sums, and were and would be unable to pay the same in full: That the defendants, before the time of making the said deed, and after the passing and coming into operation of the Bankrupt Law Consolidation Act, 1849, to wit, on the 16th of December, 1857, as such traders, suspended payment; and afterwards, by deed of arrangement made after the passing and coming into operation of the said Bankrupt Law Consolidation Act, 1849, between the defendants of the first part, William Ackroyd, John Foster, Edward Townend, and William Quilter, of the second part, and the several persons, companies, and corporations who were respectively creditors of the defendants, or one of them, of the third part,—after reciting, amongst other things, the said suspension of payment by the defendants, and that a meeting of their creditors was holden on the 30th of December, 1857, and that, the defendants hav-**[743]**-ing represented to the said creditors that they were unable to pay the amount of their respective debts in full, it was resolved and agreed that the business and affairs of the defendants should be wound up under inspectorship: and also reciting that the said William Ackroyd, John Foster, Edward Townend, and William Quilter had been appointed and had agreed to act as inspectors for and on behalf of the creditors of the defendants,—it

was witnessed that the several creditors of the defendants, or of either of them, who were or should be parties to or bound by the said deed did, and each and every of them did, by the said deed, give and grant unto the defendants and each of them free, full, and absolute liberty and licence thenceforth to conduct, manage, and wind up their said joint trade, business, and affairs, and to collect, get in, sell, and dispose of all and every their wools, stock in trade, real and personal estate, debts and effects, and every part thereof, and also their respective separate private estates, chattels, effects, and property, both real and personal, under the inspection, and subject to the approbation, direction, and control of the said inspectors, and in such manner as the said inspectors should judge to be most conducive to the benefit of the creditors of the defendants, or of either of them, until the defendants, or either of them, should have broken or failed to comply with any of the stipulations or provisions in that deed contained and on their and his part to be observed and performed, unless the said deed should sooner become void by virtue of a certain provision thereafter in that behalf contained, and hereinafter mentioned: That each of the creditors of the defendants or either of them parties to or bound by the said deed, did thereby, for himself or themselves, and his or their heirs, executors, administrators, and successors, severally covenant, grant, and agree to and [744] with the defendants and their respective executors and administrators, that he or they the said respective creditors would not, nor should his or their respective heirs, executors, administrators, or successors, or any other person or persons by his or their authority or consent, sue, arrest, seize, attach, impede, or molest the defendants, or either of them, or their or his goods, estate, or effects, in any manner howsoever, or upon any pretence whatsoever (save and except as in the security proviso thereafter contained and hereinafter mentioned), unless and until the defendants or one of them should have so as aforesaid broken or failed to comply with any of the stipulations or provisions therein contained and on their and his part to be observed and performed; and, further, that, if any creditor or creditors by whom or on whose behalf the said deed should have been actually executed, or his or their executors, administrators, or successors, should in any manner act contrary to the said covenant and the true intent and meaning of the said deed, then the defendants, and each of them, and their respective heirs, executors, and administrators, should be and were for ever by the said deed absolutely discharged from all claims and demands whatsoever, both at law and in equity, of or by such creditor or creditors who should so act contrary to the covenant in that behalf contained as aforesaid; and that the said letter of licence and the covenant thereinbefore contained as aforesaid, should and might be pleaded in bar to any such action or actions, or other proceedings at law or in equity, as a good and effectual release and discharge of and from the debts or debt of such creditors or creditor respectively, and all claims and demands in respect thereof: That it was by the said deed further covenanted and agreed that the defendants, and each of them, would, when requested so to do by the said inspectors, draw [745] out and state just, true, and exact accounts in writing of all their joint and respective separate debts and credits, claims and demands, and property, estate, and effects, and of the several charges, outgoings, liens, and incumbrances upon or affecting the same respectively, and bring the said account to a close or balance, and would thereupon deliver such accounts, signed by them and him respectively, unto the said inspectors, or, if required, unto each of the said inspectors: and, further, that each of them the defendants would from time to time and at all times thereafter until the trusts and provisions of the said deed should be fully satisfied, use and exert his best and utmost endeavours, and afford every assistance in his power, under and subject to the direction and advice of the said inspectors, to collect and get in the estate, property, debts, and effects of them the defendants and each of them, for the benefit of their and his respective creditors, according to and in pursuance of that arrangement; and that they the defendants would not, nor would either of them, at any time thereafter, convey, pay away, alienate, dispose of, pledge, or incumber any of the real or personal estate or effects then belonging to them or him or to or in which they or he had any right, title, or interest, without the consent of the said inspectors, and would not without the consent of the said inspectors knowingly or willingly do or commit, or suffer to be done or committed, any act, deed, matter, or thing whatsoever whereby any of their several joint or separate creditors might have any additional security for his, her, or their demand or demands, or otherwise obtain any undue

preference or advantage over any other or others of them : and it was by the said indenture further agreed and declared that all the moneys which should be realized from the sale, conversion, and getting in of the said goods, property, debts, real and per-[746]-sonal estate and effects, should be applied in manner thereafter and hereinafter mentioned, that is to say, in paying and discharging the costs, charges, and expenses of preparing and completing the said deed and the arrangement thereby contemplated, or incidental thereto, and of carrying the said arrangement, and the trusts, intents, and purposes of the said deed, and of all matter and things incidental thereto, into effect, including the fees, wages, and salaries of all accountants, clerks, servants, and other persons employed in the conduct and winding up of the said business, or the investigation of the affairs of the defendants : also all salaries and allowances which might be allowed by the said inspectors to any person or person in respect of their or his services in or about the premises ; and the surplus of the moneys produced by the said joint estate, and any surplus of the separate estate of either of the defendants, remaining after paying 20s. in the pound on all his separate debts, should be divided, as and when directed by the said inspectors, amongst the creditors of the said partnership rateably and proportionably according to the respective amounts of their debts, without any preference, until the creditors should have received 20s. in the pound, if the said moneys should be sufficient for that purpose : and any surplus of the joint estate of the defendants after paying the joint creditors 20s. in the pound, should be divided between the separate estates of the defendants respectively, according to their respective shares and interests therein : and the moneys produced by the separate estates of each of the defendants should be applied in or towards the liquidation of his respective separate debts and engagements rateably and proportionably ; and such of the costs and expenses thereinbefore provided to be paid as should be incurred exclusively in respect of the joint estate or affairs of [747] the defendants, should be paid exclusively out of the produce of such joint estate : and such of the said costs and expenses as should be incurred exclusively in respect of the separate estate or affairs of either of the defendants, should be paid exclusively out of the produce of such separate estate : and the remainder of the said costs, charges, and expenses should be paid out of the produce of the said joint and separate estates respectively, rateably, and in proportion to the respective amounts of such joint and separate estates : And it was by the said deed expressly declared and agreed that all and singular the joint and separate estates and effects, both real and personal, of the defendants, should be administered under the said inspectorship ; and the moneys and assets of the said partnership firm and of the defendants respectively should in all respects be distributed, divided, and appropriated in accordance with the rules of English bankruptcy : and the same rights and equities should prevail and govern any disputes or questions amongst the said creditors, or between the said creditors and the said inspectors, or between the said creditors or the said inspectors and the defendants, as if the defendants had become and been adjudicated bankrupt on the said 16th of December, 1857, and as if the respective debts for which the creditors of the defendants, or of either of them, should be accounted creditors in value as is thereinafter and hereinafter mentioned, had been the debts only proved under such bankruptcy ; and every creditor should be accounted a creditor in value in respect of such amount only as should appear to be the balance due to him upon an account fairly settled in manner directed by the 224th section of the said Bankrupt Law Consolidation Act, 1849 : And the defendants did thereby, for themselves, their heirs, executors, and administrators, covenant with the said [748] inspectors, and also with the creditors parties thereto, their executors, administrators, and successors respectively, that, if at any time before the whole of the joint and separate estates and effects of the defendants should have been got in and converted into money, it should, in the judgment of the said inspectors, appear desirable, for better carrying out the liquidation intended to be provided for by the said deed, that the defendants should execute an assignment of their estates and effects to them the said inspectors, and if the said inspectors should, by notice in writing signed by them and left at the counting-house of the defendants, require the defendants to execute any such assignment, then that they, the defendants, or their or his executors or administrators, in case of the death of them or either of them, should and would forthwith, at the expense of the said trust-estate, convey, assign, assure, and deliver up unto the inspectors or trustees, or a trustee to be nominated by the said inspectors, and effectually vest in them or him all such parts

of the estate and effects of the defendants, and of each of them, as should then remain unapplied to the ends and purposes aforesaid, for the use and benefit of all and every or such and so many of the joint and separate creditors of the defendants as should be entitled to the benefit of the said deed, according to their respective rights and interests as aforesaid; and thereupon the defendants, their executors and administrators, should be absolutely released and discharged from all and every the debt and debts, claims, and demands of all their said creditors who should have executed or become in any manner bound by the provisions of the said deed: And it was by the said deed further witnessed, that, in consideration of the premises in the said deed mentioned, the said several and respective creditors who were in any manner bound by the [749] provisions of the said deed, did thereby, for themselves severally and respectively, and for their several and respective partner and partners, and not one of them for the acts and deeds of the others or other of them, or for the acts and deeds of the heirs, executors, or administrators, partner or partners of the others or other of them, but each and every of them for himself and for his and her own acts and deeds, heirs, executors, administrators, and successors only, and for the acts and deeds of his and her partner or partners only, covenant, promise and agree with and to the defendants, their heirs, executors, and administrators, that, immediately after the said deed should be discharged from the proviso thereafter contained and hereinafter mentioned making void the same, the defendants and each of them, their and his heirs, executors and administrators, should be absolutely released, and that that covenant should operate and enure and might be pleaded in bar as a good and effectual release and discharge to them respectively of and from all and all manner of actions, suits, bills, bonds, debts, dues, accounts, sum and sums of money, judgments, extents, executions, claims, and demands whatsoever, both at law and in equity, or otherwise howsoever, which they the said creditors, or any of them, or their or any of their heirs, executors, administrators, and successors, then had, or thereafter should or might have, challenge, claim, or demand against the defendants or either of them, their or his heirs, executors, or administrators, or estates and effects, or any of them, for or by means or on account of all or every or any of the debts to them or any of them the said creditors respectively due and owing from the defendants or either of them, or of any interest, exchange, or commission due or demandable for the same, or any other matter, cause, or thing whatsoever in respect of the said debts [750] or any of them: Provided always, and it was thereby expressly declared, that, if in the opinion of the said inspectors, the defendants should at any time or times before the whole of their joint and separate estates and effects should have been fully realized and distributed, make default in performing all or any of the covenants, clauses, stipulations, and agreements thereinbefore contained and covenanted to be performed on their or his part, or if the said deed should not become binding on non-executing creditors under the provisions of the Bankrupt Law Consolidation Act, 1849, with reference to arrangements by deed, within the space of six calendar months after the day of the date thereof, then and in either of the said cases the said inspectors might, if they should think fit, by any writing under their hands, declare that the said deed, and the licence and liberty, and every other article, clause, matter, and thing therein contained, so far as the same tended to restrain the said respective creditors of the defendants or either of them, or their or his respective heirs, executors, or administrators, from suing for and recovering the several demands, should cease, determine, and be absolutely void, anything thereinbefore contained to the contrary notwithstanding: Provided also, and it was thereby declared (and the same was the security proviso thereinbefore referred to as aforesaid), that the execution of the said deed by any of the creditors of the defendants, or either of them, or the exercise of the powers in and by the said deed given or reserved to the said inspectors, or given or reserved or permitted to be exercised by the defendants, or either of them, under the direction and control of the said inspectors, or otherwise, should not operate or extend to impeach, destroy, or in any way prejudicially affect any lien, right of administration, equity, or security which they respectively had or claimed to [751] have, as bill-holders or otherwise, under the rules of law or equity relative to the administration or distribution of bankrupts' estates, or to take and have the judgment of any court of law or equity with respect to any such liens, rights, or claims as aforesaid, or to discharge any person or persons who was or might be jointly or concurrently liable with the defendants, or either of them, upon any bill or bills of

exchange, or as surety or sureties, or otherwise, to the payment thereof, anything thereinbefore contained to the contrary notwithstanding; but all such liens, rights of administration, equities, and securities as aforesaid should continue in full force, and might be insisted upon and enforced by the said creditors respectively, notwithstanding the covenants and licences on their parts thereinbefore contained; and, in the administration of the estates and funds of the defendants, all such liens, rights, equities, and securities respectively should be duly respected; but the value of securities on property of the defendants or either of them for any debt should be deducted from such debt, and a dividend should be payable under the said deed on the balance thereof only, unless such security should be given up: And it was by the said deed lastly declared and agreed that the said deed was a deed of arrangement within the meaning of the 224th section of the Bankrupt Law Consolidation Act, 1849, and the several clauses and provisions of that act with respect to arrangements by deed were intended to be applicable thereto; and, if there should be any provision or direction therein which was not authorized or allowed by the said provisions of the said act to be introduced into a deed of arrangement thereunder, every such unauthorized provision or direction should be construed to operate as being intended to bind only the creditors by or on behalf of whom the said deed should be actually executed, and their respective debts, claims, rights, and demands, and should, as against all other creditors, be wholly void and inoperative. The plea then proceeded to aver, that no person was a creditor of the defendants or of either of them, at the time of the making of the said deed, who had become such creditor between the 16th of December, 1857, and the time of the making of the said deed; and that, before the commencement of the suit, the said deed was signed and sealed by the defendants and the said parties thereto of the second part: That the said deed was also signed and sealed by or on behalf of divers persons, companies, and corporations respectively creditors of the defendants, the same having been so signed and sealed by or on behalf of some of them before the commencement of the suit, and by and on behalf of the residue of them after the commencement of the suit: That the said creditors by or on whose behalf the same was so signed and sealed, were six sevenths in number and value of the defendants' creditors within the meaning of the provisions of the said statute whose debts amounted within the meaning of the said provisions to the sum of 10l. and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities and liens from the defendants, appeared to be the balance due to him: That, after the commencement of the action, the said deed became and was, and then was, signed and sealed by or on behalf of such majority of the defendants' creditors as aforesaid; and thereupon, after the same had been so signed and sealed by or on behalf of such majority, and after the commencement of the suit, *and before the plaintiff had declared therein (a)*, the defendants obtained from the court of [753] bankruptcy for the Leeds district,—being the court within the district of which the defendants had resided or carried on business for six calendar months next immediately preceding their suspension of payment as aforesaid,—a certificate of the said court, certifying that the said deed had been duly signed by or on behalf of such majority of the defendants' creditors as aforesaid: That the plaintiff was at the time of the making of the said deed a creditor of the defendants in respect of the causes of action as to which that plea was pleaded, within the meaning of the said statute; and that, at the time of the making of the said deed, the amount in that plea mentioned was a debt due from the defendants to the plaintiff within the meaning of the said indenture: That the plaintiff had fourteen days' notice of and before the application to the said bankruptcy court for the Leeds district for such certificate as aforesaid, upon which application such certificate was so obtained as aforesaid: That, after the said suspension of payment, and before the obtaining of such certificate as aforesaid, the plaintiff was requested by the defendants to sign and execute the said deed, and might, if he would have done so, have signed and executed the same as a party thereto of the third part: That the defendants had, from the time of the making of the said deed hitherto, in all respects performed and observed the covenants in the said deed contained, and that the said deed of arrangement still remained in full force, and that, by reason of the premises, and by force of the said statute, the said deed had become and was as effectual and obligatory in all respects

(a) These words were added upon the argument.

upon the plaintiff as if he had duly signed and sealed the same: and that, by reason of the premises, the defendants had become and were released and discharged, in manner aforesaid, from the causes of action in the declaration mentioned.

[754] To this plea the defendants demurred,—the grounds of demurrer stated in the margin being, “that it does not appear by the plea that the deed had actually been executed by or on behalf of the plaintiff, and, unless it were, the covenant not to sue does not attach; and that the deed set out in the plea is not a binding deed of arrangement within the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.”

Montague Smith, Q. C. (with whom was Honyman), in support of the demurrer. The first objection to the deed upon which the plea is founded is, that it contains no assignment of the debtors' property, but leaves it in their possession, and liable to execution. All lies in covenant. The deed is in effect a letter of licence, enabling the defendants to carry on the business and get in the debts, free from molestation. It has been laid down in several cases, that, to make a good deed under the 224th section of the Bankrupt Act, it must provide for the distribution of the estate for the benefit of all the creditors, as in bankruptcy: *Drew v. Collins*, 6 Exch. 670; *Fisher v. Bell*, 12 C. B. 363; *Tetley v. Taylor*, 1 Ellis & B. 521, 532; *Bloomer v. Darke*, 2 C. B. (N. S.) 165. The cases of *Macnaught v. Russell*, 1 Hurlst. & N. 611, and *Irving v. Gray*, 3 Hurlst. & N. 34, which will be relied on in support of the plea, do not shew that such a deed as this would be valid. [Williams, J. There is no assignment to anybody here: and a duty is imposed upon the inspectors to distribute the estate when they have got it.] The property remains liable to be taken by future creditors. It is true, the debtors covenant not to make away with or encumber the estate without the consent of the inspectors: but that does not meet the difficulty. The clause at the end of the deed only binds [755] those who execute it; and that gives rise to another objection, viz. inequality of distribution. In *Ex parte Wilkes*, 5 De Gex, M'N. & G. 418, a deed of this sort was held to be bad. Lord Justice Knight Bruce there says: “I apprehend that a deed which neither is a deed of composition, nor does to the extent of the indebted trader's means, or so far as circumstances will allow, provide in a reasonable manner some satisfaction, some effectual security, or some effectual protection for his creditors, ought not, according to a proper view of the six sections (the 224th and five following), to be considered as coming within the 224th.” And Lord Justice Turner says: “I agree in the construction which the courts of law have put upon these clauses, that, in order to bring a deed within the operation of them, the whole estate must be given up to the creditors; and I think it must be so given up in all events, and not in certain events only, and in terms which are clear and unequivocal, and not open to future dispute and difficulty.” In *Irving v. Gray*, the business was to be carried on by the inspectors, with power to avail themselves of the services of the debtors, who covenanted to join in all necessary acts. In delivering the judgment of the court, Channell, B., says: “We agree that the trusts of the deed must be such as to enure for the distribution of all the debtor's estate and effects amongst all his creditors. This court, in *Drew v. Collins*, 6 Exch. 670, and the court of Common Pleas in *Fisher v. Bell*, 12 C. B. 363, decided that a deed of arrangement must provide for a distribution of all the trader's estate amongst all his creditors. The court of Exchequer Chamber, in the case of *Tetley v. Taylor*, 1 Ellis & B. 532, on a writ of error brought upon a decision of the court of Queen's Bench (1 Ellis & B. 521), decided the same. This question was afterwards much discussed in the House [756] of Lords in the case of *Larpent v. Bibby*, 5 House of Lords Cases, 481. It was not, however, then determined. The judges who heard the argument were not altogether agreed upon this point; and the case was decided on another ground. The court of Common Pleas has, since the case of *Larpent v. Bibby*, viz. in the case of *Bloomer v. Darke*, 2 C. B. (N. S.) 165, held that a plea of arrangement under the 224th section is not good, unless it shews on the face of it that the deed is for the distribution of the whole of the debtor's estate, and enures for the benefit of the whole of the creditors. No part of the trader's property is in terms, or, as we think, by necessary implication, excluded from the operation of the present deed, as was the case in *Drew v. Collins* and *Tetley v. Taylor*.” “But the plaintiffs' counsel strongly contended, that, assuming an equal distribution to be contemplated by the deed, and so far provided for, the deed is yet invalid, because it contains no express conveyance or assignment by the debtor of all the debtors' estate, but

at most a covenant to convey or assign when required by the inspectors, for the breach of which covenant the only remedy would be by action. This was the main objection urged to the validity of the deed. We are of opinion that this objection is not well founded, and that, although there is no actual conveyance or assignment of the debtor's property, the deed, if valid in other respects as a deed of inspection, is not invalid on that ground." And, after going through the cases, the learned Baron, speaking of *Ex parte Wilkes*, 5 De Gex, M'N. & G. 418, says,—“There was not in that case any conveyance or assignment of the trader's property. So far, that and the present case are alike. But the Lords Justices appear to have thought that the power on the part of the trustees to take possession was not meant by the deed to operate in all events at [757] the discretion of the trustees, but only in certain events expressed not in unequivocal, but in obscure or doubtful terms. Such a view does not, in our opinion, attach to the deed in the present case; and we think the case of *Ex parte Wilkes* is not an authority for the proposition for which it was urged at the bar, viz. that an actual conveyance or assignment is necessary to give effect to a deed of inspection.” The court of Exchequer there held that there need be no express conveyance or assignment of the debtor's property. But the inspectors were put into possession. Here, however, the whole scheme is, that the property shall be left in the possession and under the power of the debtors themselves. There is a further objection here, viz. that the deed provides that an assignment may be made if the inspectors require it,—giving a discretion in that respect to the inspectors, and not to the creditors. Then, there is this further proviso, that, upon the assignment being made, the debtors shall ipso facto be released from the claims of their creditors: but it is only in the event of some delict on the part of the traders that the inspectors could call for the assignment. A further objection to the deed is, that there might be a distribution under it which would be a preference: the debtors covenant not to give a preference to any of their creditors, without the consent of the inspectors. They could not by their act or consent bind creditors who did not sign the deed. The next objection presents a point of some novelty. There is no release by the non-signing creditors: and the deed appears to have been designedly drawn with that view. The interim release is limited to those creditors who actually execute the deed. The covenant not to sue may or may not operate as a release according to the intention of the parties: *Gibbons v. Fouillon*, 8 C. B. 483; *Willis v. De Castro*, 4 C. B. (N. S.) 216. [758] [Willes, J., referred to *Thimbleby v. Barron*, 3 M. & W. 211, where it was held that a covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt.] *Ford v. Beech*, 11 Q. B. 852, also shews that whether the deed is to operate as an extinction of the debt or a mere temporary suspension of the remedy, must depend upon the intention of the parties. The language of the clause here is substantially the same as in the case of *Gibbons v. Fouillon*, 8 C. B. 483; but the operation of the release is confined in terms to the persons who actually sign the deed. Upon principle, therefore, as well as upon authority, it is submitted that this deed does not enure as a release. The authorities upon this subject have recently been discussed in the Exchequer, in a case in which the court has taken time to consider (a).

Mellish (with whom was Bovill, Q. C.), contra. In order to arrive at a correct construction of the 224th and five subsequent sections of the 12 & 13 Vict. c. 106, it is necessary to bear in mind what was the state of things at the time of the passing of that act, and what was the inconvenience to be remedied. One of the modes by which an embarrassed trader obtained a release, was, by making an assignment for the general benefit of his creditors. That, however, was an act of bankruptcy. Another mode was, by a well-known class of deeds to wind up the estate under inspection. The main question here is, whether that sort of deed is within these provisions of the statute. It is impossible for the court to hold this plea to be bad, without overruling the decision of the Exchequer in *Irving v. Gray*, 3 Hurlst. & N. 34. [Williams, J. [759] *Irving v. Gray* is expressly in point, and binding upon us. Crowder, J. The matter was very much discussed in the House of Lords in *Larpent v. Bibby*, 5 House of Lords Cases, 481.] In that case, the deed provided for the distribution of the debtors' estate only amongst those creditors who executed it. The deed in the present case is not obnoxious to that objection. [Cockburn, C. J. In what respect does Mr.

(a) *Snodin v. Boyce*, 4 Hurlst. & N. 391. The decision turned upon a totally different point.

Smith say that this case is distinguishable from *Irving v. Gray*? Smith. The inspectors there were to carry on the business. It is true, there was no absolute assignment of the property to them: but it was completely and entirely under their control: see the first and second clauses of the deed, 3 Hurlst. & N. 46, 47. Whereas, here, the property remains entirely under the control and liable to the debts of the traders themselves. Besides, it is submitted that *Irving v. Gray* was not well decided.] The defendants' covenants in that case were substantially the same as those in this deed. [Cockburn, C. J. *Irving v. Gray* is the decision of a court of co-ordinate jurisdiction. I am not prepared to say that I should hold myself bound to follow a decision which I felt to be clearly mistaken: but, unless there be manifest mistake, we are bound to treat the judgment of another court with respect, and to follow it. But I must confess that *Irving v. Gray* seems to me to have proceeded upon right grounds. Some other objections to this deed have been pointed out; and to these your attention had better be directed. Willes, J. I see nothing in this deed to make it an answer to the plaintiff's claim. It was not complete at the time of the commencement of the action: the defendants cannot, therefore, rely upon the release clauses. Cockburn, C. J. This arrangement by deed was intended as a substitute for the ordinary proceedings in bankruptcy. It is the same thing, therefore, as if the defendants had become bankrupt pending the action. The difficulty, however, is this,—[760] bankruptcy operates as a stay of the action, but the creditor would be able to come in and prove. Here, the plaintiff, who brings his action before six sevenths of the creditors have executed the deed, would be entirely ousted of his claim. I should incline to say that the continuing the action would be a "molestation."] Looking at the whole of the deed, the plaintiff would still be one of the cestuis qui trust who would be entitled to share in the proceeds of the estate. The last clause of the deed expressly declares that it shall be a deed within the 224th and subsequent clauses of the Bankrupt Law Consolidation Act, 1849, and that, if there should be any direction or provision therein which was not authorized or allowed by the said provisions of the act to be introduced into an arrangement thereunder, every such unauthorized provision or direction should be construed to operate as being intended to bind only the creditors by or on behalf of whom the said deed should be actually executed, and their respective debts, claims, rights, and demands, and should, as against all other creditors, be wholly void and inoperative. Now, it could not be a deed within the 224th section unless the right of participation extended to all the creditors. [Williams, J., referred to the judgment of Maule, J., in *Belshaw v. Bush*, 11 C. B. 191, and, observing that this action was commenced before the deed had been executed by the required number of creditors, asked what course the plaintiff could or ought to have adopted when the deed was signed by the six sevenths.] He should have stayed his proceedings; or he might have applied for leave to discontinue without costs. The deed contains two releases, the first of which is conditional, the second absolute. [Willes, J. The latter seems to have been put in to avoid the difficulty suggested by the case of *Macnaught v. Russell*, 1 Hurlst. & N. 611.] The [761] deed upon the face of it shews an intention to bind all the creditors, whether they execute it or not; and it could not have that operation unless all the conditions of the 228th section have been complied with. *Macnaught v. Russell* is directly in favour of the defendants, though some of the reasons given are not very satisfactory. [Williams, J. The court held the deed to be good, and the plea good: whereas, if all the reasoning of the judges be good, it shews that the plea would be bad. Willes, J. The plea is assumed to have been a good plea of composition.] In *Irving v. Gray*, 3 Hurlst. & N. 34, the deed contains the same provisions as are contained in the present deed. [Cockburn, C. J. The legislature no doubt intended that a deed of arrangement executed by six sevenths of the creditors of the trader should be binding upon the rest. The question is, whether this deed carries out that intention,—whether the clause which provides, that, if any creditor by or on whose behalf the deed should have been actually executed should act contrary to the covenant not to sue, the defendants should be absolutely discharged from all claims and demands both at law and in equity by such creditor, includes those creditors who have not executed the deed.] In *Tabor v. Edwards*, 4 C. B. (N. S.) 1, it was suggested, that, inasmuch as the deed when executed by the proper number was binding upon all the creditors as if they had signed the same, it would not amount to a defence unless it contained an absolute and unconditional release. Looking at the whole deed, it is manifest that it was intended to operate as a good deed within the arrangement clauses of the 12 & 13

Vict. c. 106, and to bind all the creditors, and to be construed exactly as if all had signed it. [Willes, J. Assume that the covenant in question applies in terms to the plaintiff and the other creditors who have not executed the deed,—[762] does not *Tetley v. Taylor* and that class of cases shew that you cannot by a deed of this sort impose upon dissentient creditors something to which they would not be bound if the estate were being wound up in bankruptcy.] *Tetley v. Taylor* and that class of cases are explained by the judgment of the court of Exchequer in *Irring v. Gray*, 3 Hurlst. & N. 90. To be a valid deed under the statute, it must provide for distribution as in bankruptcy. This deed satisfies that condition. In *Ex parte Calvert*, 27 Law J., Bankruptcy, 42, the deed contained provisions very similar to those of this deed: but the Lords Justices declined to pronounce any opinion as to its validity. At the close of his judgment, however, Lord Justice Turner explains the decision in *Ex parte Wilkes*, 5 De Gex, M'N. & G. 418. He says,—“The case *Re Wilkes* seems to me to have been pushed, in the argument of *Irring v. Gray*, far beyond, not only what was intended, but what was expressed. The judgment of the court in *Irring v. Gray*, however, takes a much more correct view of the case. All that was meant to be said in it was, that the property must be devoted to the creditors,—not that it must be assigned in trust for them” (a).

Honyman, in reply. Throughout the deed, there is a marked distinction between the covenants which are to operate upon the creditors who actually sign the deed, and the covenants which are intended to apply to those who do not execute: and the court is not now to be called upon to put a construction upon the deed which is manifestly opposed to the intention of the parties. The clause which it is here sought to be made operative upon the plaintiff was [763] obviously meant to be confined in its application to those who actually executed the deed.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

This was an action against the defendants as acceptors of a bill of exchange. The question before us arose on demurrer to the second plea, which was founded on a deed of arrangement made by the defendants with their creditors (under the 224th section of the Bankrupt Law Consolidation Act, 1849), which had not been signed by the plaintiff, but which was said on the part of the defendants to be nevertheless binding on him by reason of its being executed by six sevenths in number and value of their creditors.

The instrument was not a composition deed; but it contained a clause by which each of the creditors parties to or bound by the deed covenanted not to sue, impede, or molest the defendants: and then followed another clause, to the effect, that, if any creditor, by whom or on whose behalf the deed should have been actually executed, should act contrary to that covenant, the defendants should be absolutely discharged from all claims and demands, both at law and in equity, by such creditor.

This latter clause, according to the decision of this court in *Gibbons v. Fouillon*, 8 C. B. 483, renders the deed operative as a defeazance pleadable in bar to an action brought by a creditor. The validity, therefore, of the plea depends on the question whether the clause is binding or not on the plaintiff, notwithstanding he did not execute the deed. And we are of opinion in the negative.

The distinction is carefully made by the language [764] to the instrument, between such creditors as are to be bound by the deed and such as actually execute it. As to the former, the deed is so worded that they do no more than covenant not to sue. But, as to the latter, the bringing an action is to amount to a defeazance.

It was argued, however, on the part of the defendants, that such a distinction is precluded by the language of the 224th section, which says that every such deed shall be as effectual and obligatory in all respects on all the creditors who shall not have signed such deed “as if they had actually signed the same.”

On the other hand, it was contended that the clause in question was in its very nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general.

We are of that opinion. The expression so much relied upon by the defendants is used only to describe the operation and effect of the power given to the majority of

(a) At the suggestion of the court, Mellish consented to amend the plea by introducing the words at the bottom of page 752.

the creditors to bind the minority, when the intention to exercise that power is expressed in apt words, and not with the view of restraining or expanding the proper meaning of the words which have actually been used.

We give the language relied upon full effect, by holding that those provisions of the deed which appear by the language used to have been intended, by the debtor and the creditors who sign, to bind the dissenting creditors, shall bind them; whilst those which appear by the language used to have been intended to bind the creditors who "actually" sign only, and not the dissenting creditors, shall not bind such creditors. This is so with the clause in question: and, even assuming it to be valid, if applicable, —upon which we need not give an opinion,—it is for the above reasons inapplicable, and consequently the defence founded upon it fails.

[765] This view is in accordance with the reasoning of the court of Exchequer in *Macnaught v. Russell*, 1 Hurlst. & N. 611, though, in consequence of the objection being treated in that case as an objection to the deed only, and not to the plea, judgment was there given for the defendant. That must, of course, have been upon the assumption, that, if the deed was valid, the plea presented a defence by way of composition or release, independent of the defeazance. In the present case, however, our attention is called to the admitted fact that this plea furnishes no defence apart from the defeazance.

Our judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

HUGHES AND ANOTHER, Churchwardens of St. Giles, Cripplegate, AND KING AND ANOTHER, two of the Inhabitants of the said Parish, *Appellants*: THE REV. WILLIAM DENTON, Incumbent of the Church and District of St. Bartholomew, Moorfields, in the City of London, *Respondent*. Feb. 12th, 1859.

[S. C. 28 L. J. M. C. 140; 5 Jur. N. S. 575; 7 W. R. 305.]

The church of St. Bartholomew, Moorfields,—a church erected and endowed under the provisions of the 2 & 3 Vict. c. cvii,—was built within the limits of the parish of St. Giles, Cripplegate, and the respondent was duly presented to the incumbency thereof. By an order in council in 1850, pursuant to the 59 G. 3, c. 134, s. 16, a particular district was assigned to the church so built, within the parish of St. Giles, Cripplegate, which was called "The district chapelry of Little Moorfields," and authority was given to publish banns and to solemnize marriages, &c. in the said church, the fees for which were to be paid to the incumbent. In 1857, the vicar of St. Giles, Cripplegate, by a deed, to which the Dean and Chapter of St. Paul's and the Bishop of London were parties,—reciting a local act of 7 G. 4, c. liv., whereby the tithes of the parish of St. Giles, Cripplegate, were extinguished, and in lieu thereof an annuity of 1800l. subject to the averages of the price of wheat, was secured to the vicar, payable quarterly,—annexed to the church of the district chapelry of St. Bartholomew, Moorfields, one sixth part of the annual sum to which he was entitled as vicar under the 7 G. 4, c. liv., to the intent that the respondent and his successors, perpetual curates of the said district chapelry of St. Bartholomew, Moorfields, should receive the one sixth part thereby annexed:—Held, that the extinguishment of the tithes of St. Giles, Cripplegate, and the substitution of an annual payment, by the local act, 7 G. 4, c. liv., did not prevent the legal annexation of a portion of such annual payment, under the provisions of the 1 & 2 W. 4, c. 45, s. 21.—Held also, that, although the district chapelry of St. Bartholomew, Little Moorfields had, by force of the provisions of the 19 & 20 Vict. c. 104, s. 14, become a separate and distinct parish for ecclesiastical purposes, the church of St. Bartholomew, Moorfields, still remained a church to which a district had been assigned, locally situate within the limits of St. Giles, Cripplegate, and was therefore capable of receiving the annexation made under the provisions of the 1 & 2 W. 4, c. 45, s. 21.—The 21st section of the 1 & 2 W. 4, c. 45, enacts that "the incumbent for the time being" of the district church "shall have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed" (including the case of the annexation of a part of the vicar's annual revenues) "as the rector or vicar for the time being of the rectory or vicarage might have had, if such annexation had not been made." And by the 3rd section of the local act, 7 G. 4, c. liv., the vicar

is impowered, "in case any quarterly payment of the annual sum of 1800l., or any part thereof, shall be in arrear and unpaid for twenty-eight days," to obtain a warrant to levy the same on the goods of the churchwardens or any one or more of the inhabitants of the parish:—Held, that the incumbent of the district church had the like power of distress for the portion of the annual sum so annexed.

The following case was stated by one of the Aldermen of the city of London, pursuant to the 20 & 21 Vict. c. 43, for the opinion of the court of Common Pleas:—

[766] By a public local and personal act, 7 G. 4, c. liv., intituled "An act for extinguishing tithes and customary payments in lieu of tithes and Easter offerings within the parish of St. Giles, Cripplegate, in the liberties of the city of London, and for making compensation to the vicar for the time being in lieu thereof," it was in the preamble recited, "whereas it will be beneficial to the inhabitants of the said parish that a certain annual stipend should from henceforth be paid to the vicar of the said parish for the time being in lieu and full satisfaction of all tithes and payments in lieu of tithes within the said parish, in manner and under the regulations hereinafter mentioned."

By s. 1 it is enacted "that the churchwardens of the said parish for the time being shall from time to time for ever hereafter pay or cause to be paid to the vicar for the time being of the said parish, or to such persons as he shall appoint to receive the same, one clear annual sum of 1800l. of lawful money of Great Britain, subject to such averages, according to the price of wheat from time to time, as hereinafter mentioned, in lieu, [767] satisfaction, and discharge of all tithes and Easter offerings, or payments in lieu of tithes, to which such vicar is entitled within the said parish."

By s. 3 it is provided, that, if the sum payable to the vicar is in arrear, on complaint by or on behalf of the vicar, a justice of the peace for the city of London is required to grant a warrant authorizing any person to be nominated by or on behalf of the vicar to levy such arrears by distress and sale of the goods and chattels of the churchwardens and inhabitants of the parish who had been summoned to answer.

By s. 8 it is provided, to the end that the churchwardens may raise and pay the said yearly sum of 1800l., the churchwardens in vestry, or, in case either of them refuse, any twelve vestrymen, once a year or oftener, as they shall see occasion, shall proceed to make and sign a sufficient assessment, to be called the church-rate, upon all persons inhabitants and occupiers of lands, tenements, hereditaments, and premises within the said parish, except the vicar for the time being, for raising the said annual sum of 1800l. and such further sum of money as shall be necessary for repairing and keeping in repair the church of the said parish, and the churchyard belonging to the same, and for the payment of all necessary and proper salaries and disbursements relative to the said parish church and churchyard.

Section 28 contains a provision for reviewing the stipend every ten years, and altering it according to the average price of wheat.

Since the passing of the act, the vicar for the time being has received the said annual sum of 1800l. until the 18th of March, 1856, when the sum was revised according to the price of wheat, and reduced pursuant to s. 28, to the annual sum of 142l. 15s. 8d., which is the annual sum now payable under the aforesaid act.

[768] By the provisions of an act of parliament, 2 & 3 Vict. c. cvii., the Governor and Company of the Bank of England were impowered to take down the church of St. Bartholomew, Exchange. The parish of St. Bartholomew Exchange, however, was by the said act expressly preserved, and was united to the parishes of St. Margaret Lothbury and St. Christopher le Stocks, the church of St. Margaret Lothbury being made the parish church of the three united parishes.

By the 86th section of the said act, the Governor and Company of the Bank of England, within twenty-one days after they have taken possession of the church of St. Bartholomew, Exchange, are to pay to the Archbishop of Canterbury and the Bishop of London a sum of money to be employed by the said archbishop and bishop in purchasing a site for and in erecting and endowing a church in the city of London or some parish adjoining thereto, the right of presenting to which church is by the said section vested in the Queen.

The church of St. Bartholomew, Moorfields, was built and endowed, and the Rev. William Denton has been presented to and now holds the incumbency of the said church under and by virtue of the provisions of the said act.

The attention of the court is particularly directed to sections 74 to 92, both inclusive, of the 2 & 3 Vict. c. cvii.

In the year 1850, an order in council was obtained and published in the *London Gazette* of the 21st of June, 1850, of which the following is a copy :—

“At the court of Buckingham Palace, the 19th of June, 1850, present the Queen’s most excellent Majesty in council.

“Whereas, Her Majesty’s commissioners for building new churches have, in pursuance of the 16th section of an act passed in the 59th year of the reign of His Majesty King George the Third, intituled ‘An act to amend and render more effectual an act passed [769] in the last session of parliament for building and promoting the building of additional churches in populous parishes,’ or under or by virtue of any other power or authority vested in them by the church-building acts, duly prepared and laid before Her Majesty in council a representation bearing date the 14th of May, 1850, in the words following, viz.

“‘Your Majesty’s commissioners for building new churches beg leave humbly to represent to your Majesty, that, having taken into consideration all the circumstances of the parish of St. Giles, Cripplegate, in the county of Middlesex, and within the diocese of London, it appears to them to be expedient that a particular district should be assigned to the consecrated church of St. Bartholomew, situate in Moor Lane, in the said parish of St. Giles, Cripplegate, under and by virtue of the power or authority for this purpose contained in the 16th section of an act passed in the 59 G. 3, intituled an act to amend and render more effectual an act passed in the last session of parliament for building and promoting the building of additional churches in populous parishes, or under and by virtue of any and every other power or authority in this behalf vested in your Majesty’s said commissioners by the church-building acts, and that such proposed district should be called the district chapelry of Little Moorfields, with boundaries as hereinafter mentioned.

“‘This district chapelry of Little Moorfields is bounded on or towards the north by the parish of St. Luke, Old Street, on or towards the east by the parish of St. Stephen, Coleman Street, on or towards the south by the said parish of St. Stephen, Coleman Street, and on or towards the west by the remaining part of the said parish of St. Giles, Cripplegate, from which the said district chapelry of Little Moorfields is separated by a line passing up the middle of Aldermanbury Post-[770]-ern into Fore Street, and then turning north-westerly up the middle of Fore Street as far as Milton Street, and north-easterly up the middle of Milton Street as far as the boundary line of the said parish of St. Luke, Old Street, as such district chapelry is more particularly delineated on the map or plan hereunto annexed, and thereon coloured pink.

“‘Your Majesty’s said commissioners beg leave further to represent to your Majesty that it also appears to them to be expedient that banns of marriage should be published, and that marriages, baptisms, and churchings, and also burials, upon a burial-ground being provided for the said district chapelry, should be solemnized and performed in the said church of St. Bartholomew in Moor Lane aforesaid, and that the fees to arise therefrom should be paid and belong to the incumbent thereof for the time being: that the consent of the right Hon and Right Rev. Charles James, Lord Bishop of the said diocese of London, has been obtained thereto, as required by the act and section hereinbefore mentioned, in testimony whereof the said Charles James, Bishop of London, has signed and sealed this representation :

“‘Your Majesty’s said commissioners therefore humbly pray that your Majesty will be graciously pleased to take the premises into your Royal consideration, and to make such order in respect thereto as to your Majesty in your Royal wisdom shall seem meet.’

“Her Majesty having taken the said representation, together with the map or plan thereunto annexed, into consideration, was pleased, by and with the advice of Her privy council, to approve thereof, and to order, as it is hereby ordered, that the proposed assignment be accordingly made, and the recommendation of the said commissioners in respect of the publication of banns and the solemnization of marriages, baptisms, church-[771]-ings, and burials, and the fees arising therefrom, be carried into effect agreeably to the provisions of the said acts: and Her Majesty by and with the like advice, is pleased to direct that this order be forthwith enrolled pursuant to the said acts, and registered by the registrar of the diocese of London.

“W. L. BATHURST.”

The said church of St. Bartholomew in Moor Lane, with the district assigned to it, as stated in the said order in council, is situate within the original limits of the said vicarage of St. Giles, Cripplegate; and the Rev. William Denton as aforesaid was duly appointed incumbent of the said church and district.

The inhabitants of the district of St. Bartholomew, Moorfields, are elected to and serve upon the select vestry for the parish of St. Giles, Cripplegate; and a considerable number of the said vestry consists of persons residing within the district of St. Bartholomew, Moorfields. The inhabitants of the said district are also liable to pay, and do in fact pay, their share of a sum in the nature of a rate raised annually in the said parish under the authority of the 7 G. 4, c. liv., not only for the payment of the before-mentioned composition to the vicar in lieu of tithes, but also for the payment of the expenses of the church of St. Giles, Cripplegate, and of the salaries of the various parish officers of the said parish of St. Giles, Cripplegate, and other expenses mentioned in the 8th section of the last-mentioned act.

Banns of matrimony and the solemnization of marriages, churchings, and baptisms, according to the laws and canons and customs of the established church, have been since the said order in council, and are, authorized to be published and performed in the said consecrated church of St. Bartholomew, Moorfields: and the incumbent of the said church was by such authority entitled for his own benefit to the entire [772] fees arising from the performance of such offices, without any reservation thereof: and the said Rev. William Denton has, without any reservation, always received the same so far as they arise from the performance of the ceremony of marriage, but has never received any fees either for baptisms or for churchings, having declined to receive the same.

By the 95th section of the 2 & 3 Vict. c. 107, the purchase-money arising from the sale of a certain house is to be paid to the governors of Queen Anne's bounty, to be by them invested (until it can be conveniently invested in real property) in the 3 per cent. Consols, or 3 per cent. Reduced Bank-Annuities, in trust, after certain trusts which have long expired, to pay the dividends to the minister of the new church contemplated by the act to be erected as aforesaid.

Pursuant to this section, a sum of 9934l. 14s. 4d. has been invested by the governors of Queen Anne's bounty in the 3 per cent. Reduced Bank Annuities upon the trusts stated in the above-mentioned section; and the dividends from the same, amounting to the clear annual sum of 298l. 0s. 8d., have been for several years, and are now, annually payable to and received by the said Rev. William Denton as minister of the district church of St. Bartholomew, Moorfields, which is the new church contemplated by the act to be erected.

The surplice-fees payable to the said Rev. William Denton, and paid to him, have exceeded the sum of 15l., and not exceeded the sum of 20l., during each of the years 1855, 1856, and 1857.

The said Rev. William Denton has engaged a curate deeming his services necessary for the district, of which the population is between 4500 and 5000, and pays him annually the salary of 130l. per annum. He also pays voluntarily various other sums annually towards the expenses of the church service, amounting in all to the sum of 98l. a year.

[773] On the 25th of May, 1857, an indenture was made and executed by the respective parties described as parties thereto, in the words following:—

“This indenture, made the 25th day of May, 1857, between the Rev. Philip Parker Gilbert, clerk, M.A., vicar of the parish church of St. Giles, Cripplegate, in the city and diocese of London, of the first part, the very Rev. Henry Hart Milman, D.D., dean of the cathedral church of St. Paul in London, and the chapter of the same church, patrons of the said vicarage, of the second part, the Rt. Hon. and Rt. Rev. Archibald Campbell, Lord Bishop of London, of the third part, and the Rev. William Denton, clerk, M.A., incumbent of the perpetual curacy of the district chapelry of St. Bartholomew, Moorfields (a church within the limits of the said vicarage of Cripplegate), of the fourth part: Whereas, by an act of parliament made and passed in the seventh year of the reign of His Majesty King George the Fourth, and intituled ‘An act for extinguishing tithes and customary payments in lieu of tithes and Easter offerings within the parish of St. Giles, Cripplegate, in the liberties of the city of London, and for making compensation to the vicar for the time being in lieu thereof,’

it was, among other things, enacted that the churchwardens of the said parish for the time being should from time to time for ever thereafter pay or cause to be paid to the vicar for the time being of the said parish, or to such person as he should appoint to receive the same, one clear annual sum of 1800*l.* of lawful money of Great Britain, subject to such averages according to the price of wheat from time to time as therein-after mentioned, in lieu, satisfaction, and discharge of all tithes and Easter offerings, or payments in lieu of tithes, to which such vicar was entitled within the said parish, which said clear annual sum of 1800*l.* should be paid by four quarterly pay-[774]-ments, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December in every year; and that the same annual sum of 1800*l.* should be free and clear from all deductions, and exempt from all taxes, rates, and assessments whatsoever, parliamentary or otherwise: And whereas the said Philip Parker Gilbert is desirous of charging the said vicarage of St. Giles, Cripplegate, for the benefit and support of the church of the said district chapelry of St. Bartholomew, Moorfields, to the extent and manner hereinafter mentioned: Now this indenture witnesseth, that, in pursuance and exercise of the power in this behalf given or created by an act of parliament made and passed in the 1st and 2nd years of the reign of His late Majesty King William the Fourth, intituled 'An act to extend the provisions of an act passed in the 29th year of the reign of His Majesty King Charles the 2nd, intituled An act for confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies, and for other purposes,' and of every other power enabling him in anywise in this behalf, the said Philip Parker Gilbert, with the consent of the said Archibald Campbell, Lord Bishop of London (as the bishop in whose diocese the said vicarage of St. Giles, Cripplegate, is situate), and of the said dean and chapter of St. Paul's (as patron of the said vicarage), testified by their respectively executing these presents, doth hereby, from and after the 24th day of June next, for ever annex unto the church of the said district chapelry of St. Bartholomew, Moorfields, one equal sixth part of the said annual sum of 1800*l.*, or of such other sum as shall from time to time be payable to the vicar for the time being of the said church of St. Giles, Cripplegate, by virtue of the said act of His Majesty King George the 4th, to the intent that the said William Denton and his successors, per-[775]-petual curates of the said district chapelry of St. Bartholomew, Moorfields, may, from and after the 24th of June next, receive and enjoy the said one sixth part expressed to be hereby annexed to the church of the said district chapelry, and may have and exercise all the same remedies for recovering and enforcing payment thereof as the said Philip Parker Gilbert and his successors, vicars of the church of St. Giles, Cripplegate, aforesaid, might have had if these presents had not been made: And the said Philip Parker Gilbert doth hereby declare that it is intended that these presents shall be forthwith deposited in the registry of the diocese of London aforesaid, conformably with the provisions in that behalf contained in the said act of His late Majesty King William the Fourth. In witness whereof the said dean and chapter in their chapter house have caused their common seal to be affixed, the said Archibald Campbell, Lord Bishop of London, hath set his hand and caused his episcopal seal to be affixed, and the said other parties hereto have set their hands and seals, the day and year first above written."

(Signed and sealed.)

This indenture was made without any notice to or consent from the present churchwardens or other the inhabitants of the said parish of St. Giles, Cripplegate.

Since the making of the said indenture, two quarterly portions of the said annual sum have become due, viz. at Michaelmas and Christmas, 1857.

The Rev. William Denton has demanded of the churchwardens of the said parish one sixth part of such quarterly portions as being due to him under the said indenture. The said churchwardens have not paid the same to him; and the said one sixth part of such quarterly portions was more than twenty-eight days in arrear at the time of the complaint hereinafter mentioned. The said vicar of St. Giles, Cripplegate, [776] has not demanded the said one-sixth part to be paid to him or to the said Rev. William Denton, and has declined to interfere in the matter in any way. There is one churchwarden annually appointed for the parish or district belonging to the church of St. Bartholomew, Moorfields.

On the 25th of February, 1858, the said Rev. William Denton appeared in person before one of Her Majesty's justices of the peace for the city of London, at the

Guildhall of the said city, and complained that the said two quarterly portions of the sum so annexed as aforesaid were in arrear and unpaid, and prayed that William Nightingale Hughes and John Nind, the two churchwardens for the time being of the said parish of St. Giles, Cripplegate, and William King and George Cuthbert, two of the inhabitants of the same parish, might be summoned to answer the premises; and thereupon the said justice granted a summons in due form, which was served on the said churchwardens and inhabitants by a person nominated on behalf of the said Rev. William Denton.

The said complaint, on the 1st of March, 1858, came on to be heard before Mr. Alderman Humphery, at the Guildhall of the city of London; and the said Rev. William Denton and the said churchwardens and inhabitants then attended before him, with their respective counsel and attorneys, and the above-mentioned facts were then proved or admitted.

On behalf of the applicant, it was urged, that, by virtue of the order in counsel, the church of St. Bartholomew, Moorfields, was a district church or chapel, and had a district assigned to it; that, consequently, the indenture annexing to the said church one sixth part of the annual sum payable to the vicar of St. Giles, Cripplegate, was valid under the statute, 1 & 2 W. 4, c. 45, s. 21; and that, by virtue of the indenture and [777] the last-named statute, a justice of the peace for the city of London was authorized and required, on the application of the said Rev. William Denton, to grant a warrant to levy the arrears of the one sixth portion of the said annual sum so annexed as aforesaid, if for more than twenty-eight days unpaid to the said Rev. William Denton, by distress and sale of the goods of the churchwardens of St. Giles, Cripplegate, and other inhabitants of the same parish, as he would have been required to do on the application of the said vicar, had the deed of annexation not been made.

For the defendants it was contended, that, by the statute 19 & 20 Vict. c. 104, the district to which the church of St. Bartholomew, Moorfields, belonged, had at the time of the executing the indenture become a separate and distinct parish for ecclesiastical purposes, and consequently was incapable of receiving an annexation of tithes or other revenue under the statute 1 & 2 W. 4, c. 45, s. 21,—secondly, that, without reference to the statute 19 & 20 Vict. c. 104, the statute 1 & 2 W. 4, c. 45, did not make the indenture valid so as to annex the one sixth part of the annual sum payable to the vicar of St. Giles, Cripplegate, to the district church of St. Bartholomew, Moorfields,—thirdly, that, assuming that the indenture was valid so as to annex the said one sixth part to the said district church, the incumbent of the said district church had not any summary power of recovering the arrears; and a justice of the city of London was not authorized to grant his warrant to levy the same on the goods of the said churchwardens and inhabitants.

The alderman took time to consider the case: and, on the 3rd of March, 1858, he gave his decision, and stated his opinion as follows, viz. "I was of opinion that the church of the district chapelry of St. Bartholomew was a chapel having a district assigned to it, within the meaning of the 21st section of the 1 & 2 [778] W. 4, c. 45, and that therefore the deed which had been executed by the vicar, dated the 25th of May, 1857, was a valid deed, and made in conformity with the provisions of that section of the act of parliament. I was also of opinion that I was enabled, under the powers vested in me by the 7 G. 4, c. liv., ss. 1 and 3, to direct a warrant authorizing the recovery of the arrears claimed by the Rev. William Denton, the incumbent. I was also of opinion that the district assigned to the church of St. Bartholomew was not a separate and distinct parish, and that it was not separated from the parish of St. Giles, Cripplegate. And I considered, therefore, that the vicar legally exercised the power vested in him, notwithstanding the provisions in the 14th and 15th sections of the 19 & 20 Vict. c. 104." And he thereupon granted his warrant to levy the said arrears on the goods of the said churchwardens and inhabitants.

F. Russell, for the appellants, submitted,—that the deed of annexation was not valid in law; that, by the statute of 19 & 20 Vict. c. 104, the district assigned to the church of St. Bartholomew had at the time of executing the said deed become a separate and distinct parish for ecclesiastical purposes; consequently, that the said church had ceased to be a church or chapel capable of receiving an annexation of tithe or other revenue under the statute 1 & 2 W. 4, c. 45, s. 21; that, without reference to the statute 19 & 20 Vict. c. 104, the statute 1 & 2 W. 4, c. 45, did not empower

the said vicar of St. Giles, Cripplegate, to annex to the said church of St. Bartholomew the one sixth part of the annual sum payable to him under the said first-recited local act; and that the justice was not authorized, on the application of the incumbent of the said church, to grant a warrant to levy any arrears of the said one sixth [779] part so assumed to be annexed as aforesaid, by distress and sale of the goods of the churchwardens or other inhabitants of the said parish of St. Giles, Cripplegate.

Coleridge, for the respondent, contended, that, by the operation of the 59 G. 3, c. 134, s. 16, 58 G. 3, c. 45, s. 16, and 1 & 2 W. 4, c. 45, s. 21, the Rev. P. P. Gilbert had power to annex to the district church or chapel of St. Bartholomew, Moorfields, a portion of the annual revenue belonging to the vicarage of St. Giles, Cripplegate; that the power was not taken away by the operation of the 19 & 20 Vict. c. 104; that, consequently, the deed of annexation was valid in law; and that the justice was therefore authorized in granting his warrant according to the powers given him by the Cripplegate Act, 7 G. 4, c. liv., s. 3.

Cur. adv. vult.

CROWDER, J., now delivered the judgment of the court:—

This was an appeal against the decision of a magistrate, whereby a warrant was granted to the respondent to levy the arrears claimed by him under and by virtue of a deed of the 25th of May, 1857, on the goods of the appellants. The respondent was the incumbent of the church of St. Bartholomew, Moorfields; and the appellants were the churchwardens of the parish of St. Giles, Cripplegate.

The church was built and endowed under the provisions of the 2 & 3 Vict. c. 107; by the 86th section of which, the governor and company of the Bank of England were authorized to take down the old church of St. Bartholomew, Exchange, and, in consideration of the site and the materials, to pay a certain sum of money to the Archbishop of Canterbury, and the Bishop of London, which should be employed by them in purchasing a site for and erecting and endowing a church in the city of London, or some parish adjoining thereto. The church was built within the limits of St. Giles, Cripplegate, and the respondent was duly presented to the incumbency thereof.

By an order in council obtained in the year 1850, in pursuance of the provisions of the 59 G. 3, c. 54, s. 16, a particular district was assigned to the said church within the parish of St. Giles, Cripplegate, and called "The District Chapelry of Little Moorfields;" and by the same order in council authority was given to publish banns of marriage, and to solemnize marriages, baptisms, and churchings and burials in the said church; the fees for which were to be paid to the incumbent. From the date of the order in council, marriages, baptisms, and churchings have been solemnized in the said church accordingly.

The deed of the 25th of May, 1857, was an indenture made between the Rev. Philip Parker Gilbert, vicar of the parish of St. Giles, Cripplegate, in the diocese of London, of the first part, the dean and chapter of St. Paul's of the second part, the Bishop of London of the third part, and the respondent of the fourth part,—reciting a local act of 7 G. 4, c. liv., whereby the tithes of the said parish were extinguished, and in lieu thereof an annuity of 1800*l.*, subject to the averages of the price of wheat, was secured to the vicar, payable quarterly. It was then witnessed by the said deed, that, in pursuance of the power given by the 1 & 2 W. 4, c. 45, s. 21, the vicar did thereby annex to the church of the District Chapelry of St. Bartholomew, Moorfields, one sixth part of the annual sum to which he was entitled as vicar of the parish of Cripplegate under the 7 G. 4, c. liv., to the intent that the respondent and his successors, perpetual curates of the said District Chapelry of St. Bartholomew, Moorfields, should receive the one sixth part thereby annexed. Two quarters of the respondent's annuity being in arrear, and the churchwardens having on demand refused payment, an application was made to a justice of the peace at Guildhall, who granted a warrant to levy the said arrears.

The appellants contended before the magistrate, and have argued before us, that the deed of annexation was invalid; and that, even if it were valid, the magistrate could not legally issue a warrant to levy the arrears against the appellants. It was argued that the deed was invalid on two grounds,—first, because the 1 & 2 W. 4, c. 45, s. 21, which authorizes vicars to annex a portion of their tithes, did not empower the vicar to annex the one sixth part of the annual payment in lieu of tithes secured to him by the local act 7 G. 4, c. liv., recited in the deed,—and, secondly, because,

supposing such power to exist, it could not be legally exercised in reference to the church of St. Bartholomew, Moorfields, since the passing of the 19 & 20 Vict. c. 104, as by that act the District Chapelry of St. Bartholomew, Moorfields, had, it was said, become a separate and distinct parish, and, as such, incapable of receiving an annexation of tithes or other revenues under the provisions of the 1 & 2 W. 4, c. 45, s. 21.

On the first point, we are clearly of opinion that the extinguishment of the tithes of St. Giles, Cripplegate, and the substitution of an annual payment by the local act of 7 G. 4, c. liv., did not prevent the legal annexation of a portion of such annual payment by the vicar. It is expressly included by the words of the 21st sections of the 1 & 2 W. 4, c. 45, which authorize the annexation of "any part or parts of the tithes or other annual revenues belonging to such rectory or vicarage." We think, therefore, that the vicar was authorized to annex one sixth part of the annual payment which he received in lieu of tithes.

[782] On the second point, it was contended by the appellants' counsel that the power of annexation was applicable only to the church of a district chapelry, and not to the church of a separate and distinct parish; and that, although by the order in council of 1850 (to which no exception was taken), a district was assigned to the church of St. Bartholomew, Moorfields, within the meaning of the 21st section of the 1 & 2 W. 4, c. 45; yet that, as banns of marriage were published, and marriages, churchings, and baptisms were solemnized in it before the passing of the 19 & 20 Vict. c. 104, the District Chapelry of St. Bartholomew, Moorfields, became thenceforth, by the express language of the 14th section, a distinct and separate parish, and so was incapable of receiving any annexation under the provisions of the 1 & 2 W. 4, c. 45, s. 21.

On the part of the respondent it was answered, that, as there had been a district assigned to the church of St. Bartholomew, Moorfields, within the limits of the parish of St. Giles, Cripplegate, and as, consequently, the respondent was the incumbent of a church of a district chapelry, the 19 & 20 Vict. could not operate to deprive such church of its distinctive character, or to disentitle it to a benefit which up to the time of the passing of that act it might clearly have received.

It is enacted by the 1 & 2 W. 4, c. 45, s. 21, "that it shall be lawful for any rector or vicar for the time being, of any rectory or vicarage, by a deed duly executed by him, to annex to any chapel of ease or parochial chapel, or to any chapel having a district assigned thereto, whether already built or hereafter to be built (such chapel of ease or other chapel or church with the district or place to which the same belongs, being situate within the limits, or within the original limits, of the said rectory or vicarage) any part or parts of the tithes," &c. It seems quite clear, therefore, that, [783] after the order in council of 1850, and down to the time of the passing of the act of 19 & 20 Vict. c. 104, an annexation might have been legally made by the vicar of St. Giles, Cripplegate, of part of his annual revenues to the church of St. Bartholomew, Moorfields, to which a district had been assigned, situate within the original limits of the vicarage. The 19 & 20 Vict. c. 104, s. 14, enacted, "that, whensoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms, according to the laws and canons expressed in this realm, are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this act, a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such office without any reservation thereof, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first-recited act, 6 & 7 Vict. c. 37, and the church or chapel of such district shall be the church of such parish." And by the 15th section of the 6 & 7 Vict. c. 37, such district shall be and be deemed to be a new parish for ecclesiastical purposes, and shall be known as such by the name of the new parish of , instead of the district of , according to the name so as aforesaid fixed for such district; and such church or chapel shall become and be the church of such new parish accordingly." We think that the district chapelry of St. Bartholomew, Moorfields, falls within the provisions of the 19 & 20 Vict. c. 104, s. 14, and has become since the passing of that act a separate and distinct parish for ecclesiastical purposes. But we do not find anything in that act indicating the in-[784]-tention of

the legislature to alter the nature and character of district churches, otherwise than for ecclesiastical purposes.

The church of St. Bartholomew, Moortfields, is still a church to which a district has been assigned, locally situate within the limits of St. Giles, Cripplegate, and is therefore capable of receiving the annexation made under the provisions of 1 & 2 W. 4, c. 45, s. 21. Although for ecclesiastical purposes it has become a new parish, it remains a district chapelry for all other purposes.

We think, therefore, that the deed of annexation is a good and valid deed.

The next point made by the appellants was, that, assuming the validity of the deed, the warrant to levy the arrears due to the respondent could not legally be granted by the magistrate. The respondent grounds his right to this warrant upon the 21st section of the 1 & 2 W. 4, c. 45, in connection with the local act of 7 G. 4, c. liv.

The 21st section of the 1 & 2 W. 4, c. 45, enacts "that the incumbent for the time being" (of the district church) "shall have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed" (including the case of the annexation of a part of the vicar's annual revenues) "as the rector or vicar for the time being of the rectory or vicarage might have had, if such annexation had not been made." And by the 3rd section of the 7 G. 4, c. liv., it is enacted, "that, in case any quarterly payment of the annual sum of 1800l., or any part thereof, shall be in arrear and unpaid for twenty-eight days, it shall be lawful for one of Her Majesty's justices of the peace of the city of London, on complaint of the vicar, to summon the churchwardens and any one or more inhabitants of the parish to the number of thirty, [785] to be nominated by the vicar, to appear before him and pay the arrears: and if, on appearing, they do not prove payment of the arrears, to grant a warrant to levy them of the goods and chattels of the parties summoned, and appearing." And it is further provided that the like proceedings may be resorted to if the whole of the arrears and the expenses are not levied on the first occasion: and so from time to time until the whole be paid.

On the part of the appellants, it was argued that this section was of a very harsh and stringent character, and did not apply to a case where the vicar had parted with a portion of the annual sum granted to him. But, as the vicar by this section has power to obtain a warrant "where any quarterly payment, or any part thereof, shall be in arrear;" and as by this statute 1 & 2 W. 4, c. 45, s. 21, the grantee in all cases of annexation has the same powers and remedies as the vicar himself would have had before annexation, we think that the warrant was rightly granted in this case.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed accordingly.

[786] GREENOUGH v. JOSEPH ECCLES, ALEXANDER ECCLES, AND EDWARD ECCLES.
Feb. 12th, 1859.

[S. C. 28 L. J. C. P. 160; 5 Jur. N. S. 766. Applied, *Rice v. Howard*,
1886, 16 Q. B. D. 684.]

A witness whose testimony turns out to be unfavorable to the party calling him is not therefore an "adverse" witness within the meaning of the 22nd section of the Common Law Procedure Act, 1854.—To make him an "adverse witness," so as to entitle the party calling him to contradict him by other evidence shewing that he has made at other times a statement inconsistent with his present testimony, he must in the opinion of the presiding judge be adverse in the sense of shewing a hostile mind.—Semble, that, whether adverse or not, is for the judge and not for the court to determine.

This was an action by indorsees against the drawers of two bills of exchange. The first count was upon a bill for 860l. drawn by the defendants on the 27th of April, 1857, upon, and accepted by, Messrs. Eastham, Brothers, payable three months after date, and indorsed by the defendants to one John Cadman, and by Cadman to the plaintiff. The second was upon a bill for 280l. drawn by the defendants on the 28th of March, 1857, upon, and accepted by, John Cadman, payable four months after date, and indorsed by the defendants to the plaintiff. There was also a count upon an account stated.

The defendant Joseph Eccles pleaded to the first count, except as to 305l. 17s. 6d., parcel of the money therein claimed, that the defendants indorsed the said bill of exchange in the first count mentioned to the said John Cadman to enable the said John Cadman to get the said bill discounted or to raise money upon the said bill for them the defendants, and that there was no consideration for the indorsement of the said bill to the said John Cadman; and that the said John Cadman applied to the plaintiff to discount the said bill, and that the plaintiff refused to discount the said bill, but agreed to advance to the said John Cadman the sum of 300l. upon the security of the said bill, and upon the terms, that, on the re-payment of the said sum of 300l. and interest thereon, he the plaintiff would give up the said bill: that the plaintiff did afterwards advance to the said John Cadman the said sum of 300l., and the said John Cadman indorsed the said bill to the plaintiff on the terms aforesaid; and that, save as aforesaid, there was no consideration for the indorsement of the said bill by the said John Cadman [787] to the plaintiff; and that the sum of 305l. 17s. 6d. was the whole sum which had ever become due to the plaintiff in respect of the said sum of 300l. and interest thereon, or in respect of the said bill.

For a further plea, as to so much of the first count as related to the said sum of 305l. 17s. 6d., he pleaded payment into court: and to the second count, he pleaded that the bill in that count mentioned was not duly presented for payment, and that the defendants had not due notice of dishonour: and, to the last count, never indebted.

The other two defendants pleaded,—first, as to the first count, except as to the sum of 305l. 17s. 6d. parcel of the money therein claimed, that the defendants, at the time of the drawing and indorsing of the said bill of exchange, carried on business in partnership under the firm of Joseph Eccles & Co., and that the said Joseph Eccles indorsed the said bill to the said John Cadman in the name of the said firm of Joseph Eccles & Co., to enable the said John Cadman to get the said bill discounted, or to raise money upon the said bill, for the benefit of him the said Joseph Eccles, and that there was no consideration for the indorsement of the said bill to the said John Cadman; and that the said John Cadman applied to the plaintiff to discount the said bill, and that the plaintiff refused to discount the said bill, but agreed to advance to the said John Cadman the sum of 300l. upon the security of the said bill, and upon the terms that, on the re-payment of the said sum of 300l. and interest thereon, he the plaintiff would give up the said bill: that the plaintiff did afterwards advance to the said John Cadman the said sum of 300l., and the said John Cadman paid the said sum of 300l. to the said Joseph Eccles, and the said John Cadman indorsed the said bill to the plaintiff on the terms aforesaid; and that, save as aforesaid, there was no consideration for the indorsement of the said [788] bill by the said John Cadman to the plaintiff: and that the sum of 305l. 17s. 6d. was the whole sum which had ever become due to the plaintiff in respect of the said sum of 300l. and interest thereon, or in respect of the said bill.

Secondly, to the first count, except as to the said sum of 305l. 17s. 6d., that the defendants, at the time of the drawing and indorsing of the said bill of exchange in the first count mentioned, carried on business in partnership as cotton-brokers, under the firm of Joseph Eccles & Co., and that the said Joseph Eccles drew the said bill and indorsed the said bill to the said John Cadman in the name of the said firm of Joseph Eccles & Co., and for his own purposes only, and not for the purposes of the said firm of Joseph Eccles & Co., and in fraud of the said Alexander Eccles and Edward Eccles; and the said John Cadman, at the time the said bill was indorsed to him, had notice of all the facts in that plea above mentioned: that the said John Cadman applied to the plaintiff to discount the said bill, &c., as in the first plea.

Thirdly, as to so much of the first count as related to the sum of 305l. 17s. 6d., payment of that sum into court,—fourthly, fifthly, and sixthly, to the second count, that the defendant did not indorse the bill therein mentioned, that it was not duly presented for payment, and that the defendants had no notice of dishonor,—seventhly, to the last count, never indebted.

The plaintiff joined and took issue on all the pleas except those of payment into court, and as to those took out the money in satisfaction *pro tanto*.

The cause was tried before Cockburn, C. J., at the sittings in Middlesex after Michaelmas Term, 1857. The evidence on the part of the plaintiff was to this effect:—Cadman, to whom the bill mentioned in the first count had been indorsed and

delivered by Joseph Eccles, applied to the plaintiff to discount it. The [789] plaintiff at first objected to discount a bill for more than 300l., but ultimately consented to advance Cadman 300l. upon the bill, on Cadman agreeing that the residue should go in part liquidation of a debt due from him to the plaintiff.

The case on the part of the defendants Alexander and Edward Eccles was, that the agreement with Cadman was, that the bill should be restored to him by the plaintiff upon the re-payment of the 300l. advanced, with interest. To prove this, they called Cadman; but the account he gave of the transaction was substantially the same as that which the plaintiff had previously given. Cadman was then asked by the defendants' counsel whether he had not told one Bardswell that he had only authorized the plaintiff to retain the bill as a security for the 300l. advanced by him, and interest. This was objected to by the plaintiff's counsel; whereupon the defendants' counsel proposed, under the authority of the 22nd section of the Common Law procedure Act, 1854, 17 & 18 Vict. c. 125(a), to give evidence, oral as well as written (b), of former statements made by the witness at variance with the evidence he had just given.

The learned judge was of opinion that the word [790] "adverse" in the statute was to be understood as meaning "hostile," and not merely "unfavourable"; and being of opinion, that the witness had not proved adverse in the sense of shewing a mind hostile to the party calling him, he declined to receive the evidence.

A verdict having been found for the plaintiff for 569l. 6s. 8d. in addition to the money paid into court,

Hugh Hill, Q. C., in Hilary Term, 1858, moved for a new trial on the ground that the proposed evidence was improperly rejected. The ruling of the learned judge was in substance this,—that the word "adverse" in the statute was meant to apply, not to the testimony, but to the witness himself. See what was the evil the statute intended to remedy. In *Ewer v. Ambrose*, 3 B. & C. 746, 5 D. & R. 629, to assumpsit for money had and received, the defendant pleaded that the promises in the declaration mentioned were made by him jointly with A. B. At the trial A. B. was called as a witness by the defendant to prove a partnership, but he proved the contrary; the defendant then tendered in evidence an answer of A. B. to a bill in Chancery, in which A. B. had sworn that up to a certain time he was a partner with the defendant: the court inclined to think that the answer was not admissible in evidence, because the only effect of it was to discredit the defendant's own witness. Bayley, J., said: "It was competent to the plaintiff in cross-examination to have asked the witness if he had sworn, in his answer in Chancery, contrary to the fact he was then deposing to; and, if he had said that he had not, then the plaintiff, in order to discredit him, might have given the answer in evidence; but he could not do so without putting the preliminary question to him. But I think the defendant ought not to have been permitted so to discredit his own witness." And Holroyd, [791] J., said: "I take the rule of law to be, that, if a witness proves a case against the party calling him, the latter may shew the truth by other witnesses. But it is undoubtedly true, that, if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to shew that that witness is not to be believed on his oath, but he may shew by other evidence that he is mistaken as to the fact which he is called to prove." So, in *Wright v. Beckett*, 1 M. & Rob. 414, it was held by Lord Denman, C. J., that, where a witness gives evidence destructive of the case which he was called to prove, the party calling him might, in order to neutralize his evidence, shew that he had before the trial given to the attorney an account of the transaction entirely different from that sworn to by him at the trial: and his Lordship afterwards, upon a motion for a new trial,

(a) Which enacts that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony: but, before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

(b) The witness had made the affidavit upon which the defendants had been let in to defend under the Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67.

sustained his ruling by a very elaborate judgment, in which all the authorities are reviewed. Bolland, B., however, entertained an adverse opinion. In *Holdsworth v. The Mayor of Durham*, 2 M. & Rob. 153, it was ruled by Parke, B., that, where a witness gives on cross-examination testimony unfavorable to the party calling him, and on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him by shewing he had given such different account. "I never," said the learned Baron, "had any doubt but that the opinion of my Brother Bolland was right in the case cited, if the fact were asked to in the examination in chief: as, by calling the witness, you take him for better and for worse, and must throw discredit on him. I am now satisfied that it makes no difference that the fact is elicited on cross-examination. The effect and object of the evidence is, to discredit the witness. It goes to his general credit to shew that he [792] has given a different account of the matter before; and it is a clear rule, that a party has no right to put a witness into the box as a witness of credit, and, when he gives unfavourable evidence, to call testimony to discredit him." In *Melhuish v. Collier*, 15 Q. B. 878, the rule is thus stated,—Although the general rule is, that, on the trial of a cause, a party shall not discredit his own witness, yet, if the witness unexpectedly gives adverse evidence, the party may ask him if he has not on a particular occasion made a contrary statement; and the question and answer may be stated by the judge to the jury with the rest of the evidence: the judge cautioning them not to infer merely from the question that the fact suggested by it is true. But, whether, in such case, the party may contradict the witness by evidence as to such former statement,—*quære*. This was the doubt which the statute intended to set at rest. [Williams, J. The statute seems to assume that the witness could not be contradicted as to the particular fact by other testimony. Cockburn, C. J. There was a clear case against you upon the plaintiff's evidence. You called a single witness. His testimony turned out to be adverse to you. Having no other witness to call, what could you gain by neutralizing his evidence?] We might have gone to the jury upon the plaintiff's testimony, and asked the jury to disbelieve him.

A rule nisi having been granted,

Parry, Serjt., and Doyle, in Trinity Term last, shewed cause. The statute expressly leaves it to the judge at the trial in his discretion to allow the party to contradict his own witness, if in his opinion he proves adverse. The Lord Chief Justice in this case having exercised his discretion by declining to allow the contradiction, his decision upon the matter is final. [793] In *Clark v. Saffery*, R. & M. 126, on the trial of an issue from the court of Chancery, with power to the plaintiff to examine the defendant as a witness, Best, C. J., ruled that the plaintiff's counsel might, as matter of right, cross-examine the defendant, although called as his witness: the defendant standing in a situation necessarily adverse,—saying: "There is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shews himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination: but, if a witness called stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may as matter of right cross-examine him." And in *Bastin v. Carew*, R. & M. 127, where a similar objection was taken, Abbott, C. J., said: "I mean to decide this, and no further, that, in each particular case, there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice." The discretion of the judge in this respect, like the refusal of amendment under the statutes relating to amendments, is not the subject of review. [Cockburn, C. J. I did not profess to decide the matter at the trial. I expressed a desire that the opinion of the court should be taken upon it; though I certainly should have received the evidence if I had thought the word "adverse" ought to be understood as meaning "unfavorable."] The proposed evidence was, upon the true construction of the 22nd section, properly rejected. The section provides that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave [794] of the judge, prove that he has made at other times a statement inconsistent with his present testimony." The word adverse controls both the latter branches of the section. The legislature evidently intended that the witness himself, and not his evidence merely, should be adverse, in the sense of being the emanation of a hostile mind.

Before the passing of the act, a party could not have called another witness merely to contradict one who had been previously called by him : *Melhuish v. Collier*, 15 Q. B. 878. This power is entirely new : and it is reasonable to suppose that the legislature intended it to be controlled by the discretion of the judge, who sees the witness before him. Many inconveniences might be suggested, if this were left to the discretion of the parties themselves. It might be giving greater effect to unsworn testimony than to evidence given under the sanction and safeguard of an oath. [Cockburn, C. J. A literal construction of the words of the section would be carrying the law back from what it was in *Melhuish v. Collier*. If the section is to be considered as declaratory only of what the law was before, the word "adverse" must be read as meaning "adverse testimony." The latter branch of the section, however, clearly is not declaratory. Williams, J. There is evidently some blunder in the section. In all probability it was intended to be read thus,—“but he may contradict him by other evidence, or, in case the witness shall, in the opinion of the judge, prove adverse, by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony.”] All the cases speak of an adverse mind of the witness. The legislature seem to have followed out that view. If they had meant “adverse testimony,” they would have said so : and there would have been nothing for the judge to exercise a discretion upon. [Cockburn, C. J. Testi-[795]-mony adverse to the party calling the witness might be extracted from the witness reluctantly.] In *Melhuish v. Collier*, Erle, J., says : “There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then, for a bribe, or from some other motive, make statements in support of the opposite interest. In such cases, the law undoubtedly ought to permit the party calling the witness to question him as to the former statement, and ascertain if possible what induces him to change it.” In Roscoe on Evidence, 9th ed. 152, speaking of this statute, it is said : “It will be seen that leave of the judge is made a condition precedent to the proof of former inconsistent statements, and also premonition and pre-examination as to such statements. In one particular, the act seems to limit the former admitted liberty of calling witnesses to contradict another witness called by the same party ; for, in such cases, it has been the practice for counsel to consult only their own judgment in calling other witnesses to prove all relevant facts, although their testimony may incidentally contradict the testimony of one already called on the same side.” Assuming that the Lord Chief Justice was wrong in declining to receive the proposed evidence, still there is no ground for a new trial. The utmost effect of its reception would have been, to neutralize the testimony of Cadman : and then the plaintiff's evidence would stand, as it now does, uncontradicted.

Mellish and Manisty, Q. C., in support of the rule. It may be that the words “by leave of the judge” may give the presiding judge a discretion to reject evidence in contradiction of a witness who has proved adverse : but here the Lord Chief Justice rejected the evidence because he was of opinion that the witness had not proved adverse. The preliminary question must al-[796]-ways be for the judge, as where a lunatic or a child of tender years is offered as a witness. But, upon a preliminary question of this sort, the court will always review the judge's discretion where he has mistaken the principle : *Closmudene v. Carrel*, 18 C. B. 36. The question is, what did the legislature mean when speaking of a witness who shall prove adverse, —did they mean that the witness shall prove hostile to the party calling him, or that the testimony he gives shall be adverse ? The word “adverse,” as applied to a person, is more properly applicable to his acts and conduct : as, in common parlance, we say an adverse counsel, or an adverse general. It is enough if the word is susceptible of that meaning. In order to understand correctly what the legislature did mean, it is necessary to look at the state of the law upon this subject at the time the statute passed. There were two questions upon which there had been very considerable difference of opinion, —the first, whether a party could ask his own witness whether he had not upon another occasion given a different account of the transaction from that which he then deposed to, —the other, whether, if the witness denied having done so, the party calling him was at liberty to call other witnesses to prove that he had done so. But the foundation of both was, that the witness had given adverse testimony. A witness is called from the enemy's camp : he shuffles ; and nothing can be got out of him. There, no adverse testimony being given, the statute does not apply. The testimony of a witness, if adverse, is only the more dangerous if he shews no hostile disposition. If

he has not given adverse or hostile evidence, you do not want to contradict him. In the judgments of Lord Denman and Bolland, B., in *Wright v. Beckett*, 1 M. & Rob. 414, no reference is made to the personal hostility of the witness. In *Ever v. Ambrose*, 3 B. & C. 746, [797] 5 D. & R. 629, Bayley, J., says: "I have no doubt, that, if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty afterwards to make out his own case by other witnesses." [Cockburn, C. J. That was long ago settled.] It evidently did not occur to the mind of any person concerned in the drawing or in the passing of the statute that anything would turn on the hostile disposition of the witness. The doubts upon this subject were very elaborately discussed in the 8th edition of Phillipp's on Evidence, p. 901. "It is proposed," says the learned author, "now to inquire whether a party can be allowed to discredit his own witness, that is, produce evidence which may have the effect of throwing discredit upon him. It is clear a party is not to be sacrificed to his witness: he is not represented by him, nor to be identified with him: nor ought he to be bound by all that the witness may say. On the other hand, a party ought to be placed under such restrictions as may be necessary for preventing unfair or dishonest practice. If a party produces a witness, knowing him at the time to be a man of infamous character, and the witness, in giving evidence, disappoints or deceives him, shall the party be allowed to prove his infamy, for the purpose of destroying the effect of his evidence? If a party, not acting himself a dishonest part, is deceived by his witness, or if a witness, professing himself a friend, turns out an enemy, and, having promised proof of one kind, gives evidence directly contrary,—is the party to be restrained from laying the true state of the case before the court? If a witness, whether from mistake, from ignorance, or from design, gives evidence unfavorable to the party who calls him, is the party to be restrained from calling other witnesses to prove facts different from those represented by the former witness? These are some of the questions which will [798] occur to the reader, on the first view of the subject, and which one might think it would not be difficult to answer. In the first place, it is laid down, a party will not be permitted to discredit his own witness by general evidence. The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character as would render him unworthy of credit." That shews that the first part of the section in question is only in affirmation of what the law was before. The learned author proceeds,—"'This,' says Mr. Justice Buller (Bul. N. P. 297), 'would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.' But it is now clearly settled that a party may prove by other evidence the truth as to a material fact relevant to the issue in a cause, though it may collaterally have the effect of discrediting his own witness. If witnesses had been called before the adverse witness, their evidence must have been received without objection: and it cannot make any real difference in the case, that a witness giving adverse testimony has been called first. The rule is equally applicable, whether a witness is forced upon a party by law (as in the case of a subscribing witness to a deed), or is voluntarily selected to give evidence." There, the terms "adverse witness" and "adverse testimony" are used as synonymous. And, after referring to some authorities, he says: "Whether it be competent to a party to prove that a witness who has been called by him, and who has given unfavourable evidence, has been heard at other times to make a statement contrary to that made in court, is a question on which there exists a difference of opinion (a). On the one side, it is urged, such [799] evidence would be open to the objection that the party would thus discredit his own witness by general evidence; that this rule ought to be universal; and that, to allow the evidence of a witness to be disproved and contradicted by other witnesses (which seems at first sight an exception to the rule), is in truth no exception, but an accidental consequence attendant upon giving evidence relevant to the issue: and the reason given for such practice shews this to be the correct view. 'Such facts' says Mr. Justice Buller, 'are evidence in the cause; and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.' It is further urged that there is some danger of collusion and dishonest contrivance, inasmuch as a witness may be induced to make a statement

(a) Referring to the judgments of Lord Denman, C. J., and Bolland, B., in *Wright v. Beckett*, 1 M. & Rob. 414.

out of court, for the very purpose of its being reserved and afterwards used in contradiction to the witness, and that the jury may regard such a statement as substantive evidence in the cause. On the other side, it may be argued, the evidence is not open to the objection that the party would thus discredit his own witness by general testimony; that, although a party who calls a person of bad character as a witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavorable to him, by direct proof of general bad character,—yet it is only just that he should be permitted to shew, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial; that this course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards, by hostile evidence, ruin his cause; that the rule, with the above exception, as to offering contradictory evidence, ought to be the same whether the witness is called by the one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony is the same in both cases: that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked that this is a question in which not only the interests of litigating parties are involved, but also the more important general interest of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that, in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences." This, and the case of *Melhuish v. Collier*, 15 Q. B. 878, shews what was the mischief the statute was designed to remedy,—a mischief more applicable to adverse testimony, than to a hostile or malevolent feeling on the part of the witness. This is the principle upon which a similar clause in the Scotch Evidence Act of a former session,—15 & 16 Vict. c. 27, s. 3,—was framed. That section enacts that "it shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent, in the course of such action or proceeding, to adduce evidence to prove that such witness has made such different statements on the occasion specified." [Cockburn, C. J. The reference to the opinion of the judge would seem to shew that the legislature could not have been dealing with the mere question of adverse testimony. The opinion of the judge would not be needed for that.] It may often [801] be a question of considerable nicety whether evidence is adverse or not, in the sense of being detrimental. To constitute adverse testimony, it must be positive testimony opposed to the interest of the party. As to the objection, that, Cadman's evidence being withdrawn, nothing was left to impeach the evidence given by the plaintiff,—it is to be observed that the admitted circumstances under which the bill was drawn might have induced the jury to have disbelieved the plaintiff's testimony if it had stood uncorroborated. [Cockburn, C. J. There was nothing to affect the plaintiff's evidence but the contradiction of Cadman. If that had been received, I must have told the jury, that, striking out Cadman's evidence, the plaintiff's case was unanswered.] The real test is, whether the Lord Chief Justice could have directed the jury to find for the plaintiff.

Cur. adv. vult.

WILLIAMS, J. The question in this case is, whether, in construing the terms of the 22nd section of the Common Law Procedure Act, 1854, "in case the witness shall prove adverse," the word "adverse," ought to be understood as meaning merely "unfavorable," or as meaning "hostile." The Lord Chief Justice at the trial thought the word ought to be understood as meaning "hostile"; and, being of opinion that the witness had not proved so, refused to allow evidence to be given that he had at another time made a statement inconsistent with his testimony in the witness-box. But my Lord informed us that he certainly should have received such evidence, if he had thought the word "adverse" ought to be understood as meaning merely "unfavorable:" and, if it might be so understood, the verdict may perhaps be considered, under the circumstances, so unsatisfactory as to make it right [802] to order a new trial. But, after much consideration, I am of opinion that my Lord's construction was right, and therefore that this rule must be discharged.

The section lays down three rules as to the power of a party to discredit his own witness, —first, he shall not be allowed to impeach his credit by general evidence of his bad character, —secondly, he may contradict him by other evidence, —thirdly, he may prove that he has made at other times a statement inconsistent with his present testimony.

These three rules appear to include the principal questions that have ever arisen on the subject; as may be seen by referring to the chapter in Phillips on Evidence which treats “of the right of a party to disprove or impeach the evidence of his own witness.” And it will there be further seen that the law relating to the first two of these rules was settled before the passing of the act, while, as to the third, the authorities were conflicting: that is to say, the law was clear that you could not discredit your own witness by general evidence of bad character, but you might nevertheless contradict him by other evidence relevant to the issue. Whether you could discredit him by proving that he had made inconsistent statements, was to some extent an unsettled point.

In favor of construing the word “adverse” to mean merely “unfavorable,” the main arguments are, that, taking the words of the section in their natural and ordinary sense, its object appears to be to declare the whole law on the subject by negating the right as to the first, and affirming it both on the second and third points; but that it proceeds to fetter the right as to both the latter; for, the right is declared to exist in the former as well as the latter of these two instances, “in case the witness shall, in the opinion of the judge, prove adverse,”—with the additional qualification, as to [803] the latter, that the leave of the judge must be obtained. The right, it is argued, according to this enactment, is not to exist in either instance, if the judge is not of that opinion. The fetter thus imposed, it is further said, would be harmless in its operation, if “adverse” be construed “unfavorable,” but most oppressive if it means “hostile”; because the party producing the witness would be fixed with his evidence, when it proved pernicious, in case the judge did not think the witness “hostile,” which might often happen: whereas, he could not in such a case fail to think him “unfavorable.”

The court, then, it is argued, ought to prefer the more lenient construction, which does not at all conflict with the sense in which the word “adverse” has been often applied in speaking of an adverse witness, and is, moreover, in accordance with the principle on which the legislature proceeded in the enactment of the Scotch act, 15 & 16 Vict. c. 27, s. 3, whereby an absolute unqualified power is given to examine any witness as to whether he has made a statement different from his evidence.

But there are two considerations which have influenced my mind to disregard these arguments. The one is, that it is impossible to suppose the legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue,—a right not only fully established by authority, but founded on the plainest good sense. The other is, that the section requires the judge to form an opinion that the witness is adverse, before the right to contradict, or prove that he has made inconsistent statements, is to be allowed to operate. This is reasonable, and indeed necessary, if the word “adverse” means “hostile,” but wholly [804] unreasonable and unnecessary if it means “unfavorable.”

On these grounds, I think the preferable construction is, that, in case the witness shall, in the opinion of the judge, prove “hostile,” the party producing him may not only contradict him by other witnesses, as he might heretofore have done, and may still do, if the witness is unfavorable, but may also, by leave of the judge, prove that he has made inconsistent statements.

With respect to the Scotch act, it is plain that the legislature did not think proper, in passing the Common Law Procedure Act, to act on the same principle. The right to shew that the witness has made inconsistent statements is not conferred absolutely, as it is in the former statute.

Whatever is the meaning of the word “adverse,” the mere fact of the witness being in that predicament is not to confer the right of discrediting him in this way. The section obviously contemplates that there may be cases where the judge may properly refuse leave to exercise the right, though in his opinion the witness proved “adverse.” And, as the judge’s discretion must be principally, if not wholly, guided by the witness’s behaviour and language in the witness-box (for, the judge can know

nothing, judicially, of his earlier conduct), it is not improbable that the legislature had in view the ordinary case of a judge giving leave to a party producing a witness who proves hostile, to treat him as if he had been produced by the opposite party, so far as to put to him leading and pressing questions; and that the purpose of the section is, to go a step further in this direction, by giving the judge power to allow such a witness to be discredited, by proving his former inconsistent statements, as if he were a witness on the other side.

[805] WILLES, J. I entirely agree with the judgment which has just been pronounced by my Brother Williams. I will only add a few words. If "adverse," in the 22nd section of the Common Law Procedure Act, 1854, means "hostile," the Lord Chief Justice was right: if it means only "who gives evidence opposed to the interest of the party who calls him," then the Lord Chief Justice was wrong. I am of opinion that he was right.

The legislature never could have intended to introduce the unsworn statements of a witness as evidence in favor of a party who calls him, —which with the jury they inevitably would be,—merely on the ground that the witness, without any sinister motive or ill feeling, honestly gives a different account of the matter in the witness-box from what he had given on a former occasion, without fraud upon the party who calls him. It would be unjust to the party, and oppressive and unfair to the witness, to allow this.

Such an extension of the category of admissible hearsay-evidence, if intended, would have been more clearly expressed.

The interposition of the opinion of the judge would have been idle, if "adverse" meant merely "giving unfavorable evidence."

The argument founded on the provision for admitting other evidence to contradict the adverse witness, is unfounded; because the section professes to provide for a peculiar class of cases, in which it enacts that a particular course may be taken which could not have been taken before, in addition to that which might have been taken before in a more extensive class of cases, including that specially provided for: and the introduction into such a section of a provision superfluous or over-cautious, because applicable in the more extensive class in which the common law makes the same provision, does not repeal the common law in [806] cases within that more extensive class which do not fall within the peculiar class to which the enactment exclusively refers. No mischief, therefore, will follow from the construction I put upon the section, by in any case excluding evidence which was admissible before the act.

Moreover, even if the Lord Chief Justice had been wrong, I should have been, as at present advised, of opinion that we have no jurisdiction to review that ruling. In order, no doubt, to prevent the increase of causes of new trial, the legislature have, as it appears to me, in terms made the opinion of the judge upon this point absolute, and therefore final.

COCKBURN, C. J. I think it necessary to add a word. This case was argued before my two learned Brothers who have delivered their opinions, and myself. At the trial, I took the view which has been sanctioned by their acquiescence: but the discussion which the matter has undergone has excited in my mind doubts of a very grave character, which, however, it is unnecessary to do more than allude to, inasmuch as my learned Brothers constitute the majority of the court. I must, therefore, be taken rather as not dissenting from this decision, than as assenting to it. Looking at the 22nd section of the Common Law Procedure Act, 1854, I think it is clear that there has been a great blunder in the drawing of it, and on the part of those who adopted it. The first two branches of the section were evidently intended to be declaratory of the existing law, but the third branch goes far beyond it. It was intended to give a party producing a witness an opportunity, with the leave of the judge, if the witness should prove adverse, —which, I agree with my learned Brothers, must, in this part of the section, be understood to mean "hostile,"—of shewing that he had previously [807] made a statement contradictory to his then testimony. But, unfortunately, the word "adverse," instead of preceding the third branch of the section only, is made to precede the second branch, which is clearly declaratory of the existing law: so that, if the word "adverse" in the second branch of the section is to receive the same interpretation which it is now considered it ought in the third branch to bear, there would be imposed an additional restriction to that which existed before the statute, upon the right of the party calling the witness to shew by other evidence

facts which the witness had contradicted. If, therefore, it were necessary to put an interpretation upon the word "adverse," with reference to the second branch of the section, I should incline to think it impossible that the legislature could have intended to use that word in a sense which would impose a restriction which did not before exist. However, perhaps the better course is, to consider the second branch of the section as altogether superfluous and useless. The whole section is so refused, and it is so difficult to make any sense of it, that my mind is not satisfied so far as to induce me to assent to the judgment of the court. Without, therefore, actually dissenting from it, it is enough to say that I do not wholly concur in it.

Rule discharged (a).

[808] THE MARQUIS OF CAMDEN v. BATTERBURY. Feb. 5th, 1859.

[Affirmed in Exchequer Chamber, 7 C. B. N. S. 864.]

By articles of agreement under seal, the plaintiff covenanted with one E. that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereafter agreed and covenanted to be built by him upon the land thereafter described and agreed to be demised, &c., by indenture demise and lease unto E., his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th of September then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of a peppercorn only. The articles then contained a covenant by E. with the plaintiff to pay the rent therein-before agreed to be reserved, and to pay rates, &c., to erect the messuages; and also a covenant, that, until the land, and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E., his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff in case the whole or any part of the said yearly rent or rents thereby or by the said leases so to be granted as aforesaid to be reserved, should be behind or unpaid for twenty-one days.—In January, 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W.:—Held, that neither E. nor the defendant acquired any estate in the premises under the building agreement; nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums.

This was an action for use and occupation, and for money found due upon accounts stated. Plea, never indebted.

The cause was tried before Willes, J., at the last Summer Assizes for Surrey. The action was brought to recover 241l. for one year's rent from Lady-Day, 1857, to Lady-Day, 1858, of certain ground and premises at Camden Town, St. Pancras, under the following circumstances:—

By an indenture under seal, bearing date the 4th of February, 1853, being certain building articles between the plaintiff of the first part, the Rev. Thomas Randolph, prebendary of the prebend of Cantlowes, in the Cathedral Church of St. Paul's, London, of the second part, and one John Watts Elliott, therein described, of the third part, it was witnessed as follows:—"In pursuance of an act of parliament passed in the 53 G. 3, [809] intituled 'An Act for enabling the prebendary of Cantlowes, in

(a) See *Dear v. Knight*, 1 Foster & F. N. C. P. 433.

the Cathedral Church of St. Paul's, London, to grant a lease with powers of renewal of the prebendal lands in Kentish Town, in the county of Middlesex, and in consideration of the expense which the said J. W. Elliott, his executors, &c., will be at in erecting the messuages, tenements, and buildings hereinafter covenanted to be erected and built upon the ground hereinafter described and agreed to be demised, and also in consideration of the yearly rents, covenants, and agreements hereinafter reserved and contained on the part of the said J. W. Elliott, his executors, &c., he the said George Charles Marquis Camden, with the privity and approbation of the said Thomas Randolph, testified, &c., doth hereby, for himself, his heirs, &c., covenant and agree with the said J. W. Elliott, his executors, &c., that he the said Marquis, his executors, &c., shall and will, at the costs and charges of the said J. W. Elliott, his executors, &c., from time to time, when and so soon as the said J. W. Elliott, his executors, &c., shall have erected and covered in one or more of the messuages or tenements hereafter agreed and covenanted to be built by him, upon the piece or parcel of ground hereinafter described and agreed to be demised, and laid the gutters with lead or iron, and fixed up iron pipes to carry off the water, and made the areas and the fence and garden walls, nine inches in thickness at the least, to divide and separate each house and the ground to be thereto allotted for yards or gardens from the premises adjoining on each side, by indenture or indentures of lease, demise and lease unto the said J. W. Elliott, his executors, administrators, nominees, or assigns, the whole or such part or parts whereon one or more of the said messuages or tenements shall be built or covered in, and such other things thereon done as aforesaid, of all [810] that piece or parcel of ground situate, lying, and being, &c., together with the several brick messuages or tenements and buildings which shall be erected and built on the pieces or parcels of ground hereinbefore described and hereby agreed to be demised, pursuant to the covenants for that purpose hereinafter contained (except and always reserved unto the said Marquis Camden, his executors, &c., and his and their tenants of the adjoining property, the free passage and running of water and soil through the sewers and drains made or to be made upon, through, or under the said several pieces or parcels of ground and other the premises hereby agreed to be demised), To hold the said piece or parcel of ground and other the premises hereby agreed to be demised, with their appurtenances, except as aforesaid, unto the said J. W. Elliott, his executors, &c., from the 29th of September now last past, for and during and unto the full end and term of ninety-eight years thence next ensuing, and fully to be complete and ended, yielding and paying therefore for and during the first year of the said term the rent or sum of 30*l.*, and for and during the second year of the said term the rent or sum of 60*l.*, and for and during the third year of the said term the rent or sum of 120*l.*, and for and during the fourth year of the said term the rent or sum of 200*l.*, and for and during the fifth year and remainder of the said term the yearly rent or sum of 285*l.*, and that in the several proportions and manner following, that is to say, one equal third part of the said several rents unto the said Thomas Randolph and his successors, prebendaries of the prebend aforesaid, and the remaining two equal third parts thereof respectively unto the said George Charles Marquis Camden, his executors, &c. The indenture then contained a stipulation that the rents should be payable quarterly, the first quarterly payment to be due on the 25th of De [811]-cember then last past, and the said rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one sixth of the clear yearly value of the land and buildings to be thereby demised, reckoning such annual value upon the said land and buildings when the same should be completely finished and fit for habitation, and be not less than 40*s.*; with a proviso, that, if the yearly rent or rents to be reserved upon or by the lease or leases to be granted of any part or parts only of the piece or parcel of ground thereinbefore described and agreed to be demised, should amount to or make up the full yearly rent or rents thereby agreed to be reserved and made payable, then and in such case the remainder of the said piece or parcel of ground, or any part or parts thereof, should from time to time when and as the same should be built upon be demised and leased, together with the houses and buildings thereupon erected, at the yearly rent of a peppercorn only. The indenture then stated an agreement, that, in every such lease to be so granted as aforesaid, there should be contained on the part of the said J. W. Elliott, his executors, &c., such covenants as were usually inserted in leases granted on the same estate, and in particular certain stipulations therein mentioned; and that, in every such lease, there

should be contained on the part of the Marquis the usual covenant entered into by him for quiet enjoyment by the lessee or lessees therein on payment of the rent and observance of the covenants therein contained. It further contained covenants by the said J. W. Elliott with the Marquis to pay the said several yearly rents thereinbefore agreed to be reserved, on the several days and times and in the proportions and manner thereinbefore appointed,—to pay all rates and taxes,—and to erect and completely finish the several brick messuages therein mentioned, &c.,—[812] to accept such leases as agreed,—and also a covenant, that, until the said piece or parcel of ground, and the buildings to be erected as aforesaid, should be leased in execution of the covenant in that behalf, the said J. W. Elliott, his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted as aforesaid, to such persons, and in such manner and proportions, and at such time, as the same would be payable in case such leases were actually granted; and that he or they would in the meantime until the granting of such lease or leases perform all the covenants agreed to be inserted therein, as if such lease or leases had been granted. The indenture then contained the following proviso for re-entry,—“Provided that, if the whole or any part of the said yearly rent or rents hereby or by the said leases so to be granted as aforesaid to be reserved shall be behind or unpaid for the space of twenty-one days next over or after any or either of the days or times whereon the same ought to be paid as aforesaid, or if the said J. W. Elliott, his executors, &c., shall make default in erecting, building, and finishing the several messuages, &c., then and from thenceforth, and in any of the said cases, and at any time then afterwards, it shall and may be lawful for the said George Charles Marquis Camden, his executors, &c., into and upon the same premises, or any part thereof, in the name of the whole, wholly to re-enter, and the said J. W. Elliott, his executors, &c., and all other tenants and occupiers of the same premises, thereout and from thence utterly to expel and amove, and all and singular the same premises, or so much thereof as shall not then have been actually leased, to have again, retain, repossess, and enjoy, as in his or their first and former estate.”

By an indenture dated the 31st of January, 1854, [813] and made between the said J. W. Elliott of the one part, and the defendant of the other part,—after reciting the said building articles of the 4th of February, 1853, and that the said J. W. Elliott had erected upon parts of the said ground certain buildings, therein described, which had been demised to him by certain indentures of lease by which ground-rents to the amount of 35*l.* had been reserved, in consideration of 1500*l.*, the said J. W. Elliott assigned unto the defendant, his executors, &c., the said recited building articles, and all the right, title, interest, property, possession, benefit, claim, and demand whatsoever which the said J. W. Elliott then had or might have by virtue of the said indenture, and the covenants and agreements therein contained on the part of the plaintiff, into or out of the said premises therein described, subject to the performance by the defendant, his executors, &c., of the covenants therein contained, amongst others, a covenant by the defendant to perform the covenants in the said articles on the part of the said J. W. Elliott, and to indemnify the said J. W. Elliott from the same.

The defendant erected or completed, on part of the premises so assigned to him, certain messuages which, according to the contract, were demised to him by indentures of lease.

By an indenture of the 23rd of May, 1857, and made between the defendant of the one part, and one George White of the other part, the defendant, for a nominal consideration, assigned to White, his executors, &c., the said building articles of the 4th of February, 1853, and all his interest therein.

The defendant had paid to the plaintiff all the rent due under the building agreement of the 4th of February, 1853, up to Lady-Day, 1857, being the last quarter-day previous to the date of the assignment to White.

[814] Upon proof of these facts, the learned judge directed a verdict to be entered for the plaintiff for the amount claimed,—reserving leave to the defendant to move to enter a verdict for him, or a nonsuit.

Bovill, Q. C., in Michaelmas Term last accordingly, obtained a rule nisi to enter a verdict for the defendant, on the grounds,—first, that the building-articles of the 4th of February, 1853, amounted to an actual demise,—secondly, that the defendant never took any interest except under the building agreement, and was not tenant from year to year,—thirdly, that, if there was any tenancy from year to year, Elliott became

such tenant, and that tenancy was assigned to the defendant, and by him assigned over,—fourthly, that, if any rent was recoverable, it would be due to the plaintiff and Randolph or the prebendary of St. Paul's. He cited *Doe d. Walker v. Groves*, 15 East, 244, and *Curling v. Mills*, 6 M. & G. 173, 7 Scott, N. R. 709.

Malcolm shewed cause. The articles of agreement of the 4th of February, 1853, clearly do not amount to an actual demise. The matter rests entirely in contract. The whole scope of the agreement shews that the only demise contemplated, was, a demise of each house when erected. [Willes, J. If the articles constitute a demise of the whole piece of land, out of what estate would the separate leases be granted?] The parties have carefully worded the agreement so as to prevent its operating as a lease. Neither did Elliott hold as tenant from year to year. He merely held under the terms of the agreement; and, by the assignment to the defendant, the latter became assignee of a chose in action; but, when he entered into possession and paid rent, he became tenant from year to year. [815] [Williams, J. Does not the same argument shew that Elliott became tenant from year to year?] It is submitted that it does not: a tenancy from year to year in Elliott is quite inconsistent with the building agreement. The covenants entered into by Elliott in that instrument do not bind his assignee. The position of the defendant, therefore, is simply that of a man holding under the plaintiff and paying him rent. [Cockburn, C. J. If the terms of the agreement do not create the relation of landlord and tenant, when the defendant becomes assignee of that agreement and goes to pay the stipulated sum under it, why is it to be assumed that he makes the payment in the character of tenant rather than as assignee of the agreement? Being bound by his agreement with Elliott, he makes the payment in discharge of that obligation. Why should the money be held to be rent in the case of the defendant, and not in the case of Elliott?] The defendant as assignee would not be bound by the covenants entered into by Elliott. He, therefore, does not hold under the articles. His is the common case of a man occupying land and paying rent,—which clearly creates a tenancy from year to year. If not tenant from year to year, the defendant was at the least tenant at will, and so liable for the rent. [The other point was waived.]

Bovill, Q. C., and Garth, *contra*, were not called upon.

WILLIAMS, J. (a). I am of opinion that this rule must be made absolute, upon one of the points made (but not much insisted upon) at the trial and upon the motion. I think there was no evidence at all of any [816] liability in the defendant to pay the sum claimed in this action. The way in which it is sought to make him liable is this:—It is contended, and I think properly contended, on the part of the plaintiff, that the agreement of the 4th of February, 1853, did not amount to a lease. So far from that instrument being intended to operate as a lease, every possible care seems to have been taken, not only to avoid its being treated as a demise, but also to prevent any estate being taken under it until the houses should be built and the leases granted. Then, it is further insisted on the part of the plaintiff, that Elliott never gained a tenancy from year to year under the agreement. The reason why these arguments were urged (and, as I think, successfully urged) is, that, if that agreement amounted to a lease, then the defendant would be merely an assignee; and, having assigned over before any part of the rent claimed became due, he would be discharged, inasmuch as he would as assignee only be liable for rent accruing whilst he was in possession. That is the reason why it has been urged that the articles of the 4th of February, 1853, did not amount to a lease, and that Elliott never became tenant from year to year under them. I think Mr. Malcolm has made out those two propositions. But, then comes the question whether he has succeeded in shewing that a tenancy from year to year subsisted between the plaintiff and the defendant. I think he has not. It seems to me to be clear that the building articles carefully exclude the acquisition of any estate by Elliott. It would perhaps be difficult to say that he did not become tenant at will: but, beyond a tenancy at will, he clearly had no estate. What, then, was Elliott's position? He had under the articles a right to enter upon the land and devote it to the purposes thereby contemplated, and for this right he was to pay an annual sum, not as [817] rent, but as a collateral payment until the leases should be granted, and an estate thereby acquired. It is plain, therefore, that the sum stipulated to be

(a) Cockburn, C. J., was absent on account of indisposition, and Willes, J. had gone to Chambers.

paid by Elliott not being payable as rent for the occupation of the land, but merely a stipulated sum payable by virtue of the agreement, so far as he was concerned there is no ground for saying that he ever paid rent in the sense of creating a tenancy. But it is contended by Mr. Malcolm, that, when the defendant came in, the payment was to be considered as rent paid for the enjoyment of the land, and so a tenancy from year to year was created. It seems to me that there is no ground whatever for implying a tenancy from year to year in the defendant. Where a tenancy from year to year is implied from periodical payments, it is because you cannot account for the payment of the money upon any other hypothesis than that it is paid for rent, and hence the law implies a tenancy from year to year. But here there is no more reason for implying a tenancy from year to year after the defendant came in than there was when Elliott held the land. The defendant became liable to pay the money because Elliott had assigned the agreement to him, and he had agreed with Elliott to make the payments. I am of opinion that the only person liable in a court of law for the payment of the stipulated annual sum to the Marquis, would be Elliott himself: and that the fact of the defendant having become assignee of the agreement would not make him liable to the Marquis. The payments which were made by him were not made in discharge of any original liability in himself, but in discharge of the liability of Elliott, against which the defendant as assignee was bound to indemnify Elliott. It is said that the defendant held upon terms different from those under which Elliott held. But that leaves the question precisely as it was before. Can [818] you imply from the payment of the money by the defendant, that he meant to become tenant from year to year to the plaintiff? Clearly not. The payment being due to the liability of Elliott under the agreement, there is no more reason for inferring that the defendant became tenant from year to year than that Elliott became such. Then it is said, that, if the defendant was tenant at will only, inasmuch as he continued tenant for a portion of the year, he ought to pay rent pro rata. Be it that he was tenant at will, he was not tenant at will on the terms of paying so much a year rent. The amount still remains a collateral sum, for which Elliott, and Elliott alone, was, in my opinion, liable under his agreement with the plaintiff.

CROWDER, J. I also am of opinion that this rule should be made absolute, though not precisely on the grounds upon which it was moved. The first of these was, that the building-articles of the 4th of February, 1853, amounted to a demise of the land to Elliott. I am clearly of opinion that those articles did not amount to an actual demise. At first I was inclined to think that they did: but, upon looking more closely at the instrument, it seems to me to have been the intention of both parties to exclude the passing of any estate. In substance it amounts to this:—Certain land was staked out, upon which houses were from time to time to be erected, and, when and as one or more of the houses so agreed to be built were covered in, leases were to be granted; and for this certain annual sums were to be paid from time to time. The expression used is “rent or sum:” but the word rent was probably inserted from the difficulty of distinguishing between rent which would be payable under the intended leases, and the annual payments to be made for the right to occupy the land for the purpose of [819] erecting the houses thereon in the meantime. There are also expressions about re-entering and re-possessing the land for covenants broken. But I think it is clear, upon the whole instrument, that nothing was intended to be demised until the buildings should from time to time be erected: and that no tenancy was thereby created. Elliott entered under the agreement, and commenced building, and afterwards assigned all his interest in the agreement to the defendant, who completed two houses upon the land. I am clearly of opinion that there was no actual demise, and no tenancy from year to year. The next point made in the rule is, that the defendant never took any interest except under the building agreement, and was not tenant from year to year. Upon that ground, I think the defendant is entitled to succeed, though not in the way in which it was presented to the court on moving for this rule. It seems to me that the defendant never became tenant from year to year. It was insisted, that, under the agreement of the 4th of February, 1853, Elliott became tenant from year to year: and, if so, Elliott having assigned his interest to the defendant, and the defendant having assigned to White before any of the rent claimed in this action became due, the defendant could not be liable. Mr. Malcolm has, however, satisfied me that Elliott never became tenant from year to year under the agreement. His position was rather that of tenant at will,—that is, he was not in as a trespasser, but the annual payment

was not a payment as or in the nature of rent, but a stipulated collateral payment under the articles. Then it is contended, on the part of the plaintiff, that, assuming Elliott not to have been tenant from year to year, yet the defendant, from the altered circumstances, became so. That argument, however, clearly fails. By the assignment to him, the defendant became so far placed in the posi-[820]-tion of Elliott that he might well make the annual payment stipulated to be paid by Elliott under the building-articles. It is said that, because the defendant paid the money, and because it was a payment in the nature of rent, he thereby became tenant from year to year to the Marquis. But it seems to me that the existence of a tenancy from year to year is negatived by all the evidence in the case. It is clear that the defendant was acting merely as Elliott acted. It does not in my opinion follow from the altered circumstances that the payment was made by the defendant as rent. It is true, the defendant was not under covenant with the plaintiff to make the payments: but they were made in discharge of Elliott's liability, pursuant to the defendant's bargain with Elliott. He was merely carrying out Elliott's engagement under the stipulations he had entered into with Elliott. I agree with my Brother Williams, that, when a tenancy from year to year is implied from the payment of rent, it is only where the payment can be referred to nothing else. Here, however, there is no necessity for any such inference: the facts negative the inference of a tenancy from year to year. What, then, is the condition of the defendant? Assuming him to have been tenant at will, he was not tenant at a rent: the payment was a mere collateral payment, referable to the agreement, and to nothing else. As between the plaintiff and defendant, the payment clearly was not enforceable. The plaintiff's only remedy at law is against Elliott. The rule must, therefore, be made absolute.

Rule absolute (a).

[821] THE EASTERN COUNTIES RAILWAY COMPANY v. DORLING. Feb. 12th, 1859.

[S. C. 28 L. J. C. P. 202; 5 Jur. N. S. 869. Applied, *Marshall v. Ulleswater Steam Navigation Company*, 1871, L. R. 7 Q. B. 173. Distinguished, *Lyon v. Fishmongers' Company*, 1876, 1 App. Cas. 677.]

To a declaration charging the defendant with breaking and entering upon a certain dummy or landing-stage of the plaintiffs, the same being a barge of the plaintiffs, moored to a wharf in the river Orwell, and embarking and disembarking from the same passengers and others on, to, and from divers ships and vessels, and mooring ships and vessels against the same, the defendant pleaded that the Orwell was a public and common navigable river and common highway; that he had a right to land and was desirous of landing passengers from his steam-vessel at the wharf; that the plaintiffs' dummy or landing stage at the time when, &c. was permanently moored and fixed alongside the wharf so that his passengers could not embark or disembark there without his vessel being moored thereto and his passengers passing over the same, &c.:—Held, on demurrer, a sufficient answer to the declaration, — the dummy appearing to be a permanent obstruction of the defendant's right to use the river as a highway, which he could only exercise by removing it or passing over it. Issue having been taken upon the above and other pleas, the cause went down to trial, when it appeared that the dummy was moored to the wharf so as to rise and fall with the tide, that vessels could not if the dummy had not been there have approached the wharf at low water, and that the defendant claimed the right of landing at all times over the dummy:—Held that, if the plaintiffs had intended to complain of the defendant's exercise of his supposed right at times of low water, when he could not have come to the wharf if their dummy had not been there, they should have new-assigned. —There was evidence of a custom for barges or other vessels arriving at a wharf for the purpose of loading and unloading, to pass for that purpose over any other barge or vessel moored alongside a wharf and thereby preventing access to it otherwise:—Quere, whether such custom applied to a thing like this, which was a mere landing-stage for steam-boat passengers.

This was an action brought by the Eastern Counties Railway Company against the defendant for an alleged trespass.

(a) See *Alexander v. Bonnin*, 6 Scott, 611, 4 N. C. 799.

The declaration stated that the defendant broke and entered upon a certain landing-stage or dummy of the plaintiffs, the same being a barge of the plaintiffs, moored to a certain wharf in the river Orwell, and with feet in walking and otherwise walked and trespassed upon the same, and embarked and disembarked from the same divers persons and passengers and others on, to, and from divers ships and vessels, and navigated, moored, and fastened divers ships and vessels upon and against the same.

The defendant pleaded,—first, not guilty, secondly, a traverse that the landing-stage or dummy was the landing-stage or dummy of the plaintiffs,—thirdly, leave and licence.

Fourth plea,—that the said river Orwell, and that part thereof in which the said barge of the plaintiffs at the said time when, &c. was moored as in the declaration and thereafter mentioned, was and still is a public and common navigable river, and the Queen's [822] antient and common highway for all the liege subjects of our lady the Queen with their ships and other vessels to navigate, sail, pass, and repass in, upon, and through the same, and over all parts thereof, every year and at all times of the year, and at all times and states of the tides of the said river, at their free will and pleasure, and that the said part of the said river then was and still is open to the sea, and having a free passage in and from the same for ships and other vessels, and was and still is within the flux and reflux of the tide of the sea, and the tide of the sea before and at the said time when, &c. flowed and reflowed, and still flows and reflows, in the said part of the said river: That, at the said time when, &c., the said barge of the plaintiffs was moored in a certain part of the said river lying and being within the port of Ipswich, and that there now is, and from time whereof the memory of man runneth not to the contrary hath been, a certain antient and laudable custom used and approved of within the port of Ipswich, that is to say, that all and any ships, vessels, boats, or barges trading or being in the said river, within the said port, might be laid and moored alongside the quays, wharves, and banks abutting on the said river, for the purpose of persons embarking or disembarking, and goods being laden upon and unladen from on board the said ships, boats, and barges, at, from, or upon the said quays, wharves, and banks of the said river, and that the said ships, vessels, boats, and barges might remain and continue so laid and moored for the purpose aforesaid until the said persons, goods, wares, and merchandize should be so embarked, disembarked, laden, or unladen as aforesaid, and that the said persons, goods, wares, and merchandize might be so embarked, disembarked, laden, or unladen as aforesaid at the said quays, wharves, and banks; and that, when and so often as it should so happen that [823] one ship, vessel, boat, or barge should be laid or moored alongside part of any of the said quays, wharves, or banks, so that another ship, vessel, boat, or barge should be unable to be laid or moored alongside that part of the quays, wharves, or banks at which such ship, vessel, boat, or barge was so laid or moored alongside as aforesaid, and another ship, vessel, boat, or barge upon or from which the persons, goods, wares, and merchandizes were entitled to be embarked, disembarked, laden, or unladen upon or from the said part of the said quay, wharf, or bank at which the said ship, vessel, boat, or barge might be so laid or moored alongside as aforesaid, should arrive at the said last mentioned part of the said last-mentioned quay, wharf, or bank, while the said ship, vessel, boat, or barge should be so laid or moored as aforesaid, then that the said ship, vessel, boat, or barge so arriving might be laid or moored alongside to the said ship, vessel, boat, or barge so then already laid or moored alongside the said last-mentioned part of the said quay, wharf, or bank as aforesaid, for the purpose aforesaid; and that persons might embark or disembark, and that goods, wares, and merchandize might be laden or unladen upon or from the said ship, vessel, boat, or barge so arriving as aforesaid; and that for that purpose the said last-mentioned persons might of right go, pass, and re-pass, and the said last-mentioned goods be carried upon and over the said ship, vessel, boat, or barge so firstly laid or moored alongside as aforesaid, unto, upon, or from the said part of the said quay, wharf, or bank against or alongside which the said last-mentioned ship, vessel, boat, or barge was so laid or moored as aforesaid: That, just before the said time when, &c., a certain vessel of the defendant upon which divers persons, goods, wares, and merchandize which the defendant was entitled to [824] disembark and unlade upon a certain part of a certain quay abutting upon a certain part of the said river, within the said port, and which said last-mentioned vessel was then lawfully navigating the said river in the said highway, then

arrived at the last-mentioned part of the said river and of the said last-mentioned quay, and the defendant was then minded and desirous, and was lawfully entitled, to disembark the said last-mentioned persons and unlade the said last-mentioned goods, wares, and merchandize from the said last-mentioned vessel of the said last-mentioned part of the said river and the said last-mentioned part of the said last-mentioned quay; and that, at the time the said vessel of the defendant so arrived at the said last mentioned part of the said river as aforesaid, and thence until and at and after the said time when, &c., the said barge of the plaintiffs was and continued laid and moored in the said last mentioned part of the said river alongside the said last mentioned quay, so that the said last-mentioned persons, goods, wares, and merchandize to be, and which then were in and on board of the defendant's said vessel, could not be, laden and embarked and disembarked or unladen from the same at the said last mentioned part of the said last-mentioned quay, without the defendant's said last-mentioned vessel being moored and fastened against the said barge of the plaintiffs, or without the said last-mentioned persons and others to carry, and carrying, the last-mentioned goods, wares, and merchandize, entering upon and walking and passing over the said barge of the plaintiffs; wherefore the defendant, in order to disembark the said last-mentioned persons, and unlade the said last-mentioned goods, wares, and merchandize at the said last-mentioned part of the said quay, in the exercise of his right under and by virtue of the said custom, and because he could not otherwise [825] do so, committed the said trespass complained of: and that the alleged trespasses were an use by the defendant of the said custom, and only what he was entitled to do under and by virtue of the same.

Fifth plea,—that the said river Orwell, and that part thereof in which the said barge of the plaintiffs at the said time when, &c. was moored as in the declaration and hereinafter mentioned, was and still is a public and common navigable river, and the Queen's antient and common highway for all the liege subjects of our lady the Queen with their ships and other vessels to navigate, sail, and pass, and repass, in, upon, through and over the same and all parts thereof, every year, and at all times of the year, and at all times and states of the tide of the said river, at their will and pleasure; and that the said part of the said river then was and still is open to the sea, and having a free passage in and from the same for ships and other vessels, and was and still is within the flux and reflux of the tide of the sea, and the tide of the sea before and at the said time when, &c. flowed and reflowed, and still flows and reflows in the said part of the said river; and that, just before the said time when, &c., a certain vessel of the defendant, upon which divers persons, goods, wares, and merchandize which the said defendant was entitled to disembark and to unlade upon a certain part of a certain quay abutting upon the said part of the said river, and which said last mentioned vessel was then lawfully navigating the said river in the said highway there, arrived at the said last-mentioned part of the said river, and the said last-mentioned part of the said last-mentioned quay; and the defendant was then minded and desirous and was so entitled as aforesaid to disembark the said last-mentioned persons and unload the said last-mentioned goods, wares, and merchandize from the said last-mentioned vessel at the said last mentioned river, and at the last-mentioned [826] part of the said quay: and that, at the time the said vessel of the defendant so arrived at the said last-mentioned part of the said river as aforesaid, and thence until and at and after the said time when, &c., the said landing stage or dummy of the plaintiffs, being a barge boarded over and made into a floating landing place for the embarkation and disembarkation of persons, and the lading and unlading of goods, wares, or merchandize on and from on board of vessels arriving at the said quay, was then permanently moored and fixed there, and was a permanent erection for the purpose of persons so embarking and disembarking, and of goods, wares, and merchandize being so laden and unladen upon and by means of the same, and the said landing stage or dummy was then and during the time aforesaid so moored and fixed as aforesaid wrongfully in a part of the bed and course of the said river, alongside the said last-mentioned part of the said last mentioned quay, and then wrongfully covered and obstructed the said part of the bed and course of the said river and highway there, so that it was impossible for the said last mentioned persons, goods, wares, and merchandize who and which were then in and on board of the defendant's said vessel, to disembark or be unladen from the same at the said last mentioned part of the said last mentioned quay, without the defendant's said vessel being moored and fastened

against the said barge of the plaintiffs, or without the said last-mentioned persons and others to carry, and carrying, the said last-mentioned goods, wares, and merchandize, entering upon and walking and passing over the said barge of the plaintiffs; and the said barge of the plaintiffs then was a common and a public nuisance upon and to the said highway, and to all persons sailing, passing, or navigating upon or over the same; wherefore the defendant, in order to disembark the said last-[827]-mentioned persons and unload the said last-mentioned goods, wares, and merchandize at the last-mentioned part of the said quay, in the exercise of his right so to do, and because he could not otherwise do so, and solely in order to do so, committed the said trespasses complained of, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiffs in that behalf.

Sixth plea. The defendant repeats the several allegations, statements, and averments in the said fifth plea contained, except so far as the same states or alleges that the plaintiffs' said landing-stage or dummy was wrongfully moored or fixed in the said river, and that the same was a common or public nuisance as in that plea mentioned.

The plaintiffs joined issues upon these several pleas, and also demurred to the last plea.

The cause was tried before Williams, J., at the last Summer Assizes for the county of Suffolk, when the following facts appeared in evidence:—

The Eastern Union Railway Company had established, in connection with their railway, a line of steam-packets between Ipswich and Harwich. For the convenience of embarking and disembarking passengers at Ipswich, the company, with the permission of the owner, placed a "dummy," or flush-decked barge, in the river Orwell, opposite a wharf called Griffin's Wharf. This dummy was fastened by means of chains to the wharf and to a mooring-stone sunk into the bed of the river, so as to rise and fall with the tide; and without it it would have been impossible for boats to land or embark passengers at the wharf at low-water.

The Eastern Union Railway Company having transferred their line, together with their steam-boat estab-[828]-lishment, to the Eastern Counties Railway Company, the latter company became possessed of this dummy.

The defendant, who had formerly been in the service of the company as superintendent of the steam-packets, set up an opposition steam-packet to run between Ipswich and Harwich. Having the permission of the owner of Griffin's Wharf to land and embark passengers there, and the plaintiff's dummy occupying the whole frontage, the defendant insisted upon his right to go alongside the dummy at all times of the tide for that purpose. And this was the trespass complained of.

It was proved that, but for the plaintiffs' dummy being moored as it was, the defendant's steam-boat could have got alongside the wharf at all times at high-water, but not at low-water; and that he insisted upon his right to use the dummy at all times.

In support of the custom alleged in the fourth and sixth pleas, the defendant proved, that, according to the usage of the port, whenever a barge or other vessel was moored alongside of a wharf for the purpose of loading or unloading, so as to prevent another vessel getting alongside the wharf, such last-mentioned vessel might be placed alongside the former, and her people pass over her for the purpose of loading and unloading.

The jury, in answer to questions put to them by the learned judge, found that the custom existed as alleged in the pleas; that the defendant could not land at the wharf without going over the plaintiffs' dummy; and that, on some occasions he might, though on others (according to the state of the tide) he could not have landed and embarked his passengers on the wharf, if there had been no dummy there.

A verdict was thereupon entered for the defendant upon the fourth and sixth issues, and for the plaintiffs on the rest.

[829] O'Malley, Q. C., in Michaelmas Term last, on the part of the plaintiffs, obtained a rule calling upon the defendant to shew cause why the verdict found for him on the fourth plea should not be set aside, and instead thereof a verdict be entered thereon for the plaintiffs with nominal damages, pursuant to leave reserved at the trial, on the ground that that plea was not proved: and why the verdict found for the defendant on the sixth plea should not be set aside, and instead thereof a verdict be entered thereon for the plaintiffs, on the ground that there was no evidence in

support thereof; or why the verdict should not be set aside, and a new trial had, on the ground that the verdict was against the evidence: or why judgment should not be entered for the plaintiffs on the fourth plea non obstante veredicto, on the ground that the custom alleged was unreasonable and bad. He submitted that there was no evidence that the custom, if good, applied to passenger vessels, and that there was no evidence that a "dummy" had ever been placed on the river before.

Power, Q. C., for the defendant, also moved for a new trial, on the ground that the verdict on the fifth issue (that the dummy was a public nuisance) ought to have been found for defendant: but the court declined to grant a rule.

Power, Q. C., and H. Mills, in Hilary Term, shewed cause against the plaintiffs' rule. The declaration charges the defendant with a trespass on their dummy or landing-stage moored in the river Orwell. The fourth plea in substance states, that the Orwell is a public and common navigable river, that the plaintiffs' barge (dummy) was moored therein: that, by the custom of the port of Ipswich, when a barge or other vessel is moored alongside a wharf so that another [830] vessel cannot get to the wharf, the latter may pass over the former for the purpose of landing and embarking persons and goods entitled to land at the wharf; that the plaintiffs' dummy was so moored alongside the wharf at which the defendant was entitled to land and embark his passengers and goods, that he could not land them without passing over it; and that the trespasses complained of were an use by the defendant of the said custom, and only what he was entitled to do under and by virtue of the same. The sixth plea, which is substantially the same as the fourth, treats the barge or dummy as permanently fixed, without alleging it to be a public nuisance, and justifies the passing over it. The custom proved is not the less applicable because the vessel which was moored alongside the wharf was a "dummy," and not a real vessel: *The Mayor, &c., of Carlisle v. Wilson*, 5 East, 2; *Cowling v. Higginson*, 4 M. & W. 245; *Dare v. Heathcote*, 25 Law J., Exch. 245. [Crowder, J. If the custom be good as to a vessel moored at the wharf for a limited time, it would be absurd to hold that it did not apply to a dummy.] The dummy being moored against the wharf, so that the defendant's access thereto was thereby obstructed, he had a right to go over it. If the plaintiffs had intended to insist that the defendant trespassed on their dummy at other times than those at which it formed an obstruction, they should have new-assigned,—the Common Law Procedure Act, 15 & 16 Vict. c. 76, having made no difference in this respect: see *Glover v. Dixon*, 9 Exch. 158. [Williams, J. referred to *Bouven v. Jenkin*, 6 Ad. & E. 911, 2 N. & P. 87. There, in case by a commoner for disturbing his common by putting on cattle, the defendant pleaded a right of common appurtenant for cattle, levant and couchant, that the cattle in the declaration mentioned were the defendant's own commonable cattle levant and couch-[831]-ant, and that he put them on to use the common, &c. The plaintiff replied that "all the said cattle in the declaration mentioned" were not the defendant's own commonable cattle levant and couchant, in manner and form, &c. It was held that the defendant maintained his issue by shewing, that, on the occasion of every alleged disturbance, some of the cattle put on were levant and couchant: and that, on these pleadings, the plaintiff could not insist on a surcharge,—the word "all" being interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle; not that it was truly alleged of some, and falsely of others. Lord Denman there said: "If the plaintiff had stated in his declaration (as he might have done, though he was not bound to do) that the defendant, being a commoner, had put on cattle which were not levant and couchant, and the defendant had asserted in his plea that they were levant and couchant, doubtless he must fail, unless he could prove by his evidence that all the cattle which the plaintiff proved to have been put on the common by him were levant and couchant."] In the note (6) to *Green v. Jones*, 1 Wms. Saund. 299, it is laid down, that, "where the defendant has committed several trespasses either upon the person, goods, or land of another, some of which are justifiable and others not, and the action is brought for those trespasses which are not justifiable, but the defendant by his plea answers those only which are, the plaintiff by his replication should make a new-assignment." Again, p. 299 b., the learned editor says: "A new-assignment is used to ascertain with precision and exactness the time or place which had been alleged only generally in the declaration. It is also used to explain that more fully which is only apparently answered by the plea. As, where the plea covers the whole trespass (which it must do, otherwise [832] it would be bad on demurrer), but mistakes it, that is, does not hit, if I may so say, either

wilfully or ignorantly, the whole or some part of the trespass which the plaintiff intended in his declaration, the plaintiff must new-assign, to explain." In *Monprivat v. Smith*, 2 Campb. 175 (cited with approbation in 1 Smith's Leading Cases, 4th edit. 106), to trespass for breaking and entering a house and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours; and it was ruled that the plea covered the whole declaration. [Williams, J. If the plaintiff's had applied to amend at the trial, I should have allowed it to be done immediately.] That would scarcely have been just, seeing that the defendant went down prepared to try the general right. The declaration being restricted to a single act of trespass, the plaintiff could not, it is submitted, new-assign; nor could he be allowed to traverse and new-assign. [Willes, J. Why not?] In note (n), in 1 Wms. Saund. 300 d., it is said, that, "where a single act of trespass is laid in a declaration without 'divers days and times,' and the defendant's plea in justification covers that act, to which plea the plaintiff replies, he cannot also new-assign: *Taylor v. Smith*, 7 Taunt. 156. So, where the declaration contains several counts, each alleging a single act of trespass, and the defendant pleads a separate plea of justification to each count, the plaintiff cannot take issue on such justifications and also new-assign another act of trespass: for, such replication and new-assignment are double, and extend the cause of complaint beyond what is contained in the count: *Cheasley v. Burns*, 10 East, 73." [Willes, J. All that that proves is, that you cannot by a new assignment enlarge the cause of complaint. But, as a general proposition, I do not agree with you. You must make [833] out, that, where the plaintiff alleges the grievance without days, he cannot under that prove acts of trespass on more than one day. Cockburn, C. J. What is to prevent us from adding a new-assignment now?] It is submitted that the court has no power on the discussion of this rule to make such an amendment as that. [Willes, J. We certainly assumed to have such power, in *Carpenter v. Parker*, ante, vol. iii., p. 206.] That was a special case; and the course pursued was not objected to. All that the defendant had to shew, upon the fourth plea was, that he had a right to go to the wharf for the purpose of landing and embarking his passengers, and to pass over the plaintiffs' dummy. Without any custom at all, —subject to the variation introduced by the sixth plea, that the dummy was permanently fixed, —it is impossible to distinguish this from the ordinary case of a man having a right of way which is obstructed.

O'Malley, Q. C., and David Kean, in support of the rule, and of the demurrer. The fourth plea was not proved: and, even if it was, it is a bad plea, the custom therein alleged being clearly unreasonable. There was no evidence, assuming the custom to be a reasonable one, of its ever having been applied to any but cargo-bearing ships. This dummy was a thing of a totally different character: it is fastened by mooring chains to the wharf and to the bed of the river; and is used as a mere landing stage or projection into the river for the purpose of facilitating the embarking or disembarking of passengers when the state of the tide precludes the approach of the steam-vessel. It is a thing which is rateable for the relief of the poor: *The Queen v. Forrest*, 27 Law J., M. C. 96. The custom is laid in general terms, and is applicable to the whole frontage of the port of Ipswich. [Williams, J. No [834] objection was taken at the trial to this part of the custom not having been proved. If there had been, I should have amended the plea. There was quite evidence enough to support a custom to justify the defendant.] The evidence was, that the right was subject to the payment of wharfage: see *Pudlock v. Forrester*, 3 M. & G. 903, 3 Scott, N. R. 715, 1 Dowl. N. S. 527. As to the sixth plea,—If that plea is bad on demurrer for not averring that the landing-stage or dummy of the plaintiffs was a public nuisance, the finding of the jury is immaterial. But, if the plea is good, it can only be so because the word "permanently" gives to the other statements in the plea the character of a nuisance: and, the question having been submitted to the jury, and they having found that it was not a nuisance, the plaintiffs are entitled to a verdict upon that issue. The river Orwell being a public highway, the defendant had first to make out that his right of access to the wharf was obstructed. Having made out that, he might have a right to remove the obstruction; but he could not justify walking over it. Unless the defendant has a right of action, he has no right at all: and his right of action depends upon the thing causing the obstruction being a public nuisance and causing him a private and particular damage. This was not necessarily a nuisance because a permanent structure. Hale, De Portibus Maris, 85, gives instances

of "such nuisances as are common to all men that have occasion to come, go, or stay at ports." Amongst others, "1. Silting or choking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port, whereby it is choked. 2. Decays of the wharfs, keys, and piers, which are for the landing of merchandise and the safe-guard of shipping. 3. The leaving of anchors in the port without buoys or marks, whereby ships or vessels may strike against them and be [835] spoiled (a). 4. The building of new wears or enhancing of old, whereby navigation or passage of vessels is obstructed. 5. The straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden; for, it is to be observed that nuisance or not nuisance in such case is a question of fact. It is not therefore every building below the high-water mark, nor every building below the low-water mark, is ipso facto in law a nuisance. For that would destroy all the keys that are in all the ports in England. For they are all built below the high-water mark; for, otherwise vessels could not come at them to unlade; and some are built below the low-water mark. And it would be impossible for the King to license the building of a new wharf or key, whereof there are a thousand instances, if ipso facto it were a common nuisance, because it straitens the port, for the King cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the King's, the building below the high-water mark is a purpresture, an incroachment and intrusion upon the King's soil, which he may either demolish, or seize, or arent at his pleasure; but it is not ipso facto a common nuisance, unless indeed it be a damage to the port and navigation. In the case, therefore, of building within the extent of a port in or near the water, whether it be a nuisance or not is *questio facti*, and to be determined by a jury upon evidence, and not *questio juris*." [Cockburn, C. J. The plea does not allege that the dummy was wrongfully there: nor does it shew [836] that it had not been there as long as the wharf itself. Suppose I have a right of way, and you obstruct it by placing a hurdle across it,—may I not get over it? You may possibly have a right to remove it, but nothing more. The authorities are numerous to shew that the mere fact of a structure being obstructive of a river or a highway gives no right of action, unless some private and particular injury results therefrom to the party complaining: *The King v. Russell*, 6 B. & C. 566; *The King v. Ward*, 4 Ad. & E. 384; *The King v. Tindall*, 6 Ad. & E. 143, 1 N. & P. 719; *Rex v. Lord Grosvenor*, 2 Stark. N. P. C. 511; *Wilkes v. The Hungerford Market Company*, 2 Scott, 446, 2 N. C. 281; *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244; *The Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Wiggins v. Boddington*, 3 C. & P. 544. In *Bateman v. Bluck*, 18 Q. B. 870, to trespass for entering the plaintiff's close and pulling down a wall thereon, the defendant pleaded that the close was a public pavement within the Metropolitan Paving Act, 57 G. 3, c. xxix.: that the plaintiff unlawfully and contrary to the act erected thereon the said wall; and, because the wall incumbered the pavement, and the plaintiff refused, on the defendant's request, to remove the same, the defendant entered and pulled it down: and it was held, on motion for judgment non obstante veredicto, that the plea was bad for not shewing that it was absolutely necessary for the defendant, in order to exercise the alleged right of passage, to remove the wall. *Dimes v. Pelley*, 15 Q. B. 276, is to the same effect. The plea was not proved. The obstruction clearly was not a permanent one. And the plaintiffs were in the exercise of a right at least concurrent and commensurate with that of the defendant. The utmost the defendant could be entitled to would be an action for the wrong done to him by the obstruction, and not a right to [837] redress himself by trespassing upon the plaintiffs' property,—according to the distinction pointed out by Bracton, lib. iv., c. 37, between *nocumentum justum*, and *nocumentum injuriosum*.

The Court, without calling upon Power and Mills to support the demurrer to the sixth plea, expressed a desire to consider the fourth plea and the general question.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

We intimated during the argument our opinion that the fourth plea was not proved, and stated our reasons for that opinion. We took time to consider, as to the second plea, first, whether upon the demurrer it could be sustained in point of law,

(a) See *Hancock v. The York, Newcastle, and Berwick Railway Company*, 10 C. B. 348.

and, secondly, how the rule to enter a verdict thereon for the plaintiffs should be disposed of.

Upon the demurrer we think judgment ought to be entered for the defendant. The plea in effect states that the defendant had a right to land at a quay upon the bank of a public navigable river, and that the plaintiffs permanently moored their dummy so as to obstruct and prevent the defendant's approach to the quay, and so that it was impossible for him to land without passing over the dummy; and so justifying passing over it, doing no unnecessary damage to the plaintiffs in that behalf. The plaintiffs, therefore, are alleged by the plea or have prevented the defendant's approach to his quay over the river, which was a public highway, by substituting for the part of the river which the dummy occupied the dummy itself, and making it, instead of the river, the means and the only means of passing over that space. The dummy is further al-[838]-leged to have been permanently fixed, which must mean at least that it would require time and labour to remove it, and, it may be, means which the defendant had not at hand. And, lastly, it is stated that the defendant could not have landed except by passing over the dummy, and that no unnecessary damage was done to the plaintiffs.

Under these circumstances, the defendant had a right to use the river as a highway until he got near enough to the quay to exercise his right of landing upon it, subject of course to the reasonable use of the river by persons having a priority over him in point of time. The plaintiffs' dummy was placed where it was, not for the use by it of the river as a highway, but permanently, in order to make that part of such highway more commodious for the plaintiffs' own use, otherwise than by the dummy; and it was intended to remain there; and it interfered with the right of the defendant to pass over the place as a way, which right he could not exercise in any other manner than by removing or passing over the dummy.

The defendant, therefore, was entitled to abate the nuisance to him thereby caused, and to effect that by its removal: and we cannot see that the course actually pursued by him involved the assumption of any greater control over the plaintiffs' property, and it is impliedly stated not to have been more injurious to them, than such removal would have been. Moreover, if the defendant were compelled to remove the dummy, instead of passing over it as he did, he must have been subjected to injurious delay. It appears to us, therefore, that, upon the principle of the authorities collected in 2 Roll. Abr. Trespass, Justification sur default ou act del plaintiff mesme, the plea is good, and there must be judgment for the defendant on the demurrer.

As to the rule to enter the verdict for the plaintiffs [839] upon the sixth plea, we are of opinion, subject to what we shall presently say as to a new trial, that the rule ought to be discharged. The declaration is general, for trespasses upon the dummy. The plea justifies such trespasses at times when the defendant could have exercised the right of landing there set up, but for the obstruction caused by the plaintiffs. At the trial it appeared that he committed trespasses by landing upon the dummy, both when the tide was high, and when but for the dummy being there he could have landed (so that it was at such times an obstruction to his landing), and also when the tide was so low, that, had the dummy not been there, he could not have landed, so that it did not at such times constitute an interference with his right. The landing on the occasions in the former class, when the defendant could have landed but for the dummy, by getting up to the quay was, for the reasons already stated in giving judgment upon the demurrer, justifiable. The landing upon the occasions in the latter class, when if the dummy had not been there, the defendant could not have got up to the quay, and when he could not have landed but for the dummy, was not justifiable: and, if the plaintiffs had new-assigned in respect of those occasions, they would have been entitled to a verdict for nominal damages in respect of them. It was, however, insisted, for the defendant, that such a new-assignment was necessary: and we are of that opinion. The declaration is in a general form, and applicable to either class of trespasses: and the defendant was justified in respect of one class, viz. that of trespasses committed upon occasions when the dummy did interfere with his right to land, and it is *primâ facie* a good answer to the whole declaration. In such a case, the plaintiff ought to new-assign that he proceeds, or proceeds also, in respect of the class of trespasses to which [840] the plea is not directed: and upon this ground the plaintiffs' rule as to the sixth plea ought to be discharged.

Inasmuch, however, as the right of using the dummy when the tide was low and

the defendant could not have landed without it, was doubtless the substantial question in dispute, and upon that we are of opinion against him, so that the merits are with the plaintiffs, we think the rule ought to be made absolute for a new trial, the plaintiffs being at liberty, in order to avoid further objection, to amend the declaration, by stating that the trespasses were committed on divers days, and also to new-assign, —the costs to be defendant's costs in the cause.

Rule accordingly.

FARRALL v. HILDITCH. Feb. 12th, 1859.

[S. C. 28 L. J. C. P. 221 ; 5 Jur. N. S. 962 ; 7 W. R. 409. Referred to, *Jackson v. North Eastern Railway*, 1877, 7 Ch. D. 583.]

An indenture made between the plaintiff and defendant recited that the former was seised or entitled to certain hereditaments and premises, subject to a mortgage and further charge, that he was indebted to the defendant in the sum of 100l. for goods sold and delivered, that the defendant had commenced an action against him to recover the same, and that the plaintiff, being desirous of staying the action and of securing to the defendant the payment of his debt, had proposed and agreed to convey the hereditaments and premises to him, subject to the incumbrances, upon certain trusts for securing the same. It then recited as follows, "and it has also been agreed between the [plaintiff] and [defendant] that he the [defendant] shall be at liberty to sign judgment in the said action so commenced against the [plaintiff] as aforesaid, but that no execution shall issue thereon until this present security be realized." The indenture then proceeded to convey the premises to the defendant upon certain trusts:—Held, that the latter recital amounted to a covenant by the defendant not to issue execution until the realization of the security.

This was an action for a breach of covenant.

The declaration stated, that, before and at the time of making the indenture thereafter mentioned, the plaintiff was entitled to certain hereditaments, subject to certain indentures of mortgage and further charge, and was indebted to the defendant in 100l., for which the defendant had commenced an action against the plaintiff; and thereupon, theretofore, to wit, on the [841] 23rd of April, 1857, an indenture was made by and between the plaintiff and the defendant, which, after reciting that the plaintiff was entitled to the said hereditaments as aforesaid, subject as aforesaid, and was indebted to the defendant in the said sum of 100l., contained the following words, that is to say,—And whereas the said Charles Hilditch (meaning the defendant) having recently commenced an action against the said Richard Farrall (meaning the plaintiff) for the recovery of the said sum of 100l. so due to him as aforesaid, and he the said Richard Farrall being desirous of staying such action, and of securing unto the said Charles Hilditch the payment of the said sum of 100l. sought to be recovered by such action, hath proposed and agreed to convey and assure the said hereditaments and premises, subject to the said several incumbrances thereon mentioned in the said schedule, unto the said Charles Hilditch and his heirs, upon the trusts thereafter mentioned for securing the said debt or sum of 100l. so due to the said Charles Hilditch: and it has been also agreed between the said Richard Farrall and Charles Hilditch, that he the said Charles Hilditch shall be at liberty to sign judgment in the said action so commenced against the said Richard Farrall as aforesaid, but that no execution shall issue thereon until this present security be realized: and it was by the said indenture witnessed, that, in pursuance of the said recited agreement, and in consideration of the said sum of 100l., the plaintiff granted, released, and conveyed to the defendant and to his heirs the said hereditaments, to hold the same to the defendant and his heirs, to the use of the defendant, and, subject to the said indenture of mortgage and further charge, upon trust that the defendant should forthwith enter into the possession and receipt of the rents and profits of, and with all convenient [842] speed absolutely sell and dispose of, the said hereditaments as therein mentioned: and it was thereby declared that the defendant should stand possessed of the moneys to arise from the said sale or sales, and the said rents and profits, upon trust, first, to discharge certain costs, charges, and expenses therein mentioned, secondly, to pay and satisfy the principal and interest arising on the said indentures of mortgage and further

charge, together with all costs and expenses, if any, attending to the non-payment of the same, and, subject thereto, to retain and pay himself the said sum of 100l. and interest thereon, as therein mentioned: Averment, that the plaintiff did all things necessary on his part to entitle him to have the said covenant or agreement as to not issuing execution until the said security was realized, performed by the defendant: Yet that the defendant, contrary to the said covenant or agreement issued execution on the said judgment so signed in the said action before the said security was realized, and seized and sold under such execution the plaintiff's goods before the said security was realized, whereby the plaintiff's credit and trade was destroyed, and he was put to great expense in endeavouring to pay out and get rid of the said execution, and was and is otherwise injured, &c.

The defendant pleaded, that he did not make the covenant or agreement in the declaration alleged to have been broken: and that the said indenture contained divers other provisions, covenants, and stipulations of and concerning the said 100l. and payment of the same, and other matters. Issue thereon.

The cause was tried before Whately, Q. C., at the last assizes at Stafford. The plaintiff put in the deed upon which the declaration was founded, and which was in the following terms:—

"This indenture, made the 23rd day of April, 1857, [843] between Richard Farrall, of Kids Grove, in the parish of Wolstanton, in the county of Stafford, grocer and provision dealer, of the one part, and Charles Hilditch, of Audley, in the said county of Stafford, gentlemen, of the other part: Whereas the said Richard Farrall is seised of or otherwise entitled to the messuage, tenement, or dwelling-house, shop, hereditaments, and premises hereinafter described and intended to be hereby conveyed and assured, subject to the several indentures of mortgage and further charge enumerated and set forth in the schedule hereunder written (a): And whereas the said Richard Farrall has up to the date of these presents made the several payments and subscriptions, and in all other respects complied with the rules of the said Building and Investment Society, and the terms of the proviso for redemption in the indenture firstly mentioned and set forth in the said schedule hereunder written contained, and the sum of 335l. or thereabouts, only now remains due and owing to the trustees of the Burslem and Tunstall Permanent Fifty Pounds Benefit Building and Investment Society upon or by virtue of the several mortgage securities enumerated in the said schedule hereunder written: And whereas, the principal sum of 100l. is still due to Mr. John Buckley upon the mortgage security in his favour particularised in the said schedule, but all interest thereon has been duly discharged: And whereas the said Richard Farrall now stands justly indebted to the said Charles Hilditch in the sum of 100l. for goods sold and delivered to the said Richard Farrall, which the said Richard Farrall doth hereby admit and ac-[844]-knowledge: And whereas the said Charles Hilditch having recently commenced an action against the said Richard Farrall for the recovery of the said sum of 100l. so due to him as aforesaid, and he the said Richard Farrall being desirous of staying such action and of securing unto the said Charles Hilditch the payment of the said sum of 100l. sought to be recovered by such action, hath proposed and agreed to convey and assure the said hereditaments and premises, subject to the said several incumbrances thereon mentioned in the said schedule, unto the said Charles Hilditch and his heirs, upon the trusts hereinafter mentioned for securing the said debt or sum of 100l. so due to the said Charles Hilditch: and it has also been agreed between the said Richard Farrall and Charles Hilditch that he the said Charles Hilditch shall be at liberty to sign judgment in the said action so commenced against the said Richard Farrall as aforesaid, but that no execution shall issue thereon until this present security be realized: Now, this indenture witnesseth, that, in pursuance of the said recited agreements, and in consideration of the sum of 100l. so due from the said Richard Farrall to the said Charles Hilditch as aforesaid, he the said Richard Farrall doth by these presents grant, release, and convey unto the said Charles Hilditch and to his heirs all that messuage, tenement, or dwelling-house, with the buildings, shop, bakehouse,

(a) The schedule referred to contained only the following: "7th May, 1852. Indentures of mortgage made between George Hargreaves of the first part, and the several other persons therein named, trustees of the Burslem and Tunstall Permanent 50l. Benefit Building Society, of the second part."

out-buildings, yard, land, and all other the premises thereto belonging and adjoining, situate at Kids Grove, in the parish of Wolstanton, in the county of Stafford, as the same are now in the occupation of the said Richard Farrall, his under-tenants or assigns, and which said messuage or dwelling-house was heretofore erected by one George Hargreaves on a plot of land which formerly formed part of a certain farm and lands called Harding's Wood Farm, and containing by admeasurement, including [845] the site of the buildings, 350 square yards, or thereabouts, more or less; together with all houses, out-houses, buildings, rights, members, and appurtenances whatsoever to the same belonging; and all the estate, right, title, and interest, both legal and equitable, of him the said Richard Farrall therein and thereto; To have and to hold the said messuages, tenement, or dwelling-house, shop, buildings, and all and singular other the hereditaments hereinbefore described, and hereby conveyed and assured, with their and every of their appurtenances, unto the said Charles Hilditch and his heirs, to the use of the said Charles Hilditch his heirs and assigns for ever; subject, nevertheless, to the several indentures of mortgage and further charge enumerated and set forth in the schedule hereunder written, the provisos for redemption therein respectively contained, and the trusts, powers, and provisions hereinafter contained, that is to say, upon trust that he the said Charles Hilditch, his heirs, executors, administrators, or assigns, do and shall forthwith enter into the possession or receipt of the rents and profits of, and with all convenient speed absolutely sell and dispose of, the said messuage or tenement, hereditaments, and premises, by public auction or private contract, either together or in parcels, at such price or prices as to him or them shall seem reasonable, and subject or not subject to any special or other conditions or stipulations relative to the title, or evidence of title, or otherwise, with liberty to buy in the said hereditaments and premises, or any part thereof, and to resell the same at any future sale or sales, without being responsible for any loss that may be incurred thereby; and also with full power for him or them to rescind and annul or alter the terms, conditions, and stipulations of any contract which may be entered into respecting the sale of the said hereditaments, or any [846] part thereof, without being answerable for any loss sustained in consequence; and also with full power to convey and assure the said hereditaments and premises when sold to the purchaser or purchasers of the said hereditaments, and to give receipts to such purchaser or purchasers under the power of sale hereinbefore contained which shall effectually exonerate such purchasers or purchaser taking the same from all responsibility with respect to the application of the purchase-moneys therein expressed to be received: And it is hereby further declared that the said Charles Hilditch, his heirs, executors, administrators, or assigns, shall stand possessed of the moneys to arise from the sale or sales of all or any part of the said messuage, tenement, or dwelling house, hereditaments, and premises herein directed to be sold as aforesaid, and the rents and profits henceforth arising therefrom until the same shall be sold (and which rents and profits may be received under or by virtue of these presents without prejudice to the exercise of the aforesaid trusts for sale), Upon and for the trusts, intents, and purposes following, that is to say, in the first place, to discharge all such costs, charges, and expenses attending the said action, the preparation and execution of the presents, and also of any such sale or sales as aforesaid, or the receipt and recovery of the said rents and profits, or otherwise, to be incurred in the execution of the trusts hereby declared: and, in the second place, to pay and satisfy thereout all principal moneys and interest that may be then due or owing upon the said several indentures of mortgage and further charge mentioned in the said schedule hereunder written, to or in favor of the said Benefit Building and Investment Society, and the said John Buckley, as aforesaid (together with all costs and expenses, if any, attending the non-payment of the same respectively), [847] and, subject thereto, do and shall retain and pay himself and themselves the said sum of 100l. so due as aforesaid, together with interest thereon at the rate of 5l. per cent. per annum; and then upon trust to pay over the surplus, if any, unto the said Richard Farrall, his executors, administrators, or assigns: And the said Richard Farrall doth hereby, for himself, his executors administrators, and assigns, covenant, promise, and agree with and to the said Charles Hilditch, his executors and administrators, that he the said Richard Farrall, his executors, administrators, or assigns, or some or one of them, shall and will forthwith well and truly pay or cause to be paid unto the said Charles Hilditch, his executors or administrators, the sum of 100l., with interest for the same at the rate of 5l. per cent. per annum; and also

that he the said Richard Farrall, subject as aforesaid, now hath in himself good right, full power, and lawful and absolute authority to grant and release the said hereditaments and premises unto and to the use of the said Charles Hilditch, his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: and, further, that, subject as aforesaid, the said hereditaments and premises shall be held and enjoyed according to the limitations and provisions hereinbefore contained, without any let, suit, eviction, ejection, denial, or disturbance of or by the said Richard Farrall, his heirs, executors, or administrators; and at his and their own costs well and sufficiently protected, saved, harmless, and kept indemnified of, from, and against all former and other estates, rights, titles, liens, charges, and incumbrances whatsoever, except as appears by these presents: And moreover that the said Richard Farrall and all persons rightfully claiming any estate or interest, legal or equitable, in the said hereditaments and premises (except persons claiming in respect of the [848] said prior incumbrances) shall and will from time to time and at all times hereafter, at the request of the said Charles Hilditch, his heirs, executors, administrators, and assigns, but at the costs of the said Richard Farrall, his heirs or assigns, execute and perfect all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the better, more perfectly, or satisfactorily granting, releasing, confirming, or otherwise assuring the said hereditaments and premises hereby granted and conveyed, unto and to the use of the said Charles Hilditch, his heirs and assigns, according to the true intent and meaning of these presents, as the said Charles Hilditch, his heirs, executors, administrators, or assigns, or his or their counsel in the law, shall require: And lastly, the said Charles Hilditch doth hereby attorn and become tenant of the said hereditaments and premises hereby conveyed, to the said Charles Hilditch, at the yearly rent of 20l. per annum, to be paid by two equal half-yearly payments, on the 29th day of September and the 25th day of March in every year. In witness," &c.

The defendant proposed to shew, on cross-examination of the plaintiff, that the recital therein that no execution should issue upon the judgment signed against the plaintiff, until that security had been realized, had been inserted in the deed by mistake and without the knowledge or consent of the defendant, and that he had executed it without reading it. This evidence, however, was rejected.

It was then submitted that the recital did not amount to a covenant, but was merely evidence of an agreement.

The learned judge, however, overruled the objection, and directed a verdict to be entered for the plaintiff, leave being reserved to the defendant to move to enter [849] a verdict for him if the court should be of opinion that the recital in question did not constitute a covenant.

Huddleston, Q. C., in Michaelmas Term last, accordingly obtained a rule nisi on the point reserved, and also for a new trial, on the ground that the learned judge improperly rejected the evidence to shew that there was no such agreement as recited in the deed, and that the recital was inserted by mistake. He submitted that, if the plaintiff relied on the estoppel arising from the defendant's execution of the deed, he should have replied it: and that, not having done so, the matter was thrown at large. He referred to *Thoroughgood's case*, 2 Co. Rep. 5, *Fought v. Winch*, 2 B. & Ald. 662, *Magrath v. Hardy*, 4 N. C. 782, 6 Scott, 627, *Bowman v. Taylor*, 2 Ad. & E. 278, 4 N. & M. 264, *Bowman v. Rostron*, 2 Ad. & E. 295, 4 N. & M. 551, *Carpenter v. Buller*, 8 M. & W. 209, and *Lord Faversham v. Emerson*, 11 Exch. 385, and to the notes in Wms. Saund. 325 a., and to *Trevelan v. Lawrence* and *The Duchess of Kingston's case*, in 2 Smith's Leading Cases, 605 et seq.

Pigott, Serjt., and Phipson, shewed cause. The question is whether the recital of the agreement that no execution should issue upon the judgment until the security should have been realized, operates as a covenant. It is submitted that it does. In Comyns's Digest, Covenant (A. 2), it is said that "any words in a deed which shew an agreement to do a thing make a covenant; as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. solvendo prouinde the interest to A.; covenant lies against B. for the interest. In *Courtney v. Taylor*, 7 Scott, N. R. 749, 6 M. & G. 851, Tindal, C. J. says: "I entirely agree that it is not [850] necessary, in order to charge a party with a covenant, that there should be express words of covenant or agreement, but that it is enough if the intention of the parties to create a covenant be apparent." And Maule, J., says: "Where a party

unequivocally admits (in a deed) himself to be liable to pay money, a covenant that he will pay it may be implied." It is enough if it shews a clear intention that the thing shall or shall not be done: *Asplin v. Austin*, 5 Q. B. 671, D. & Meriv. 515; *Dunn v. Sayles*, 5 Q. B. 685, D. & M. 579. In giving the judgment of the court in the former of these cases, Lord Denman says: "Where words of rental or reference manifested a clear intention that the parties should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instrument had contained express covenants to perform them." So, in *Platt on Covenants*, 33, it is said: "Words of recital may, when joined and considered with the rest of the instrument, be the foundation of an action of covenant." As to the evidence, the learned judge was clearly warranted in rejecting it. It was not competent to the defendant by parol evidence to vary or contradict the terms of the deed.

Huddleston, Q. C., and Gray, in support of the rule. It may be conceded that no particular form of words is necessary to constitute a covenant, where the intention to make a covenant clearly appears. In Co. Litt. 352 b., it is said that a recital doth not include, "because it is no direct affirmation." The recital in question has no reference whatever to the subject-matter of the deed in which it is found: and it may well rest on the parol agreement. The mere fact of its being found in an instrument under seal does not make it a covenant: it is a mere recital of a past agreement. [Crow-**[851]**-der, J. Suppose it had been introduced thus,—“And whereas it is agreed,” &c., would that be a covenant?] It might. [Williams, J. My Brother Byles has just handed me a case which seems to hit the very point, viz. *Barfoot v. Fresswell*, 3 Keble, 465, which is as follows:—“In covenant against two on demise of a coal-mine by two, except the fourth part, whereby its recited that before sealing of the indenture it was agreed on consideration that the plaintiff should have the third part of the coals digged. On demurrer to the declaration, Wild excepted that here is no covenant to pay the third part, but a recital of agreement to have it. But, by Hales, C. J., were it but a recital that before the indenture they were agreed, it is a covenant; and so, to say whereas it was agreed to pay 20l., for now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act in pays, when its declared by deed, its now a covenant by the indenture.” That is exactly in point; though Keble is not generally esteemed a first-rate authority.] There the recital has reference to the very subject-matter of the deed; and in that respect the case resembles *Rigby v. The Great Western Railway Company*, 14 M. & W. 811: here it is altogether collateral. Suppose this deed had contained a recital that the defendant was indebted to the plaintiff in 100l. on a promissory note,—would that have amounted to a covenant to pay it? [Byles, J. In *Serrin and Clerk's case*, 1 Leon. 122, “the case was, that A. by his deed-poll recited that whereas he was possessed of certain lands for years of a certain term; by good and lawful conveyance, he assigned the same to J. S., with divers covenants, articles, and agreements in the said deed contained, which are or ought to be performed on his part. It was moved, if this recital (whereas he was) be an article or agreement within the meaning of the **[852]** condition of the said obligation, which was given to perform, &c. Gawdy conceived that it was an agreement; for, in such case I agree that I am possessed of it, for everything contained in the deed is an agreement, and not only that which I am bound to perform; as, if I recite by my deed that I am possessed of such an interest in certain land, and assign it over by the same deed, and thereby covenant to perform all agreements in the deed, if I be not possessed of such interest the covenant is broken. And it was moved, if that recital be within these words of the condition (which are or ought to be performed on my part). And some were of opinion that it is not within those words; for that extends only in futurum, but this recital is of a thing past, or at the least present. Clench: Recital of itself is nothing; but, being joined and considered with the rest of the deed, it is material, as here, for against this recital he cannot say that he hath not anything in the term. And at length it was clearly resolved that, if the party had not that interest by a good and lawful conveyance, the obligation was forfeited.”]

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

In this case the question we propose to consider, is, whether the recital in the deed set out in the declaration, “Whereas, &c. it has been agreed between the said R. Farrall

(the plaintiff) and C. Hilditch (the defendant) that he the said C. Hilditch shall be at liberty to sign judgment in the said action so commenced against the said R. Farrall as aforesaid, but that no execution shall issue thereon until the present security is realized," amounts to a covenant by the defendant [853] not to issue execution until that period shall have arrived.

In the course of the argument, a case of *Barfoot v. Frewell* was cited from 3 Keble, 465, which, if faithfully reported, appears to be very much point. In that case, in covenant against two on a demise of a coal-mine by two, except the fourth part, whereby it was recited that, before the sealing of the indenture, it was agreed, on consideration, that the plaintiff should have a third part of the coals digged, on demurrer to the declaration it was excepted that there is no covenant to pay the third part, but a recital of an agreement to have it. But, by Hale, C. J., "were it but a recital that before the covenant they were agreed, it is a covenant: and so, to say 'whereas it was agreed to pay 20l.:' for, now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act in pays, when it is declared by deed it is now a covenant by indenture:" and judgment was given for the plaintiff.

It must, however, be admitted that Keble is of no high repute as an accurate reporter: and the court would be slow to act on a case in that book, if it were unsupported by others.

There are several authorities that a recital in a deed may amount to a covenant. Thus, in *Serern v. Clerk*, 1 Leon. 122, it was held that, where A. by his deed-poll, after reciting that he was possessed of certain lands for years of a certain term, assigned the same to S. G., with divers covenants, articles, and agreements in the said deed contained, it was held that this recital (whereas he was, &c.) amounted to an agreement within the meaning of the condition of the obligation, which was to perform all agreements in the deed. (See also *Johnson v. Proctor*, Yelv. 175, and the remarks of Lord [854] Eldon on that case, in his judgment in *Browning v. Wright*, 2 B. & P. 25). So, in *Holles v. Carr*, 3 Swanst. 638, 2 Mod. 86, Lord Chancellor Nottingham held (contrary to the opinion of Wilde, J., and Wyndham, J., whom he had called to his assistance), that, where both parties to a deed recite "whereas it is intended a fine shall be levied," this declared an agreement to levy, and that every agreement under seal amounts to a covenant on which an action lies. We may also mention that, in *Adams v. Gibney*, 6 Bingh. 656, 4 M. & P. 491, although the citation of the case in Keble drew forth a strong remark from Park, J., yet the considered judgment of the court seems to take it for granted that a recital may amount to a covenant.

On the other hand, it is plain that the court ought to be cautious in spelling a covenant out of a recital of a deed; because that is not the part of a deed in which covenants are usually expressed. The proper office of a recital, said Lord Mansfield in *Moore v. Mayrath*, Cowp. 9, like that of a preamble of an act of parliament, is, to serve as a key to what comes afterwards.

But, in the present case, we think it sufficiently appears by the whole deed that it was intended to express thereby the whole arrangement and transaction, and to ratify it under the seals of both parties. It is mentioned that the now defendant has commenced an action to recover the debt of 100l., and that the now plaintiff is desirous of staying such action, and of securing the payment. And this is followed by a distinct and unqualified statement of an agreement that the execution should be stayed. If the recital had been that it has been [and is] agreed, this would surely have been a covenant to that effect. And it seems to us that the intention which [and is] would have expressed, does sufficiently appear by the words [855] used, when construed with reference to the subject-matter.

It must be added, that the fact relied on, and which it was proposed by the defendant to put in evidence, viz. that no such agreement existed independently of the deed, appears to us a strong confirmation of the conclusion at which we arrive, that an agreement was intended to be constituted by the deed itself.

For these reasons, we are of opinion that this rule should be discharged: and the view we have taken of the case makes it unnecessary to consider the other question which arose on the argument, viz. whether the defendant was estopped from giving evidence that no such agreement had ever been made.

With respect to the authority of Keble, we cannot refrain from referring to the highly valuable and interesting work of Mr. J. W. Wallace, of Philadelphia, the Reporters, 3rd edit. pp. 207, 208, from which it appears that more is to be said for

the character of this reporter, as a "tolerable historian of the law," than from the remarks made upon him from time to time might have been supposed.

Rule discharged.

[856] MANNALL AND OTHERS v. FISHER AND ANOTHER. Feb. 5th, 1859.

[S. C. 5 Jur. N. S. 389.]

The corporation of Orford claiming the exclusive right of fishery in Orford Haven, their lessees brought an action against two fishermen for an invasion of that right. —The evidence offered on the part of the plaintiffs consisted of a charter of Queen Elizabeth, dated in 1569, confirming all former charters of the corporation, and giving them power to make bye-laws for the preservation of the fish in the haven, — a statute of 27 Eliz. c. 21, for the preservation of Orford Haven, and a private act of 31 Eliz. c. 1, confirming the former act, in both of which mention was made of the interest of the corporation, — the record in an action brought by the corporation in 1792 against a fisherman for dredging for oysters in their water, in which the corporation succeeded in establishing their right to the oysters, — a book kept by the chamberlain of the corporation containing entries from 1792 downwards of various sums paid by inhabitants of Orford, as well as by strangers, for licences to fish in the haven for "floating fish," — and oral testimony shewing that the corporation had from that period down to the present time claimed the exclusive right to the floating fish within the limits of the haven, and had on many occasions obstructed and prevented unlicensed persons from fishing therein: — Held, that the jury were warranted in finding upon this evidence that the corporation had the right claimed; and that the plaintiffs' case was not displaced by evidence on the other side that a great number of persons had constantly fished without licenses, though repeatedly warned off.

This was an action by the plaintiffs, lessees of the corporation of Orford, in the county of Suffolk, against the defendants, two fishermen, for unlawfully fishing in their several fishery.

The first count of the declaration stated that the defendants, on divers days and times, broke and entered the several fishery of the plaintiffs in the river and water of Ore, in the county of Suffolk, and fished and trawled in the said fishery for fish, and chased and disturbed the fish therein, and caught, took, and carried away and converted to their own use divers quantities of the plaintiffs' fish therein.

The second count stated that the defendants, on divers days and times, broke and entered the several fishery of the plaintiffs in the river and water and county aforesaid, and in that portion of the said river and water called "the Middle Gull," and fished and trawled in the said fishery for fish, and chased and disturbed the fish therein, and caught, took, and carried away, and converted to their own use divers quantities of the plaintiffs' fish therein.

The third count charged similar acts committed in that portion of the said river and water called "the [857] Lower Gull;" and the fourth, in that portion of the said river and water called "the Gull."

The fifth account alleged that the defendants converted to their own use divers quantities of the plaintiffs' goods, to wit, live fish and dead fish.

The defendants pleaded, — first, to the whole declaration, not guilty.

Secondly, to the first, second, third, and fourth counts, that the several alleged fisheries in which, &c., at the said several times when, &c., were, and still are, and from time immemorial have been, part and parcel of the said river and water called Ore, and that the said several parts of the said river and water in which, &c., now are, and at the several times when, &c., were, and from time whereof the memory of man is not to the contrary have been, a public and common navigable river, in which the tides and waters of the sea during all the times aforesaid have flowed and re flowed; and that, in the said parts of the same river and water in which, &c., every subject of this realm, at the said several times when, &c., of right had, and of right ought to have had, and still hath, and of right ought to have, the liberty and privilege of fishing; wherefore the said defendants, being subjects of this realm, at the said several times when, &c., entered into the said fisheries in which, &c., so being parts of the said

navigable river as aforesaid, where the said waters of the sea flow, to fish in the said river there, at the said several times when, &c., being reasonable times of the year for such fishing, and at those several times did fish and trawl for fish there, and chase and disturb the fish therein, and the said fish in the said first, second, third, and fourth counts mentioned there found and being, caught and took and carried away and converted to their own use, as it was lawful for them to do for the cause aforesaid.

[858] Thirdly, to the fifth count, that the said goods in the said fifth count mentioned were not the plaintiffs' as alleged.

The plaintiffs joined issue on the first and third pleas, and took issue on the second plea: and, for further replication to the second plea, they said, that the town of Orford, in the county of Suffolk, is, and from time whereof the memory of man is not to the contrary hath been, an antient town, and that the inhabitants of the said town are, and from time whereof the memory of man is not to the contrary have been, a body corporate and politic in deed, fact, and name, and have at various times for and during the time aforesaid until the 7th day of July in the 21st year of the reign of the Lady Elizabeth, late Queen of England, been called and known by various names of incorporation, to wit, by the name of the Honest Men of Oreford, and also by the name of the Burgesses of the Town of Oreford, and since and after the last-mentioned day by the name of the Mayor and Commonalty of the Borough of Orford; that the said body politic and corporate, from time whereof the memory of man is not to the contrary, until and at the said several times when, &c., have had and enjoyed, and have used and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, for themselves and their farmers, tenants, and lessees thereof, the several and exclusive right, liberty, and privilege of fishing for and catching and taking and carrying away all fish in and upon the said places and fisheries in which, &c., and were and still are seised of the said several fisheries in the declaration mentioned for an estate in fee-simple, to them and their successors, and had and were entitled in law to the said several fisheries for the said estate in fee; and, being so entitled and seised, the [859] said body corporate and politic, before the committing of the acts complained of, by an indenture made between them of the one part, and the plaintiffs and one William Field of the other part, and sealed with the common seal of the said body corporate and politic, did demise, grant, and lease unto the plaintiffs and the said William Field the said several fisheries, with the appurtenances thereunto belonging, and the sole profit and benefit of the same, and also full power and authority to have, take, and dispose of to their own use and uses all oysters and other fish whatsoever within the said fisheries, to have and to hold the same to the plaintiffs and the said William Field, except as therein is excepted, from the 31st day of March, 1851, for the term of ten years next ensuing, and fully to be complete and ended, at a certain yearly rent therein mentioned; by virtue of which said demise the plaintiffs and the said William Field entered into and upon the said several fisheries, and became and were, until and at the committing of the acts complained of, possessed thereof for the said term so to them granted as aforesaid. Issue thereon.

The cause was tried before Williams, J., at the last assizes for Suffolk. In support of the claim of the corporation of Orford to the exclusive right of fishery in the places named in the declaration, the plaintiffs put in a charter of Queen Elizabeth of the date of 1569, whereby all former charters were confirmed, and power given to the corporation of Orford to make bye-laws for the preservation of the fish in the haven of Orford; and also an act of the 27 Eliz. c. 21, by which it was provided that "it shall not be lawful to any person to set any net with any boat called a stallboat, or other boat or vessel whatsoever, within the entry or mouth of Orford Haven, in the county of Suffolk, or in the Gull, being a branch of the said haven, except the [860] mask or shale of every such net throughout the whole do contain two inches and a half at the least in the wideness from knot to knot, upon pain to forfeit the net so set, or the value thereof, and 5*l.* to the Queen and the informer," &c.; and also a private act of 31 Eliz. c. 1, "for the preservation of the haven of Orford." The lease from the corporation to the plaintiffs was then put in, dated in March, 1851; and also certain bye-laws made by the corporation on the 4th of October, 1790, prohibiting all persons from fishing in the Ore without a license under the corporation seal.

The chamberlain of the corporation of Orford produced a book from which were read some entries in the handwriting of a former chamberlain, from 1791 downwards,

of sums received at various times for licences to fish for "floating fish:" and he stated that he had been in the habit of granting such licenses as well to inhabitants of Orford as to "outsetters," or persons residing elsewhere, viz. at Harwich and Aldborough; but that the latter were charged double the sum charged to the former,—generally 10s. each.

One of the water-bailiffs of the corporation was also called, to prove that he had for many years been employed to prevent unlicensed persons from fishing in the haven, and that he had repeatedly warned them off, and on some occasions had seized their nets.

The record in an action by the corporation of Orford against one Tabor, tried before Ashhurst, J., at the Bury assizes in 1792, in which the exclusive right of the corporation to the oysters was after much litigation established, was also put in.

On the part of the defendants reference was made to the 13 Edw. 1, c. 47, which is found in Barrington's Observations on Statutes, p. 128, and is as follows:—"Provisum est quod aque de Humbre, Ouse, Trente, Doon, Eyre, Dervent, Werf, Nid, Yore, Swale, Teese, [861] et omnes alie aque in quibus salmones capiuntur in regno, ponantur in defenso quoad salmones capiendos a die Nativitatis Beate Marie, usque ad diem Sancti Martini, et similiter quod salmoneti non capiantur nec destruantur per retia vel per aliqua ingenia, a medio Aprilis usque ad Nativitatem Beate Joannis Baptiste;" and examined copies, from the parliament roll, of two acts of 4 H. 7, c. 21, and 7 H. 7, c. 9, relating to the Orford fishery, were put in and read. They ran as follows:—

(4 H. 7, c. 21.) "The act for the preservation of the frye of fyshe.

"To the King, our sovereign Lord.

"Prayen your comyns in this present parlement assembled, that where divers statutes and ordenaunces for saving and keping of frye and broode of fish in fresh ryvers of this realme before this time have been made and ordeigned, but for sayyng and keeping of frye and brood of fissh resorting oute of the see and salt waters into havens and creekys within the seid realme, any ordenaunce generall hath not been purveied ne made, hou be it it were full requisite and profitable to all the comyns of this your realme, and specially to your subjeettis and inhabitauntes nygh adjoyning to the nasse and haven of Orford, in the countie of Suff., within whiche nasse and haven there is yerely grete multitude of spawn and brood of all manner of fisshes of the see, and there wold largely increace multiplie if they myght there convenient tyme be suffered to abide: But nowe it is so that in late dayes for a singuler covetise and lucre in taking of a fewe grete fisshes, certeyn persones have used to sette and ordeyn certeyn botes callid stall boetes fastened with ankers, havyng with theym suche manner of unresonable nettes and ingynes, that all manner frie and brood of fissh in the seid haven multiplied is taken and destroyed, as well grete fisshes unseasonable as the seid frie and brood to [862] nombre innumerable, with the which frie and brood the seid persones with parte thereof fede their hogges and the residue they put and ley it in grete pittes in the grounde, whiche ellis wold turn to such perilous infeccion of eire that no person thidre resorting shuld it abide or suffre: to the great hurte of all your liege people within this your realme, and specially to your subgiectis and inhabitauntes within the shires of Norff. and Suff., and also causeth grete scarsite of fische in that contreis where afore this tyme was wont to be grete plente: Wherefor please it your most noble grace by thadvyse and assent of the lordes spirituall and temporall in this present parlement assembled, and by auctorite of the same, to ordeigne, stablish, and enacte that all such stall boetes, nettes, and ingynes aforesaid, from the first day of Apryll that shalbe in the yere of our Lord mccccxxxx. be not occupied ner used for the destroyng or takyng of eny frie or brood of fissh within the haven or nasse aforesaid, upon payn of forfeiture of x. li. at every tyme that any persone shall happen to do contrarie to this ordenaunce, the oon half thereof to be to your Highnes, and the oder half to him that shall happen to fynde the said forfeiture and shewe the same by informacion in to your Eschequer there to be determined afftir the cours of the same court. And ov. that be it ordeyned by thauctorite aforesaid, that the justices of peas of the shires of Norff. and Suff. for the tyme beyng have auctoritie and power to inquire in their several sessions of all the botes, nettes, and engynes used or occupied contrary to this ordenaunce aforesayed, and the offenders therein befor theym presented to punyshe as by their discrecion shall be thought

lawfull and resonable : This acte and ordenaunce to endure unto the begynnyng of the next parliament."

(7 H. 7, c. 9.) "An act of parliament inrolled anno septimo Henrici Septimi.

[863] "Prayen the comens in this present parliament assembled, that where within the nasse and haven of Orford, in the countie of Suffolk, there is yerely grete multitude of spawne and broode of all manner fysshes of the see which there shuld naturally and largely increas and multiplie if they myght by space and tyme convenient there be suffred to continue : And where in late dayes for a singular covetise and lucre in takyng of a fewe grete fysshes, certeyn persones have used to ordeyn and sette certeyn bootes called stallbootes festened with ankers havyn with theym suche manner unlefull nettes and ingynes that as well grete habundaunce of all manner of frie and broode of divers kyndes of fische in the said haven multiplied as grete fisses unseasonable have be taken and destroyed, with whiche fisse and broode so taken the said persones with grete parte thereof have fedde their hogges, and the residue thereof they buried in grete pittes in the grounde in eschewing of grete infeccions of ayer, whiche hath of long tyme caused grette scarcite and bareynes of fisch in that countre, to the grete hurte and impoverysshing of your people whiche in tymes past had grete plente : Weerfor as well for the grete profite of your subgettis and inhabitauntes nygh adjoyning to the said nasse and havyn as for the grete profite and comforte of all your subgettis and inhabitauntes within the counties of Norff. and Suff. by autorite of your Parliament holden at Westm. the xiii. day of Januarie, the iiiiith yere of your most noble reign, yt was enacted, ordeyned, and established by auctorite of the same Parliament, that all suche stallebootes nettes and ingynes aforesaid frome the first day of Aprill that was in the yere oure Lord God meccccxxxx. shuld not be occupied nor used for the destroying or taking of any frye or broode of fische within the haven or nasse aforesayn uppon peyn of forfeiture of x. li. at every tyme that any person shuld [864] happyn to do contrarie to that seyd ordenance, the one half thereof to be to your Highnes, and the oder half ty hym that shuld happyn to fynde the seyd forfeiture and shew the same in your Eschequer by informacion there to be determyned after the cours of the same court : And ov. that it was ordeyned by auctorite of your Parliament aforesaid that the justices of peas of the seid counties of Norff. and Suff. for the tyme being shuld have auctorite and power to inquere in their severall sessions of all the botes, nettes, and ingynes used and occupied contrarie to the seid ordenance, and the offenders therein before theym presented to punyssh as by their discrecions shuld be thought lawfull and resonable : And that the seid acte and ordenance shuld endure and take effect till the beginning of the next Parliament ensuyng, as by the same acte more pleynty apperith : by force of which acte and ordenance the seid stallebootes, nettes, and ingynes have be hidderto withdrawn and abated and grete plente of fysshe frye and broode of fysshe hath in this mane time gretly be multiplied and increased, to the grete profite, comforte, and releef as well to the people of the seid counties of Norff. and Suff. as to the people of many oder contrees, as well apperith by opyn experience, and yet more largely shall encrease by fyrdyr continuance : And forasmuche as the said acte of parliament was ordeyned no fyrdyr to stand in effect then to the first day of this present parliament, Pleas it therefore your Most Noble Grace by thadyce and assent of the Lords spirituall and temporall in this present Parliament assemblid, and by auctorite of the same, in consideration of the premysses, to ordeyn, establissh, and enacte that the seid acte and ordenance in the seid last Parliament made and ordeyned may alwey stand, contynewe, and endure in perfite strenght and effecte.

"Respons. Le Roy le vult."

[865] A great number of witnesses were called on the part of the defendants, who proved that they had for many years (as far back as living memory could go) fished in the Ore without licences, and for the most part without interruption.

It was contended on the part of the defendants, that the right to fish in a navigable river or arm of the sea, as this was, was a right in all the Queen's subjects ; that this common law right was not to be defeated without the clearest evidence of an exclusive right in some individual or corporation ; and that the evidence here offered was insufficient for that purpose.

For the plaintiffs it was insisted, that the charter of Queen Elizabeth was a sufficient recognition of the right claimed on the part of the corporation ; that the right of the corporation to the exclusive dredging for oysters formally recognized and

established on the trial before Ashhurst, J., in 1792 was strongly corroborative of the plaintiffs' right (a)¹, and that the charter of Queen Elizabeth made no distinction between the exclusive right to oysters and to floating fish.

The learned judge, in summing up, observed that the record of the trial in 1792 did not advance the plaintiffs' case, inasmuch as the contest there was confined to the right to oysters, which was not disputed upon the present occasion, and that it might very well be that the corporation had that limited right, and yet not the right now claimed. And he left the case to the jury upon the balance of testimony on the one side and on the other.

The jury returned a verdict for the plaintiffs, with nominal damages.

[866] O'Malley, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence; Williams, J., observing, that, although he could not say that he was dissatisfied with the verdict, yet, he thought that, upon the whole, it was a case in which the court should form their own opinion.

Power, Q. C. and H. Mills, now shewed cause. There was abundant evidence to justify the verdict. It was proved, that the corporation, having in 1792 established their right to the oysters,—which was by far the most valuable part of the right,—proceeded to grant licenses for dredging and fishing for floating fish within the limits of their waters, and that none had been without interruption since allowed to fish there unless licensed. [Williams, J. You certainly proved no acts of ownership anterior to the date at which the right of the corporation to the oysters was established. I must say I should not have been dissatisfied with a verdict either way.] The question was peculiarly one for the jury: and, unless the court can see that there has been some misapprehension or miscarriage, they will not interfere.

O'Malley, Q. C., and Couch, in support of the rule. There was undoubtedly a great deal of evidence on both sides: but an important right like this ought not to rest solely upon the loose testimony of witnesses as to acts of ownership, which might be usurpation. If the right existed, it would be but reasonable to look for some evidence of it in the charters of the corporation. There is, however, none: and the act of 4 H. 7, c. 21, which passed upon the petition of the inhabitants of Orford, deals with the right, and yet makes no mention whatever of the corporation. The charter of [867] Elizabeth, indeed, which impowers the corporation to make bye-laws for the regulation of the fishing, is inconsistent with the ownership of the fishery being in them; for, if it were, they would not need such authority. In a case of this sort, the strong presumption of law is in favour of the rights of the public; and the evidence to overcome it should be beyond question. The absence of all documentary evidence in support of the claim affords a powerful argument against its validity. In *Warren v. Mathews*, 6 Mod. 73, it is laid down that "every subject of common right may fish with lawful nets, &c. in a navigable river, as well as in the sea (a)²; and the King's grant cannot bar them thereof; but the Crown only has a right to Royal fish, and that the King only may grant." In *Williams v. Wilcox*, 8 Ad. & E. 314, 3 N. & P. 606, in order to shew the antiquity of a weir appurtenant to a fishery, in a navigable river (the Severn), the evidence consisted of an extract from Domesday Book, in which the fishery was mentioned,—an extract from the chartulary of Haghmon Abbey, containing copies of the grants of the fishery to the church, and of a way to the fishery, the earliest of which appeared to have been made in 1172-3,—and a judgment of M. T., 6 H. 6, in a cause wherein the Abbot of Haghmon was indicted for obstructing the navigation of the Severn, and pleaded an immemorial right of taking fish in the river, that the navigation was not obstructed, and that the weir was not made since the 3 Edw. 1, all which was found in his favour. In *The Mayor of Colchester v. Brooke*, 7 Q. B. 339, the plaintiffs' claim was [868] founded upon a series of charters of Richard 1, Henry 3, Edward 2, Edward 3, Richard 2, and Edward 4, and of acts of user down to the time of the commencement of the action. In *Rogers v. Allen*,

(a)¹ See *The Mayor and Commonalty of Orford v. Richardson*, 4 T. R. 437; *Richardson v. The Mayor and Commonalty of Orford*, 2 H. Bl. 182, 2 Anstr. 231.

(a)² See *Lord Fitzwalter's case*, 1 Mod. 106, 2 Lev. 139, *Carter v. Murel*, 4 Burr. 2163, *Seymour v. Courtness*, 5 Burr. 2814, *Mayor of Lynn v. Turner*, Cowp. 16, *The Mayor of Orford v. Richardson*, 4 T. R. 437: but see the judgment in this case reversed, 2 H. Bl. 182, 2 Anstr. 231.

1 Campb. 310, to prove a prescriptive right to a fishery as appurtenant to a manor, an inquisitio post mortem and seven other antient documents from the Tower of London were put in to shew that in very early times there had been a fishery at the mouth of the Burnham river held by the ancestors of the family in possession as parcel of the manor of Burnham; and also three judgments which had been obtained in the reigns of Charles 1, and Charles 2, by the lords of the manor of Burnham, in actions for breaking and entering their several fishery in the Burnham river; and also certain licenses, which appeared on the court-rolls of the manor, and bore date from the year 1661 downwards to the end of the seventeenth century, whereby the lords of the manor, in consideration of certain rents, had granted the liberty of fishing and dredging for oysters in their several fishery in the Burnham river, reserving to themselves the exclusive right to all floating fish therein: and evidence of the same character as the evidence offered in this case was held sufficient to negative the prescriptive right claimed as to the floating fish, though not as to the oysters or ground fish. The same sort of documentary evidence as was given in the above cases was also given in *Jenkins v. Harvey*, 1 C. M. & R. 877, 2 C. M. & R. 833, and in *The Duke of Beaufort v. The Mayor, &c. of Swansea*, 3 Exch. 514, and *Calmady v. Rowe*, 6 C. B. 861. [Willes, J., referred to *Bevest v. Pipon*, 1 Knapps, P. C. Cas. 60, where it was held that repeated attempts to exercise the right of taking sea-weed from the rocks between high and low-water mark off the island of Jersey, afforded no evidence of the existence of such right.] The plaintiffs [869] ought to have given some evidence of a grant from the Crown, or some documentary evidence to shew the antiquity of the exclusive right they claimed for the corporation of Orford. None such was produced. The plaintiffs contented themselves with putting in the record in the action against Tabor in 1792, in which the right of the corporation to oysters-beds in the haven was established. Founding themselves upon that verdict, the corporation seem gradually to have set up a claim to the floating fish also. The evidence on that part of the case was as strong on the one side as on the other: and, upon a mere balance of evidence, it is submitted, the general right ought to prevail.

CROWDER, J. I am of opinion that this rule should be discharged. The question, which was one of some importance, appears to have been tried at very great length. Many witnesses were called and documents put in on the part of the plaintiffs, and two statutes of 27 Eliz. c. 21, and 31 Eliz. c. 1, were relied on. The defendants, on the other hand, relied on other statutes of 13 Ed. 1, c. 47, and of 4 H. 7, c. 21, and 7 H. 7, c. 9. But I do not think these afford any great support to the arguments on either side. The main agitation of this question seems to have arisen since the year 1792. On the one side, there was a very strong body of evidence to shew that the corporation of Orford had for that long period exercised control over the fishing by granting licences to fish as well to their own people as to strangers, and had set persons to watch so as to prevent unlicensed persons from incroaching on the right, seizing nets, and imposing fines upon persons caught trespassing. All this was evidence from which the jury might conclude that the right of fishing claimed by the plaintiffs did exist. On the other hand, many instances were proved of persons, as well inhabitants [870] of Orford as strangers fishing and claiming to exercise the general right to fish in all parts of Orford Haven, so as to invade the supposed exclusive right of the corporation. There was this positive conflict of testimony on the one side and on the other: and it is impossible to reconcile it. But it does not appear to me to present that sort of conflict suggested by the defendants' counsel, viz that of two conflicting and opposing rights openly set up. It was insisted that the fact of the licences to take floating fish not being shewn to have been granted until after the year 1792 afforded strong evidence of usurpation on the part of the corporation; and that, if the exclusive right to the floating fish had been in the corporation, they would have set it up when their right to the oysters was in agitation. But I do not think that is a fair inference from that case. The complaint against the defendant there was for invading the rights of the corporation by dredging for oysters. It was unnecessary for the plaintiffs to set up any right beyond the right to the oysters: the fact, therefore, of their omitting to set up the more extensive right cannot afford any legitimate inference against the existence of the right now claimed. What caused the corporation to issue the fishing licences is mere matter of conjecture. Having been successful in resisting an invasion of their right to the oysters, it was reasonable that they should seek to establish some system to check incroachments on their right

to the floating fish. From 1792 to the present time, these licences appear to have been openly and continuously granted. The fact of their being granted was known to all, outsetters, as they are called, as well as inhabitants of Orford; and no action seems to have been brought or proceeding taken to resist the usurpation, if usurpation it were. The inhabitants were made to pay 5s. for their licences, strangers 10s., and in one instance as much as [871] a guinea. There was a strong body of evidence: there was some conflict: but, upon the whole, especially as the learned judge who tried the cause does not express any dissatisfaction with the conclusion the jury came to, I do not think we ought to interfere.

WILLES, J., concurred.

WILLIAMS, J. The case on the part of the plaintiffs was certainly not a very strong one: but I do not think we should be acting right in interfering with the decision of the jury. The plaintiffs' case was certainly deficient in documentary evidence which one naturally looks for in a case of this sort. But, at the same time, the evidence of acts of ownership in the corporation for the last sixty years, by granting licences, and obstructing and warning off persons who fished without being licensed, was very strong. On the other hand, the evidence offered on the part of the defendants was much of it of very little value; and some of the witnesses gave their evidence in a manner which probably induced the jury to withhold credit from them. Consistently with the ordinary rules which guide the courts in these cases, I think we ought not to disturb the verdict.

Rule discharged.

End of Hilary Vacation.

COMMON BENCH REPORTS. New Series. CASES
 ARGUED and DETERMINED in the COURT of
 COMMON PLEAS, and in the EXCHEQUER
 CHAMBER, in Easter and Trinity Terms and
 Vacations, 1859. By JOHN SCOTT, Esq., of
 the Inner Temple, Barrister-at-Law. Vol. VI.
 London, 1860.

[1] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, IN EASTER
 TERM, IN THE TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banc in this Term, were,—Cockburn, C. J.,
 Crowder, J., Willes, J., and Byles, J.

THE EARL OF SHREWSBURY *v.* JAMES ROBERT HOPE SCOTT AND OTHERS.
 June 9th, 1859.

[S. C. 29 L. J. C. P. 34, 190; 6 Jur. N. S. 452, 472.]

The Duke of S., in 1700, settled lands to certain uses. After his death, viz. in 1718, his heir,—by a settlement, which was confirmed by a private act of 6 G. 1, c. 29, intituled “An act for annexing the late Duke of Shrewsbury’s estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury’s settlement in order thereto, and for other purposes therein mentioned,” whereby the settled estates were rendered inalienable by any future tenant-in-tail, but with a proviso that any issue male taking under the act might aliene, on his making the declaration and taking the oaths prescribed by the 30 Car. 2, c. 2, and 11 & 12 W. 3, c. 4, within six months after attaining the age of eighteen, and continuing a protestant,—conveyed the same lands to uses in some respects different from and inconsistent with those of the settlement of 1700:—Held, that, assuming the settlement of 1700 to have been left as a subsisting settlement so far as its provisions were reconcileable with those of the settlement of 1718, the latter (in conjunction with the act) must be considered as the dominant settlement; and, consequently, that the removal of the disabilities of Roman Catholics by subsequent public statutes did not destroy the efficacy of the parliamentary settlement, so as to enable a tenant-in-tail under the first settlement to bar the entail and dispose of the estate without complying with the conditions imposed by the private act.—Held also, that the acts of parliament imposing disabilities upon Roman Catholics did not prevent persons of that persuasion who were legally in possession of land from alienating it; and therefore that the enactments of the estate act of 6 G. 1, c. 29, were not to be considered as intended to enforce the general law of the realm, and consequently were not affected by the subsequent acts which removed the disabilities which the general law had formerly imposed upon Roman Catholics.—Where the performance of an act is made a condition precedent to the exercise of a power, and such performance subsequently becomes by act of the law impossible,—it does not follow that the power may be exercised without performance of the condition.—Where, therefore, a tenant-in-tail had, under a proviso in an estate act, power to aliene lands on condition of

his making the declaration and taking the oaths prescribed by the 30 Car. 2, c. 2, and 11 & 12 W. 3, c. 4, within six months after attaining the age of eighteen, and continuing protestant, and the statutes requiring the declaration and oaths were afterwards repealed:—Held, that the only effect of such repeal was, that the power enabling the issue in tail to aliene could not take effect.—An estate act must be carried into effect according to the intention plainly and cleared expressly therein, and cannot be impeached after the estates have been dealt with for a century and a half under it, by a suggestion that the proper parties were not before the legislature, or that the legislature were imposed upon.

This was an action of ejectment brought by the plaintiff to recover the mansion of Alton Towers, and certain lands situate in the township of Farley, in the parish of Alton, in the county of Stafford.

[2] The plaintiff claimed the said mansion and lands as being entitled thereto under the 2nd section of an act of 6 G. 1, c. 29, intituled “An Act for annexing the late Duke of Shrewsbury’s estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury’s settlement in order thereto, and for other purposes therein mentioned.” See the statute, *post*, p. 64.

The following admissions were entered into before the trial by the defendants’ attorneys,—

“1. That the plaintiff is issue male of the body of John the first Earl of Shrewsbury.

“2. That Gilbert Earl of Shrewsbury (named in the 2nd section of the 6 G. 1, c. 29) died in 1743 without issue male; and that John Talbot (named in the same section of the same act) died in 1743 without issue male.

“3. That George Talbot, named in the same section of the said act of parliament, died in 1733; and that the issue male of the said George Talbot became extinct upon the death of Bertram Arthur, the last Earl of Shrewsbury, on the 10th of August, 1856.

“4. That, upon the death of the said Bertram Arthur Earl of Shrewsbury as aforesaid, the title, honour, and dignity of Earl of Shrewsbury did by virtue of the letters-patent of creation of the said earldom (made and granted by King Henry the Sixth to the said John first Earl of Shrewsbury and the heirs male [3] of his body) descend and come to the plaintiff, who then succeeded to and inherited the said earldom.

“5. That the plaintiff has been duly summoned to parliament and taken his seat as Earl of Shrewsbury; and that it shall not be necessary for the plaintiff at the trial of this cause to prove his pedigree from the said John first Earl of Shrewsbury, or to give any further or other evidence in proof of the facts and matters above admitted.”

The following admissions were also made on the part of the defendants at the trial,—

“That the lands described in the schedule hereunder written, being the lands sought to be recovered in this action, are situate in the township of Farley, in the parish of Alton, in the county of Stafford, and are parts of the estates in that county mentioned or referred to in the 6 G. 1, c. 22, intituled, &c.; and that the duke in the said section referred to, at the time of his decease, had an estate of inheritance in possession, reversion, remainder, or expectancy, in the said premises; and that the said premises were at the commencement of this action, and still are, in the actual possession of the defendants or some of them, and were not subject to any estate or interest under which the right to possession might be outstanding in some person not party to this action: and that it shall not be necessary for the plaintiff at the trial of this cause to give any further or other evidence in proof of the facts and matters above admitted.”

The schedule above referred to described the several premises sought to be recovered, with their respective quantities, and the names of the occupiers.

The following admissions were also made at the trial, on the part of the plaintiff, —“That the said Gilbert Earl of Shrewsbury, John Talbot, and George Talbot, mentioned in the 2nd section of the 6 G. 1, c. 29, were [4] Roman Catholics; and that search had been made in vain for all documents connected with the residence of Gilbert Earl of Shrewsbury at the colleges of jesuits abroad, in Belgium and in France.”

It was also agreed that the pedigree set out opposite should be used as evidence at the trial of the cause, for the purposes of the action.

The plaintiff gave in evidence the following documents:—

1. The settlement on the marriage of the Hon. George Talbot with Mary Fitzwilliam, dated the 3rd and 4th of March, 1718.

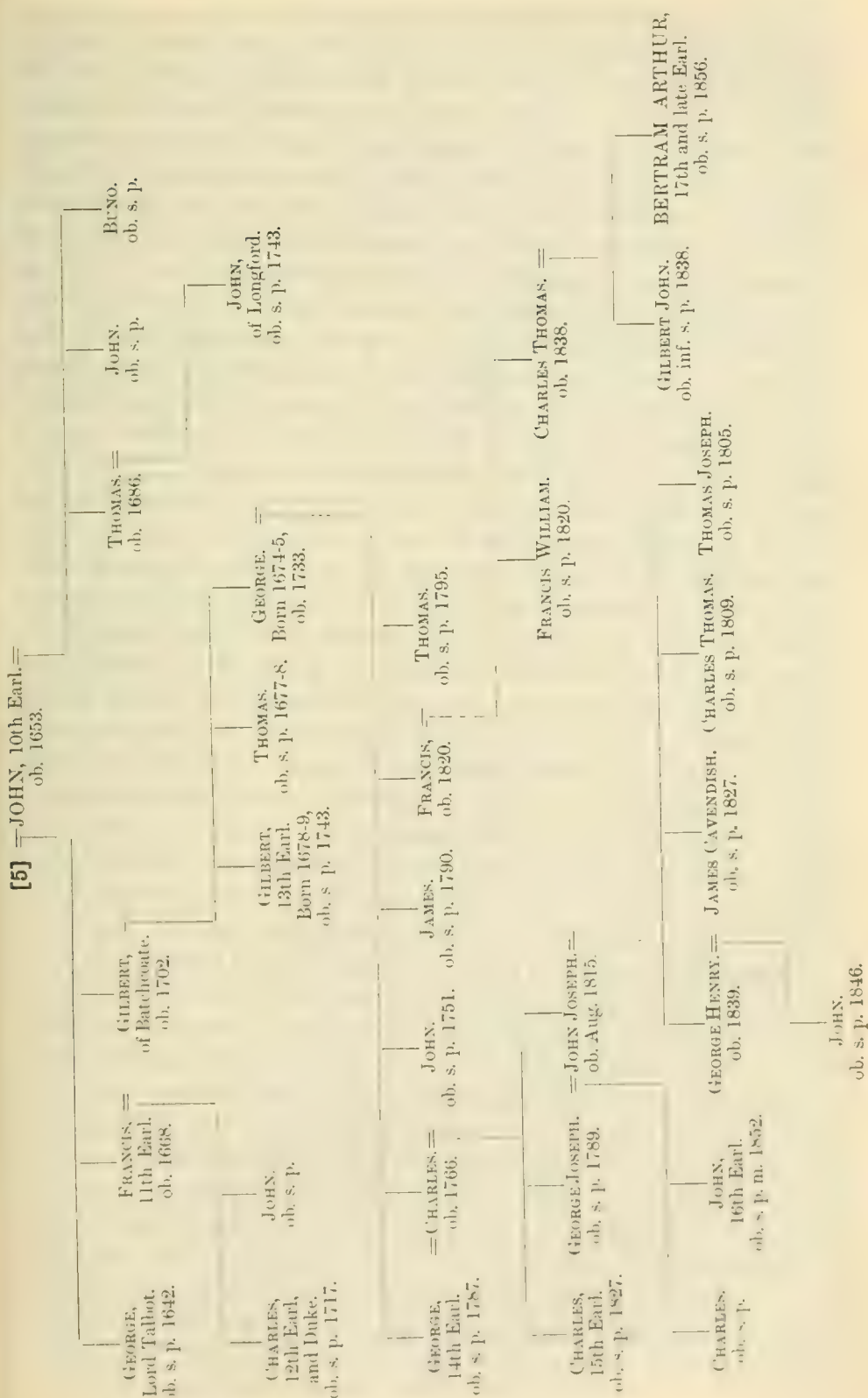
2. The Shrewsbury Estate Acts, 6 G. 1, c. 29, 43 G. 3, c. 40, and 6 & 7 Vict. c. 28.

3. The counterpart of a lease of mines of copper, lead, &c., in the townships of Stanton and Cotton, in the county of Stafford, granted on the 1st of September, 1855, by Bertram Arthur Earl of Shrewsbury to Messrs. Richmond and Niness, and which lease purported to be executed by the earl “in pursuance and by virtue and in exercise of the powers and authorities vested in him in and by an act of parliament passed in the session held in the 6th and 7th years of the reign of Her present Majesty (6 & 7 Vict. c. 28), intituled ‘An act for vesting part of the settled estates of the Right Hon. John Earl of Shrewsbury, in the counties of Oxford, Chester, Salop, Worcester, and Stafford, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands and hereditaments to be settled in lieu thereof to the same uses and subject to the same restrictions, and for other purposes therein mentioned,’ and of every other power and authority, estate, or interest enabling him in that behalf.”

4. An affidavit of one of the attorneys for the defendants, shewing that the defendants were trustees for the devisee under the will of Earl Bertram Arthur.

[6] The settlement of 1718 was as follows:—

This indenture quinquelpartite, made the 4th day of March, in the 5th year of the reign of our Sovereign Lord George by the grace of God of Great Britain, France, and Ireland, King, defender of the faith, &c., and in the year of our Lord 1718, between the Right Hon. Gilbert Earl of Shrewsbury, cousin and heir of the most noble Charles Earl and Duke of Shrewsbury, deceased, and the Hon. George Talbot, only brother of the said Gilbert Earl of Shrewsbury, of the first part, the Right Hon. Richard Lord Viscount Fitzwilliam, of Merion, in the kingdom of Ireland, and the Hon. Mary Fitzwilliam, sister of the said viscount, of the second part, the Right Hon. George Earl of Cardigan, the Right Rev. Father in God, William Lord Bishop of Salisbury, Sir John Stanley of London, Knt., and Charles Talbot, Esq., eldest son and heir apparent of the said William Lord Bishop of Salisbury, of the third part, the Right Hon. Richard Lord Lumley and John Talbot of Longford, in the county of Salop, Esq., of the fourth part, Sir John Webb, of Great Cantford, in the county of Dorset, Bart., George Pitt, of Stratfield Sea, in the county of Southampton, Esq., and Nevile Ridley, of the parish of St. Ann, Soho, in the county of Middlesex, Esq., of the fifth part: Whereas, the said Charles Duke of Shrewsbury, by his indentures of lease and release bearing date respectively the 30th and 31st of October which was in the year of our Lord 1700, the release being tripartite, and made between the said duke of the first part, the Lord Godolphin and William Walsh of the second part, the said Lord Bishop of Salisbury, by the name of Dr. William Talbot, Lord Bishop of Oxford, Sir John Talbot, and John Arden, of the third part, did settle and convey all his manors, messuages, farms, advowsons, rectories, tithes, lands, and hereditaments in the several counties of Salop, Worcester, Berks, Chester, [7] Stafford, Oxon, Wilts, and Derby, or elsewhere in the kingdom of England and Ireland, on failure of issue male of his body, to the uses following, that is to say, as to such of the said manors, lands, tenements, and hereditaments as are situate in the said counties of Worcester, Salop, and Berks, to the use of the said George Talbot for life, without impeachment of waste, remainder to preserve contingent remainders, remainder to his first and other sons in tail-male, remainder to the said John Talbot for life, remainder to his first and other sons successively in tail male, remainder to the said Charles Duke of Shrewsbury and his heirs; and, as for and concerning all and every the said manors, lands, tenements, and hereditaments in the several counties of Chester, Stafford, Oxford, Wilts, and Derby, to the use of the said duke for life, remainder to the said Lord Bishop of Salisbury, by the name of Dr. William Talbot, Bishop of Oxford, Sir John Talbot, and John Arden (both since dead), and their heirs, upon trust for raising money for payment of the debts of the said duke as his personal estate should not be sufficient to pay, and to pay all annuities he by deed or will should appoint, and, charged and chargeable therewith, to convey the same to such person and persons, and for such estate and estates, and subject to such powers, provisos,



limitations, and agreements as are therein mentioned for and concerning the aforesaid manors, lands, tenements, and hereditaments in the said several counties of Worcester, Salop, and Berks: in which said indenture is a power enabling the said George Talbot and John Talbot, when they should be in the actual possession of the said manors and premises, by any deed or writing executed in the presence of two or more credible witnesses, to grant, limit, or appoint so much of or out of the said manors, messuages, lands, tenements, hereditaments, and premises [8] as shall not exceed the yearly value or sum of 2000*l.* a year for the jointure of any wife or wives, for the life of such wife or wives, as by the said indentures, relation being thereto had, may more fully and at large appear: And whereas the said Duke of Shrewsbury, in and by his last will and testament in writing, bearing date on or about the 19th of July, which was in the year of our Lord 1712,—reciting, that, since the making of the said will, he had purchased the manors of Dunthropp, alias Dunthorpe, and Showell, alias Sowell, and divers freehold messuages, granges, lands, tenements, and hereditaments, situate, lying, and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tew, Little Tew, and elsewhere in the county of Oxford: and that he had likewise purchased a farm called Broadstone farm, lying in Dunthropp, Chalford, Lidstone, and Broadstreet, in the said county of Oxford, held, by a college lease,—he did thereby devise the said purchased freehold premises to the said William Lord Bishop of Salisbury, Sir John Talbot, and John Arden, and their heirs, to the same uses, intents, and purposes as the manors, lands, tenements, and hereditaments in the said recited indenture tripartite are limited and settled, and did thereby devise the said leasehold premises called Broadstone farm to the said Lord Bishop of Oxford,* Sir John Talbot, and John Arden, their executors and administrators, upon trust to permit the persons entitled to the freehold of the said manors in the county of Oxon to enjoy the same; and by his said will did charge his said manors, lands, tenements, and hereditaments in the counties of Chester, Stafford, Oxford, and Wilts, and elsewhere in the said kingdom of England and Ireland, with the payment of the several annuities to his servants and others for their respective lives; and of the said will made the said George Earl of Cardigan, William Lord Bishop [9] of Salisbury, Sir John Stanley, and John Arden, his executors; and some time after making the said will the said duke died: And whereas the said duke left assets to pay all his debts and legacies, with a great overplus: And whereas several disputes have arisen touching the said settlement and will: but the said Gilbert Earl of Shrewsbury, heir-at-law to the said duke, being determined not to marry, hath agreed to confirm the said settlement made by the said duke, and to marry his said brother, and make such further provisions as is usual in such cases: And whereas the said Sir John Talbot and John Arden are dead: And whereas the legal estate of and in the manor of Dunthropp and other the purchased premises in the county of Oxford is now vested in the said Bishop of Salisbury, and the said George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley are likewise interested in other parts of the said premises for payment of debts and legacies of the said duke: And whereas a marriage is by God's permission intended to be shortly had and solemnized between the said George Talbot and Mary Fitzwilliam: Now, this indenture witnesseth, that, in consideration of the said intended marriage, and of the sum of 13,000*l.* of lawful money of Great Britain to the said Gilbert Earl of Shrewsbury and George Talbot, or one of them, in hand paid by the said Richard Lord Fitzwilliam, Mary Fitzwilliam, and George Pitt, some or one of them, at or before the sealing and delivery of these presents, as and for the marriage portion of the said Mary Fitzwilliam, and of the further sum of 5*s.* of like money to the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, in hand likewise paid by the said Richard Lord Lumley and Nevile Ridley, at or before the ensembling and delivery of these presents, the respective [10] receipts of which said sums of 13,000*l.* and 5*s.* they the said Gilbert Earl of Shrewsbury, George Talbot, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, do hereby respectively acknowledge, and thereof and of and from every part and parcel thereof do acquit, release, and for ever discharge the said Richard Lord Viscount Fitzwilliam, Mary Fitzwilliam, George Pitt, Richard Lord Lumley, and Nevile Ridley, their heirs, executors, and administrators, by these presents, and, for settling and confirming the manors, lands, tene-

* Sic.

ments, and hereditaments hereinafter mentioned to the several uses, intents, and purposes, and subject to the trusts, provisos, limitations, and agreements hereinafter declared and expressed, and for divers other good and valuable considerations hereunto specially moving, they the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, according to their respective estates and interests, and subject to the annuities and annual payments, and to the jointure of the Duchess of Shrewsbury charged on some of the said manors, and to the remedies for recovering the same, have, and each and every of them hath, bargained, sold, aliened, released, and confirmed, and by these presents do, and each and every of them doth, bargain, sell, alien, release, and confirm unto the said Richard Lord Lumley and Nevile Ridley (in their actual possession now being by virtue of a bargain and sale to them thereof made by the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, for one year, in consideration of lawful money, by indenture bearing date the day next before the day of the date of these presents, and by force and virtue of the statute for transferring uses into possession), and to their heirs, all those the manors of Dunthropp, alias Dunthorpe, [11] and Showell, alias Sowell, in the county of Oxford, and all the freehold messuages, granges, lands, tenements, and hereditaments, lying and being in the parishes, villages, fields, and hamlets of Heathrop, Swarford, Great Tew, and Little Tew, in the said county of Oxford, and also all and every the manors, freehold messuages, farms, advowsons, rectories, tithes, lands, tenements, and hereditaments, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, or elsewhere in the kingdom of Great Britain or Ireland, whereof or wherein the said duke, or any other in trust for him, at the time of the death of the said duke, were seised of any estate of inheritance in possession, reversion, remainder, or expectancy, with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances, and all and every the manors, lands, tenements, and hereditaments granted or settled, or intended to be granted and settled, comprised or intended to be comprised in the said recited indenture tripartite, together with all and singular messuages, houses, outhouses, edifices, buildings, barns, stables, yards, orchards, gardens, lands, tenements, meadows, pastures, feedings, closes, inclosed grounds, demesne lands, commons, wastes, heaths, furzes, moors, marshes, waters, fishings, ponds, pools, streams, woods, underwoods, free-warrens, rents, reversions, services, courts-leet, courts-baron, view of frankpledge, perquisites and profits of courts, fairs, markets, tolls, piecage, stallage, waifs, estrays, heriots, goods and chattels of felons, fugitives, and felons of themselves, rights, royalties, privileges, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said several manors or lordships and premises, every or any of them, belonging or in anywise appertaining, or accepted, reputed, enjoyed, deemed, taken, or known as part, parcel, or member of them or any of them; and the reversion [12] and reversions, remainder and remainders, rents, issues, and profits of the said premises; and all the estate, right, title, interest, use, trust, possession, property, claim, and demand of the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, in and to the same, except out of this present grant and release all manors, messuages, lands, tenements, and hereditaments, in the county of Middlesex, and also except the said farm called Broadstone farm, and all lands, tenements, and hereditaments thereunto belonging, and also except the manor of Cooksey, and all and every the messuages, cottages, mills, lands, tenements, meadows, leasowes, closes, coppices, wood grounds, boileries of salt water, or salt-fatts, walling rents, and hereditaments whatsoever, which were late the estate of the Hon. Gilbert Talbot, deceased, late father of the said Earl and George Talbot, situate, lying, and being in Cooksey, Upton Warren, Elm Bridge, Purshall Green, Timber Hanger, Bromesgrove, Dodderhill, and Droitwich, or elsewhere in the county of Worcester, To have and to hold the said manors, lands, tenements, rectories, tithes, hereditaments, and all and singular the premises hereby bargained, sold, released, ratified, and confirmed, or intended so to be, with their and every of their rights, members, and appurtenances (except as is hereinbefore excepted), unto the said Richard Lord Lumley and Nevile Ridley, and their heirs, to and for the several uses, intents, and purposes, and subject to the several trusts, provisos, limitations, and agreements hereinafter mentioned and declared concerning the same, that is to say, until the said intended marriage shall take effect, to the same uses, intents, and purposes as the said

manors, lands, tenements, rectories, tithes, hereditaments, and premises are and stand limited in and by the said recited indenture tripartite of settlement; and, from and [13] immediately after the solemnization of the said intended marriage of the said George Talbot and Mary Fitzwilliam, then, as for and concerning all and every the manors, lands, tenements, and hereditaments in the several counties of Worcester, Salop, and Berks, with their and every of their rights, members, and appurtenances, to the use and behoof of the said Richard Lord Viscount Fitzwilliam, and George Pitt, their executors, administrators, and assigns, for and during the term of nine-nine years, if the said George Talbot and Mary Fitzwilliam his intended wife shall jointly so long live,—Upon trust that they the said Richard Lord Viscount Fitzwilliam, and George Pitt, and the survivor of them, his executors, administrators, and assigns, shall, out of the rents, issues, and profits of the said premises so to them limited for the term aforesaid, raise and pay, or cause to be raised and paid, the yearly rent or sum of 400l. of good and lawful money of Great Britain during the joint lives of the said George Talbot and Mary Fitzwilliam, not to the said George Talbot or as he shall appoint, but to such person and persons only, and for such uses, intents and purposes as the said Mary Fitzwilliam alone, without the order, direction, intermeddling, or control of him the said George Talbot, notwithstanding the coverture between them, shall by any writing or writings to be signed by her the said Mary Fitzwilliam with her name of her own proper handwriting, from time to time direct or appoint, where-with the said George Talbot, her intended husband, shall not intermeddle; the said yearly sum of 400l. to be paid quarterly, at the four most usual feasts or days of payment in the year, that is to say, Lady Day, Midsummer, Michaelmas, and Christmas, by even and equal portions,—the first payment thereof to begin and to be made at such of the said feasts or days of payment as shall first and next happen after the solemn[14]-ization of the said intended marriage; and the said yearly sum of 400l. to be paid without any deduction or abatement for or by reason of any manner of taxes, assessments, or impositions to be assessed thereon or on the said premises by authority of parliament or otherwise howsoever, or for or by reason of any other matter, cause, or thing whatsoever; And upon this further trust, that, after payment of the said yearly sum of 400l. as the same shall become payable and to be paid as aforesaid, and subject to the payment thereof and such charges and expenses as they the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, shall sustain in and about the execution of the trusts hereby in them reposed, which they are to be paid in the first place, they the said Richard Lord Viscount Fitzwilliam, and George Pitt, their executors, administrators, and assigns, shall permit and suffer the said George Talbot and his assigns, during so many years of the said term of ninety-nine years as he and the said Mary Fitzwilliam, his intended wife, shall jointly live, to have, receive, and take the residue and remainder of the rents, issues, and profits of the said manors, lands, tenements, and hereditaments, over and above the said 400l. a year, as the same shall become payable, to his and their own use and uses absolutely: And as for and concerning the said manors, lands, tenements, and hereditaments limited in use to the said Lord Viscount Fitzwilliam and George Pitt for ninety-nine years, determinable as aforesaid, and as for and concerning all and every other the said manors or lordships, advowsons, rectories, messuages, lands, tenements, tithes, hereditaments, and premises hereby bargained, sold, released, ratified, and confirmed, or intended so to be, with their and every of their appurtenances, after solemnization of the said intended marriage, [15] to the use and behoof of the said George Talbot and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Richard Lord Lumley and Neville Ridley and their heirs during the life of the said George Talbot, upon trust to support and preserve the contingent uses and estates thereof hereinafter limited from being destroyed or discontinued, and for that purpose to make entries as occasion shall require, but nevertheless to suffer the said George Talbot and his assigns, to have, receive, and take the rents, issues, and profits of the same premises to his and their own use and uses for and during the term of his natural life; And, from and after the decease of the said George Talbot, then to the use, intent, and purpose that the said Mary Fitzwilliam and her assigns, in case the said intended marriage shall take effect and she the said Mary Fitzwilliam shall happen to survive the said George Talbot, her intended husband, shall and may have, receive, and take yearly and every

year during the term of her natural life the annual payment or yearly rent-charge of 1500l. of good and lawful money of Great Britain, to be issuing and going out of all and every the said manors or lordships, rectories, messuages, lands, tenements, hereditaments, and premises aforesaid, and out of every part and parcel thereof, with their appurtenances, without any abatement for taxes, charges, assessments, or impositions of any kind whatsoever,--the said annual payment or yearly rent-charge of 1500l. to be payable and paid at four of the most usual feasts or days of payment in the year, that is to say, Lady-Day, Midsummer, Michaelmas, and Christmas,—the first payment to begin and to be made on such of the said feasts or times of payments as shall first and next happen after [16] the decease of the said George Talbot; and to this further use and intent, that, if it shall happen the said annual payment or yearly rent-charge of 1500l., or any part thereof, shall be behind and unpaid by the space of thirty days next after any of the said feasts or days of payment thereof as aforesaid, that then and so often it shall and may be lawful to and for the said Mary Fitzwilliam and her assigns, during the term of her natural life, into and upon the said manors, lands, tenements, hereditaments, and premises aforesaid charged with the yearly sum or rent of 1500l. as aforesaid, and into and upon every or any part or parts thereof, to enter and distrain, and the distress and distresses then and there found to take, lead, drive, carry away, and impound, and in pound to detain until she the said Mary Fitzwilliam and her assigns shall be fully satisfied and paid the said yearly sum or rent-charge of 1500l., and every part thereof, and all arrears thereof, together with the costs and charges of such distress: And, for the better assuring the said jointure, the said George Talbot, by this present writing, sealed in the presence of the credible persons whose names are indorsed on these presents as witnesses hereunto, doth, by virtue of the power in the said recited indenture contained, and all other powers enabling him in this behalf, grant, limit, and appoint, that, in case the said marriage shall take effect, and the said Mary Fitzwilliam shall survive the said George Talbot, her intended husband, that then and in such case she the said Mary Fitzwilliam shall, during her natural life, out of the said manors, lauds, tenements, and hereditaments in the said recited indenture and in these presents comprised, have and receive the annual sum of 1500l. for her jointure, payable as is hereinbefore mentioned: Provided always, and it is hereby declared and agreed that the said Mary Fitzwilliam shall only have one annual sum of [17] 1500l. for her life for her jointure, which said annual sum of 1500l. is hereby declared to be in the name or nature of a jointure to and for the said Mary Fitzwilliam, the intended wife of the said George Talbot, and to be in full recompense, lieu, and satisfaction of her dower and thirds at common law which she may or otherwise might have, claim, challenge, or demand, of, into, or out of all or any of the manors, lauds, tenements, and hereditaments of the said George Talbot, her intended husband: And as for and concerning all and every the said manors or lordships, lands, tenements, rectories, tithes, hereditaments, and premises aforesaid, and every part thereof, from and after the decease of the said George Talbot, so charged and chargeable with the said annual sum of 1500l., and the remedies for recovering thereof as aforesaid, to the use of the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, for and during and unto the full end and term of two hundred years, to commence and be accounted from the day of the death of the said George Talbot, and fully to be complete and ended, without impeachment of waste, on the trust and confidence hereinafter mentioned touching the said term; and, after the end, expiration, or other sooner determination of the said term of two hundred years, or the performance or determination of the said trusts concerning the said term, whichsoever of them shall first happen, then to the use and behoof of the first son of the said George Talbot on the body of the said Mary Fitzwilliam, his intended wife, lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing, charged and chargeable as aforesaid; and, for want of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and every other son and sons of the said George Talbot on [18] the body of the said Mary Fitzwilliam, his intended wife, lawfully to be begotten, severally and successively, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such son and sons issuing, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger

of such sons and the heirs male of his or their bodies issuing: And, for default of such issue, then, as for, touching, and concerning the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, to the use and behoof of the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, their executors, administrators, and assigns, for and during the term of five hundred years, without impeachment of waste, on the trusts hereinafter declared: And as for and concerning the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, from and after the expiration or other sooner determination of the said term of five hundred years, and all other the manors, lands, tenements, and hereditaments hereby granted, or intended so to be, from and after the several determinations of the several and respective estates and interests hereinbefore limited, and as the same shall severally end and determine, and charged and chargeable as aforesaid, to the use and behoof of the first son of the said George Talbot on the body of any other after-taken wife or wives he shall happen to marry after the death of the said Mary Fitzwilliam, lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing: and, for default of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every other son and sons of the said George Talbot on [19] the body or bodies of such after-taken wife and wives to be begotten, severally and successively, one after another, as they and every of them shall be in seniority of age or priority of birth, and of the several and respective heirs males of the body or bodies of all and every such son and sons issuing, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger of such sons and the heirs male of his or their bodies issuing: and, for default of such issue, to the use and behoof of the said John Talbot for and during the term of his natural life, without impeachment of waste: And, from and after the determination of that estate, to the use and behoof of the said Richard Lord Lumley and Nevile Ridley and their heirs, during the natural life of the said John Talbot, upon trust only to preserve the contingent uses and estates hereinafter limited from being destroyed or discontinued, but nevertheless in trust to permit and suffer the said John Talbot to receive the rents, issues, and profits of the said premises for and during the term of his natural life: and, from and after his decease, to the use and behoof of the first son of the body of the said John Talbot lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing: and, for default of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every other son and sons of the body of the said John Talbot lawfully to be begotten, severally and successively, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such son or sons issuing, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger of such sons and the heirs male of his or their bodies issuing: [20] And as for and concerning the said term of two hundred years hereinbefore limited to the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, the same is so limited to them on the trusts and confidences, and to the ends, intents, and purposes hereinafter mentioned, declared, and expressed, that is to say, upon trust, that, in case the said intended marriage shall take effect, and the said Mary Fitzwilliam shall survive and outlive the said George Talbot, her intended husband, and shall be disturbed in the quiet enjoyment of the said annual sum of 1500l. to be limited for her life for her jointure as aforesaid, by the heir-at-law of the said George Talbot or any other person whatsoever, that then and in such case they the said Richard Lord Viscount Fitzwilliam and George Pitt, and the survivor of them, or the executors and administrators of such survivor, shall and do, by and out of the rents, issues, and profits of the said premises, or by mortgage or sale thereof or of a competent part thereof, or by any other ways or means as they in their discretion shall think fit, levy and raise the gross sum of 13,000l., and pay the same to the said Mary Fitzwilliam, her executors, administrators, or assigns, or to such person or persons as she shall appoint, within three months after such disturbance, with legal interest for the same from the time of such disturbance till payment: and, after raising and paying the said sum of 13,000l. and interest, and the trustees' charges, the said term of two hundred years to cease: And as touching and concerning the said term of five hundred years

hereinbefore limited to the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, their executors, administrators, and assigns, the same is so limited to them upon the trust and to the intents and purposes hereinafter expressed, that is to say, Upon trust, that, [21] in case there shall be no son of the said George Talbot on the body of the said Mary Fitzwilliam, his intended wife, begotten, or if all the sons between them begotten shall all happen to die without issue male before any of them attain the age of twenty-one years, and that there be issue between them the said George Talbot and Mary Fitzwilliam one or more daughter or daughters living at the time of the decease of the said George Talbot, or born after his death, which shall attain the age of twenty-one years or be married, that then such daughter and daughters shall have the several and respective sums of money hereinafter expressed for their respective portions, that is to say, if there shall be but one daughter only and no more such, then such only daughter to have the sum of 20,000*l.* for her portion; and, if there shall be two or more such daughters, then such two or more daughters to have the sum of 20,000*l.* to be equally divided between them share and share alike, the said portions to be raised by the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, their executors, administrators, or assigns, by and out of the rents, issues, and profits of the premises so to them limited in use for the term of five hundred years as aforesaid, or by lease or leases, mortgage or mortgages, sale or sales, to be made thereof, and to be payable to the said daughter and daughters respectively at her and their several and respective ages of twenty-one years, or days of marriage, which shall first happen; and upon further trust, that, in the mean time, and until the said portions shall be payable, the said daughter or daughters be allowed, out of the rents, issues, and profits of the said premises, interest for their respective portions after the rate of 5*l.* per cent. till their said respective portions shall become due and payable; and upon trust, that, in the mean time, and until the said por-[22]-tions shall be payable, to permit and suffer such person and persons to whom the next and immediate reversion and remainder of the premises expectant upon the said term of five hundred years shall for the time being appertain, to receive the rents, issues, and profits thereof over and above the said interest for the said 20,000*l.*; and, after raising the said sum of 20,000*l.* and interest, or, in case the said George Talbot shall not have any daughter or daughters by him begotten on the body of the said Mary Fitzwilliam, or if all such daughter and daughters between them begotten shall in the life-time of the said George Talbot have been preferred with any portions of less value than the portions hereby for them intended, and that such portion and portions to such one or more daughters, and she or they, or any issue of her or their bodies, be then living, be made up to such one or more daughters or her or their issue 20,000*l.*; or, if the said George Talbot shall in his life-time pay to such one or more daughters the sum of 20,000*l.*, or if such issue female shall happen to die before any of their portions shall become payable as aforesaid, and that the said trustees, their executors, administrators and assigns, shall have been satisfied and paid out of the rents and profits of the said premises (which they are to be and shall be satisfied in the first place, such money and damages as they or either or any of them shall have sustained or expended in and concerning the trust aforesaid or the execution thereof), that then the said estate and term for five hundred years in the premises, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall go with and attend upon the reversion and inheritance of the premises immediately expectant thereon, according to the uses and estates thereof hereinbefore limited: Provided always, and it is declared and agreed by and between the said parties [23] to these presents, that, if the person or persons to whom the next immediate freehold or inheritance expectant upon the said term of five hundred years, according to the uses and estates thereof hereinbefore limited, shall belong or appertain, shall satisfy and pay, or, to the good liking of the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, or the survivors or survivor of them, his executors, administrators, or assigns, shall secure to be paid, to the said daughter or daughters the said sum of 20,000*l.* and interest hereinbefore limited to be charged and raised for the said daughter and daughters respectively, according to the true intent of these presents, that then and from thenceforth the said term of five hundred years to cease and be void: Provided also, and it is declared and agreed by and between the said parties to these presents, that, after the decease of the said Mary Fitzwilliam, and in case she shall happen to die, the said George Talbot surviving her, it shall and may be lawful to and for the said George Talbot and the

first and other sons of his body lawfully to be begotten, and also that it shall and may be lawful to and for the said John Talbot and the first and other sons of the body of the said John Talbot lawfully to be begotten, when and as he and they shall be in the actual possession of the freehold of the said manors, lands, tenements, hereditaments, and premises by virtue of the limitations aforesaid, by any deed or deeds, writing or writings, to be by them respectively signed, sealed, or executed in the presence of two or more credible witnesses, to grant, limit, or appoint, so much of or out of the said manors, lands, tenements, hereditaments, and premises (other than and except the said manors, lands, tenements, hereditaments, and premises in the said county of Oxford), as shall not exceed the yearly value or sum of 2000*l.* a year, to and for the jointure [24] of his and their wife and wives respectively, for the life and lives of such wife or wives, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: Provided also, that it shall and may be lawful to and for the said George Talbot, and also to and for the said John Talbot, by any deed or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors and premises whereof the person making such lease shall be actually possessed (except the capital messuage, outhouses, gardens, and parks of Hethrop, in the said county of Oxford), to any person or persons in possession, and not in reversion, for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boones, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases anything hereinbefore contained to the contrary notwithstanding: And whereas Broadstone farm, part of the premises purchased by the said Charles Duke of Shrewsbury, was devised by the said duke by his said recited will to the said Lord Bishop of Salisbury, by the name of Dr. William Talbot, Bishop of Oxford, and to the said Sir John Talbot and John Arden, their executors, administrators, and assigns, upon trust to be enjoyed by the persons who enjoyed his freehold estate; and, the said Sir John Talbot and John Arden being both dead, the said farm, with its appurtenances, is [25] now legally vested in the said William, Lord Bishop of Salisbury, by survivorship, for all the term and estate in the lease thereof granted now to come and unexpired, on the trust aforesaid: Now, this indenture further witnesseth, that the said William, Lord Bishop of Salisbury, in performance of the trust in him reposed, hath assigned and set over, and by these presents doth fully, clearly, and absolutely assign and set over unto the said Richard Lord Lumley and Nevile Ridley, their executors and administrators, the recited lease from Brazenose College, and all his trust, term, and estate therein, to hold to the said Richard Lord Lumley and Nevile Ridley, their executors, administrators, and assigns, during all the term and estate for years that is therein now to come and unexpired,—upon trust and confidence that they the said Richard Lord Lumley and Nevile Ridley shall and will from time to time during the continuance of the said lease, permit and suffer such person and persons as by virtue of the aforesaid limitations hold and enjoy the freehold premises hereby granted, to receive and take the rents, issues, and profits of the said farm and other premises held by lease under the principal and scholars of King's Hall College of Brazenose, in the University of Oxford, and according to the devise, direction, and intention of the said Charles Duke of Shrewsbury expressed and contained in his said recited will: And the said George Talbot, for himself, his heirs, executors, and administrators, doth covenant, promise, and grant, to and with the said Richard Lord Lumley and Nevile Ridley, their heirs, executors, administrators, and assigns, by these presents, that, for and notwithstanding any act, matter, or thing by them the said Gilbert Earl of Shrewsbury and George Talbot done, committed, or suffered to the contrary, they the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, [26] William Lord Bishop of Salisbury, and Sir John Stanley, have, or some one of them hath, good right, full power, and lawful and absolute authority to bargain, sell, release, and convey the said manors and premises to and for the uses, intents, and purposes, and under the provisos, trusts, and agreements aforesaid; and that the said manors and premises at all times from henceforth shall and may be peaceably and quietly held and enjoyed, and the rents

and profits thereof had and taken, according to the several uses, estates, and interests thereof hereinbefore limited, expressed, and declared, without the lawful let, suit, trouble, interruption, or demand of the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, Sir John Stanley, and George Talbot, their heirs and assigns, or any or either of them, or any person or persons lawfully claiming or to claim by, from, or under them, any or either of them, or in trust for them, any or either of them; and that free and clear, and freely, clearly, and absolutely acquitted, freed, and discharged, or otherwise upon reasonable request saved harmless and kept indemnified by the said George Talbot, his heirs and assigns, of and from all and all manner of former and other bargains, sales, leases, mortgages, jointures, uses, wills, entails, debts, statutes, recognizances, judgments, extents, executions, and of and from all former and other estates, titles, troubles, forfeitures, and incumbrances whatsoever, had, made, committed, done, or wittingly or willingly suffered by the said Gilbert Earl of Shrewsbury and George Talbot, or Charles Duke of Shrewsbury, deceased, or any other person or persons whatsoever lawfully claiming or to claim, by, from, or under them, or either of them, or in trust for them or either of them, except the annual rent-charge of 1200*l.* per annum payable to the Duchess of Shrewsbury for her life for her jointure, and also except the several annuities charged on some part [27] of the said premises to the several persons for their lives by the said will of the said Charles Duke of Shrewsbury, or otherwise, and also except the several leases made to the respective tenants of the said premises; and that they the said Gilbert Earl of Shrewsbury and George Talbot and their heirs, and all and every other person and persons anything having, or lawfully claiming any estate or interest into or out of the said manors, messuages, farms, lands, tenements, hereditaments, and premises, or any part or parcel thereof, by, from, or under the said Gilbert Earl of Shrewsbury and George Talbot, or either of them, shall and will from time to time, and at all times hereafter, upon the reasonable request, costs, and charges in the law of the person and persons requiring the same, his and their heirs, executors, administrators, or assigns, do, make, acknowledge, suffer, and execute, or cause and procure to be made, done, acknowledged, suffered, and executed, all and every such further and other lawful and reasonable act and acts, thing and things, assurances, and conveyances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, and assuring of the said manors, messuages, farms, lands, tenements, hereditaments, and premises, with their and every of their appurtenances, to and for the uses, estates, interests, intents, and purposes, and under the trusts, and subject to the charges and provisos hereinbefore contained concerning the same, be it by fine or fines, recovery or recoveries, or otherwise howsoever, as by the counsel learned in the law of the said Richard Lord Lumley and Nevile Ridley, their heirs, executors, administrators, or assigns, shall be reasonably devised, advised, or required, so as such further assurance or assurances contain in them no covenant or warranty than only against the person and persons required to make such further assurances, his and their heirs and assigns, his and their acts and [28] deeds, and so as the person and persons required to make such assurance be not compelled or hereby compellable to travel further than from the cities of London and Westminster for the doing thereof: And the said William Lord Bishop of Salisbury and Charles Talbot, for themselves, their heirs, executors, and administrators, do covenant, promise, and grant to and with the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, that, in case the said marriage shall take effect, and the said Mary Fitzwilliam, the intended wife of the said George Talbot, shall him survive, that then and in such case she the said Mary Fitzwilliam and her assigns shall and may from time to time during her natural life have, hold, receive, and enjoy the said annual sum of 1500*l.* to her limited and granted for her life as aforesaid without any the lawful let, suit, interruption, or disturbance of or by the said William Lord Bishop of Salisbury or Charles Talbot, or any claiming or to claim by, from, or under them, or by their or either or any of their assent, consent, means, privity, or procurement: And whereas, after the respective deaths of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male of their respective bodies, the title, honor, and dignity of Earl of Shrewsbury will by virtue of letters patents of creation of the said earldom made and granted by King Henry the VI. to John first Earl of Shrewsbury, and the heirs male of his body, by course of descent, and per formam doni, descend and come to the said William Lord

Bishop of Salisbury, and the heirs male of his body; and the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, in consideration thereof, and for the better support of the said honor, title, and dignity of Earl of Shrewsbury, and of the said Lord Bishop of Salisbury and Charles Talbot joining in this present settlement, have agreed to con-[29]-sent to and use their utmost endeavour to procure a private act of parliament,—a draft whereof is prepared and signed by the said Gilbert Earl of Shrewsbury, George Talbot, Mary Fitzwilliam, William Lord Bishop of Salisbury, and Charles Talbot,—for confirming this present settlement, and all and every the uses, trusts, estates, powers, and limitations hereinbefore contained, and for annexing all and every the said manors, messuages, advowsons, tithes, lands, tenements, and hereditaments in and by these presents granted (except all lands, tenements, and hereditaments in the county of Middlesex, and the manor of Cooksey, and other the lands, tenements and hereditaments in and by these presents excepted), to the said earldom, by extending the limitation thereof immediately after the respective deaths of the said George Talbot and John Talbot, and failure of issue male of their respective bodies, subject to the jointures and other charges as shall be thereon by virtue of any the powers or limitations in this present settlement contained, to the said William Lord Bishop of Salisbury and the issue male of his body; and, for want of such issue, to the right heirs of Charles Earl and Duke of Shrewsbury, in such manner, and with such powers and limitations as in the said draft of the said intended act of parliament is expressed, if the same can be obtained: Now this indenture further witnesseth, that it is covenanted, concluded, and fully agreed upon by and between all the said parties to these presents, and the said Gilbert Earl of Shrewsbury, George Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, do hereby, for themselves and their heirs, mutually covenant and agree, so soon as conveniently may be, to make their humble application for obtaining a private act of parliament in the form and for the purposes aforesaid, and to use their utmost endeavours to obtain the same and give their consent thereunto: which said intended act [30] is to be prepared and carried on at the proper costs and charges of the said William Lord Bishop of Salisbury. In witness whereof, the parties first above named have to these present indentures interchangeably set their hands and seals the day and year first above written."

The principal acts relating to disabilities of Roman Catholics, are the following:—

1 James 1, c. 4. An act for the due execution of the statutes against jesuits, seminary priests, &c.

3 James 1, c. 5. An act to prevent and avoid dangers which grow by popish recusants.

3 Charles 1, c. 2 (3). An act to restrain the passing or sending of any to be popishly bred beyond the seas.

30 Charles 2, stat. 2, c. 1. An act for more effectual preserving the King's person and government, by disabling papists from sitting in either House of Parliament.

1 William & Mary, c. 8. An act for abrogating of the oaths of supremacy and allegiance, and appointing other oaths.

1 William & Mary, c. 9. An act for the removing papists and reputed papists from the cities of London and Westminster and ten miles distance from the same.

1 William & Mary, c. 15. An act for the better securing the government by disarming papists and reputed papists.

1 William & Mary, c. 17. An act for rectifying a mistake in the act 1 William & Mary, c. 9.

11 & 12 William 3, c. 4. An act for the further preventing the growth of popery.

1 George 1, c. 55. An act to oblige papists to register their names and real estates.

3 George 1, c. 18. An act for explaining an act of 1 Geo. 1, c. 55, and for enlarging the time for such registering, and for securing purchases made by protestants.

[31] 11 George 2, c. 17. An act for securing the estates of papists conforming to the protestant religion against the disabilities created by several acts of parliament relating to papists, and for rendering more effectual the several acts of parliament made for vesting in the two Universities in that part of Great Britain called England the presentations of benefices belonging to papists.

18 George 3, c. 60. An act for relieving His Majesty's subjects professing the

popish religion from certain penalties and disabilities imposed on them by the act 11 & 12 William 3, c. 4.

31 George 3, c. 32. An act to relieve, upon conditions and under restrictions, the persons therein described, from certain penalties and disabilities to which papists or persons professing the popish religion are by law subject.

43 George 3, c. 30. An act to entitle Roman Catholics taking and subscribing the declaration and oath contained in the act 31 Geo. 3, c. 32, to the benefits given by an act of the 18 Geo. 3, c. 60.

10 George 4, c. 7. An act for the relief of His Majesty's Roman Catholic subjects.

9 & 10 Victoria, c. 59. An act to relieve Her Majesty's subjects from certain penalties and disabilities in regard to religious opinions.

The defendants offered in evidence the following documents,—which were admitted in evidence by the Lord Chief Justice, subject to the opinion of the court as to the admissibility of any of them: and it was agreed that the opinion of the court upon the points reserved should be given upon consideration of such only of the evidence offered on the part of the defendants as the court should deem admissible,—

The settlement of 1700 [post, p. 34].

The will of the Duke of Shrewsbury, dated the 19th of July, 1712 [post, p. 48].

[32] The petition of Gilbert Earl of Shrewsbury and others for the bill which terminated in the act of 6 G. 1, c. 27 [post, p. 58].

The original bill of 1719, shewing the parts added and the parts omitted respectively in committee.

The report of the judges upon the bill [post, p. 61].

The petition of Lord Fitzwilliam and George Pitt, trustees under the settlement of 1718, against the bill [post, p. 64].

The proceeding in the House of Lords relative to the bill, and the proceedings in committee, for which see post, 78.

The proceedings in the House of Commons relative to the bill.

[All the above documents were either received without objection, or the objection to them was subsequently waived.]

A grant and release of Francis Earl of Shrewsbury (the father of the Duke) to Mr. Carill, Mr. Weld, and Mr. Rushworth, dated the 6th of January, 1658, of the third parts of Bolterstone, Hansworth, Alton, and Bampton.

One part of the settlement made upon the marriage between Francis Earl of Shrewsbury and the Lady Anna Maria Brudenell, of his Lordship's lands in Staffordshire, Oxfordshire, and Yorkshire, dated the 8th of January, 1658.

One part of the declaration of the Earl of Shrewsbury and his trustees for settling Alton, in the county of Stafford, on the Earl and his lady, and his third part of Bolterstone, in the county of York, on Sir George Savile, and his third part of Hansworth, in the county of York, on Mr. Henry Howard, of Norfolk, dated the 4th of June, 1663.

The settlement of Francis Earl of Shrewsbury of the third part of Alton purchased from Sir George [33] Savile, upon his son, Charles Lord Talbot, dated the 3rd of August, 1663.

A deed (of 18th October, 1706) to make a tenant to the precipe, the deed to declare the uses of the recovery (of the 19th October, 1706), and the exemplification of the recovery suffered in pursuance thereof (28th November, 1706, 5 Anne), touching lands, &c. at Alton, in the county of Stafford.

A disentailing deed by Bertram Earl of Shrewsbury, dated the 31st of May, 1856 [post, p. 106].

Evidence as to the date of the birth and death of Earl Gilbert, the priest.

A pedigree of the Talbot family, dated 1752, extracted from a book in the muniment-room of the late Bertram Arthur Earl of Shrewsbury.

Probate of the will of Gilbert Earl of Shrewsbury, dated 4th July, 1743.

Sir William Russell's grant of Batchcoate, dated 23rd August, 1667.

The award of Mr. Anthony Windsor in the differences between the Duke of Shrewsbury and Mr. Gilbert Talbot of the one part, and the Lady Wintour of the other part, dated the 6th of June, in the 4 Jac. 2, 1688.

Extracts from documents produced from the Jesuits' College at Stonyhurst, for the purpose of shewing that Earl Gilbert was a member of that society.

The will of Sir George Wintour, dated the 13th March, 1657.

The evidence taken under a commission for the examination of witnesses at Rome for the purpose of proving that Gilbert Earl of Shrewsbury was from 1696 to 1744 a member of the Society of Jesus, where he appeared to have been known by the name of Gilbertus Gray, or Gilbertus Talbot, and described as having been born in 1673.

[34] Extracts from a book (referred to in the evidence taken under the commission), intituled "*Catalogus tertius rerum provincie Anglicane Soc. Jesu, An. 1696.*"

Copies of Latin letters from the archives of the College of Jesus at Rome,

Extracts from a book intituled "*Constitutiones Societatis Jesu,*" 1606.

Extracts from a book intituled "*Regulæ Societatis Jesu,*" 1590.

Extracts from a book intituled "*Constitutiones Societatis Jesu,*" 1583.

Two catalogues of the Society of Jesus, dated 1730, in which appeared the name of "Gray, Gilbert, Missionarius in Anglia, verè Talbot, comes de Shrewsbury."

Evidence was also given of documents from the State-Paper Office, shewing that Gilbert Earl of Shrewsbury was known by the name of Gray.

A certified copy of an administration bond, dated the 7th of July, 1743, entered into by Gilbert Earl of Shrewsbury, George Talbot, and Charles Talbot, as to the goods, chattels, and credits of John Talbot of Longford.

An extract from the register of burials of St. Pancras, Middlesex, shewing the burial on the 13th of July, 1743, of "Gilbert Gray."

The settlement of the Duke of Shrewsbury was as follows:—

"This indenture tripartite, made the 31st day of October, 1700, between the most noble lord Charles Earl and Duke of Shrewsbury, one of the lords of His Majesty's most Honorable Privy Council, and Knight of the most noble Order of the Garter, of the first part, The Right Honorable Sydney Lord Godolphin, and William Walsh, of Abberley, in the county of Worcester, Esq., of the second part, and Dr. William Talbot, [35] now Lord Bishop of Oxford, the Honorable Sir John Talbot, of Laycocke, in the county of Wilts, Knight, and John Arden, of Upton Warren, in the county of Worcester, gentleman, of the third part, Witnesseth, that, for the settling and establishing of the manors, messuages, lands, tenements, and hereditaments hereinafter mentioned, to continue in the name and blood of the said duke so long as it shall please Almighty God, and to the end the said manors, messuages, lands, tenements, and hereditaments may likewise be settled and assured to and for the uses, intents, and purposes, and upon and under the trusts, provisos, and agreements hereinafter limited, declared, and expressed, and for paying, satisfying, and discharging all the just debts of the said duke, now owing, or which he shall owe at the time of his decease, and which the personal estate of the said duke shall not be sufficient to satisfy, and for divers other good causes and considerations him hereunto especially moving, he the said Charles Duke of Shrewsbury hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said Sydney Lord Godolphin and William Walsh, and their heirs (in their actual possession now being by virtue of an indenture of bargain and sale to them thereof made, bearing date the day next before the day of the date of these presents, and by force of the statute for transferring of uses into possession), all and every the manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, and hereditaments whatsoever, of him the said Charles Duke of Shrewsbury, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdoms of England or Ireland, whereof or wherein the said duke, or any other person or persons in trust for him, now have or [36] hath any estate of inheritance in possession, reversion, remainder, or expectancy, together with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances; and the reversion and reversions, remainder and remainders, rents reserved, yearly and other rents, services, issues, and profits thereof or thereunto belonging, or reputed so to do, and also all the estate, right, title, interest, property, benefit, trust, claim, and demand whatsoever of him the said Charles Duke of Shrewsbury, out of, in, and to the same premises, and every or any part or parcel thereof, To have and to hold the said manors, messuages, farms, advowsons, rectories, lands, tithes, tenements, hereditaments, and all and singular other the premises hereby granted or mentioned to be granted, with their and every of their appurtenances, unto the said Sydney Lord Godolphin and William Walsh, their heirs and assigns, for ever, to and for the several uses, intents, and purposes, and subject to the trusts, provisos, and agreements hereinafter men-

tioned, limited, and declared concerning the same, that is to say, As to, for, and concerning such of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, as are situate, lying, and being in the said several counties of Worcester, Salop, and Berks, any or either of them, with their appurtenances, to the use and behoof of the said Charles Duke of Shrewsbury and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Lord Godolphin and William Walsh, and their heirs, during the natural life of the said duke, upon trust only for preserving the contingent uses and estates hereinafter limited from being defeated or destroyed, and to make entries for that purpose if need shall re-[37]quire, but nevertheless to permit and suffer the said duke and his assigns to receive and take the rents, issues, and profits thereof during the term of his natural life; and, from and after the decease of the said Charles Duke of Shrewsbury, to the use and behoof of the first son of the body of the said Charles Duke of Shrewsbury lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said Charles Duke of Shrewsbury lawfully to be begotten, and of the several and respective heirs males of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger and the heirs male of his and their bodies issuing; and, in case the said Charles Duke of Shrewsbury shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next immediate freehold or reversion of the premises shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use of such after-born son and sons severally and successively one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, [38] being always preferred to take before the younger of them and the heirs male of his body issuing; and, for default of such issue, to the use and behoof of George Talbot, Esq., third son of (Gilbert Talbot, of Batchcoate, in the county of Worcester, Esq. (uncle of the said Charles Duke of Shrewsbury), for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, during the natural life of the said George Talbot, in trust for preserving the contingent uses hereinafter limited from being destroyed and discontinued, and to make entries for that purpose if it shall be needful, but nevertheless to permit and suffer the said George Talbot to receive and take the rents, issues, and profits of the said premises during the term of his natural life; and, from and after the decease of the said George Talbot, to the use and behoof of the first son of the body of the said George Talbot lawfully begotten, and the heirs males of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said George Talbot lawfully begotten, and of the several and respective heirs males of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of their bodies issuing; and, in case the said George Talbot shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh and their heirs, until such wife shall be delivered of such child [39] or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next and immediate freehold or reversion thereof shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-

born son and sons severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of his body issuing; and, for default of such issue, to the use and behoof of John Talbot, Esq., eldest son and heir of Thomas Talbot, Esq., late of Longford, in the county of Salop, deceased, for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of Sydney Lord Godolphin and William Walsh, and their heirs, during the natural life of the said John Talbot, in trust for preserving the contingent uses hereinafter limited from being destroyed or discontinued, and to make entries for that purpose if it shall be needful, but nevertheless to permit and suffer the said John Talbot to receive the rents and profits of the said premises during the term of his natural life; and, from and after the decease of the said John Talbot, to the use and behoof of the first son of the body of the said John Talbot lawfully begotten, and of the heirs male of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said John Talbot lawfully begotten, and of the several [40] and respective heirs male of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of their bodies issuing; and, in case the said John Talbot shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh and their heirs until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next and immediate freehold or reversion thereof shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-born son and sons severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of his body issuing; and, for default of such issue, to the use and behoof of the said Sir John Talbot for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Sydney Lord Godolphin and William Walsh and their heirs, during the natural life of the said Sir John Talbot, upon trust only to preserve the contingent uses and estates hereinafter limited from being destroyed or discontinued, and to make entries for that [41] purpose if it shall be needful, but to permit and suffer the said Sir John Talbot to receive the rents, issues, and profits of the said premises during the term of his natural life; and, from and after the decease of the said Sir John Talbot, to the use and behoof of the first son of the body of the said Sir John Talbot lawfully begotten, and the heirs male of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said Sir John Talbot lawfully begotten, and of the several and respective heirs male of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger and the heirs male of their bodies issuing; and, in case the said Sir John Talbot shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next or immediate freehold or reversion of the premises shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-born son and sons severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respec-

tive heirs male of the body or bodies of all and every such after-born son or sons issuing, the elder of such after-born son or sons and the heirs male of his body issuing being always preferred to take before the younger and [42] the heirs male of their bodies issuing: and, for default of such issue, to the use and behoof of the said Charles Duke of Shrewsbury, and of his heirs and assigns for ever: And as touching and concerning all and every the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, with their appurtenances, within the said several counties of Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdom of England or Ireland, whereof no use is hereinbefore limited, to the use and behoof of the said Charles Duke of Shrewsbury for and during the term of his natural life, without impeachment of or for any manner of waste: and, from and after his decease, to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, during the natural life of the said duke, upon trust only to preserve the contingent uses to the estates hereinafter limited of and in the last-mentioned premises from being destroyed or discontinued, and to make entries for that purpose if it shall be needful, but nevertheless to permit and suffer the said Charles Duke of Shrewsbury to receive the rents, issues, and profits thereof during the term of his natural life; and, from and after the decease of the said Charles Duke of Shrewsbury, to the use and behoof of the first son of the body of the said Charles Duke of Shrewsbury lawfully begotten, and of the heirs male of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said Charles Duke of Shrewsbury lawfully begotten, and of the several and respective heirs male of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body issuing being always preferred to [43] take before the younger and the heirs male of their bodies issuing: and, in case the said Charles Duke of Shrewsbury shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next and immediate freehold or reversion thereof shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-born son or sons, severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of his body issuing: and, for default of such issue, to the use and behoof of the said Dr. William Talbot, Sir John Talbot, and John Arden, and their heirs and assigns for ever, nevertheless upon the trusts, and to and for the intents and purposes hereinafter mentioned, declared, and expressed concerning the same, that is to say, upon trust that they the said Dr. William Talbot, Sir John Talbot, and John Arden, and the survivors and survivor of them, and the heirs and assigns of such survivor, shall and do, by and out of the rents, issues, and profits of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises last mentioned, or by leasing, mortgaging, or sale thereof, or of any part or parts thereof, or otherwise, as to them shall seem [44] meet, raise and levy such sum and sums of money as shall be sufficient to pay, satisfy, and discharge, and therewith to pay, satisfy, and discharge all such just debts as are or shall be owing from the said duke, which his personal estate shall not be sufficient to pay and discharge, and also to pay and satisfy all and singular annuities and other sum and sums of money which the said duke shall give or appoint to be raised and paid by any deed or writing, or by his last will and testament in writing by him subscribed and sealed in the presence of two or more credible witnesses, or which shall be mentioned in any schedule annexed to such deed or writing or to such last will and testament in writing, to such person and persons, and in such manner and form, and with such remedy for the same as in such deed or writing, or last will and testament in writing, or any schedule annexed to such deed or writing or last will and testament in writing shall be expressed: and, from and after payment, discharge, and satisfac-

tion of such debts as are or shall be justly owing to the said duke, and sums of money by the said duke given and appointed as aforesaid to be raised, together with all such charges and expenses as the said Dr. William Talbot, Sir John Talbot, and John Arden, or any of them, their or any of their heirs or assigns, shall have sustained, expended, or been put unto in or about the execution of the trust hereby in them reposed, then upon trust that they the said Dr. William Talbot, Sir John Talbot, and John Arden, or the survivors or survivor of them, or the heirs or assigns of the survivor of them, shall and do convey, assure, and settle such of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, as shall remain unsold and undisposed of (charged, nevertheless, with such annuities and remedy for the same as shall be given and ap-[45]-pointed by the said duke as aforesaid), unto and to the use of such person and persons, and for such estate and estates, and subject to such powers, provisos, limitations, and agreements, and in such manner and form, or as near the same as may be, mutatis mutandis, as are herein mentioned for and concerning the aforesaid manors, lands, tenements, hereditaments, and premises in the said several counties of Worcester, Salop, and Berks, any or either of them: Provided always, and it is declared, concluded, and agreed by and between all and every the parties to these presents, that it shall and may be lawful to and for the said Charles Duke of Shrewsbury, by any deed or writing to be signed by him in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors, messuages, farms, lands, tenements, hereditaments, and other the premises hereinbefore mentioned to be hereby granted, or any part or parcel thereof, to any person or persons, for any term or number of years in possession or reversion, upon such considerations, to and for such ends, intents, and purposes, and at and under such yearly rents and reservations, as to the said duke shall seem meet and convenient: Provided also that it shall and may be lawful to and for the said George Talbot, John Talbot, and Sir John Talbot, or any of them, by any deed or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors and premises whereof they or any of them shall actually be possessed, to any person or persons, in possession and not in reversion, for the term of three lives, or one and twenty years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable [46] yearly during the continuance thereof, the usual and accustomed yearly rent and rents for the same, and so that in every such lease there be contained a condition of re-entry for non-payment of the rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases, anything herein contained to the contrary thereof notwithstanding: Provided also, and it is further concluded, declared, and agreed by and between all and every the said parties to these presents, that it shall and may be lawful to and for the said Charles Duke of Shrewsbury, by any deed or writing by him signed and executed in the presence of two or more credible witnesses, to grant, limit, and appoint all or any part or parts of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises hereby granted, or mentioned to be granted, to or for the jointure of any wife or wives whom he shall marry, for the life or lives of such wife or wives: Provided also, that it shall and may be lawful to and for the said George Talbot, John Talbot, and Sir John Talbot, or any of them, as they and every of them shall respectively come and be in the actual possession of the freehold of the manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises hereby to them respectively limited, or hereafter to be conveyed to them as aforesaid, by any deed or deeds, writing or writings, to be by them or any of them respectively signed, sealed, and executed in the presence of two or more credible witnesses, to grant, limit, or appoint so much of or out of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, as shall not exceed the yearly rent or sum of 2000*l.* per annum, to and for the join-[47]-ture of his or their wife or wives respectively, for the life or lives of such wife or wives, anything herein contained to the contrary notwithstanding: Provided also, and it is further declared, concluded, and agreed by and between all and every the said parties to these presents, and these presents are upon this express condition, that, in case the said Charles Duke of

Shrewsbury shall be minded to revoke, make void, alter, or change all or any the use or uses, estate or estates, trust or trusts, hereinbefore limited or declared of or concerning all or any of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises hereby granted, or mentioned to be granted, or any part or parcel or parts or parcels thereof, and such his mind and intention shall signify and declare by any deed or writing by him signed and subscribed of his own proper hand-writing in the presence of two or more credible witnesses, that then and in such case it shall and may be lawful to and for the said duke, from time to time, by any deed or deeds, writing or writings, by him personally signed and subscribed of his own proper hand-writing as aforesaid, to revoke, make void, alter, or change all and every or any of the use or uses, estate or estates, trust or trusts hereinbefore limited or declared of or concerning all or any of the said manors, messuages, farms, advowsons, rectories, tithes, hereditaments, and premises, or any part or parcel parts or parcels thereof, and by the same, or by any other writing or writings under the hand and seal of the said Charles Duke of Shrewsbury, attested as aforesaid, any new or other use or uses, estate or estates, trust or trusts of the said manors and premises, or any part or parcel parts or parcels thereof, whereof or concerning which such revocation shall be made, and with, under, and subject to the like power of revocation and [48] new limitation as in these presents is contained, or any other or others, or without such power of revocation, or otherwise, to declare, limit, or appoint, anything herein contained to the contrary notwithstanding. In witness whereof, the parties first above named have hereunto set their hands and seals the day and year first above written."

The will of the Duke of Shrewsbury, dated the 19th of July, 1712, was as follows:—

In the name of God, Amen. I, Charles, Earle and Duke of Shrewsbury, knight of the most noble order of the garter, one of Her Majesty's most honorable privy council, and lord chamberlain of Her Majesty's household, being, praised be God, in perfect health, yet considering the frailty of human nature, and the certainty of death, do resigne my soul unto my merciful Creator, hoping for pardon and salvation through the alone merits of Christ Jesus, my Saviour, and being minded to settle and dispose of my worldly substance for payment of my just debts, and other purposes, do make this my last will and testament in manner and forme following: Imprimis, I give and bequeath unto my beloved wife, the Lady Adelaida Duchess of Shrewsbury, all that my capital messuage or mansion-house called and known by the name of Warwick House, and all out-houses, gardens, yard, and stables, with the appurtenances thereunto belonging, and therewith now used and enjoyed by me, situate, lying, and being in the parish of Saint Martin-in-the-Fields, in the county of Middlesex, and Saint James, Westminster, or in one of them, in part of which premises I am interested for several terms of years, and have the inheritance of the rest, To have and to hold the said capital messuage or mansion-house, outhouses, gardens, yard, stables, and premises, to the said lady Duchess of Shrewsbury, my wife, immediately after [49] my decease, for and during so many years of the respective termes which I have or may have at the time of my decease in the premises, as she the said lady Duchess of Shrewsbury shall happen to live, and to have and to hold so much of the premises as I have the inheritance to her the said lady Duchess of Shrewsbury for the term of her natural life. Item, I give to the said Adelaida Duchess of Shrewsbury all the household goods and furniture of what nature and kind soever (plate only excepted) that shall at the time of my decease be in or about the said capital house or outhouses, all which goods and furniture my will and meaning is she the said lady Duchess shall have at her own disposal: And, immediately from and after the said lady Duchess of Shrewsbury, and from and after my decease, if I survive her, I give and bequeath all the rest, residue, and remainder of the respective terms then to come, and all my estate, title, and interest in and to the said capital messuage, outhouses, gardens, yard, stable, and premises, with the appurtenances thereunto belonging, unto my executors hereinafter named, upon the same trusts and for the same purposes as my personal estate is hereinafter given to them. Item, I give to the said lady Duchess of Shrewsbury, my wife, all the jewels she usually wears and makes use of by way of ornament: and I further give and bequeath unto the said lady Duchess of Shrewsbury 2000 oz. of my plate, such as she shall make choice of: and I also give unto the said lady Duchess of Shrewsbury the sum of 5000*l.* of good and lawful money of Great Brittain. Item, I give to my

kinsman Talbot Touchett, son of my late cozen, John Talbot, deceased, the summe of 2000l. of good and lawfull money of Great Brittain. Item, I give to my kinswoman, Mrs. Mary Touchett, sister of the said Talbot Touchett, the sum of 2000l. of like lawfull money of [50] Great Brittain. Item, I give to my niece, Mrs. Ann Bodenham, wife of Charles Bodenham, of Rotheras, in the county of Hereford, Esq., the summe of 1000l. of like lawfull money. Item, I give to my kinsman Edward Talbot, the second son of Dr. William Talbot, Bishop of Oxford, the summe of 1000l. of like lawfull money. Item, I give to my kinswoman Penelope Plowden, the eldest daughter of my late niece Mary Plowden, deceased, the summe of 500l. of like lawfull money. Item, I give to Mrs. Frances Bathurst, daughter of Villars Bathurst, Esq., deceased, late judge advocate, the summe of 1000l. of like lawfull money of Great Britain. Item, I give to my true and faithful servant John Arden the summe of 500l. of like lawfull money. Item, I give and bequeath to the Right Hon. George Earle of Cardigan, Dr. William Talbot, Lord Bishop of Oxford, Sir John Stanley, Knt., and the aforesaid John Arden, and the survivours and survivor of them, and the executors and administrators of the survivor of them, all my ready money, plate, jewells, furniture, and household stuff (excepting such part of my jewells, plate, household stuff, and furniture as is before bequeathed unto the said lady Duchess of Shrewsbury), debts, credits, and all other my moveables, and other my personal estate whatsoever, and of what nature, kind, and quality soever: nevertheless, upon the trusts, and to and for the ends and purposes hereinafter declared and expressed concerning the same, that is to say, upon trust and confidence that they the said George Earle of Cardigan, Dr. William Talbot, Lord Bishop of Oxford, Sir John Stanley, and John Arden, and the survivors and survivor of them, and the executors and administrators of the survivor of them, shall and do with and out of the premises, and by sale thereof, and by the money arising by such sale, as far as the same will extend and go, satisfye and [51] pay all my just debts which shall be owing at the time of my decease to any person or persons whatsoever, and my funeral charges, and also shall pay and discharge the several legacies and sums of money by me before particularly devised and given, and all such other legacies and summes of money as I have in this my will, or shall by any codicil or writing hereafter to be made, give, direct, and appoint the same to be paid: and my will and meaning is, that the summe of 1000l., part of the summe or legacye of 5000l. before by me given to the Lady Duchess of Shrewsbury, my wife, shall be paid to her within six months next after my decease, and the summe of 4000l. the remaining part of her said legacye of 5000l., and all other the legacyes hereinbefore given, and which I shall hereafter give, direct, and appoint, shall be paid within the space of two years next after my decease, without interest: But my further will and meaning is, that the aforesaid Talbot Touchett and Mary Touchett shall have interest after the rate of 5 per cent. per annum for their respective legacyes from the time of my decease till such time as their respective legacyes shall be paid. Item, I do give and bequeath unto every such person and persons as shall be a servant or servants unto me at the time of my decease, one year's wages over and above what shall be then due to them respectively for their wages, to be paid by my aforesaid trustees within one year after my decease. Item, I give and bequeath the summe of 1000l. of lawful money of Great Brittain to be disposed of to and for the charitable uses and in such manner as the Archbishop of Canterbury for the time being, the aforesaid Dr. William Talbot, Lord Bishop of Oxford, and the Lord Willoughby de Brooke, and Dr. Smalldridge, Deane of Carlisle, and the survivours and survivor of them, shall think best, nevertheless, with and under this re-[52]-commendation to them, that the said summe of 1000l. may not be laid out or disposed of in the building or repairing of any church, or in the endowing of any college or schools (it being my opinion that there are too many scholars in the nation already), but rather that the same may be employed and applyed in relieving some aged persons who are truly necessitous, or in education and bringing up of youth in such laborious trades and callings as may make them useful to their country. And my will and meaning is, that the said sum of 1000l. be payable and paid to the said Archbishop of Canterbury, Bishop of Oxford, Lord Willoughby, and Deane of Carlisle, or the survivours or survivor of them, for the purposes aforesaid, within two years next after my decease. Item, I do hereby give, ratifye, and confirm all my mannores, messuages, lands, tenements, and hereditaments to the several trustees named, in and for the uses, intents, and purposes, and upon the trusts, provisoes, and agreements limited, declared, and expressed in and by the settlement

or indenture tripartite bearing date the 31st day of October which was in the twelfth year of the reign of our late Sovereign Lord King William the Third, made by me of the first part, the Right Hon. Sydney Lord Godolphin, and William Waleh of Aberly, in the county of Worcester, Esq., since deceased, of the second part, and the aforesaid Dr. William Talbott, Lord Bishop of Oxford, the Hon. Sir John Talbott, of Laycock, in the county of Wilts, Knt., and John Arden, of Upton Warren, in the county of Worcester, gent., of the third part: And whereas, since the making of the before-mentioned indenture tripartite, I have purchased the mannors and lordshippes of Dunthropp, alias Dunthorpe, and Showell, alias Sowell, and divers freehold messuages, granges, lands, tenements, and hereditaments, lying and being in the parishes, vil-[53]-lages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the county of Oxford, and have likewise purchased a tenement or farme called or known by the name of Broadstone Farme, lyeing and being in the town and field of Dunthropp, Chalford, Lidstone, and Broadstone, in the said county of Oxford, which I hold by lease from and under the principal and scholares of King's Hall College, of Brasenose, in the University of Oxford, and am minded and desirous that the said freehold and leasehold premises so by me purchased should be settled, limited, and enjoyed to the same uses and by the same person and persons as my manors, messuages, lands, and hereditaments mentioned and comprised in the before-mentioned indenture tripartite are settled and limited unto and upon: and I do therefore give and devise all my aforesaid mannors, messuages, lands, tenements, and freehold hereditaments by me purchased as aforesaid, lying and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the said county of Oxford, unto the aforesaid Dr. William Talbott, Lord Bishop of Oxford, Sir John Talbott, Knt., and John Arden, and their heirs, to the use and uses of the person and persons, and subject to the same limitations, powers, provisoes, and restrictions as the mannors, lands, and hereditaments mentioned and comprized in the aforesaid indenture tripartite are limited and settled. And I do give and devise all my estate, right, title, and interest, and terme of years in and unto the aforesaid messuage, lands, and tenements, called Broadstone Farme, unto the said Dr. William Talbott, Lord Bishop of Oxford, Sir John Talbott, Knt., and John Arden, and the survivours and survivor of them, and the executors and administrators of the survivor of them, upon trust and confidence that they [54] shall from time to time and at all times permit and suffer such person or persons as shall by virtue of the aforesaid devise be entitled to hold and enjoy the aforesaid freehold premises, to receive and take and enjoy the rents, issues, and profits of the said farme. And, whereas, pursuant to a power to me reserved in and by the before-mentioned tripartite indenture, I have, by deed-poll, bearing date the 16th day of August, which was in the year of our Lord 1708, appointed and directed part of my real estate as therein mentioned to the Lady Adelaida Duchess of Shrewsbury, my wife, for her jointure, subject to such provisoe as in the said deed-poll is mentioned and expressed, and have by the said deed poll raised a term of ninety-nine years of other of my manors, lands, tenements, and hereditaments, I do hereby ratifye and confirme the joynture of the said lady Duchess, and the said terme for the trusts and purposes contained in the said deed-poll. And whereas, by the aforesaid indenture tripartite, all my mannors, lands, tenements, and hereditaments, in the countyes of Chester, Stafford, Oxford, and Wilts, or elsewhere in the kingdom of England or Ireland, whereof no use is thereinbefore limited, are and do stand charged, after my decease, and after failure of issue male of my body, with the payment of such debts as then shall be owing by me, and which my personal estate shall not be sufficient to pay, and of all and singular the annuities and other somme and sommes of money which I should give or appoint to be raised or paid by any deed or writing, or by my last will and testament in writing subscribed and sealed by me in the presence of two credible witnesses, or which should be mentioned in any schedule annexed to such deed or writing or to such last will or testament, and to such person and persons, and in such manner and forme, and with such remedy for the same [55] as in such deed or writing or last will and testament should be expressed. Now, in pursuance and by virtue of the power to me reserved in and by the said indenture tripartite, and of all and every other power, right, interest, or authority in me vested, I doe, by this my last will and testament, give, bequeath, and appoint unto my aforesaid servant John Arden and his assignes one annuity or yearly summe of 100l. for

and during the term of his natural life. Item, I give, bequeath, and appoint unto my servant Charles Goodere, and his assigns, one annuity or yearly somme of 40l. for and during the terme of his natural life. Item, I give and bequeath to Mr. James Morgan, who was formerly my governour, one annuity or yearly sum of 30l., to have to him and his assigns for the terme of his natural life. Item, I give and bequeath unto my servant Joseph Chancery and his assigns one annuity or yearly somme of 30l. for the terme of his natural life. Item, I give and bequeath unto my page Thomas Power and his assigns one annuity or yearly sum of 10l. for the term of his natural life. Item, I give and bequeath unto Thomas Burford, my groom of the chambers, and his assigns, one annuity or yearly sum of 10l. for the term of his natural life. Item, I give and bequeath to Charles Venables and Thomas Venables, the sons of my late butler, deceased, to each of them one annuity or yearly somme of 10l. for their respective natural lives. Item, I give to Mrs. Mary Bathurst, widow of the aforesaid Villars Bathurst, Esq., late judge advocate, and to her assigns, one annuity or yearly suume of 50l. during the terme of her natural life. Item, I give and bequeath unto the several person and persons the several annuities or yearly summe or summes of money which I shall hereafter by writing, schedule, or codicil under my hand and seal attested by three credible witnesses, name, mention, and express. And I declare my will and [56] meaning to be, that all the said annuities and annual summe and sums before particularly given, and such as I shall hereafter give, shall be charges upon and issuing out of all my manors, lands, tenements, and hereditaments in the aforesaid countyes of Chester, Stafford, Oxford, Wilts, and such other my lands and hereditaments as I have power to charge with and make subject to the payment of the same, and shall be paid by the person or persons that shall enjoy my said mannors, lands, and tenements, by equal quarterly payments, at the four most usual feasts or days of payment in the year, that is to say, the birth of our Lord God, the Annunciation of the Blessed Virgin Mary, the Nativity of Saint John Baptist, and the feast of St. Michael the Archangel, the first payment thereof to begin and to be made at such of the said feasts as shall first happen after my decease. And, if default shall be made in payment of the aforesaid several annual summes, or any of them, or of any part of them or of any of them, by the space of forty days after any of the said feasts or days of payment when the same shall become payable as aforesaid, that then it shall and may be lawful to or for the person or persons, his, her, or their assignee or assigns, to whom such payment or payments ought to have been made, to enter and distreigne for the same, and all arrearages thereof, in and upon all such of my said mannors, lands, tenements, and hereditaments in the countyes of Chester, Stafford, Oxford, and Wilts, or any of them, and such other of my lands as aforesaid which shall not be sold or mortgaged by my trustees in the said recited indenture tripartite named for payment of my debts or for the portions and provisions I have by the aforesaid deed poll directed and appointed to be raised and payd to and for such daughter or daughters which I shall happen to have by the aforesaid lady Duchess [57] of Shrewsbury. And my further will and meaning is, and I do hereby will and direct, that, in case my personal estate shall not be sufficient for the payment of my funeral expenses and such legacies and summes of money as I have before given and bequeathed, and shall direct and appoint to be paid in and by such writing, schedule, or codicil as is before mentioned, that then my said trustees the said George Earl of Cardigan, the said Dr. William Talbott, Lord Bishop of Oxford, and John Arden, their heires and assigns, shall, out of my mannors, lands, tenements, and hereditaments in the said countys of Chester, Stafford, Oxford, and Wilts, raise and levy so much money as my said personal estate shall be deficient, and apply the same for discharging and paying of so much of the said legacies and summes of money as my personal estate shall not extend to pay and satisfye. Item, I give and bequeathe to each of them the said George Earl of Cardigan, and the said Dr. William Talbott, Lord Bishopp of Oxford, the summe of 100l. of lawfull money of Great Brittain; and I do make and constitute them, and the aforesaid Sir John Stanley, to whom I likewise give the summe of 100l. of like lawfull money, and the aforesaid John Arden, executors of this my last will and testament, hereby revoking and making void all or any former will or wills by me made, and do make and publish this to be my last will and testament. And, in testimony thereof, I have hereunto subscribed my name and set my seale this 19th day of July, in the 11th year of the reign of our gracious sovereigne Lady Anne, Queen of Great Brittain, France, and Ireland, Defender of the Faith, et annoq. Domini 1712."

The petition of Gilbert Earl of Shrewsbury and others in favour of the bill which terminated in the act of 6 G. 1, c. 29, was as follows:—

[58] “To the Right Honorable the Lords Spiritual and Temporal in Parliament assembled.

“The humble petition of the Right Honorable Gilbert Earl of Shrewsbury, the Honorable George Talbot, only brother of the said Gilbert Earl of Shrewsbury, the Honorable Mary Talbot, wife of the said George Talbot, John Talbot of Longford, in the county of Salop, Esq., the Right Rev. William Lord Bishop of Salisbury, Charles Talbot, Esq., Edward Talbot, clerk, Archdeacon of Berks, and Sherington Talbot, Esq., sons of the said William Lord Bishop of Salisbury,—

“Sheweth,—That the Most Noble Charles late Duke and Earl of Shrewsbury, by his settlement, made on the 30th and 31st of October, 1700, and by his last will, made the 19th of July, 1712, conveyed or limited, or directed to be conveyed, all the manors, messuages, advowsons, tithes, lands, tenements, and hereditaments of the said duke, in the several counties of Worcester, Salop, Berks, Chester, Stafford, Oxford, Wilts, and Derby, or elsewhere in the kingdoms of England and Ireland, subject to the charges therein mentioned, in failure of issue male of the said duke, to your petitioner, George Talbot, for his life, with remainders to the first and other sons of your said petitioner in taile-male; and, for default of such issue, to your petitioner John Talbot, for his life, with like remainders to his first and other sons in taile-male; and, for default of such issue, and after other uses, since determined, to the heirs of the said Charles late Duke and Earl of Shrewsbury; with such powers for your petitioners George Talbot and John Talbot to make jointures not exceeding 2000*l.* per annum, and to make leases, as therein are mentioned:

“That the said duke died without issue on the 1st of February, 1717: and your petitioner Gilbert Earl of [59] Shrewsbury, his heir-at-law, having resolved not to marry, hath married your petitioner George Talbot to your petitioner Mary Talbot; and, being willing to pay a due observation to the intentions of the said duke, hath, by indentures of lease and release, severally bearing date the 3rd and 4th of March, 1718, conveyed the said manors, messuages, advowsons, tithes, lands, tenements, and hereditaments of the said late duke, except as therein is excepted subject to the charges created by the said duke, to your petitioner George Talbot for his life, with remainders to the first and other sons of your said petitioner [George Talbot] by your petitioner Mary Talbot, or by any after taken wife, in taile-male; and, for default of such issue, to your petitioner John Talbot for his life, with like remainders to his first and other sons in taile-male: and hath thereby charged the said estates with a yearly rent of 1500*l.* for the jointure of your petitioner Mary Talbot, and with the sum of 20,000*l.* for the portions of the daughters of your petitioner George Talbot by your petitioner Mary Talbot, in failure of issue male of your said petitioners; in

which your petitioners, William ord Bishop of Salisbury, and Charles Talbot, his eldest son, from a just regard to the intention of the said duke, and at the request of your petitioners Gilbert Earl of Shrewsbury and George Talbot, Esq., have joined; and in consideration thereof, and for the better support of the honour, title, and dignity of Earl of Shrewsbury, your petitioners Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, have in and by the said indenture of release covenanted and agreed to make their humble application for obtaining a private act of parliament for confirming the said settlement last recited, and for annexing all the said manors, messuages, advowsons, tithes, [60] lands, tenements, and hereditaments of the said duke, except a small part thereof lying in the county of Middlesex, to the said earldom, by extending the limitations thereof after the deaths of your petitioners George Talbot and John Talbot, and failure of issue male of their respective bodies, subject to the jointures and other charges thereon by virtue of any of the powers or limitations in the said settlement contained, to your petitioner William Lord Bishop of Salisbury and the issue male of his body, to whom after the respective deaths of your petitioners Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, on failure of issue male of their respective bodies, the said honour, title, and dignity of Earl of Shrewsbury will descend and come, and, for want of such issue, to the heirs male of the body of John first Earl of Shrewsbury, and, for want of such issue, to the heirs of the said Charles Duke and Earl of Shrewsbury, in such manner and with such powers and limitations

as in a draught of the said intended act of parliament, signed by your petitioners Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, by the name of Mary Fitzwilliam, William Lord Bishop of Salisbury, and Charles Talbot, is expressed :

"Wherefore your petitioners humbly pray leave to bring in a bill to confirm the said settlement made by your petitioner Gilbert Earl of Shrewsbury, and to annex the said estates to the said earldom, by extending the limitations in the manner before mentioned :

"And your petitioners, as in duty bound, shall ever pray, &c.

"SHREWSBURY. "W. SARUM.

"G. TALBOT. "CHARLES TALBOT.

"M. TALBOT. "JOHN TALBOT."

[61] The judges' report upon the bill was as follows :—

"In obedience to your lordships' order of the 14th of this present January, hereunto annexed, we have considered of the petition of the Right Hon. Gilbert Earl of Shrewsbury, the Hon. George Talbot, only brother of the said earl, the Hon. Mary Talbot, wife of the said George Talbot, John Talbot of Longford, in the county of Salop, Esq., the Right Hon. William Lord Bishop of Salisbury, Charles Talbot, Esq., Edward Talbot, clerk, Archdeacon of Berks, and Sherington Talbot, Esq., sons of the said William Lord Bishop of Salisbury, to us thereby referred, and hereunto also annexed, and do find,—

"That the Most Noble Charles late Duke and Earl of Shrewsbury, by indentures of lease and release, dated the 30th and 31st of October, 1700, and by his last will, dated the 19th of July, 1712, conveyed and limited all his freehold estates in the several counties of Worcester, Salop, Berks, Chester, Stafford, Oxford, Wilts, and Derby, or elsewhere in the kingdoms of England and Ireland, after failure of issue male of his body, and subject to the charges therein mentioned, to the said George Talbot for his life, with remainder to his first and other sons in tail-male, and, for default of such issue, to the said John Talbot for life, with like remainders to his first and other sons in tail-male, and, for default of such issue, and after other uses since determined, to the heirs of the said Charles late Duke and Earl of Shrewsbury, with powers for the said George Talbot and John Talbot to make such jointures and leases as are therein mentioned :

"And we humbly certify to your lordships, that it hath been proved before us that the said late duke died without issue the 1st of February, 1717, and that the said Gilbert, now Earl of Shrewsbury, is his heir-at-law, and hath resolved not to marry, [62] and persuaded the said George Talbot to marry the said Mary Talbot, sister to Richard Lord Fitzwilliam : that the same Earl Gilbert, being willing to observe the late duke's intentions in the said settlement and will expressed, hath by indentures of lease and release dated the 3rd and 4th of March, 1718, conveyed the said freehold estates (except as is therein excepted) subject as aforesaid, to the said George Talbot for life, with remainder to his first and other sons by the said Mary Talbot, or any after-taken wife in tail-male, and, for default of such issue, to the said John Talbot for his life, and to his first and other sons in tail-male ; and hath thereby charged part of the said freehold estates with the payment of 400l. per annum during the joint lives of the said George and Mary, for her separate maintenance : and after charged all the said freehold estates (except as aforesaid) with the payment of 1500l. per annum to the said Mary for her life for her jointure, and, subject thereto, such part thereof as is therein for that purpose mentioned, with 20,000l. for the portions of the daughters of the said George and Mary Talbot, on failure of their issue male ; and by the said indenture of the 4th of March, 1718, the said late duke's said leasehold estate is pursuant to his said will assigned to trustees, to permit such persons as by virtue of the said limitations are to hold the said freehold estates to enjoy the said leasehold estate : And we further certify to your lordships, that the said Lord Bishop, and Charles Talbot, his eldest son, from a just regard they have to the said late duke's intention as before expressed, and at the request of the present Earl of Shrewsbury and the said George Talbot, have joined in the said settlement : and, in consideration thereof, and for the better support of the said earldom, the said Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, Lord Bishop, and Charles [63] Talbot, did thereby covenant to make application to obtain an act of parliament for confirming the said settlement made on the marriage of the said George Talbot, and

for annexing the said late duke's said estate (except a small part thereof in the county of Middlesex) to the said earldom, by extending the limitations thereof after the deaths of the said George and John Talbot without issue male, subject to the charges thereon by virtue of the said settlement, to the said Lord Bishop and his issue male, to whom on the respective deaths of the said Gilbert Earl of Shrewsbury, George and John Talbot, without issue male, the said earldom will descend, and, for want of such issue, to the heirs male of the body of John first Earl of Shrewsbury, and, for want of such issue, to the heirs of the said late duke.

"And we also certify to your lordships, that the said Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, are all the persons that appeared to us to be concerned in the consequences of the said bill; and that it hath been proved to us, upon the oath of two witnesses sworn at your lordships' Bar, that the said Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, and John Talbot have signed the said petition, and signified their consent (as the rest of the said parties have done in person appearing before us) to the said bill, which bill confirms the said settlement made by the said Gilbert Earl of Shrewsbury, and the limitations therein expressed, and also annexes the said lands and estates to the said earldom, by extending the limitations thereof in the manner before mentioned; Wherefore we conceive the bill annexed, which we have signed, is proper for the purposes aforesaid, and reasonable to pass into a law, if your lordships shall think fit."

[64] The petition of Lord Fitzwilliam against the bill was as follows (a):—

"The humble petition of the Right Hon. Richard Lord Viscount Fitzwilliam, of the kingdom of Ireland, brother of Mary Talbot, wife of the Hon. George Tal-

(a) The act (6 G. 1, c. 29),—which is intituled "An act for annexing the late Duke of Shrewsbury's estate to the Earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned,"—continued the following provisions:—

"Whereas the Most Noble Charles Earle and Duke of Shrewsbury, by indentures of lease and release, bearing date respectively the 30th and 31st of October, 1700, and the release being tripartite, and made or mentioned to be made between the said Duke of the first part, the Right Hon. Sidney Lord Godolphin and William Walsh (both since deceased) of the second part, and the Rev. Dr. William Talbot, then Bishop of Oxford, and now Bishop of Salisbury, and Sir John Talbot, and John Arden (both since deceased), of the third part, after failure of issue male of his body, and other uses since determined, did settle all and every the manors, messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments whatsoever of the said Charles Duke of Shrewsbury, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdom of England or Ireland, whereof or wherein the said Duke, or any other person or persons in trust for him, had any estate of inheritance in possession, reversion, remainder, or expectancy, together with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances, to the uses following, that is to say, to the use and behoof of George Talbot, Esq., third son of Gilbert Talbot, of Batchcoate, in the county of Worcester, Esq., uncle of the said Charles Duke of Shrewsbury, for and during the term of his natural life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said George Talbot in tail-male; and, for want of issue, to the use and behoof of John Talbot, Esq., eldest son and heir of Thomas Talbot, Esq., late of Longford, in the county of Salop, deceased, for and during the term of his natural life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said John Talbot, successively, in tail-male; and, for want of such issue, to the use of the said Sir John Talbot, party to the said indenture, for life, with remainder to his first and other sons successively in tail-male; and, for want of such issue, to the use of Charles Duke of Shrewsbury, his heirs and assigns for ever, with power to make jointures and leases as therein mentioned: And whereas the said Charles Duke of Shrewsbury, in and by his last will and testament in writing, bearing date on or about the 19th of July, 1712, reciting, that, since the making the said recited settlement, he had purchased the manors or lordships of

[65]-bot, George Pitt, Esq., uncle of the said Mary Talbot, and executor of her late father's will, and trustees for her and her children in her marriage-settlement, and next friends to and for and on the behalf of George Talbot (an infant of very tender years), son and heir [66] apparent of the said George Talbot, husband of the said Mary, by the said Mary, late Mary Fitzwilliam :

"Sheweth,—that the most noble Charles, late Duke and Earl of Shrewsbury, by

Dunthorpp, alias Dunthorpe, and Showell, alias Sowell, and divers freehold messuages, granges, lands, tenements, and hereditaments, lying and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the county of Oxford, and likewise had purchased a tenement or farm called Broadstone farm lying and being in the town and fields of Dunthorpp, Chalford, Lidston, and Broadstone in the said county of Oxford, which was held by lease from the principal and scholars of King's Hall College and of Brazen Nose, in the University of Oxford, which he was desirous should be settled, limited, and enjoyed to the same uses and by the same person and persons as his manors, messuages, lands, and hereditaments, mentioned and comprised in the said recited indenture tripartite are settled and limited unto and upon, did thereby give and devise all his aforesaid manors, messuages, lands, tenements, and freehold hereditaments by him purchased as aforesaid, lying and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the county of Oxford, to the said William Talbot Lord Bishop of Oxford, Sir John Talbot, John Arden, and their heirs, to the use of the person and persons, and subject to the same limitations, powers, provisos, and restrictions as the manors, lands, and hereditaments mentioned and comprised in the aforesaid indenture tripartite are limited and settled ; and thereby did give and devise all his estate, right, title, interest, and term of years of, in, and unto certain messuages, lands, and tenements called Broadstone farm, to the said trustees, their executors and administrators, upon trust that they should from time to time and at all times permit and suffer such person and persons as should by virtue of the aforesaid devise be entitled to hold and enjoy the aforesaid freehold premises, to receive, take, and enjoy the rents, issues, and profits of the said farm ; and further reciting, that, by the aforesaid indenture tripartite, all his manors, lands, tenements, and hereditaments in the counties of Chester, Stafford, Oxford, and Wilts, and elsewhere in the kingdoms of England and Ireland, whereof no use is therein-before limited, stood charged, after his decease, and failure of issue male of his body, with the payment of such just debts as then should be owing by him, and which his personal estate should not be sufficient to pay, and all annuities and other sums of money he should give or appoint to be raised by deed or will, attested by two or more credible witnesses, —he the said duke did bequeath to his servants and others several annuities for their respective lives : And whereas the said Charles Duke of Shrewsbury, on or about the 1st of February, 1717, departed this life without leaving any issue, whereby the honour, title, and dignity of Earl of Shrewsbury, and the reversion and inheritance of the settled manors, lands, tenements, hereditaments, and premises descended and came to the Right Hon. Gilbert now Earl of Shrewsbury, eldest son and heir of the said Gilbert Talbot of Batchcoate aforesaid, Esq., uncle of the said duke : And whereas the personal assets of the said duke are sufficient to pay the said duke's debts, funeral, and legacies, with a very great overplus, so that the manors, lands, tenements, and hereditaments by the said recited indenture tripartite of settlement, and last will and testatment, subject to the payment of the said annuities thereon charged, ought to be enjoyed by the said George Talbot, and such persons, and in such manner, as the same are thereby settled : And whereas the said Sir John Talbot dyed without issue male, in the life-time of the said Duke of Shrewsbury : And whereas the said Gilbert Earl of Shrewsbury is resolved not to marry ; and, being desirous to pay a due observance to the intentions of the said duke, expressed in the said settlement and will, hath persuaded the said George Talbot, his younger brother, to marry the Hon. Mary Fitz-William, sister to the Right Hon. Richard Lord Viscount Fitz-William of Merwin, in the kingdom of Ireland, and, by indentures of lease and release, bearing date respectively the 3rd and 4th of March, 1718, and the release being quinquipartite, and made or mentioned to be made between the said Gilbert Earl of Shrewsbury and George Talbot of the first part, the said Richard Lord Viscount Fitz-William and

deed of settlement, and by his last will, conveyed, limited, and directed [67] to be conveyed several manors, lands, and hereditaments in the said settlement and will mentioned, in failure of issue male of the said duke, to the said George Talbot, the father, for life, with remainder to his first and other sons in tail-male, and, for default of such issue, with other remainders over.

[68] "That, the said duke being dead without issue male, a treaty of marriage

Mary Fitz-William of the second part, the Right Hon. George Earl of Cardigan, William Lord Bishop of Salisbury, Sir John Stanley, Knt., and Charles Talbot, Esq. (eldest son and heir apparent to the said William Lord Bishop of Salisbury), of the third part, the Right Hon. Lord Lumley and the said John Talbot of the fourth part, Sir John Webb, Bart., George Pitt, Esq., and Nevile Ridley, Esq., of the fifth part,—reciting the settlement and will made by the said Charles Duke of Shrewsbury,—in consideration of a marriage then intended between the said George Talbot and Mary Fitz-William, and 13,000*l.* portion, they the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, according to their respective estates and interests, did grant and convey unto the said Richard Lord Lumley, Nevile Ridley, and their heirs, all those the said manors of Dunthropp alias Dunthorpe, and Showell, alias Sowell, in the county of Oxon and all the said freehold messuages, granges, lands, tenements, and hereditaments, situate, lying, and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, in the said county of Oxford, and also all and every the said mannors, freehold messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, and Wilts, or elsewhere in the kingdoms of Great Britain or Ireland (except all manors, lands, tenements, and hereditaments in the county of Middlesex, and except the said leasehold farm called Broadstone Farm, and also except the manor of Cooksey, and all and every the messuages, cottages, mills, lands, tenements, meadows, leasowers, closes, coppices, wood grounds, boilaries of salt water or salt-fatts, walling rents, and hereditaments whatsoever, which were late the estate of the Hon. Gilbert Talbot, Esq., deceased, late father of the said Gilbert Earl of Shrewsbury and George Talbot, situate, lying, and being in Cooksey, Upton Warren, Elmbridge, Piershall Green, Timber Hanger, Broomsgrove, Dodderhill, and Droitwich, and elsewhere in the said county of Worcester, and other the manors, lands, tenements, and hereditaments which were the estate and inheritance of Gilbert Talbot, late of Batcheoate, in the said county of Worcester, Esq., deceased, father of the said Gilbert Earl of Shrewsbury and George Talbot, To hold (except as before excepted) to the said Richard Lord Lumley and Nevile Ridley, and their heirs, to the uses following, that is to say, immediately after the solemnization of the said marriage, then, as for, touching, and concerning the said manors, lands, tenements, and hereditaments in the said counties of Salop, Worcester, and Berks, to the use of the said Richard Lord Viscount Fitz-William and George Pitt, their executors, administrators, and assigns, for the term of ninety-nine years, if the said George Talbot and Mary Fitz-William shall jointly so long live, upon trust to raise the annual sum of 400*l.*, tax-free, for the said Mary, during the said term, for her separate use; and upon further trust to permit and suffer the said George Talbot to receive the residue of the rents and profits during the said term; and as for, touching, and concerning the said manors, lands, tenements, and hereditaments limited in use to the said Richard Lord Viscount Fitz-William and George Pitt for ninety-nine years, determinable as aforesaid, and as for and concerning all and every other the said manors, lands, tenements, hereditaments, and premises by the said indenture bargained and sold (except as therein is excepted), to the use of the said George Talbot for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; and, after his decease, to the use, intent, and purpose, that the said Mary Fitz-William should have and receive out of all the said manors, lands, tenements, hereditaments, and premises, the annual sum of 1500*l.*, tax free, for her life, for her jointure, with power of distress for non-payment thereof, and, charged and chargeable therewith, to the use of the said Richard Lord Viscount Fitz William and George Pitt, their executors, administrators, and assigns, for two hundred years, without impeachment of waste, for the better raising the said rent charge of 1500*l.*, and securing the same; and, after the expiration or other sooner determination of the

was had between the said George Talbot the father and the said Mary his now wife ; and it was agreed on, that, in consideration of 13,000*l.*, the marriage portion of the said Mary, and in consideration of the said marriage, the said manors and [69] premises should be settled on the said George Talbot, the father, for life, with remainder to his first and other sons by the said Mary in tail-male, with remainders over.

said term of two hundred years, to the use of the first and other sons of the said George Talbot on the body of the said Mary Fitz-William to be begotten, in tail-male, successively ; and, for want of such issue, as to the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, to the use of the said Richard Lord Viscount Fitz-William, Sir John Webb, and George Pitt, their executors, administrators, and assigns, for five hundred years, without impeachment of waste, upon trust for raising 20,000*l.*, and [as] maintenance for the daughters of the said George Talbot on the body of the said Mary Fitz-William to be begotten, in case they shall have no issue male ; and, as to the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, from and after the determination of the said term of five hundred years, and all other the said manors, lands, tenements, and hereditaments, from and after the several determinations of the several estates thereinbefore limited, to the use of the first and all other the sons of the said George Talbot on the body of any after-taken wife to be begotten, in tail-male, successively ; and, for want of such issue, to the use of the said John Talbot of Longford, for and during the term of his natural life, without impeachment of waste ; remainder to trustees to preserve contingent remainders ; remainder to the first and other sons of the said John Talbot in tail-male, successively : in which said indenture of release there is comprised a power to the said George Talbot, and also to the said John Talbot, when he shall be in the actual possession of the said manors and premises, to make joynitures to any women they should marry, not exceeding the yearly value or sum of 2000*l.* a year ; with power also to lease the said manors, lands, tenements, and hereditaments (except as therein is excepted) for twenty-one years or three lives : and, by the said indenture, the said William Lord Bishop of Salisbury did assign the said lease of Broadstone farm to the said Lord Lumley and Nevile Ridley, upon trust that they should permit and suffer such persons as by virtue of the aforesaid limitations hold and enjoy the freehold premises thereby granted, to receive and take the rents, issues, and profits of the said farm : And, reciting in the said indenture of release, that, after the deaths of Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male of their respective bodies, the title, honor, and dignity of Earl of Shrewsbury will, by virtue of letters-patents of creation of the said earldom, made and granted by King Henry VI. to John first Earl of Shrewsbury, and the heirs male of his body, by course of descent, and per formamdoni, come to the said William Lord Bishop of Salisbury, and the heirs male of his body, it was by the said indenture agreed that the said Gilbert Earl of Shrewsbury, George Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, should use their humble application for obtaining a private act of parliament, and give their consent thereunto, for settling the said manors, lands, tenements, hereditaments, and premises on the said William Lord Bishop of Salisbury and the issue male of his body, after the death of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male of their bodies, in such manner as should be advised,—as in and by the said indenture, relation being thereunto had, may more fully and at large appear : And whereas the said Gilbert Earl of Shrewsbury is desirous that the said settlement should be further extended, in such manner as is hereinafter mentioned, and that the said manors, lands, tenements, and hereditaments should be annexed to and go along with the said honour, title, name, and dignity of Earl of Shrewsbury in such manner as is hereafter expressed, for the better and more honorable support of the said name, dignity, and title, which cannot be done without an act of parliament : Wherefore, may it please your most Excellent Majesty, at the humble petition of the said Gilbert Earl of Shrewsbury, George Talbot, John Talbot, William Talbot Lord Bishop of Salisbury, and Charles Talbot, son and heir apparent of the said Bishop of Salisbury, Edward, Sherington, and Henry Talbot, younger sons of the said William Lord Bishop of Salisbury, that it may be enacted, and be it enacted by the King's most Excellent Majesty, by and with the

"That, by indentures of lease and release, bearing [70] date the 3rd and 4th days of March, 1718, the said manors and premises (except as therein is excepted) were conveyed accordingly, and soon after the said marriage was had and solemnized.

"That, on or about the 11th day of December last, [71] the said George Talbot, the father, and Mary his said wife, had issue between them the said George Talbot, the infant, who is now seised of and in the said manors and premises of an estate in tail-male expectant on the death of the said father.

advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that the said recited indentures of lease and release bearing date the said 3rd and 4th of March, 1718, being the settlement made on the marriage of the said George Talbot with the said Mary Fitz-William, and all and every the uses, trusts, and estates therein mentioned, limited, and declared, is, are, and shall be hereby ratified and confirmed; and that the said George Talbot and his first and other sons, and the heirs male of their bodies respectively, and the said Mary his wife, and the said John Talbot of Longford, and his first and other sons, and the heirs male of their bodies respectively, and all and every other person or persons to whom any use, trust, estate, rent, remedy for the same, or other power or interest, is by the said recited marriage-settlement granted or limited, shall be enabled to take, hold, and enjoy, and shall and may have, hold, and enjoy, the said manors, lands, tenements, hereditaments, and premises respectively, according to the true intent and meaning of the said marriage-settlement, any law or statute to the contrary thereof notwithstanding; subject, nevertheless, to the jointure of the most noble Adelaida Duchess of Shrewsbury for her life, and to the several annuities charged on some of the said manors by the said last will and testament of the said Duke of Shrewsbury, and to the remedies thereby given for recovering the same.

"II. And be it further enacted by the authority aforesaid, that, after the decease of the said George Talbot and John Talbot, and failure of issue male of their respective bodies, all and every the manors, messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments whatsoever of the said duke, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdoms of Great Britain or Ireland, whereof or wherein the said duke at the time of his decease, or any other person or persons in trust for him, had any estate of inheritance in possession, reversion, remainder, or expectancy, together with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances (except all lands, tenements, and hereditaments in the county of Middlesex, and also except the manor of Cooksey, and all and every the messuages, cottages, mills, lands, tenements, meadows, leasowes, closes, coppices, woods, wood-grounds, boilaries of salt-water, or salt-fats, walling rents, and hereditaments whatsoever, which were late the estate of the Hon. Gilbert Talbot, Esq., deceased, late father of the said Gilbert Earl of Shrewsbury and George Talbot, situate, lying, and being in Cooksey, Upton Warren, Elmbridge, Piershall Green, Timber Hanger, Broomsgrove, Dodderhill, and Droitwich, or elsewhere in the said county of Worcester), charged, nevertheless, and chargeable with the said rent-charges of 1200l. a year and 1500l. a year to the said Duchess of Shrewsbury, and Mary Talbot, wife of the said George Talbot, and subject to the said annuities given by the said duke, and to the respective remedies for recovering the same respectively, and to such jointures, leases, rent-charges, and other charges and estates as shall by virtue of the powers in the said recited indenture quinquipartite of release dated 4th of March, 1718, or in this present act, contained, be granted, made, or charged thereon, or on any part thereof, shall be and remain to the use and behoof of the said Gilbert Earl of Shrewsbury for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Richard Lord Lumley and his heirs, during the natural life of the said Gilbert Earl of Shrewsbury, upon trust only to preserve the contingent uses and estates hereinafter mentioned from being destroyed or discontinued, but, nevertheless, in trust to permit and suffer the said Gilbert Earl of Shrewsbury to receive the rents, issues, and profits of the premises during his natural life; and, from and after his decease, to the use and behoof of the first son of the body of the said Gilbert Earl of Shrewsbury lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, for

[72] "That Gilbert Earl of Shrewsbury, the said George Talbot, the father, the said Mary Talbot, John Talbot, William Lord Bishop of Salisbury, Charles Talbot, Esq., Edward Talbot, clerk, and Sherington Talbot, sons of the said William Lord Bishop of Salisbury, [73] have petitioned your lordships for leave to bring in a bill to confirm the said settlement made on the said marriage, and to annex the said estates to the said earldom, by extending the limitations thereof to the said Lord Bishop of Salisbury, and the issue male of his body.

default of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every son and sons of the body of the said Gilbert Earl of Shrewsbury lawfully to be begotten, severally and successively, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such son and sons issuing, the elder of such son and the heirs male of his body issuing being always preferred and to take before the younger of such sons and the heirs male of his or their bodies issuing; and, for default of such issue, to the use and behoof of all and every person and persons, being issue male of the body of the said John first Earl of Shrewsbury, to whom the said title, honour, and dignity of Earl of Shrewsbury shall after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of the said letters-patents of creation of the said earldom, descend and come, severally and successively, one after another, as they and every of them shall succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said earldom, and to be annexed to and descend with the same.

"III. And be it further enacted by the authority aforesaid, that the said Gilbert Earl of Shrewsbury, and the heirs male of his body, George Talbot, and John Talbot, any or either, shall not, by him or themselves, or together with any other person or persons whatsoever, alien, grant, or convey away any of the said manors, messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments hereby settled, or any part thereof, nor do any other act or deed whatsoever which shall or may be to the prejudice or disinherison of any person or persons to whom any remainder or estate in the premises is limited, confirmed, or appointed to descend or come by this present act of parliament after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot; and that all and every alienation, fine, recovery, and conveyance, and every act whatsoever to be, made, levied, suffered, or done by the said Gilbert Earl of Shrewsbury, or the heirs male of his body, George Talbot, and John Talbot, any or either of them, by him or themselves, or together with any other person or persons whatsoever, shall be and are hereby declared to be null and void as against every person or persons to whom any remainder or estate in the premises is hereby limited, confirmed, or appointed to descend or come after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot.

"IV. Provided always, and be it further enacted by the authority aforesaid, that it shall and may be lawful to and for the said George Talbot, son of Gilbert Talbot of Batchcoate, in case he shall have issue by the said Mary his now wife, or any after-taken wife, a son, and also younger child or children, sons or daughters, at any time during his natural life, by any writing under his hand and seal, to be attested by two or more credible witnesses, or by his last will and testament in writing, to be attested as aforesaid, to grant, lease, limit, devise, or appoint all or any of the said manors, lands, tenements, and hereditaments, or any part thereof (except the said manors, lands, tenements, and hereditaments in the county of Oxford), to any person or persons for the term of ninety-nine years, to commence from the decease of the said George Talbot, upon trust only for raising any sum of money not exceeding in the whole the sum of 15,000*l.* for the portion of the daughter or daughters of the said George Talbot (subject, nevertheless, to the jointure of the said Adelaida Duchess of Shrewsbury and of the said Mary Talbot, and to the said annuities, and to such leases, jointures, charges, and estates as shall happen to be thereof made by virtue of any the powers in the said recited settlement or in this present act contained), the same to be paid to such daughter or daughters respectively when and if such daughter or daughters shall respectively attain the age of twenty-one years, or be married, and not otherwise, and in such proportions, and with such maintenance not exceeding 5*l.* per centum per

[74] "That a bill is brought in accordingly, whereby the said infant (in case he should come to the possession of the said manors and premises) is restrained from barring any remainder limited in and by the said settlements made by the said duke and on the said mar-[75]-riage of his said father and mother, and which by law when he shall attain the age of twenty-one years he hath a power to do.

"That your petitioners have been informed that Gilbert, present Earl of Shrews-

annum, till payment, as the said George Talbot shall by any writing, attested by two or more credible witnesses, direct or appoint; and also to charge the said premises (except before excepted) with annuities or rent-charges for the younger sons respectively, during their respective lives only, so as no one annuity to any younger son exceed the sum of 200*l.* a year, and so as no such annuity be prejudicial to the present charges on the said manors and premises.

"V. Provided always, and be it further enacted, that, if the said Mary, now wife of the said George Talbot, shall die in the life-time of the said George Talbot, son of Gilbert Talbot, of Batchcoate, without any issue, and he shall marry again, and shall have no issue male, and one or more daughter or daughters, that then and in such case it shall and may be lawful to and for the said George Talbot, by any writing under his hand and seal, attested by two or more credible witnesses, or by his last will and testament in writing, attested as aforesaid, to grant, lease, limit, devise, or appoint all or any the said manors lands, tenements, hereditaments, and premises (except the said manors, lands, tenements, hereditaments, and premises in the said county of Oxford) to any person or persons, for the term of four hundred years, to commence from and after the decease of the said George Talbot and of the said John Talbot, and failure of issue male of their respective bodies, and subject to the jointures and annuities aforesaid, and to such other leases and charges as shall be thereon by virtue of any the powers in the said recited settlements or this present act contained, upon trust only for raising any sum or sums, not exceeding in the whole the sum of 20,000*l.* of lawful money, for the portion or portions of such daughter or daughters, the same to be raised and paid to them respectively at their respective ages of twenty-one years or days of marriage, which shall first happen after the commencement of the said term of four hundred years; and, in case such daughter or daughters shall attain the said age of twenty-one years, or be married, before the commencement of the said term, then within six months after the commencement thereof, with maintenance till payment, not exceeding the interest of the portion or portions: provided, that, if any such daughter or daughters shall happen to die unmarried before she or they shall respectively attain the age of twenty-one years, the portion or portions of the daughter or daughters so dying shall not be raised.

"VI. Provided also, and be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the said George Talbot (son of the said Gilbert Talbot of Batchcoate) from time to time during his natural life, by any indenture or other writing or writings under his hand and seal, testified in the presence of two or more credible witnesses, to make or grant any lease or leases, estate or estates, of the said manors, lands, tenements, hereditaments, and premises, or any part thereof (except the said manors, lands, tenements, hereditaments, and premises in the said county of Oxford), without prejudice to the said jointures or annuities or any other precedent charges thereon, for the term of three hundred years, to commence from and after the decease of the said George Talbot, and John Talbot of Longford, and failure of issue male of their respective bodies, upon trust, in case the said George Talbot shall die without any issue of his body, male or female, living at his death, or born after his decease, and Anne Talbot and Mary Talbot, daughters of Anne Talbot, late sister of the said George Talbot, or any issue of their bodies, shall happen to be then alive, to raise by sale or mortgage of the premises to be comprised in the said term of three hundred years, or of a competent part thereof, after the commencement of the said term, and not before, such sum or sums of money not exceeding in the whole the sum of 10,000*l.* for the portions of the said Anne Talbot and Mary Talbot, the daughters, together with such maintenance for their portions not exceeding 5*l.* per cent. per annum, as the said George Talbot, by any deed or writing to be by him signed and sealed in the presence of two or more credible witnesses, or by his last will and testament in writing, attested as aforesaid, shall direct or appoint; the same to be paid to such daughter or daughters, or their issue, at her or their age of twenty-one

bury, the said George [76] Talbot, the father, and Mary his wife, and John Talbot, have consented to the said bill : but your petitioners humbly conceive, and are advised, that their consent cannot bar the son and children of the said marriage. And your petitioners crave leave humbly to [77] inform your lordships that such consent has been unduly gained from them. All which your petitioners humbly hope, to prove if your lordships shall be pleased to hear your petitioners touching the same.

years, or days of marriage, which shall first happen after the commencement of the said term of three hundred years : and, if such daughter or daughters shall attain the said age of twenty-one years or be married before the commencement of the said term, then within six months after the commencement thereof : provided, nevertheless, that, if the said Anne Talbot and Mary Talbot, the daughters, die without issue before she or they attain the age of twenty-one years, and unmarried, then the said portion or portions shall not be raised.

“VII. Provided always, and be it further enacted and declared by the authority aforesaid, that, if the said George Talbot (son of Gilbert Talbot) shall happen to die without any issue of his body, male or female, living at his death, that, then and in such case it shall and may be lawful to and for the said George Talbot (son of Gilbert Talbot), from time to time during his natural life, by any deed or writing under his hand and seal, attested by two or more credible witnesses, to grant, lease, limit, or appoint the said manors, lands, tenements, hereditaments, and premises, or a competent part thereof (except the premises in the county of Oxon), for the term of one hundred years, to commence from the same George Talbot's death without issue, upon trust for raising any sum of money not exceeding 5000*l.* to be applied to such uses as the said George Talbot, son of the said Gilbert Talbot, shall in like manner direct or appoint.

“VIII. And be it further enacted by the authority aforesaid, that neither the first or any other son or sons of the body of the said George Talbot (son of the said Gilbert Talbot), or of the body of the said John Talbot of Longford, nor any the heirs male of the body or bodies of any such son or sons, nor any other person or persons, his or their heirs male of his or their body or bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, shall hereafter come, descend, or accrue by force or means of this present act of parliament, shall alien, give, grant, bargain, sell, or otherwise convey away any of the said manors, messuages, advowsons, tythes, lands, tenements, hereditaments, or any other the premises hereby settled, or any part thereof, nor any other thing do which shall or may be to the disinherison of the heirs inheritable by force of the said recited settlement or this present act of parliament, or of any person or persons to whom any remainder is limited by the said recited settlement or this present act of parliament, or whereby any of them shall be barred or put from entry into the premises : and that all and every alienation, conveyance, fine, money, gift, grant, bargain, and sale, and every other act whatever to be made, suffered, or done by any of the persons respectively to whom the premises are respectively before assured, conveyed, or limited by the said recited settlement or this present act of parliament, shall be for ever after the decease of the alienor utterly void, and shall be so deemed and adjudged in the law : Provided, nevertheless, that neither the first nor any other son or sons of the body of the said George Talbot, or of the body of the said John Talbot, or of the body of the said Gilbert Earl of Shrewsbury, nor any the heirs male of the body or bodies of any such son or sons issuing, nor any other person or persons, his or their heirs male of his or their body or bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, shall hereafter come, descend, or accrue by force or means of this present act of parliament, who shall within six months after he or they shall attain the age of eighteen years take the oaths appointed to be taken instead of the oaths of supremacy and allegiance, by an act of parliament made in the first year of the reign of their late Majesties King William and Queen Mary, intituled ‘An act for the abrogating the oaths of supremacy and allegiance, and appointing other oaths,’ and also subscribe the declaration set down and expressed in an act of parliament made in the thirtieth year of the reign of King Charles II. intituled ‘An Act for the more effectual preserving the King's Person and Government by disabling papists from sitting in either Houses of Parliament,’ to be by him or them made, repeated, and subscribed in the courts of Chancery or King's Bench, or the quarter sessions of the county where he or they shall reside, and who

"Wherefore your petitioners humbly pray that they [78] may be heard by their counsel against the said bill at the Bar of your lordships' House.

"And your petitioners shall pray.

"FITZWILLIAM.

"G. PITT."

[79] The following are the minutes of proceedings of the committee of the House of Lords on the bill which terminated in the act 6 G. 1, c. 29 :—

Die Lunæ, 8 Feb. 1719.

The judges' report read. The parties called. The bill read entire.

[80] The petition of the Lord Fitzwilliam and Mr. Pitt to be heard against the bill which was referred to the committee, was read.

shall from thenceforth continue a protestant until he or they shall attain the age of twenty-one years, shall, after he or they shall attain the said age, and while he or they continue protestants, be disabled from aliening, giving, granting, bargaining, selling, or otherwise conveying away the said manors, messuages, advowsons, tythes, lands, tenements, and hereditaments, or any other the premises hereby settled, or any part thereof, but may alien, give, grant, bargain, sell, or otherwise convey away the same premises, or any part thereof, as freely and absolutely as he or they might have done if this act had never been made *: Provided also, that no person or persons shall be disabled to execute all or any the powers expressed in the said recited settlement, or any the powers by this present act of parliament given, and which are hereby or shall be by express words vested in him or them; nor shall any acts to be done pursuant to and in execution of the said powers, or any of them, be rendered or deemed void.

"IX. Provided always, and be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the first and every other son and sons of the body of the said George Talbot, son of the said Gilbert Talbot, to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons issuing, and to and for the first and all and every the son and sons of the body of the said John Talbot of Longford lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons issuing, and also to and for all and every other person and persons to whom the said manors, lands, tenements, hereditaments, and premises are by this act of parliament limited, successively, as aforesaid, when they shall respectively be in the actual possession of the freehold of the said manors, lands, tenements, hereditaments, and premises, by any deed or deeds, writing or writings, to be by them respectively signed, sealed, and executed in the presence of two or more credible witnesses, to grant, limit, or appoint so much of or out of the said manors, lands, tenements, hereditaments, and premises (other than and except the said manors, lands, tenements, and hereditaments in the said county of Oxon), as shall not exceed the yearly value or sum of 2000*l.*, subject to such jointures, leases, charges, and estates as shall happen to be thereof made by virtue of any the powers contained in the said recited settlement or in this present act contained, unto and to the use of any woman or women which he or they shall marry, for the lives of such women respectively only, for her or their joynture or joyntures, such assignments, limitations, or appointments to be made before or after marriage, and to take effect respectively from and after the death of the said persons who shall make the same, so as every such jointure shall respectively be made and expressed to be, and shall be accepted by such woman or women respectively, in full recompence, lieu, and satisfaction of her and their dower and thirds at common law, which she or they might otherwise have, claim, challenge, or demand, of, in, to, or out of all or any the said manors, lands, tenements, hereditaments, and premises.

"X. Provided also, and be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the first and all and every other son and sons of the body of the said George Talbot, son of the said Gilbert Talbot, lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and to and for the first and all and every other son and sons of the body of the said John Talbot of Longford

* This proviso is repealed by the 32nd section of the Shrewsbury Estate Act, 6 & 7 Vict. c. 28.

A lord of the committee proposed that certain witnesses may be summoned before any further proceeding be had on the bill.

[81] The Lord Fitzwilliam and Mr. Pitt being present desired to be heard by their counsel, and that the necessary witnesses might be summoned, and acquainted the committee that certain writings for which there might be occasion were as far off as Worcestershire, and therefore desired a week's time.

[82] Die Martis, 16 Februarij, 1719.

The minutes of the committee at the last sitting read. The committee being informed counsel and the parties attended, they were called in. The petition of the Lord Fitzwilliam and Mr. Pitt against the bill read.

lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and also to and for all and every other person and persons to whom the said manors, lands, tenements, hereditaments, and premises are limited by this present act of parliament, successively, as aforesaid, by any deed, or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors lands, tenements hereditaments, and premises whereof the person making such lease shall be actually possessed, except the capital messuage, outhouses, gardens, and park of Heathropp, in the county of Oxon, to any person or persons, in possession, and not in reversion, for the term of three lives or twenty-one years, or for any number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boones, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases.

“XI. Provided also, and be it further enacted and declared by the authority aforesaid, that, if the said George Talbot, son of the said Gilbert Talbot, shall happen to die without any issue male of his body living at his death, and if the said John Talbot of Longford shall also die without any issue male of his body living at his decease, then, from and after the decease of the survivor of them the said George Talbot and John Talbot, such other person and persons who for the time being shall be entitled to the freehold of the said manors and premises in the county of Oxford by virtue of this present act of parliament, shall successively receive the rents, issues, and profits of the said farm called Broadstone Farm, and of all other the premises held by the said lease made by the said principal and scholars of King's Hall College of Brazen Nose, in the university of Oxford, during the continuance of the same lease, and of any future lease or leases thereof hereafter to be obtained from the said college, pursuant to the trust hereinbefore contained concerning the renewing the same.

“XII. Provided always, and be it further enacted and declared by the authority aforesaid, that nothing in this act contained shall anyways extend or be construed to extend to settle, entail or anywise affect the manor of Neston, with its rights, members, and appurtenances, in the county palatine of Chester, or any other the lands, tenements, and hereditaments of the said John Talbot, son of Thomas Talbot of Longford, in Neston, or elsewhere in the said county of Chester, or the several manors of Longford, Church Aston, alias Little Aston, alias Aston Parva, Edgmond, alias Edgmondon, Longueville, alias Longfield, alias Cheyneis Longueville, the advowson of the church of Longford, the moiety of the manor of Newport, with their respective rights, royalties, members, and appurtenances, in the county of Salop, or any the lands, tenements, or hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Longford, Brocton, Chershall, alias Cheshall, Church Aston, alias Little Aston, alias Aston Parva, Edgmond, alias Edgmondon, Chetwyne, Whitchurch, Longueville, alias Longfield, alias Cheyneis, Longueville, and Newport, or any or either of them, or elsewhere in the county of Salop, or the manor or castle of Pembridge, and Newton, alias Welsh Newton, in the county of Hereford, or any the lands, tenements, or hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Pembridge, Newton, alias Welsh Newton, Garway, St. Waynards, Longarren, Whitchurch, and Gannerew, or elsewhere in the county of Hereford, or the manor of Bittisby, alias Bittesby, in the counties of Warwick and Leicester, or any the lands, tenements, and hereditaments of

[83] Mr. Peer Williams on behalf of the petitioners was heard, and states the case of George Talbot, an infant, son and heir of George Talbot, who has an expectancy in remainder by the late Duke of Shrewsbury's settlement dated 30 and 31 days of October, 1700, and will [84] dated the 19th July, 1712, and insists that though the father of the infant has consented to the bill, yet, he being but tenant-for-life, that consent cannot bar the infant, and mentions a seeming surprise that the Bishop of Sarum, who is a trustee in the settlement, should [85] desire a bill to alter the uses limited by it: observes that lands are inseparably annexed to the two great offices of Lord Great Chamberlain and Earl Marshall, which seems highly reasonable; but takes notice, that, in this case, there seems no manner of occasion for annexing lands to the earldom of Shrewsbury, and concludes with hoping the bill shan't pass.

Mr. Bootle heard also for the petitioners against the bill, and explains at large the effect of the late Duke of Shrewsbury's settlement: he mentions an estate purchased by his late grace in Oxfordshire since making the said settlement which occasioned a mistake in their instructions: he also insists that anything done by the father of the infant cannot bar him, though at the same time acknowledges the trustees might before his birth have done an act which in law might have been a bar to him: says Harry 6th created by letters-patent the first Earl of Shrewsbury: he mentions a covenant made by the father of the infant in his prejudice, and acquaints the committee they have witnesses to prove in what manner the same was obtained: observes, that, as the Bishop of Sarum was frequently with the late duke, if his grace

the said John Talbot, son of Thomas Talbot aforesaid, in Bittisby, alias Bittesby, and Claybrooke, or elsewhere in the counties of Warwick and Leicester, or either of them, or the divided moiety of the manor of Wiggold, in the county of Gloucester, or any the lands, tenements, and hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Wiggold and Cirencester, or elsewhere in the county of Gloucester, or the manor of Burward Scott, alias Boreward Scott, alias Buscott, Philpott's Court, alias Philpote's Court, and the third part of the advowson of Buscott, in the county of Berks, or any the lands, tenements, and hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Boreward Scott, alias Buscott, or elsewhere in the county of Berks, or any other the manors, lands, tenements, or hereditaments whereof or wherein the said John Talbot, son of Thomas Talbot of Longford, or any other person or persons in trust for him, is or are seised, in possession, reversion, remainder, or expectancy (except the manors, lands, tenements, and hereditaments mentioned and comprised in the said indenture tripartite of settlement dated the 31st of October, 1700, and in the said last will and testament of the said Earl and Duke of Shrewsbury), —the manors, lands, tenements, and hereditaments of the said earl and duke comprised in the said settlement and will (except all lands, tenements, and hereditaments in the county of Middlesex hereinbefore excepted), and no other, being intended to be entailed and settled by virtue of this present act, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

“XIII. Saving to the most noble lady Adelaida, now Duchess of Shrewsbury all such estate, right, title, and interest as she has or claims for her life in and to the said annual sum of 1200*l.*, or the manors, lands, tenements, and hereditaments charged with the payment thereof, as fully as if this present act had never been made.

“XIV. Saving also to Charles Goodere, James Morgan, Joseph Chancey, Thomas Power, Thomas Burford, Charles Venables, and Thomas Venables, their several annuities to them respectively devised for their respective lives by the said recited will of the said Charles Duke of Shrewsbury, together with the remedies by the said will provided for recovering the said respective annuities, as fully as if this act had never been made.

“XV. Saving also and reserving to our Sovereign Lord the King, his heirs and successors, and to all and every person and persons, bodies politick and corporate, their heirs, successors, administrators, and assigns (other than and except the said Gilbert Earl of Shrewsbury and his heirs and assigns, the said George Talbot, brother of the said Earl of Shrewsbury, and the issue male of his body, and the said John Talbot of Longford, and the issue male of his body), all such right, title, claim, or demand whatsoever, as they, every or any of them, might, could, or ought to have had, claimed, held, or enjoyed, in case this act had never been made, anything hereinbefore contained to the contrary notwithstanding.”

had intended the estate should have been limited as by the bill, he would have done it so by the settlement: also [86] observes, that, though there are divers papists of this family, yet the infant is no papist: and, if the estate should be taken from him, the motive to his being bred a protestant will be removed, the inconvenience whereof he leaves to the consideration of the committee.

Mr. Peer Williams says he supposes the settlement will be admitted.

Mr. Mead allows the settlement is as opened, excepting that Mr. Peer Williams mentioned it to be a trust, which was a mistake.

Mr. Peer Williams says they have witnesses to prove the obtaining the father's consent, &c., but they are not sworn. Whereupon it was proposed to adjourn to Thursday, that, though there seemed an affected delay, yet there might be no room for any complaint or hardship.

Die Jovis, 18 Februarij, 1719.

The petitioners' counsel acquaint the committee that the infant on whose account the petition was presented was born 11th of December last. Admitted by the counsel for the bill.

Joseph Cox produced as a witness, and asked what he knew of any negotiation between the trustees and the Bishop of Salisbury as to executing the late Duke of Shrewsbury's settlement, and whether there was any refusal, and upon what account; he desires to be excused giving any evidence.

Mr. Peer Williams on behalf of the petitioners insisting he should deliver his knowledge of this matter,

Mr. Cox proceeds, and says he was wrote to when in Worcestershire to bring up writings, and he did so, and Mr. Pigott seemed satisfied with the title: he went down again, but was sent to a second time about difficulties, and came up again, and the Bishop of Sarum complained he was left out of the settlement: my Lord [87] Harcourt interposed, and was several times with the parties, and the consultation was chiefly as to the settlement. It was apprehended the bishop was unwilling to execute the trust; but he cannot say he absolutely refused it, but declared his willingness to join, provided he might have an act of parliament to settle the estate with the honour; that Mr. Pigott said there was a discourse that Nich. * Earl of Shrewsbury was a priest, and it was an ill way to come to an estate through the blood of the family; but no mention was made of the bishop on this account: that it was hoped all things would be compromised.

He is asked who is in possession of the estate, and says George Talbot, who has not been interrupted; that he is his agent, and has no directions from him to oppose the bill, being advised it was necessary.

Asked if the Lord Fitzwilliam was concerned, and says he knows not, never being with his lordship about it, but heard he would oppose it; and says Mr. George Talbot thinks it a good bill, but the Earl of Shrewsbury does not concern himself one way or other.

Asked if Mr. George Talbot is a reputed papist, but desires to be excused answering that question in respect of the laws against papists, and says he never was at mass with him.

Lord Fitzwilliam asked as to the above-mentioned negotiation, and says Mr. George Talbot designing to propose a marriage with his sister, he received a letter from Mr. Pigott signifying he had an authority to propose it, and Mr. Pitt appointed a meeting at his lordship's house: it was thought reasonable, and agreed upon soon after. Mr. G. Talbot was admitted to court his sister, and two or three months after the Bishop of Salisbury made difficulties in joyning in the settlement, and thereupon he desired one Mr. Webber to wait on the bishop about it.

[88] Mr. Webber asked as to the message he was sent with to the bishop, and says he went to him before the marriage, but does not remember the time, and his lordship said he had difficulties, and would not joyn without further consideration.

Lord Fitzwilliam says, a good while before the marriage he went to the bishop, who said Mr. George Talbot was of such a religion as to be disabled to take anything from his brother; that he had been with the king, and would not comply without the matter was settled as now proposed.

The Lord Fitzwilliam asked whether he was privy to the settlement and bill, and

says he knew of both, and was desired to sign, but positively refused it. Mr. Pitt also refused, and, being displeased, his lordship was not at the marriage.

'Twas admitted Mr. George Talbot's consent was signed at the time of the settlement. The time mentioned was also admitted.

Asked if the settlement and draught of the bill was prepared by Mr. Pigott: says Mr. Pigott told his lordship last night that the bishop's son reduced it into form, who himself being present, acquainted the committee that the form was Mr. Pigott's, that he did make some additions to it: and, it being mentioned 'twas copyed from Mr. Talbot the bishop's son's hand, he denied he ever wrote the bill.

Mr. Pigott's letters to my Lord Harcourt, and his lordship's answers produced. Mr. Pigott's hand was proved by his clerk, who believed it all of his handwriting. The Lord Harcourt's hand to the answers to the said letter was admitted.

Sir John Stanley was produced as an evidence, and asked as to the custody and possession of the late duke's settlement: and says he received a message to put it into the hands of Mr. G. Talbot's counsel, which [89] he acquainted the bishop with, and he said care should be taken of it: it was taken out of the box to be perused before both parties, and delivered into the bishop's hands, and, when done with all, to be returned to the executors: owns it was now here: all the executors had the custody of it formerly, and knows not of any directions of the late duke for keeping it: there was but one key to the box, but that each executor had a seal.

He was asked if he joyned as a trustee, and says he signed the writings; and the motive was, that he was obliged, he believed, by the trust, to do it.

Mr. Cox acquainted the committee that the settlement lay some time with Mr. Pigott to prepare the marriage-settlement; but he knows not how long.

Charles Goodyere was asked as to the duke's pedigree, and what his grace had declared as to the bishop's being related to him, and says the duke before he fell ill directed him to look into the pedigrees to see if the bishop had any right, but says he, not being skilled in pedigrees, could find nothing: he thinks his grace mentioned he had one or two pedigrees from the bishop.

Mr. Peer Williams mentioning the covenant in the marriage-settlement obtaining the consent of Mr. George Talbot to the bill, that part of the covenant was read; and the Lord Fitzwilliam being asked if his sister was of age when she was married, says she was.

Mr. Peer Williams, having spoke against the whole bill, concludes with submitting it upon the evidence and face of the bill.

Sir John Stanley was asked if the bishop's son was a trustee, and says he believes not.

Mr. Bootle, counsel for the petitioners, speaks likewise against the bill, from the restraint therein which prohibits the infant from alienating the estate, and that they appear only in his vindication, and in order to the performance of the trusts.

[90] Mr. Mead heard for the bill, and says, as to allegations of the petitions touching the means used to obtain the consent of Mr. G. Talbot, it is to be observed the settlement was made at the marriage, and hopes no undue means was used, it being of great weight, in his opinion, that not one of the parties objects against the settlement.

The present Earl of Shrewsbury does not complain, and Mr. G. Talbot had not given any directions to oppose the bill, and no suspicion of unfair means as to the bishop's making a difficulty: says it is only proved he declined 'till something was done, which he thought reasonable: that an account will be given the bishop had nothing in his thoughts of getting the estate through the blood of the family, his son also declaring the same: observes he need not take notice of what was said of the pedigree; but, if they insist, they are prepared to shew that the bishop's name is mentioned in that brought into the office by the Earl of Shrewsbury, from whom the late duke descended. That this matter ought to be considered as it stood at the time of the marriage-settlement, the birth of the infant son not varying the case. It has been admitted the settlement was made on account of the marriage, which had not been obtained without it; and the infant ought to come in with a restrictive power not to alienate. As to the intention of the late duke, has not the right heir disposed of it as he had a power by having the reversion in fee, and desiring to limit it further? is that contrary to his grace's intention? wherefore the argument of his intention being defeated falls to the ground. As to its being unusual that a tenant-in-tail should be

restrained, says it may be so, but there is nothing in this than what has and may be done when the reason is so strong, though it can't be done but by act of parliament. Mentions the statute de donis was [91] with a view to perpetuate families, that the tenant-in-tail should not alienate. Insists no undue means have been used; that the infant must be considered only as a purchaser under the marriage-settlement, it being owned the bill was a plan of the marriage: and insists the bishop has acted as a fair and just trustee, and hopes the committee will think there is no foundation for opposing the bill.

Mr. Fazakerly, also for the bill, insists there was no opposition, a trustee being by law compellable to execute a trust, and therefore the refusal mentioned of the bishop falls to the ground: thinks the late duke's intention rather confirmed by the settlement than contradicted: for, had his grace designed the estate should have gone to the heirs female, he would then have limited it to the heirs general: insists the bill is necessary in respect of the circumstances of the family. Mentions what an inconvenience it would be if so venerable a title should be stript of the estate; and, in regard he conceives the infant is bound in honour not to alienate, a restraining power can't be thought unjust or unreasonable; and mentions the powers he will have notwithstanding the restraints in the bill, and apprehends, if the infant conducts himself wisely, there is nothing which they can desire more of him. Mentions the case of the annexing an estate to the earldome of Arundell, and that of annexing one to the dukedome of Marlborough, and observes it appeared from what was said by the Lord Fitzwilliam, that the marriage had not proceeded if it had not been for the settlement; and mentions one advantage for the infant, that a doubt which may be started as to his succeeding to the estate will be removed by the bill: observes all are papists between the present earl and the bishop, and therefore thinks it no wonder the bishop desires the bill, and doubts not but it will be passed.

[92] Mr. Mead offers to prove the blanks left in the bill were filled up with the sums, and appeals to the Lord Harcourt as to the time of the filling up the blanks, whose lordship says it was to the best of his remembrance two or three days before last Christmas.

Mr. Lock, his lordship's servant, being examined concerning this matter, says the blanks were filled up about the 23rd of December last.

Mr. Mead then proceeded, and acquaints the committee it was agreed the estate should go with the honour, before the execution of the settlement; and, having liberty, as he says, appeals to the Lord Harcourt as to his lordship's concern in this affair: whereupon the said lord acquaints the committee that Mr. Pigott was a very good, honest, and ingenuous man: that his religion was unfortunate: that he came to his lordship's house after the late duke's death, and, his grace being mentioned, his lordship expressed his surprise at the duke's settlement, in regard it was impossible but his intentions must be defeated, the remainder-men being all papists: that the act against popery was made just before the settlement, 29th April, 1700. Mr. Pigott was also surprised at this matter, and thereupon mentioned a private act for annexing an estate to the earldom of Arundel: his lordship further said one of them, or both, and believed both, expressed their wishes that something of that kind might be done, and soon after went to the bishop and mentioned that act, apprehending from the conversation which he had had with Mr. Pigott that there might be a means by agreement to come into a law. The bishop mentioned this to his son: and, after that, Mr. Pigott and the bishop's son conferred together upon it, and Lord Harcourt was informed the Earl of Shrewsbury and George Talbot were willing, and that Mr. Pigott thought it was the only thing that could be done, in regard they [93] were papists which were in remainder. His lordship being desired the time of this consultation, said near two years ago, above one he was sure. That some time since Mr. Pigott came to see his lordship, and told him that the Earl of Shrewsbury came to him full of resentment and indignation, as he said became one of the blood of the Talbots, and told him the said Pigott that the Bishop of Salisbury, as he heard, had a design to attaint him the said earl; upon which information of Mr. Pigott, the Lord Harcourt said he would acquaint the bishop with it, and did so: and the bishop thereupon declared his detestation and amazement at such a report, and said if their opinions or characters were not so widely different as to make it improper to go to the earl, he would go himself: and desired the Lord Harcourt to go to Mr. Pigott, which he did, and Mr. Pigott told his lordship afterwards that he had mentioned this matter to the earl, who

was satisfied the report was false. The Lord Harcourt further said he has of late been satisfied they were pleased with his services in this case and his good offices, as by Mr. Pigott's letter appears: and his lordship concluded with expressing his belief that he had really served every branch of the family, and declared, if he had forgot anything, he was very willing to supply it.

Mr. Mead acquainted the committee that the settlement remained with the petitioners' counsel until lately it was taken away to be produced on this account, and offers to prove it.

Oliver Marton asked as to the possession of the settlement, and says he is employed as solicitor for the bill: and, being to attend the judges, he was referred to Mr. Pigott to get the settlement produced there, who said he would write in order that it might be delivered, and did afterwards deliver it: and he (Marton) offering to write a note for it, Mr. Pigott said it was no [94] matter, he knew him so well: and thereupon he promised to return it, and shall do it as soon as this matter is over.

Mr. Mead desires to prove the Bishop of Salisbury's pedigree, and offers Mr. Anstis for that purpose, who produces a book belonging, as he said, to the corporation of heralds, which was in the office before he came into it: it was signed in 1675, no officer at that time there being now living: and shews Sir Gilbert Talbot's name at the bottom of the pedigree: he was master of the jewel office. Mr. Anstis then explains the pedigree out of the book, and Sir John Talbot of Laycock was in it, who was grandson of Sherington Talbot, who was grandfather of the bishop.

Mr. Anstis acquainted the committee that he waited on the late Duke of Shrewsbury a little before his death with some ancient deeds, who at that time made this reflection that it was hard so ancient a title should descend without an estate in the family: asked as to the sufficiency of the proof from that book, and thereupon mentions a case in Plowden, where it was allowed, and says he has been told they have been produced as evidence in several courts, and even here: says they have no books of pedigrees attested by the heralds, and that there have been none of this kind a great while. He then read the title of the book, and acquaints the committee there are several pedigrees of nobility in the book. Asked if he shewed the late duke this book, and says he did not, but shewed him some ancient deeds: never heard a syllable mentioned of the bishop on his occasion, and that he went often to the duke on account of some books of Lord Weymouth's (5 vols.), but knows not whether those books mention the pedigree.

The bishop himself produced a pedigree of the duke, which his lordship said he had out of the family.

[95] Mr. Anstis was asked if he found George in that pedigree, and answered no; this being Gilbert's line, John of Longford not there: he comes out very high.

Asked if the bishop was the next heir male, failing George and John and says no, there being several others, if living: it was to be observed this pedigree was from a second brother.

Lord Fitzwilliam acquaints the committee three pedigrees were found in the family, which deduce down to George Talbot, but no mention is made of the bishop.

Mr. Anstis acquaints the committee that it appears by the pedigree the first Earl of Shrewsbury had a son killed: he had two sons, and the title continued in descent to King James the First's time, and then the title went back to Gilbert, there being only daughters: and endeavours to explain the pedigree in a more large and particular manner.

Asked how he came by this book, and says it was in the office as long as he knew it, and found it in the library.

The petitioners' counsel were asked if they controverted the bishop's title, who answered they neither controvert it nor admit.

Proposed to adjourn, and in the mean time that the parties on both sides have access to the pedigrees mentioned, in order for them to make such observations thereon as they shall think proper, and to come prepared to offer any other evidence in respect of this inquiry as they shall think fit: that intimation be given to the petitioners' counsel that they will at next meeting inform the committee, if they can, whom they conceive has a nearer title to the earldom than the bishop: and that his lordship have liberty to proceed at that meeting to make out his pedigree. Agreed to: and Mr. Anstis was desired to assist and attend.

[96] Lord Fitzwilliam informs the committee that one of the three pedigrees he

mentioned is affixed to some rentals or matters which may not be proper for public inspection, and therefore desires to be excused leaving that with the other, but offers to bring it at the next meeting, and in the meantime give an authentic copy of it. Agreed that a copy of it is of no moment, but that the thing itself be brought at the next meeting to be inspected.

Die Martis, 23 Februarij, 1719.

The order of the last committee read. The parties called in. The counsel for the petitioners were asked if they had anything to offer as to the pedigree, and say, as they did before, they had no direction, either to controvert or admit it.

Mr. Mead proceeded in order to make out the Lord Bishop of Salisbury's pedigree; and, as to the book produced by the heralds, mentions some instances besides that in Plowden taken notice of by Mr. Anstis, particularly a late one in the 7th of King William, in a case of *Slaner v. The Borough of Dromwich*, where the heralds' books were admitted as to pedigrees to be as good evidence as parish books of births and burials. He mentions another case, *King v. Forster*, in King Charles the Second's time, where a chart and pedigree was produced, but was objected to as evidence, though the heralds attested their belief upon oath that it agreed with their books; afterwards, the books themselves, being produced, were allowed by the court as evidence; and therefore insists the book signed by Sir Gilbert Talbot is very strong and authentic evidence when produced by the heralds, being such as the nature of the thing will admit or require. Mentions another case in Jones's Reports, Car. 2, where there was a pretender to the earldom of Northland, and Dugdale's Baronies was produced as evidence, but not [97] admitted, and very justly, the same not being of equal force with the heralds' books, but yet that was thought of such weight as to be offered in a court of law. That, in looking into this matter, finds that Francis Earl of Shrewsbury, in 1657, by will, appoints the father of the bishop guardian and trustee of his children: the late duke in his will calls the second son of the bishop (to whom he gives a legacy) his kinsman. The present earl, by declaration under his hand and seal, has owned the bishop is so related to the family that the honour will descend to him upon failure of issue male of George and John Talbot: takes notice of the limitations in the late duke's settlement, and acquaints the committee he has leave to mention the Earl of Sussex, and the Bishop of Exeter, who married the bishop of Salisbury's sister, will declare the notion the duke had of the relation the bishop had to the honour, and what was reputed on that account.

Mr. Fazakerly heard also to the same matter, and hopes allowances will be made as to the nature of the case; that, if the heralds' book be admitted, it will make out the bishop is truly descended: argues as to what will be thought evidence in Westminster Hall from the reason of the thing, and mentions the cases above cited: desires that Mr. Le Neve may give an account concerning the book, which being shewed to him, he acquaints the committee that he has known it several years, that he has been in the heralds' office ever since the year 1690, that the book was then in the office, and takes it to be as authentic as other books of visitation: the reason of making that book was from a commission under the great seal, which he believes is now in a dark closet at the office: the commission was in King Charles the Second's time, for building the office, which was burnt by the great fire, though only one book was then lost: asked how it appears the per-[98]-sons who contributed to that book made any search, or who did, and says he cannot speak of his own knowledge, but has heard great endeavours were used in searching, that the noble persons came themselves to the office, saw the pedigrees, and signed them: asked how came them not to be attested by the heralds, and says they never do attest them, but where they give copies; when a visitation is made, they sign them: asked whether, if a pedigree is above the grandfather, then there must be more proof, but afterwards they take the person's word: asked whether the pedigree in the book was ever shewed to the Earl of Shrewsbury, and whether it is part of his pedigree, and says it is signed only by Gilbert Talbot, but has always been looked upon as the pedigree of the ancient family as well as Sir Gilbert's: asked whether Sir Gilbert's signing it affects the pedigree of the earl, and says it affects it as far as it shews: he then mentioned something of antiquity, though he could not call it a record, which was done by a person of curiosity, and delivered into the heralds' office: that it came to the hands of Mr. Wood, another antiquary; it was prepared by an indifferent person, and deduces the pedigree down to the bishop's father, and is now in Mr. Anstis's hands: asked whether Sir Gilbert was a descendant

from the Talbots of Grafton, and says he was : he also acquainted the committee that he produced a book of like nature for the pedigree of the baron of Hunsdon, and it was allowed ; but knows not whether ever this was so produced.

Mr. Bootle acquaints the committee he has been informed the pedigree delivered in by the bishop and the book disagrees.

Mr. Anstis was desired to give an account of the pedigree as mentioned in the book, and accordingly endeavours to explain it.

Objection being made to the method of proceeding, they were directed to withdraw.

[99] It was offered to the consideration of the committee, whether the words in the bill ought not to be general, that the estate should go as the title would do, without particularizing the bishop.

Another proposition was made, that the judges who had the bill under consideration might be directed to draw a clause that the estate should be annexed to the honour, instead of the particular limitations of it ; and to lay the same before the committee at the next meeting.

Proposed, that the Earl of Sussex and the Lord Bishop of Exeter be now heard as to the reputation of the Bishop of Salisbury's being so related to the earldom of Shrewsbury as is insisted on.

Accordingly, the said earl declared it was the late duke's notion that the bishop was the immediate heir next after John Talbot of Longford.

The Bishop of Exeter likewise acquainted the committee that he had known the family for near fifty years ; that it is thirty-five years since he married the Bishop of Salisbury's sister ; that, upon the occasion of the Earl of Shrewsbury's disinclination to marriage, it was often the discourse of the family and other persons of quality of their acquaintance, who would succeed to the honour if the Earl of Shrewsbury should die without issue ; that the current and unanimous opinion of them was, that, after the several popish branches without issue male, the honour would descend to Sir John Talbot and his issue male, after them to Sir Gilbert and his issue male, that failing, to William Talbot (the father of the Bishop of Salisbury) and his issue male ; and that he never heard this opinion contradicted or doubted of by any body until very lately, within these twelve months.

Proposed that the counsel should be called in and acquainted that the committee are of opinion to make [100] no further enquiry at this time touching the pedigree, in regard the bill may be so framed as to make any such enquiry unnecessary ; and that, therefore, if the counsel for the bill have any thing further to offer in answer to what was advanced by the petitioners' counsel, they should now proceed.

Accordingly, the counsel were called in, and the lord in the chair acquainted them as above, whereupon

Mr. Mead proceeded, and informed the committee that it was admitted that the consent to the bill formerly mentioned was signed, and no force or undue means was, he said, used to obtain it ; that the birth of the infant made no alteration ; and, having repeated some things before mentioned, hoped the committee would agree to the bill.

Mr. Fazakerly speaks much to the same purpose, and expresses his surprise, that, since they insisted on the consent being obtained by undue means, they came so unprepared to make it out, though they had sufficient time and notice : and insists the bill will be of advantage to the infant.

Proposed, that some words in the last covenant in the settlement be read, whereupon the clause expressing the consent, and that the charges of obtaining the bill should be defrayed by the bishop, was read.

Mr. Peer Williams, by way of reply, hopes that, notwithstanding what has been said, the bill shall not have the consent of the committee : then argued in defence of the persons in remainder, and insists the point of law is for them, notwithstanding their religion. The statutes in relation to popery cannot affect the infant who is but lately born : he may conform till eighteen. If the bill passes, it may offer a temptation to go on in the errors of the family : a motive being taken away for his becoming a protestant. Repeats the [101] arguments used before as to the father's consent to be of no moment to the infant : he claims part of the estate by the settlement of the late duke, by way of use, therefore in that he has a legal estate : endeavours to answer what was said by the other counsel, of the bishop's being compellable to execute the trust : speaks likewise as to the objection that the marriage had not otherwise taken effect :

mentions the infant's interest to be at present above twenty years' purchase, but says if the bill passes it will not be worth above ten or eleven: as to the statute *de donis*, mentions divers inconveniences from that law, in respect of the non-payment of creditors and otherwise. That now common recoveries are in use, and divers estates depend upon them: insists there never was an act to make a perpetuity, without the consent of all parties concerned, and then with difficulty; wherefore, the infant being next in remainder after his father, and the next friends of the infant opposing the bill, he hopes it shall not pass.

The Earl of Cardigan acquaints the committee that he had no consideration whatsoever in resigning his trust.

Sir John Stanley asked as to his resigning, and says his trust was only as to a small term, and the reason of his surrender was in respect of the marriage-settlement.

Mr. Bootle heard on the reply, and mentions the old estate in the family is not above 3000*l.* per annum; the rest is the acquisition of the late duke; and, as to what the father does, says that cannot affect the infant, by reason he claims from the late duke: acquaints the committee, that, if he was rightly instructed, there are thirty nearer the estate than the bishop, who is but of the half blood: speaks likewise as to the stat. *de donis*, and says what was mentioned in arraigning recoveries, in which most if not all the estates of the nobility are [102] concerned: mentions his supposition that what was mentioned by the counsel for the bill as to the persons in remainder being papists, was without the bishop's permission, because the trustees were protestants, in whom, until the infant was born, the estate was executed, and, when he was born, it was executed in the infant: that the bill occasions less encouragement for him to become a protestant: aggravates the disadvantage he will sustain if the bill passes, and concludes with hoping the same will not receive the approbation of the committee.

Die Jovis, 25 Februarij, 1719.

The lord in the chair acquainted the committee, that, the counsel at the last meeting having been fully heard, it was then proposed to proceed on the bill; but, it being late, the committee adjourned till this time. Whereupon it was agreed now to proceed on the bill accordingly.

The title was read, and postponed. The preamble began to be read, and the deeds and will which were recited were perused, and found to agree.

The latter part of the preamble, reciting that part of the deed which mentions, that, after the deaths of Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male, the title, &c., of Earl of Shrewsbury will by letters-patents of King Henry 6th descend to the Bishop of Salisbury and his heirs, was read, as also the next recital, of the agreement made to obtain a private act for settling the estate on the said bishop and his issue male, after the present Earl George and John Talbot and their issue male, as likewise the next, being the last recital in the said preamble.

Whereupon it was agreed that all the preamble to those recitals should stand part of the bill; but those recitals to be postponed.

[103] Then the 1st enacting clause was read and agreed to.

The 2nd enacting clause read, which particularly limits the estate.

And, it being proposed to leave out those limitations, it was agreed to leave out from the word (remain) in the 6th line of the 8th sheet to the word (provided) in the 15th line of the 13th sheet.

Proposed, that the judges do prepare proper words to be inserted in the room of the limitations agreed to be left out, to limit the estate, after the uses already agreed to, to the present Earl of Shrewsbury and the heirs male of his body, and, for default of such issue, to the heirs male of the body of John, first Earl of Shrewsbury, so as to make the last limitation to the heirs male of John, first Earl of Shrewsbury effectual so as to restrain George Talbot, John Talbot of Longford, and Gilbert Earl of Shrewsbury, from barring any remainder after their decease. Agreed to, and ordered that the two judges who had the bill formerly under consideration, together with Mr. Justice Blencowe and Mr. Justice Eyre, do prepare the same accordingly.

Die Lunæ, 29 Februarij, 1719.

The order for the judges to prepare proper words to be inserted in the room of those agreed to be left out at the last sitting, read.

Whereupon Mr. Justice Blencowe presented the same to the committee, which being twice read, the settlement made on Mr. Talbot's marriage was perused, to see who were the trustees named therein to support contingent remainders; and, it

appearing to be Richard Lord Lumley and Nevile Ridley, the committee were informed Mr. Ridley was dead.

Then it was agreed to fill the blank with the Lord Lumley's name only, which being done the clause was read entire, and agreed to: 8th sheet, 6th line, agreed [104] to leave out from (remain) to (provided), in the 15th line of the 13th sheet.

Proposed to agree to the clause as amended: but, the same being objected to, the question was put whether the said clause as amended shall stand part of the bill. It was resolved in the affirmative.

The next enacting clause read and agreed to, as also the several enacting clauses following, to the clause which restrains the heirs male of George Talbot from aliening the estate, read.

Moved to reject the clause.

Proposed to alter it so that the infant son of the said George, or any other after his decease, or the decease of John Talbot, may alien the estate after they come of age, if will conform to the act against popery.

Ordered, that the judges who had the bill formerly under their consideration, together with Mr. Justice Blencowe, Mr. Justice Tracy, and Mr. Justice Eyre, do amend the above-mentioned clause, or prepare another in the room thereof, to enact that the said infant, or any other person after the decease of the said George and John Talbot, may as soon as he or they shall attain the age of one and twenty years alien the estate, provided he or they shall conform according to the act to prevent the growth of popery, and continue a protestant until such alienation.

Ordered also, that the same judges do consider whether, as the bill is now penned, the said George and John Talbot and the heirs male of their bodies, if papists, will be enabled to enjoy the estate notwithstanding the act to prevent the growth of popery, or whether the general saving will preserve the right of the next protestant of kin to the estate by that act, and deliver their opinions thereupon to the committee.

Die Jovis, 3 Martij, 1719.

The order made last sitting for the judges to prepare [105] a clause and deliver their opinions on a question proposed to them, read.

The committee were informed that Mr. Justice Tracy had sent the clause, and would have come himself, but was assisting the Lord Chancellor in the hearing of a cause; and thereupon it was directed the said judge should come to the committee with all convenient speed.

Then the clause in the bill where the committee last left off was again read, as was the clause drawn by the judges, and both agreed to.

The several clauses remaining, to the general saving, read and agreed to, with direction to leave out the Bishop of Salisbury's name.

The general saving read, and, Mr. Justice Tracy not being come, the same was postponed.

The postponed clauses in the preamble read, and with leaving out the Bishop of Salisbury's name the same were agreed to.

Mr. Justice Tracy being come, the general saving was again read. And he was asked whether, as the bill now stood, the persons in remainder would enjoy the estate in respect of their religion; and answered that he was doubtful whether it would be sufficient to enable them to enjoy it or not, but he had considered of an amendment or two, which, if their lordships thought proper, would make it clear. Accordingly, he proposed to insert after the word (limited), (shall be enabled to take, hold, and enjoy, and), and, in the same clause, after (settlement), to insert (any law or statute to the contrary thereof notwithstanding).

And the said amendments were agreed to.

Then the judge was asked if the saving would preserve the right which the next protestant of kin might claim, and said it would not.

The general saving read again, and agreed to.

[106] The title, which was postponed, read and agreed to.

Ordered, that the bill be reported with the amendments.

The disentailing deed executed by Bertram Arthur Earl of Shrewsbury was as follows:—

“This indenture, made the 31st day of May, 1856, Between the Right Hon. Bertram Arthur Earl of Shrewsbury and Waterford of the one part, and James Robert Hope

Scott, of, &c., of the other part, Witnesseth, that, in order to bar and defeat all estates in tail-male, or in tail, or quasi estates in tail-male, or in tail, or interests in the nature of estates in tail-male, or in tail, of the said earl in the hereditaments and effects hereinafter described, and all reversions, remainders, estates, interests, powers, charges, liens, and incumbrances at law or in equity, to take effect after the determination or in defeazance thereof, and for limiting and assuring the same hereditaments and effects in fee-simple absolute, to the uses hereinafter limited, the said earl doth by these presents, intended to be duly inrolled in Her Majesty's high court of Chancery, grant and dispose of unto the said James Robert Hope Scott, his heirs and assigns for ever, All the manors, messuages, lands, tenements, and hereditaments whatsoever which by or under or by virtue of an indenture of settlement dated the 31st of October, 1700, between the most noble Lord Charles then Earl and Duke of Shrewsbury of the first part, the Right Hon. Sydney then Lord Godolphin and William Walsh of the second part, and Dr. William Talbot, then Lord Bishop of Oxford, the Right Hon. Sir John Talbot, and John Arden, of the third part, -and the last will and testament in writing of the said Charles Earl and Duke of Shrewsbury, dated the 10th of July, 1814,—and an indenture of settlement dated the 4th of March, 1718, between the Right Hon. Gilbert then Earl of [107] Shrewsbury and the Hon. George Talbot of the first part, the Right Hon. Richard then Lord Viscount Fitzwilliam and the Hon. Mary Fitzwilliam of the second part, the Right Hon. George then Earl of Cardigan, the Right Rev. Father in God William then Lord Bishop of Salisbury, Sir John Stanley, and Charles Talbot, of the third part, the Right Hon. Richard then Lord Lumley and John Talbot of Longford of the fourth part, and Sir John Webb, Bart., George Pitt, and Neville Ridley, of the fifth part,—an act of the sixth year of George the First, intituled 'An act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned,'—and an act of the Forty-third year of George the Third, c. 40, intituled 'An act for vesting part of the settled estates of the Right Hon. Charles Earl of Shrewsbury, in the counties of Salop, Chester, Wilts, Berks, and Oxford, in trustees to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands and hereditaments, to be settled in lieu thereof to the same uses and subject to the same restrictions,'—and an act of the session of the sixth and seventh years of Her present Majesty, c. 28, intituled 'An act for vesting part of the settled estates of the Right Hon. John Earl of Shrewsbury, in the counties of Oxford, Chester, Salop, Worcester, and Stafford, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other hereditaments to be settled in lieu thereof to the same uses and subject to the same restrictions, and for other purposes therein mentioned,'—and any allotments, exchanges, assurances, acts, deeds, and things whatsoever, were or are in any way settled, ratified, confirmed, or assured, either at law or in equity, to any uses or upon any trusts under or by [108] virtue of which the said Bertram Arthur Earl of Shrewsbury and Waterford has now therein any estate in tail-male, or in tail, or any quasi estate in tail-male, or in tail, or any interest in the nature of an estate in tail-male, or in tail; and also all moneys, stocks, and funds, and real or other securities which, or the produce of which, are or is subject to any trust to be invested in the purchase of any lands or hereditaments to be settled to any of the limitations of the same manors, messuages, lands, tenements, and hereditaments, or any of them, with the appurtenances, And the inheritance in fee-simple absolute, and the absolute interest respectively of and in the same, with their and every of their respective rights, royalties, members, and appurtenances, To have and to hold all and singular the said hereditaments and premises hereinbefore described, and hereby granted and disposed of, and every part thereof, with the appurtenances, unto the said James Robert Hope Scott, his heirs and assigns for ever, freed and discharged from all estates in tail-male or in tail, or quasi estates in tail-male or in tail, or interests in the nature of estates in tail-male or in tail, of the said Bertram Arthur Earl of Shrewsbury and Waterford, and all reversions remainders, estates, interests, powers, charges, liens, and incumbrances, at law or in equity, to take effect after the determination or in defeazance thereof, Nevertheless, to the use of the said Bertram Arthur Earl of Shrewsbury and Waterford, his heirs and assigns for ever. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

"SHREWSBURY AND WATERFORD."

The Lord Chief Justice, without expressing any opinion, directed a verdict to be entered for the plaintiff; reserving leave to the defendants to enter a ver-[109]-dict for them upon certain points of law depending upon the construction and effect of the various documents and acts of parliament referred to.

Shée, Serjt., in Hilary Term last, obtained a rule, pursuant to the leave reserved to him at the trial, to set aside the verdict entered for the plaintiff, and instead thereof to enter a verdict for the defendants, on the following grounds,—

1. That Bertram Arthur Earl of Shrewsbury was tenant-in-tail under the settlement of 1700, or under that settlement and the will of the Duke of Shrewsbury: and, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the statute 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section of that statute.

2. That, if Bertram Arthur Earl of Shrewsbury was tenant-in-tail under the settlement of 1718, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the statute 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section.

3. That, having regard to the state of the law affecting Roman Catholics at the time of the passing of the statute 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, Bertram Arthur Earl of Shrewsbury was not restrained by the 8th section of the statute 6 G. 1 from executing a disentailing assurance, and thereby acquiring an estate in fee-simple absolute; and this whether his estate-tail was acquired in one of the several ways above-mentioned or otherwise, and whether he was or was not within the terms of the 8th section of that statute.

[110] 4. That Earl Gilbert was, at the death of the Duke and Earl of Shrewsbury, in 1717, incapable of taking, or, if capable of taking, was, at the date of the settlement in 1718, and also at the time of the passing of the act of the 6 G. 1, c. 29, incapable of making a valid conveyance or settlement of the reversion in fee expectant on the failure of the limitations under which an estate-tail became vested in Bertram Arthur Earl of Shrewsbury, and therefore that such reversion was not by the statute 6 G. 1, c. 29, effectually limited to the use of the person and persons being issue male of John first Earl of Shrewsbury, to whom the earldom of Shrewsbury should descend and come, as in such statute mentioned.

5. That the evidence offered on the part of the defendants was properly received, and that the verdict ought to be entered for the defendants (a).

6. That the evidence offered by the plaintiff of the proceedings in the House of Lords and House of Commons on the bill which terminated in the act of 6 & 7 Vict. c. 28, was not legally admissible (b).

Upon moving for the rule, the learned Serjeant's contention was in substance as follows:—The plaintiff's title rests entirely on an act of 6 G. 1, c. 29, by which a remainder expectant on the determination of the estates-tail granted by a marriage-settlement to the issue male of George Talbot, John Talbot, and Gilbert Talbot, was limited to the heir male of the first Earl of Shrewsbury. The issue male of George Talbot, John Talbot, and Gilbert Talbot having failed on the death of Bertram Arthur, the late earl, and, it being admitted for the purposes of this cause, that the plaintiff [111]-tiff is heir male of the first Earl of Shrewsbury, his title to recover is complete, unless,—first, Bertram Arthur, the late earl, and issue male of George Talbot, held his estate-tail under some other settlement than the one confirmed by the act of parliament,—or, secondly, he (Bertram Arthur) had power to bar his estate-tail (under whatsoever title it was held) by a disentailing deed,—or, thirdly, the parliamentary remainder limited to the heir male of the first Earl of Shrewsbury was not well created, and void. The plaintiff is admitted, for the purposes of this cause, to be descended from a younger brother by the half blood of an ancestor of the late earl who lived in the reign of Henry the Eighth. He could by no possibility have inherited the Shrewsbury estates: he is an entire stranger to the family settlements. He rests his claim on the remainder limited to him by the act of parliament, and on the alleged

(a) This objection was not much pressed.

(b) This ground of objection was removed by the plaintiff's consenting to withdraw from the consideration of the court the documents upon which it was founded.

incapacity of the late earl to disentail. The late earl (Bertram Arthur) was grandson of Francis, the fifth son of George Talbot, third son of Gilbert of Batchcoate, the uncle of Charles twelfth Earl and Duke of Shrewsbury. He was, by descent to him of the remainder in tail which vested in his grandfather, Francis, who died as late as 1820, tenant-in-tail in possession of that portion of the Shrewsbury estates which is situate in the counties of Worcester, Salop, and Berks, under the settlement of 1700 (ante, p. 34), and the will of the Duke of Shrewsbury of 1712 (ante, p. 48). He held the estate of Alton Towers and other estates of the duke in Chester, Stafford, Oxford, Wilts, and Derby, under the conveyance, by direction of the duke, of a trustee (William Talbot, Bishop of Salisbury, ancestor of the plaintiff), to the uses to which the estates in Worcester, Salop, and Berks were limited. These uses are thus recited in the 6 G. 1, c. 29, ante, 65, n.—“After failure of issue male of the [112] Duke, to George Talbot, third son of Gilbert Talbot of Batchcoate, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of George Talbot successively in tail-male; remainder to trustees to preserve contingent remainders; remainder to John Talbot of Longford for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail-male; remainder to Sir John Talbot of Laycock for life; remainder to his first and other sons successively in tail-male; remainder to the Duke, his heirs and assigns for ever.” He was thus tenant-in-tail under the settlement and the will of the duke and the conveyance by the duke’s direction (the trust being a mere trust to raise money and to pay debts, funeral expenses, and legacies, to discharge which the duke left a large amount of personal property, appointing the bishop executor), when he executed the disentailing deed, which barred (if it ever existed) the plaintiff’s parliamentary remainder. And, subject, therefore, to the validity of the plaintiff’s remainder, the question is, whether Bertram Arthur, the late earl, had power, like any other tenant-in-tail, to disentail his estate. The plaintiff admits, that, but for the passing of a private estate-act, 6 & 7 Vict. c. 28, obtained by John, the sixteenth earl, in 1843, he would have had power to do so, had he abjured his religion (the Roman Catholic), and become a protestant: but he says, that, upon the passing of that act, the estates became inalienably annexed to the earldom. Before stating the grounds of defence to the action, it may be convenient to explain, by reference to the 6 G. 1, c. 29, the plaintiff’s case. That act is intituled “an act for annexing the late Duke of Shrewsbury’s estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury’s settlement in order thereto, and for other purposes.” It begins by reciting the settlement of the duke in 1700, and his will in 1712, and that, on his death, the reversion and inheritance of the settled estates descended and came to his heir-at-law, Gilbert, now Earl of Shrewsbury, eldest son of Gilbert Talbot of Batchcoate. It then recites, that, the personal property being sufficient, with a large surplus, to satisfy the duke’s debts, funeral expenses, and legacies, “the settled estates ought to be enjoyed by the said George Talbot and the other persons to whom by the said settlement and will they were limited:” that disputes had arisen respecting the said settlement and will, but that Gilbert Earl of Shrewsbury, being resolved not to marry, had agreed to confirm them, and to marry his brother George to Mary Fitzwilliam, and to make for that purpose such further provision as was usual. It next recites the marriage-settlement of George Talbot with Mary Fitzwilliam, to which Earl Gilbert, George Talbot, Mary Fitzwilliam, her trustees, Lord Fitzwilliam and Mr. Pitt, the Bishop of Salisbury as trustee of the duke, and his eldest son, Charles Talbot, are parties, and by which the estates are settled (subject to certain terms for securing jointures for wives and portions for younger children) to the same uses as those of the duke’s settlement and will, that is,—to George Talbot for life, &c., remainder to his sons successively in tail-male, remainder to John Talbot for life and to his sons successively in tail-male. It then sets out an agreement between Earl Gilbert, George Talbot, the bishop and his son Charles Talbot (afterwards Lord Chancellor, and then Attorney-General to the Prince of Wales), by which,—after a recital that, after failure of the issue male of George, John, and Earl Gilbert, the bishop was next in succession to the earldom,—Earl Gilbert, George Talbot, and John Talbot, in consideration thereof, and of the bishop’s signature to the marriage-settlement, cove-[114]-nanted to make their humble application with him to parliament to obtain a private act, a draft of which was already prepared, to be promoted at the cost and charge of the bishop, for limiting the settled estates to the bishop and his

eldest and other sons (by name) successively in tail-male, and, on failure of their issue, to the heirs male of the first Earl of Shrewsbury. After these recitals, and in the same section, comes the first enactment,—“that the said indenture of 1718, being the marriage-settlement of the said George Talbot and Mary Fitzwilliam, and all the uses, trusts, and estates therein limited and declared, are hereby ratified and confirmed: and that the said George Talbot and his first and other sons, and the heirs male of their bodies respectively, and the said Mary his wife, and the said John Talbot of Longford and his first and other sons and the heirs male of their bodies respectively, and all and every other person and persons and to whom any estate or interest is by the said recited marriage-settlement granted or limited, shall be enabled to take, hold, and enjoy, and shall and may have, hold, and enjoy the said manors, lands, &c., according to the true intent and meaning of the said marriage-settlement, any law or statute to the contrary thereof notwithstanding.” This is plainly an enabling section, —enabling persons to whom by the marriage-settlement estates and interests are granted or limited, to take, hold, and enjoy “the said manors, lands,” &c., “any law or statute to the contrary thereof notwithstanding.” On reference to other parts of the act, it is clear that the “law or statute” notwithstanding which the persons to whom estates and interests were limited by the marriage-settlement were enabled to hold and enjoy the said manors, lands, &c., was, the “act to prevent the further growth of popery,” the 11 & 12 W. 3, c. 4. By the 2nd section of the 6 [115] (G. 1, c. 29, after failure of George and John and their issue male, an estate for life is limited, after the estate-tail limited in the marriage-settlement, to Gilbert Earl of Shrewsbury, and the heirs male of his body, with remainders,—not to the bishop and his sons, as agreed in the marriage-settlement,—but “to the issue male of John, first Earl of Shrewsbury, to whom the said title, honor, and dignity of Earl of Shrewsbury shall, after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of letters-patent of creation of the said earldom descend and come, severally and successively, one after another, as they and every of them shall succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons.” It is under this remainder that the plaintiff claims.

The 3rd section enacts that the persons entitled under the marriage-settlement and the act to life-estates,—that is, George, John, and Gilbert,—should not have power to alien either by themselves or with any other person: that is, that they should not join their eldest sons in disentailing the estates. The 4th, 5th, 6th, and 7th sections are parliamentary sanctions of the jointure for a second wife and of the portions for younger children, as arranged in the marriage-settlement. Then comes the 8th and most important section, —“that neither the first nor any other son or sons of the body of the said George Talbot, son of the said Gilbert Talbot, or of the body of the said John Talbot of Longford, nor any of the heirs male of the bodies of any such son or sons, nor any other person or persons, his or their heirs male of his or their body or bodies, to whom any estate of inheritance of or in the premises, or any part thereof, shall hereafter [116] come, descend, or accrue by force or means of this present act of parliament, shall alien, give, grant, bargain, sell, or otherwise convey away any of the said lands, &c., nor any other thing do which shall or may be to the disherison of the heirs inheritable by force of the said recited settlement or this present act of parliament, or of any person or persons to whom any remainder is limited by the said recited settlement or this present act of parliament, or whereby any of them shall be barred or put from entry into the premises: and that all and every alienation, conveyance, fine, &c., and every other act whatever to be made, suffered, or done by any of the persons respectively to whom the premises are respectively before assured, conveyed, or limited by the said recited settlement or this present act of parliament, shall be for ever after the decease of the alienor utterly void, and shall be so deemed and adjudged in the law: Provided, nevertheless, that neither the first or any other son or sons of the body of the said George Talbot, or of the body of the said John Talbot, or of the body of the said Gilbert Earl of Shrewsbury, nor any the heirs male of the body or bodies of any such son or sons issuing, nor any other person or persons, his or their heirs male of his or their body or bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, shall hereafter come, descend, or accrue by force or means of this present act of parliament, who shall within six months after he or they shall attain the age of

eighteen years take the oaths appointed to be taken instead of the oaths of supremacy and allegiance, 1 W. & M. c. 8, and also subscribe the declaration [against transubstantiation and the invocation of saints] set down and expressed in the 30 Car. 2, stat. 2, c. 1, to be by him or them made, repeated, &c., and who shall from thenceforth continue a protestant until he or they shall [117] attain the age of twenty-one years, shall, after he or they shall attain the said age, and while he or they continue protestants, be disabled from aliening, giving, granting, &c., or otherwise conveying away the said manors, messuages, &c., or any other the premises hereby settled, or any part thereof, but may alien, give, grant, &c., or otherwise convey away the same premises, or any part thereof, as freely and absolutely as he or they might have done if this act had never been made."

The plaintiff's case is, that Bertram Arthur, the last earl, being a Roman Catholic, and not having taken the oath or subscribed the declaration mentioned in the proviso to that section, had not power to execute a disentailing deed, and that therefore the estates in question belong to him (the plaintiff) under the parliamentary remainder, as heir male of the first Earl of Shrewsbury.

1. The answer to the case so set up by the plaintiff is,—first, "that Bertram Arthur Earl of Shrewsbury was tenant-in-tail under the settlement of 1700, or under that settlement and the will of the Duke of Shrewsbury; and, regard being had to the state of the laws affecting Roman Catholics at the time of the passing of the 6 G. 1, c. 29, and the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section of that statute."

That Bertram Arthur Earl of Shrewsbury took under the settlement (of 1700) and will of the duke (1712) the estate-tail which vested, in the life-time of his great-grandfather George Talbot, in his grandfather Francis Talbot, is clear from the pedigree and from the limitations of the duke's settlement. It follows, then, as a necessary consequence, that his estate had all the essential incidents of an estate-tail, and, among them, the incident that the tenant-in-tail is complete master [118] of the inheritance: the remainders being of no account, unless,—first, his estate-tail was qualified by the special provisions of the 6 G. 1, c. 29,—or, secondly, by the state of the law affecting Roman Catholics at the time of the passing of that act. That it was not qualified by the special provisions of the 6 G. 1, c. 29, will be clear after reference to its title, recitals, and enacting clauses, all of which limit its operation to the marriage-settlement of 1718. It is intitled, not that much reliance can be placed on the wording of the title of an act of parliament,—“an act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement (that is, the marriage settlement,) in relation thereto, and for other purposes.” It recites the duke's settlement, without one word detracting from its continuing efficacy: that disputes had arisen touching it, but that Gilbert Earl of Shrewsbury had resolved not to marry, and agreed to confirm it; that the estates settled by the duke's settlement and will ought to be enjoyed by the said George Talbot and such persons and in such manner as the same are thereby settled. It then recites the marriage-settlement of 1718, carefully confining to it the recital and the purposes of the act and its enacting clauses; that Gilbert Earl of Shrewsbury is “desirous” (and his desire must be taken to be limited to the interest which he had, and which was only a reversion defeasible by the tenants-in-tail under the duke's settlement) “that the said settlement should be further extended” (that is, confirmed and extended) “in the manner hereinafter mentioned, and the said manors, lands, &c. should be annexed to and go along with the honor and dignity of Earl of Shrewsbury, for the better and more honorable support of the said dignity and title, which cannot be done without an act of parliament.” It then [119] enacts (s. 1) “that the said indenture of 1718, being the marriage-settlement of the said George Talbot with Mary Fitzwilliam, and all the uses and trusts thereof thereby limited and declared, shall be hereby ratified and confirmed; that all persons to whom any estate or interest, use, or trust is by the said marriage-settlement granted or limited, shall be enabled to take, hold, and enjoy the said manors, lands, &c., according to the true intent and meaning of the said marriage-settlement.” That (s. 3) neither George, John, nor Gilbert “shall alien the said manors, messuages, farms, &c. hereby settled, by themselves or with any other persons:” “That (s. 8) no person or persons to whom any estate of inheritance shall come, descend, or accrue by force or means of this present act of parliament shall alien, &c., or any other thing do which shall or may be to the

disherison of the heirs inheritable by force of the said recited settlements or this present act of parliament." Not a word, from the first line of the act to the last, in which the duke's settlement is mentioned but to confirm it. The estates-tail, therefore, granted and limited by it were not qualified by the 6 G. 1, c. 29. Nor were they qualified by the state of the law affecting Roman Catholics at the time of the passing of that act. The statutes in force against Roman Catholics, as respects their property, at that time was, the 11 & 12 W. 3, c. 4, which passed in the year 1700, a few months before the date of the duke's settlement. Its provisions and its language are most peculiar, and furnish, when properly understood, the key to the whole controversy between these parties. It enacts, "that, from and after the 20th of September, 1700, if any person educated in the popish religion, or professing the same, shall not, within six months after he, she, or they shall attain the age of eighteen years, take the oaths of allegiance and supremacy, and also subscribe the de-[120]claration set down and expressed in the 30 Car. 2, stat. 2, c. 1, to be by him or her made, repeated, and subscribed, &c., every such person shall, in respect of him or herself only, and not to or in respect of any of his or her heirs or posterity, be disabled and made incapable to inherit or take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments within the kingdom of England, &c.; and that, during the life of such person, or until he or she do take the said oaths, and make, repeat, and subscribe the said declaration in manner as aforesaid, the next of his or her kindred which shall be a protestant shall have and enjoy the said lands, tenements, and hereditaments, without being accountable for the profits by him or her received during such enjoyment thereof as aforesaid, but, in case of any wilful waste committed on the said lands, tenements, or hereditaments by the person so having or enjoying the same, or any other by his or her license or authority, the party disabled, his or her executors and administrators, shall and may recover treble damages for the same against the person committing such waste, his or her executors or administrators, by action of debt, &c.; and that, from and after the 10th of April, 1700, every papist or person making profession of the popish religion shall be disabled, and is hereby made incapable to purchase, either in his or her own name or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, lands, &c., within the kingdom of England, &c., and that all and singular estates, &c., or profits whatsoever out of lands, from and after the said 10th of April, to be made, suffered, or done to or for the use or behoof of any such person or persons, or upon any trust or confidence mediately or immediately to or for the benefit or relief of any such person or persons, shall be utterly void and of [121] none effect, to all intents, constructions, and purposes whatsoever." If the estate-tail was qualified by any law at the time the 6 G. 1, c. 29, was passed, so as to deprive it of its descendible qualities, it was by that act. It is difficult to discover from its language the meaning of the act. It is submitted that the act did not qualify the estates-tail of Roman Catholics, but only imposed personal incapacities on Roman Catholics to enjoy them. The descendible qualities of estates-tail limited to them were saved by the express words of the statute,—“in respect of him or herself only, but not in respect of any of his or her heirs or posterity.” Their own legal right to enjoy the estates on conformity was saved by the words “and during the life of such person, and until he or she take the said oaths, and make, repeat, and subscribe the said declaration, the next of his or her kindred which shall be a protestant shall have and enjoy the said lands, tenements,” &c. Their permanent legal resumable interest in their estates was saved by the words giving them a right of action in case of wilful waste against the protestant next of kin. The estates-tail, so long as they were in contingency, and until they became vested remainders on the birth of each successive son of the tenant-for-life during his lifetime, were preserved by the trusts of the settlement, and descended, like other hereditaments, to the heir of such son. The person in whom the remainder-in-tail so vested, and the person to whom it came from him by descent, took an estate-tail, with all the incidents which the duke had attached to it by the very form of his gift. The personal incapacities imposed by the 11 & 12 W. 3, c. 4, did not in the least impair them. When, therefore, the statutes affecting Roman Catholics which passed subsequently to the 6 G. 1, c. 29, viz. the 18 G. 3, c. 60, 31 G. 3, c. 32, 43 G. 3, c. 30, 10 G. 4, c. 7, and 9 & 10 Vict. c. 59, removed all the personal [122] incapacities which the 11 & 12 W. 3, c. 4, had imposed, all the conditions which were attached by it to the “inheriting and taking by descent, devise, or

limitation," and to the "purchasing" of lands by Roman Catholics ceased. Earl Bertram Arthur, who was the first tenant-in-tail after the total repeal (though the 18 G. 3, c. 60, probably, and the 10 G. 4, c. 7, certainly, would have sufficed for the argument) of the 11 & 12 W. 3, c. 4, by the 9 & 10 Vict. c. 59, took by descent from his grandfather, Francis Talbot, the estate-tail in remainder which had first vested in Francis during the life of his father, George. On the death of John, the 16th earl, that estate-tail in remainder became an estate-tail in possession,—perfect, as respects the estate-tail itself, in all the incidents of an estate-tail, and free, as respects the tenant-in-tail, from all personal incapacities. It was an estate-tail, like all other estates-tail, which gave him, as tenant-in-tail, entire dominion over the fee. A condition not to alien an estate-tail, would, according to Lord Coke, be repugnant and void. Bertram Arthur took his estate under the settlement of the duke, not under the marriage-settlement, to which alone the 6 G. 1, c. 29, applied, and which was founded on a reversion which he as tenant-in-tail under a superior title could at any time have destroyed. He was not, therefore, what he would have been had the penal laws remained in force, a person enabled by the 6 G. 1, c. 29, to take, hold, and enjoy an estate-tail limited by the marriage-settlement, "any law or statute to the contrary notwithstanding,"—not a person "enabled to hold and enjoy" (s. 1),—not a person "to whom an estate of inheritance had come, descended, or accrued by force or means of that act of parliament;"—not, therefore, within the 8th section of it. That the estates-tail created by the duke's settlement,—whatever may have been the vague notions of unlearned persons [123]—were deemed by all competent to form an opinion, and those members of the profession who were the advisers of the Talbot family, to be valid and subsisting limitations, notwithstanding the 6 G. 1, c. 29, and the popery laws, is plain from the provisions of the Shrewsbury estate acts, 43 G. 3, c. 40, s. 1, and 6 & 7 Vict. c. 28, s. 20, by which it is enacted that the settled estates authorized by those acts to be sold, should be conveyed to the purchasers, "freed, acquitted, exonerated, and discharged from all the uses, trusts, estates, entails, remainders, charges, powers, provisions, limitations, and agreements in and by the said indentures of the 30th and 31st of October, 1700, and the will of the said Charles Duke of Shrewsbury."

2. The second answer to the plaintiff's case is this,—“that, if Bertram Arthur Earl of Shrewsbury, was tenant-in-tail under the settlement of 1718, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section of that statute.” It is not intended to be admitted that Bertram Arthur was tenant-in-tail under the settlement of 1718; which he could not be, if he took his estate-tail under the older and better title of the settlement of 1700, with power as tenant-in-tail to defeat the reversion of Earl Gilbert, out of which, if the settlement of 1718 really created any estates-tail, they were carved. But, assuming him, for the sake of argument, to have taken an estate-tail under the settlement of 1718, as he would have done if the first settlement (of 1700) had from any cause been void,—it is submitted that the 8th section of the 6 G. 1, c. 29, must be read together with the 1st section, the enabling provisions of which it qualified and restrained. Were it not for the 3rd and the 8th sections, [124] the 1st section would secure to all persons to whom estates of any kind were limited by the marriage-settlement the full enjoyment of and dominion over the said manors, lands, &c. The 8th section qualified, as to estates of inheritance, the generality of that enabling clause, and the two therefore must be read together. So read, it will be manifest that the 8th section restrained none from aliening the said manors, lands, &c., but those whom the 1st section enabled to take, hold, and enjoy the estates-tail granted and limited to them by the marriage-settlement; and that the 1st section enabled none to take, hold, and enjoy such manors, lands, &c., but those who were or should be when their estates-tail fell to them disabled by some other law or statute (the 11 & 12 W. 3, c. 4) to take, hold, and enjoy the said manors, lands, &c. The operation of the 1st section as to estates of inheritance, and of the 8th section, which dealt with none but estates of inheritance, was prospective. It was also contingent,—contingent on the uncertain event of the infant son of George Talbot, in whom an estate-tail in remainder had already vested, and on the unborn issue male of George Talbot and John Talbot, being disabled by a popish education to enjoy their estates-tail when those estates-tail fell to them; and, if that should happen before they attained the age of eighteen and a half, on their not having conformed,

before they exceeded that age, to protestantism, by taking the oaths and making the declaration. If such issue male, when their estates fell to them, should, by having been educated as protestants, or, by conforming, obtain the full enjoyment of their estates, or by the repeal of the laws requiring conformity to protestantism, be under no disability, there would be no restraint: The statutable restraint was to cease when the statutable ability ceased; and the statutable ability was to cease when (and all those [125] popery laws were laws of temporary expediency only) it had no longer a disability on which to operate. This statute, like the 11 & 12 W. 3, c. 4, does not qualify the estate-tail; but merely, the disability of the tenant-in-tail under the 11 & 12 W. 3, c. 4, to enjoy it. To attribute any other operation to it would be to attach by construction a condition to an estate-tail, which, in an ordinary conveyance, would destroy its essential and most valuable incident, and render it repugnant and void. [Cockburn, C. J. The uses of the two settlements being the same as respects the estate-tail, what was the object of repeating them in the marriage-settlement?] The objects of the 6 G. 1, c. 29, may be ranged in three classes,—first, the objects of the family,—secondly, those of their trustee, the bishop, and of his son, the future Chancellor,—and thirdly, those of the legislature arbitrating between them and with reference to the public statute law. The object of the family was, to remedy any defect, by reason of the 11 & 12 W. 3, c. 4, in *George Talbot*, to whom a power of jointuring had been given by the duke's settlement, to exercise that power and secure a settlement to his wife. The difficulty arising from the repetition of the uses of the duke's settlement in the marriage-settlement, occurred to Lord Cranworth when the plaintiff's claim to the earldom was before the committee of privileges in the House of Lords, and was thus dealt with by Lord St. Leonards,—“My noble friend says that he does not understand the settlement of 1718, because there is a limitation of the old uses. But my noble and learned friend will recollect that the settlement (of 1718) states that disputes had arisen, and that Gilbert, who was the heir-at-law, and therefore could take advantage of those disputes, had agreed to confirm the settlement; and, consequently, that was a very good reason for repeating in [126] the settlement of 1718 the limitations which were contained in the deed of 1700. Accordingly they are repeated, that is, by donation from Gilbert.” Another object was, to protect the persons entitled to life-estates, who probably did not need protection (though there was a serious doubt about it then and for some years after), and their issue, from the cupidity of their protestant next of kin. A third was, to induce the bishop to obey,—and that without too much delay, for, the marriage could not take place until the settlement was arranged,—the duke's direction to divest himself of his legal trust-estate in the Chester, Stafford, Oxford, Wilts, and Derby estates, and convey them to the uses to which the estates in Worcester, Salop, and Berks were limited. The objects of the bishop and his son will be found in the extraordinary recital and covenant at the end of the marriage-settlement,—to which effect was attempted to be given in the bill promoted at the bishop's charge, but which the legislature refused to sanction. The bishop's motives were spoken of by Lord St. Leonards, in the House of Lords, as follows:—“It was said of the bishop, that he had made use of the power which he possessed, first, as the protestant heir” (that is a mistake; he was neither protestant heir nor protestant next of kin), “and, next, as trustee of the legal estate, to compel in fact the acknowledgment of his title to the peerage, and to enforce a settlement of the estate upon himself. This, which was very strongly put at the Bar, is no doubt an impeachment of the honor and reputation of the Bishop of Salisbury. Now, the real truth appears to be this, so far as I can make it out, after a very attentive consideration of the evidence; and, in giving this opinion, I speak without any doubt in my own mind about the fact. The further settlement of the estate was what the bishop desired: the bishop did not [127] simply desire a recognition of his title to the peerage, which nobody could have given him, but he desired the substantiality of the settlement of the estate. He wanted the estate: and the question was, how he was to obtain the estate. He had no right whatever to it: he had no claim to it except that he might, or his issue male might, become Earl of Shrewsbury: but he had no right to the estate, and no possible claim to it. How, then, was he to obtain it? There is no ground for saying that he acted fraudulently, in a bad sense: such a statement is not at all justifiable; there is nothing to warrant it. But, to say that he acted as a man of the world, taking advantage of the position in which he stood, for his own interests, is to speak the

truth. There is no question or doubt about it,—that, knowing that he was the protestant heir,—knowing that he had the legal interest (that is, as trustee to convey to the uses of the duke's settlement) in a portion of the property,—knowing that the Roman Catholic branch could not take, and certainly could not annex the estates to the peerage, so as to make them certain,—he took advantage, no doubt, of the position in which he stood. And the evidence shews, that, on being applied to, he said it could not be as they wished. When they talked of the settlement, he said that George, being a papist, could not take the estates, and that he had had an interview with the King with reference to the annexation of the estates, and that it could not take place. But it is perfectly clear that there was no difficulty in its taking place, provided the bishop and his issue male were introduced into the settlement, and gave their consent. And it is clear, that, at that time, it was considered between the parties, that, if the estates were, contrary to law, secured to the Roman Catholic branches of the family, it was to be conceded, as a sort of set-off, that they should be [128] ultimately secured to the protestant branches. Now, that certainly could never be any violation of any wish or intention of the Duke of Shrewsbury, who died a protestant. The Duke of Shrewsbury had provided in his settlement for Sir John of Laycock, who was a protestant. The Duke of Shrewsbury, thereof, if the bishop was rightly placed in the pedigree, would have been the very man who would have made the provision for the bishop which the bishop claimed for himself. Therefore, to represent that the conduct of the bishop in desiring that settlement, was in contravention of the wishes of the duke, appears to me to be entirely without foundation." Lord Wensleydale, adhering more closely to the matter in hand, viz. Lord Talbot's right to the earldom of Shrewsbury, is rather less indulgent to the memory of the prelate. "What effect," he asks, "are we to attribute to this agreement" (the agreement at the end of the marriage-settlement) "to which the bishop was a party in 1718? It is the statement of persons well acquainted with the state of the family, and with all the persons who were nearly related to them: and they all give a clear opinion that they know of no one who stood in the descent in a nearer relation than the bishop. That opinion of theirs, if an honest one, must be correct in point of fact. Now, is there anything in these proceedings to satisfy any reasonable man that they stated what they did not believe to be true, either from some pressure upon them, or for the sake of some advantage which they expected? Now, I cannot go so far as to say that there is anything of that sort to be found in these proceedings. I do not, indeed, consider the bishop as perfectly immaculate in what he did in this case. I think that there is a part of his conduct which is open to objection. I think, in the first place, he may have had a conscientious scruple [129] against being a party to an act of parliament which invested a papist with a right which he had not under the popery laws. He may have thought, that, as a protestant, he ought not to consent to a bill which would repeal the 11 & 12 W. 3, prohibiting any Roman Catholic from holding an estate unless he took the oath of allegiance (and of supremacy, and the declaration against transubstantiation): and he may possibly have consulted the King upon the propriety of assenting to an act of parliament of this nature. But I certainly should have been better satisfied, if he had not made any bargain for himself. I do not think it reflects any credit upon him, that he afterwards made a bargain for himself for settling the estates. I do not approve of his conduct in that respect: but, am I to conclude from that, that the whole of this statement is a fraudulent and false statement? Am I to suppose that his son, afterwards the Lord Chancellor, was a concurring party to that act? Am I to suppose that the bishop himself made a statement that he knew to be untrue, and that Gilbert and John of Longford were parties to the same act? My Lords, I think it is quite out of the question." Supposing, then, Earl Bertram was tenant-in-tail under the settlement of 1718, still he was not within the 8th section of the 6 G. 1, c. 29, —that provision being contingent upon the persons entitled to the estates being, when the estates fell to them, disabled by the public law: he, not being enabled by the 6 G. 1, was not restrained by it.

3. The next point is, "that, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the 6 G. 1, c. 29, and to the acts affecting Roman Catholics passed subsequently to that statute, Bertram Arthur Earl of Shrewsbury was not restrained by the 8th section of that act from executing a disentailing assurance, and thereby acquiring an es-[130]-tate in fee-simple absolute ;

and this whether his estate was acquired in one of the several ways above-mentioned or otherwise, and whether he was or was not within the terms of that section." Assuming, as the plaintiff asserts, that no heir male of the body of any son of George Talbot could after the passing of the 6 G. 1, c. 29, disentail his estates without taking the oath and subscribing the declaration mentioned in the proviso to the 8th section, —the policy and the letter of the law have been so altered by the statutes since passed to relieve Roman Catholics from the penalties and oppressions under which they laboured at that time, that that disability has been entirely removed. [The learned Serjeant here referred to and commented upon the 3 Jac. 1, c. 5, 30 Car. 2, stat. 2, c. 1, 1 W. & M. c. 8, 1 W. & M. c. 9, 11 & 12 W. 3, c. 4, 1 G. 1, c. 12, and 1 G. 1, c. 55.] Now, the 6 G. 1, c. 29, although in part a private act, is in part also a public act. It dealt with matters of the highest public concern. It established an exception, in favour of the members of a powerful popish family, out of the provisions of the 11 & 12 W. 3, c. 4, giving them a capacity to hold and enjoy what no other papists could hold and enjoy. The 18 G. 3, c. 60, relieved Roman Catholics from certain of the penalties and disabilities imposed on them by the 11 & 12 W. 3, c. 4, —amongst others, from the disability to inherit or take by descent, devise, or limitation in possession, reversion, or remainder, any lands," &c. : and substituted a new oath of supremacy for that provided by the 1 Eliz. c. 1. Further relief was afforded to Roman Catholics by the 31 G. 3, c. 32, and the 43 G. 3, c. 20. Then came the Roman Catholic Emancipation Act, 10 G. 4, c. 7, by the 1st section of which it is enacted that it shall not be necessary to take the declaration against transubstantiation as a qualification for the exercise and enjoyment by any of Her Majesty's subjects of any [131] civil right ; and by s. 23, that no oath shall be tendered or required to be taken by his Majesty's subjects professing the Roman Catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may be by law tendered to and required to be taken by His Majesty's other subjects. Some doubts having been suggested as to whether that statute wholly repealed the 11 & 12 W. 3, c. 4, those doubts were set at rest by the 9 & 10 Vict. c. 59. [Cockburn, C. J. Your contention is, that a Roman Catholic under disability by the virtue of the 11 & 12 W. 3, c. 4, could always, by taking the necessary oath and making the necessary declaration, relieve himself from that disability ; and that, before the execution by Bertram Arthur of the disentailing deed, the possibility of doing that whereby he might have relieved himself from all disability had ceased.] And the necessity also. In a word, the 6 G. 1, c. 29, was an exception of the Talbot family out of the 11 & 12 W. 3, c. 4 ; and, that statute being wholly repealed, the exception went with it, and all the restraints attached to the exception. It will be insisted, on the other side, that the effect of the repeal by the 32nd section of the Shrewsbury Estate Act, 6 & 7 Vict. c. 28, of the proviso in the 8th section of the 6 G. 1, c. 29 (ante, p. 80), was to restore the disability created by the 11 & 12 W. 3, c. 4. But, the disability being once gone by force of the 10 G. 4, c. 7, it was gone for ever, and could not be revived in this way. [Williams, J. At the time of the passing of the 6 G. 1, c. 29, I do not find that there was any general enactment disabling papists from aliening their lands.] It was at that time a grave question whether the 11 & 12 W. 3, c. 4, had that effect : the subject was under discussion in *Ratcliff's case*, 1 Stra. 267, 9 Mod. 172. It arose out of the attainder of the Earl of Der-[132]-wentwater. That unfortunate nobleman was tenant-in-tail under the marriage settlement of his father ; and, being a papist, and before he committed high treason, he disentailed the settled estate : and, upon his conviction and execution for high treason, a question arose before the commissioners of forfeited estates, whether Lord Derwentwater, being a papist, was not disabled by the 11 & 12 W. 3, c. 4, from disentailing his estate. If he was so disabled, then the estate was forfeited under the then recent statute of treasons, 1 G. 1, c. 50, which in the case of a tenant-in-tail, created a forfeiture not only of the estate-tail, but also of the fee. If, on the other hand, it was competent to him, notwithstanding the 11 & 12 W. 3, to disentail the estate, then his son, Mr. Ratcliffe, took a vested estate tail. The commissioners (whilst the 6 G. 1, c. 29, was in progress) finally decided that Lord Derwentwater was incapable of disentailing, and consequently that the whole estate was forfeited. But afterwards it was decided, on appeal to the judges, that the converting of an estate-tail into a fee-simple absolute was not a "purchase" within the 11 & 12 W. 3, c. 4, that it was not a new estate acquired by the earl, and consequently that the disentailing deed was valid. [Cockburn, C. J. The 11 & 12 W. 3, c. 4, is,

as you observe, a strangely drawn act: it provides that a person not taking the oaths and making the declaration required shall be incapable of inheriting or taking by descent, &c.: it does not, however, provide that the estate shall go to anybody else, but simply that the next of kin may enjoy. Suppose the next of kin to be a man of high and generous principle, and to decline to take advantage of his position! It is to that high and generous principle that the Roman Catholics of that day owed the enjoyment of their estates,—there being few instances upon record of the protestant next of kin taking advantage of this oppressive law.

[133] 4. The next point is, “that Earl Gilbert was, at the death of the Duke and Earl of Shrewsbury in 1717, incapable of taking, or, if capable of taking, was at the date of the settlement of 1718, and also at the time of the passing of the 6 G. 1, c. 29, incapable of making a valid conveyance or settlement of the reversion in fee expectant on the failure of the limitations under which an estate-tail became vested in Bertram Arthur Earl of Shrewsbury, and therefore that such reversion was not by the statute 6 G. 1, c. 29, effectually limited to the use of the person and persons being issue male of John first Earl of Shrewsbury, to whom the earldom of Shrewsbury should descend and come, as in such statute mentioned. The remainder under which the plaintiff claims was not well created, because the reversion out of which it was carved had no legal existence. The 6 G. 1, c. 29, though, as regards some of its provisions, a public act, is so far as it relates to the Talbot family and their estates a private act, and as such must be construed as any other private conveyance. The recitals shew what the intention of the promoters of the act was. That the reversion was not in Earl Gilbert, or, if it was in him, that he was incapable of dealing with it, is clear when the statute 1 Jac. 1, c. 4 (a), and the evidence respecting Earl Gilbert, are looked at.

[134] The learned Serjeant then proceeded to urge that the documents offered in evidence on the part of the defendants (referred to, ante, p. 31) were admissible, for the purpose of elucidating the meaning of the 6 G. 1, c. 29, and shewing which of the two inconsistent constructions of which that act was susceptible ought to be adopted, and also for the purpose of shewing that Earl Gilbert was a jesuit priest and so subject to the pains and penalties of the 1 Jac. 1, c. 4, s. 6. But the course which the case ultimately took renders it unnecessary more particularly to notice this part of the argument.

Cause was shewn against this rule in Trinity Term, by the Attorney-General (Sir Fitzroy Kelly), Rolt, Q. C., Manisty, Q. C., Ellis, and Hannen: and Shee, Serjt., Sir Richard Bethell, C. Hall, Badeley, and Archibald, were heard in support of it.

The following is a short, and necessarily very imperfect, summary of the points urged on the one side and on the other, and the statutes and authorities referred to

Argument for the plaintiff. The estates in question are inseparably annexed to the earldom of Shrews-[135]-bury by the 6 G. 1, c. 29; and the plaintiff, having by the judgment of the House of Peers succeeded to the title, became entitled to the estates. The grounds upon which it is sought to impeach his right are in substance three,—first, that Earl Bertram Arthur (the late earl) was seised of an estate-tail, not under, but by a title paramount to, and independent of, the 6 G. 1, c. 29, and so not

(a) The 6th section of which enacts “that all and every person and persons under the King’s obedience, which at any time after the end of this session of parliament shall pass or go, or shall send or cause to be sent any child or other person under his or any of their government, into any of the parts beyond the seas out of the King’s obedience, to the intent to enter into or to be resident in any college, seminary, or house of jesuit priests, or any other popish order, profession, or calling whatsoever, or repair in or to any the same to be instructed, persuaded, or strengthened in the popish religion, or in any sort to profess the same, every such person so sending or causing to be sent any child or other person beyond the seas to any such purport or intent, shall for every such offence forfeit to his Majesty, his heirs and successors, the sum of 100l.; and every such person so passing or being sent beyond the seas to any such intent or purpose as is aforesaid, shall, by authority of this present act, as in respect of him or herself only, and not to or in respect of any of his heirs or posterity, be disabled and made incapable to inherit, purchase, take, have, or enjoy, any manors, lands, tenements, annuities, profits, commodities, hereditaments, goods, chattels, debts, duties, legacies, or sums of money within this realm of England, or any other his Majesty’s dominions.”

bound by the clause (s. 8) against alienation, and therefore entitled to disentail,—secondly, that, regard being had to the state of the laws affecting Roman Catholics at the time of the passing of that act, and to the acts subsequently passed for their relief, even supposing Earl Bertram Arthur to have been within the operation of the 6 G. 1, c. 29, s. 8, the prohibition against alienation therein contained is repealed and abrogated,—thirdly, that Earl Gilbert, who was a party to the settlement of 1718, which that act confirmed, had, by reason of the then-existing law against papists, no estate in reversion out of which the remainder under which the plaintiff claims was carved, and so the limitation to the heirs male of the first Earl of Shrewsbury was inoperative.

The legal effect of the statutes in existence with reference to Roman Catholics at the date of the settlement of 1718 and of the statute 6 G. 1, c. 29, was not to restrain them from alienating the inheritance, but merely to prevent them from enjoying estates which might devolve upon them by descent or become theirs by purchase, unless or until they should have taken certain oaths and made and subscribed certain declarations required by those statutes. That this is so, is clear from the cases of *Thornby v. Fleetwood*, 1 Stra. 318, and *Ratcliffe's case*, 1 Stra. 267, 9 Mod. 172. George, the first taker under the settlement of 1700, being of mature age at the time of the death of the duke, and being a Roman Catholic, and having only [136] an estate for life, the first tenancy under the settlement could not take effect at all. The settlement of 1718, and the act of 6 G. 1, c. 29, to which all the then-existing members of this family were assenting parties, substantially repeated the settlement of 1700. The main question is, whether that act was ab initio inoperative and void, or is now repealed. Assuming it to be a subsisting act, it conclusively shews that Bertram Arthur, the late earl, did hold these estates under the parliamentary title thereby created, and not merely under the settlement of 1700: the act recites the two settlements and the will of the Duke of Shrewsbury; and it expressly and in terms ratifies and confirms the settlement of 1718, “and all and every the uses, trusts, and estates therein mentioned, limited, and declared,”—amongst others, the limitation to the heirs male of the body of George Talbot, who took the first estate for life: it therefore expressly comprises Earl Bertram Arthur, who took the estates as heir male of the body of George Talbot. It enables all the heirs male of the body of George Talbot to take, hold, and enjoy the said lands, &c. according to the true intent and meaning of the settlement, “any law or statute to the contrary notwithstanding,”—that is, notwithstanding the operation of the penal laws under which, if Roman Catholics, they might otherwise have been deprived at least of the use and enjoyment of these estates during their lives. And this is confirmed by the language of the 12th section. The 2nd section, under which the plaintiff claims, is clear and express in its terms; it enacts, that, after the decease of George Talbot and John Talbot, and failure of issue male of their respective bodies, Gilbert being deceased, and having no issue, the estates shall be “to the use and behoof of all and every the person and persons being issue male of John first Earl of Shrewsbury to [137] whom the title should after the decease of Gilbert, George, and John, without issue male of their respective bodies, by virtue of the letters-patent of creation descend and come, severally and successively, as they shall succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said earldom, and to be annexed to and descend with the same.” The intent and policy of the act was, to secure to the Roman Catholics earls of this family the enjoyment of these estates, notwithstanding the possible operation of the penal laws in force against those professing that faith: but it was also to annex (for the benefit alike of protestant and of Roman Catholic) the estates inalienably to the earldom; which object could not be effected without an express clause restraining and prohibiting alienation. Accordingly, the 8th section (ante, p. 78) imposes an absolute restraint and incapacity to alien, in terms as clear as language can express. The proviso which follows in that section was repealed (by the 6 & 7 Vict. c. 28) at the date of the disentailing deed, but, for the purpose of this case, the act must be construed as it would have been construed at the time of its passing. The fallacy which pervades the whole argument for the defendants upon this part of the case is, that this 8th section was intended to operate only in restraint of Roman Catholics. It obviously, however, was intended to deprive all who might succeed to the earldom, protestants as well as Roman Catholics, of the power of alienating the estates, except upon the condition of their taking, or having taken, the oath, and made the declaration referred to, with six months of their attaining the age

of eighteen, and continuing protestants until twenty-one, and thence to the time of alienation. The powers, too, to charge the estates [138] are altogether inconsistent and incompatible with an estate-tail in any future tenant-in-tail under any earlier or paramount title.

1. Bertram Arthur, the late earl, then, was tenant-in-tail, not under the settlement of 1700, but under the settlement of 1718, and the 6 G. 1, c. 29. Upon any other supposition, the estates-tail created by the two settlements are wholly different and inconsistent. Except so far as the provisions of the settlement of 1700 were entirely consistent with those of the settlement of 1718, the former is entirely defeated; and, even where the terms are identical, the estates thereby limited must be taken to be held under the later settlement and the act of parliament. As to five of the counties mentioned, —viz. Chester, Stafford, Oxford, Wilts, and Derby, —the settlement of 1700 gives no legal estates at all, except to the Bishop of Salisbury and his co-trustees, of whom the bishop was ultimately the survivor. The estate-tail given to the infant son of George Talbot by the settlement of 1700 was general and uncontrolled by any qualification or condition; that given him by the settlement of 1718 and the statute 6 G. 1, c. 29, s. 1 (ante, pp. 17, 71), is limited to the first son of George “on the body of Mary Fitzwilliam lawfully begotten;” and it is accompanied by many benefits and safeguards against the penal acts affecting Roman Catholics, and subject also to many qualifications and conditions, amongst others, to the restraint of the power of alienation already mentioned. Earl Gilbert, George Talbot, and John Talbot are expressly excepted out of the general saving clause (s. 15). Bertram Arthur was not a stranger: he was within the exception in the saving clause: and he was expressly bound by the act, and took under it an estate-tail subject to all the qualifications and conditions imposed by s. 8. A private act “is as powerful and [139] effective, if duly and properly obtained, as a public one, in transferring the legal estate in lands from one person to another, and in binding all those who are intended to be bound by it, and whose rights are not saved:” see Cruise’s Digest, vol. 5, p. 2, § 29, title “Private Act.” That Earl Bertram dealt with the estates as if he took under the act of parliament of 6 G. 1, c. 29, is evident: for, under the settlement of 1700, he had no power to grant the lease of the 20th of June, 1840, which he appears to have done (ante, p. 4), professing to grant it in pursuance of the powers and authorities vested in him by the estate-act of 6 & 7 Vict. c. 28, and in which lease the subject-matter of the demise is said to be subject to the existing limitation of the 4th of March, 1718, and the statute 6 G. 1, c. 29.

2. There is nothing in any of the statutes whereby the rigour of the penal laws against Roman Catholics was relaxed, —18 G. 3, c. 60, 31 G. 3, c. 32, 43 G. 3, c. 30, and 10 G. 4, c. 7, —to relieve Earl Bertram Arthur from the disability as to alienation imposed by the 8th section of the 6 G. 1, c. 29, or from the conditions contained in the proviso. The general Emancipation Act, 10 G. 4, c. 7, has no reference whatever to the capacity or incapacity of Roman Catholics to hold or enjoy lands: its object was merely to enable Roman Catholics to exercise certain civil rights without taking the old oaths: see *M’Mahon v. Lennard*, 6 House of Lords Cases, 970. [Cockburn, C. J. It is a strange circumstance that you find a provision which is intended to apply exclusively to persons educated in the Roman Catholic religion, imported into this private act of parliament.] That does not alter the construction of the act. It is not because the legislature has by a subsequent act relieved the members of this family, along with all Her Majesty’s Roman Catholic subjects, from the performance of one of the conditions upon which [140] the power of alienation was to depend, that they are therefore to be relieved from the performance of the other. The 6 & 7 Vict. c. 28, — the 32nd section of which expressly repeals the proviso in the 6 G. 1, c. 29, s. 8, but leaves the clause against alienation subsisting and unrepealed, —conclusively shews that the 10 G. 4, c. 7, was not intended to have the effect of repealing the condition in the 6 G. 1, c. 29, upon which alone a tenant-in-tail was to be permitted to alien the estates. But, assuming that, from the altered state of the law, the performance of the condition upon which alone a tenant-in-tail could alienate has become impossible, — whether by the act of God or the act of the legislature, —the only consequence will be that the power to alienate cannot be exercised: *Egerton v. Earl Brownlow*, 4 House of Lords Cases, 1, 120. All parties interested were represented before parliament when that act (6 & 7 Vict. c. 28) passed, and all took benefits under it. [Cockburn, C. J. The fact of Earl John having in 1843 obtained an act of parliament to sanction his

dealing with the estates in a particular way, is not to be taken as a conclusive admission on his part that he could not have dealt with them by virtue of the operation of the 10 G. 4, c. 7, upon the 6 G. 1, c. 29. It might have been thought a safer course to obtain an act of parliament, than to rely upon that which might be subject to very great argument.] The legislature themselves by this act, which passed only fourteen years after the 10 G. 4, c. 7, expressly declare the law to be that Earl John held these estates under the 6 G. 1, c. 29, and subject to the provision in s. 8 restraining him from aliening except upon performance of the conditions therein specified. The act recites, in substance, that the estates were held by Earl John under the 6 G. 1, c. 29, that that act contained certain clauses, and amongst others this clause against aliena-[141]-tion (which is set out in extenso, with the proviso in question), and that, by reason of that restrictive clause,—the legal effect of which is declared to be, to operate an exception from the clause restrictive of alienation in favor of any taker of the settled estates who should within six months after he should attain the age of eighteen take the oaths and subscribe the declaration therein referred to,—Earl John could not alienate without the authority of an act of parliament: and the act then proceeds to give that authority. It is not competent to this or any other tribunal to hold the legislature to have erred in this respect. [Cockburn, C. J. It must be borne in mind that this is not a declaratory enactment, but merely a recital in a private act of parliament,—a recital of the supposed state of the law. If convinced that that recital is erroneous, may we not give effect to our conviction? Are we bound by the erroneous recital?] As between the parties to the act, at all events, it is submitted that the recital though erroneous is conclusive: and no authority to the contrary can be cited. [Cockburn, C. J. Have you any authority for your proposition?] An authority scarcely can be needed for the position that the legislature is not to be assumed to be ignorant of the law. But, be that as it may, if Earl John had the power which Earl Bertram Arthur has claimed to exercise, of disentailing this property, this act was altogether unnecessary. In the face of these recitals and of these enactments, it is impossible to say that the clause against alienation and the proviso in the 6 G. 1, c. 29, s. 8, had already been repealed fourteen years before. Assuming the 10 G. 4, c. 7, to have operated a repeal, this would amount to a re-enactment of the former law. It may be observed that all the acts relating to these estates concur in this error, if error it be: all treat the property as being subject to the con-[142]-ditions imposed by the 6 G. 1, c. 29, s. 8: and under these acts property has been sold and other property purchased and settled to the same uses and subject to the same conditions and restrictions, for a long series of years.

3. Then, as to the alleged incapacity of Earl Gilbert to take or to transmit an estate, by reason of the existing penal laws against Roman Catholics. It is submitted that Earl Gilbert was not by any of those laws disqualified from alienating the reversion, or that, at all events, it was well conveyed by the 6 G. 1, c. 29. Though they might in a certain sense have been disqualified from enjoying property, there was no statute in existence at the time which at all interfered with the rights of Roman Catholics, whether priest or layman, to transmit or to alien their estates in favour of protestants, by any conveyance or act to take effect after their own deaths. The 1 Jac. 1, c. 4, and the 11 & 12 W. 3, c. 4, extended only to the life of the taker, and did not deal with the estate, but merely enabled the protestant next of kin to take the profits during the life of the recusant tenant-in-tail: *Thornby v. Fleetwood*, 5 Bro. P. C. 203, 1 Stra. 318; *Tredway's case*, Hobart, 73; *Rutcliffe's case*, 1 Stra. 267; *Mattem v. Bingley*, Com R. 570, Willes, 75. The 11 & 12 W. 3, c. 4, was dealing with an incapacity to enjoy; the 8th section of the 6 G. 1, c. 29, with an incapacity to alien. [Cockburn, C. J. The former incapacity is defeasible by the party coming in and taking the oath and making the declaration prescribed: the latter is absolute.] The capacity cannot be acquired after the age of eighteen and a half in the one case: in the other it can.

4. The answer to the fourth point mentioned in the rule is threefold,—first, that Earl Gilbert is not proved by legal evidence to have passed beyond the seas and [143] to have been educated as a papist,—secondly, that, if he were a person educated beyond the seas in the popish religion, still the reversion in fee did not descend upon him, and he was competent to alien,—thirdly, that it is perfectly immaterial whether he had any estate or not, for, the legislature, in passing the 6 G. 1, c. 29, were dealing with the inheritance, as it was perfectly competent to them to do.

The following authorities were also referred to:—Viner's Abridgment, Condition (T.), pl. 20, 21, citing Bro. Abr. Condition, pl. 67; ib. pl. 65, citing *Creagh v. Wilson*, 2 Vern. 573; ib. (G. c.), note to pl. 33; ib. (I. c.), pl. 19, citing *Skidmore's case*, D. 262 a., pl. 30; Comyns's Digest, Condition (D. 1; Co. Litt. 206 a., 206 b. 218 a.; *The Duke of Kingston's case* (Mr. Booth's opinion), 5 Cruise Dig. 9; *Biddulph v. Biddulph*, 5 Cruise Dig. 23; *Kinnerley v. Stuart*, 5 Cruise Dig. 26; *Barrington's case*, 8 Co. Rep. 136; *The Prior of Castleacre v. The Dean of St. Stephens*, 8 Co. Rep. 138 a.; *Westby v. Kiernan*, 2 Ambler, 697; *Brett v. Beales*, M. & M. 421; *Doe d. Shelley v. Edlin*, 4 Ad. & E. 582, 589; *Doe d. Cadogan v. Ewart*, 7 Ad. & E. 636, 3 N. & P. 197.

In conclusion, the learned counsel observed, that these estates having been dealt with and enjoyed by each successive Earl of Shrewsbury under and in accordance with the provisions of the act of 6 G. 1, c. 29, from the time of the passing of that act down to the date of the disentailing deed in 1856, it was not competent to any one to question the limitations created or confirmed by the act, or, after so great a lapse of time, to contend that the legislature was mistaken or imposed upon.

Argument for the defendants:—The statute 6 G. 1, c. 29, was based upon and is to be construed with reference to the then-existing penal laws against Roman [144] Catholics. The 8th section is applicable to Roman Catholics alone, and the disabilities with regard to the enjoyment and alienation of their estates expressed in that section have been entirely removed by the subsequent general acts for their emancipation. At the time the act passed, the existing laws with reference to the enjoyment of lands by Roman Catholics, were divisible into three classes or branches,—the first consisted of certain penalties and disabilities with regard to the enjoyment of lands consequent simply upon recusancy (23 Eliz. c. 1, s. 3),—the second, more stringent and penal, were addressed to those who either went or were sent abroad for the purposes of a popish education (3 Jac. 1, c. 4, s. 11),—and the third class consisted of penalties and disabilities created by the 11 & 12 W. 3, c. 4, s. 4.

The condition of the parties with whose rights and interests the statute 6 G. 1, c. 29, was dealing, was this:—Earl Gilbert, George Talbot, and John Talbot of Longford, were all Roman Catholics. Now, the 4th section of the 11 & 12 W. 3, c. 4, describes and legislates with respect to four distinct things,—first, with regard to infants who have been educated in the popish religion, who are under the age of eighteen and a half, and who are entitled to any estate by virtue of any descent, devise, or limitation taking effect with regard to such infants before they attain that age; and they are placed under a disability to inherit or take “by devise, descent, or limitation,” any lands, tenements, or hereditaments during the life of such infant, or until he or she do take the oaths and make, repeat, and subscribe the declaration formerly spoken of by the statutes. This was a state of law which in all probability became applicable to the issue of George Talbot and John Talbot of Longford, should there be any,—because, under the limitations of the set-[145]-tlement of 1700, the will of the duke, and the settlement of 1718 (to the father, that is, to George for life, remainder to his first and other sons, &c.), the children of George and John Talbot would take as purchasers. A devisee was held to take as a purchaser under that clause: *Fane v. Fletcher*, 1 P. Wms. 352; *Hill v. Filkin*, 2 P. Wms. 6, 9 Mod. 154, 10 Mod. 481, 536; *Curriek v. Errington*, 2 P. Wms. 361; *Davers v. Daves*, 3 P. Wms. 42; *Rooper v. Ratcliffe*, 5 Bro. P. C. 360; *Jones v. Meredith*, 2 Com. Rep. 661; *Fairclaim d. Borlace v. Newland*, Vin. Abr. (I. 7), pl. 4.

By operation of this section, George and John Talbot, who were adult persons at the time when the settlements and the will would take effect, were incapable of taking any estate whatever under and by virtue of the limitations contained in those instruments. Gilbert Talbot being declared incapable of taking by devise or by purchase, it followed as a matter of course, that, at the time of the passing of the 6 G. 1, c. 29, George Talbot and John Talbot were by force of that enactment incapable of joining for the purpose of alienation in any common recovery, which alone would be the form of alienation which could bar remainders or reversions expectant upon the estates-tail limited to their children.

In *Ratcliffe's case*, 1 Stra. 267, the tenancy in tail was created under and by virtue of an indenture of lease and release dated in March, 1687 (anterior, therefore, to the day mentioned in the 11 & 12 W. 3, c. 4, the 10th of April, 1700), and therefore exempted from the operation of the subsequent part of s. 4. In *Pye v. George*, cited by Sir E. Northey, in the argument of *Thornby v. Fleetwood*, 1 Stra. 318, 364, it is said

that "the subsequent words controlled the former, so that they carried away no more than a permanency of the profits, and the legal estate descended notwithstanding."

[146] The severity of the penal laws against Roman Catholics was relaxed by various acts,—11 G. 2, c. 17, 18 G. 3, c. 60, 31 G. 3, c. 32, 43 G. 3, c. 30, and 10 G. 4, c. 7,—the 18 G. 3, c. 60, operating a conditional repeal in favour of Roman Catholics of the 11 & 12 W. 3, c. 4, provided they took the oaths prescribed by that statute; and the general Emancipation Act, 10 G. 4, c. 7, abolishing the oaths of Roman Catholics, and providing that persons of that persuasion shall have a general liberty to hold and enjoy lands.

The following authorities were also referred to:—*Sir Anthony Mildmay's case*, 3 Co. Rep. 41 a.; Grotius, book 2, ch. 6, § 1; Corley's Statutes against Papists; Bacon's Abridgment, Condition, Statute; Dwaris on Statutes, 269; *Pelham v. Fletcher*, 6 Bac. Abr. 130; *Chance v. Adams*, Hardres, 324; *Hervey v. Aston*, Willes, 83; *Vane v. Fletcher*, 2 P. Wms. 352; *Woolmorton v. Burrows*, 1 Sim. 512; *Dore v. Gray*, 2 T. R. 358; *Woodward v. Cotton*, 1 C. M. & R. 44; *The Churchwardens, &c., of Deptford v. Sketchley*, 8 Q. B. 394; *Russell v. Ledsam*, 14 M. & W. 574.

COCKBURN, C. J. This case has occupied the court so long a time, and has had so much light thrown upon it by the elaborate arguments of which the court has had the assistance, and we have had such full and abundant opportunity and materials for the consideration of the great questions involved in it, that we have been enabled to come to a clear and decided opinion, and I think, therefore, that we ought not, merely on account of the magnitude of the interests involved, to delay pronouncing our judgment, or, by any apparent hesitation, to seem to give countenance to the supposition that any doubt exists in our minds, when, in point of fact, none whatever does exist. We feel, therefore, that we ought at once to pronounce our judgment.

[147] The great question in the case is, whether Bertram Arthur, the late Earl of Shrewsbury, being tenant-in-tail in possession of the estates in question, was competent, by executing a disentailing deed, to put himself in a position to aliene these estates as he might think proper. This question will depend ultimately upon the construction to be put upon the provisions of the Shrewsbury Estate Act of the 6 G. 1, c. 29. The plaintiff contends, that, by force of that act, aided by the repeal of the qualifying provision of the 8th section of the more recent Estate Act of the 6 & 7 Vict., inalienability was, by legislative enactment, annexed to the estate-tail. The defendants join issue with the plaintiff upon that question. But, before they come to this great battle ground, the defendants take two positions, their success in either of which would altogether preclude the necessity of entering into the consideration of the effect of the statute 6 G. 1. It becomes, therefore, necessary to deal with this part of the controversy in the outset.

In the first place, the defendants affirm that Earl Bertram Arthur was seised of these estates under and by virtue of the prior settlement of the Duke of Shrewsbury of the year 1700, which they allege to have been a co-existing and co-ordinate settlement; and they contend, that, although it may be true, that, so long as they were under the necessity of resorting in the then state of the law to the posterior settlement of 1718, and the act of parliament which confirmed it,—which, taken together (as it is a form of expression which appears to me both compendious and convenient), I shall, throughout the observations I am about to make, call "the parliamentary settlement,"—for protection and immunity from the existing law, they were not in a condition to alienate; yet, when by the alteration of the law affecting Roman [148] Catholics it was no longer necessary to seek protection under that parliamentary settlement, then, as the other remained in independent and unimpaired force and vigour, and as the late Earl was tenant in tail under it, without any incapacity as to alienation attaching to him, it was competent to him to bar the entail and dispose of the estate. This position is met by an antagonistic one on the part of the plaintiff, that the settlement of 1700 was entirely abrogated, superseded, and set aside by the posterior parliamentary settlement. And, if this contention of the plaintiff is right, no doubt it follows, as a matter of course, that, if the effect of the 6 G. 1 was to prevent alienation, unless that provision has been done away with by any subsequent alteration of the law, the late Earl was not competent to alienate. It becomes, therefore, a preliminary question of very great importance how far the settlement of 1700 continued in force.

On the part of the defendants, we are told with truth that there is not in the

6 G. 1, c. 29, any express repeal or annulling of the settlement of 1700. It is observed, and truly, that, in the settlement of 1718, Earl Gilbert, who had succeeded the Duke in the dignity of the earldom of Shrewsbury, declares his desire to confirm the settlement of 1700; and, further, that, in the act of the 6 G. 1, the settlement of 1700 is referred to as one the provisions of which it was the intention of Gilbert Earl of Shrewsbury to carry into effect. And we are further told, with truth, that, in the subsequent Shrewsbury Estate Acts, the settlement of 1700 is referred to as a still-subsisting settlement. On the other hand, it is pointed out to us that the provisions of the two settlements are irreconcilably at variance: and that it cannot, therefore, be conceived that those who were parties to the later settlement could have intended that the first should continue to be in force. [149] And it is observed, with equal truth, that, in the later Shrewsbury Estate Acts, the prevailing power of the parliamentary settlement is assumed: and that power is taken by these acts to alienate portions of the estates, on the assumption that the restraint on alienation contained in the 6 G. 1 was still subsisting and operative, and binding on the tenant-in-tail.

Various instances of discrepancy between the two settlements were brought to our attention by the counsel for the plaintiff. I pass over the minor points of difference, and direct my attention particularly to those which are more immediately material and important to the present inquiry: and I find two so remarkable and important, that upon them I found my opinion that it is quite impossible that the first of these two settlements can, at least in its integrity, be considered as subsisting. The first point of difference is the very important one that there is introduced between the estate-tail and the estate in reversion a new limitation to a new set of tenants-in-tail. Now, suppose for a moment that that which might have happened within a very few years from the date of the later settlement had in point of fact then taken place, instead of having happened, as it has done, after an interval of a century and a half,—suppose that the intermediate estates had been determined by failure of issue: that George and John, the tenants-for-life, had died having had no issue, or that their issue had died: and that then the heirs of the body of the first Earl of Shrewsbury, who had been introduced between the former tenants-in-tail and the reversionary estate in fee, had claimed, under the later settlement, possession of the estates: while, on the other hand, the heirs of the Duke of Shrewsbury, who were entitled to the reversion under the settlement of 1700, had come forward to assert their claim, on the ground that the settlement of 1700 [150] was still a subsisting settlement,—you would here have had conflicting claims which could not by any possibility have been reconciled. But there is, as regards the present inquiry, a still more striking discrepancy between the two settlements. I assume, for the purpose of this part of the inquiry, that the effect of the parliamentary settlement is to render the estate inalienable by the tenant-in-tail. I assume this, at present, only for the purpose of this part of the inquiry; it is a matter which I shall have to consider hereafter: but, assuming that this new condition was introduced by the parliamentary settlement, the two settlements become wholly inconsistent and irreconcilable. By the first, the tenant-in-tail would have had, as every tenant-in-tail has by law, as incidental to his estate, the power of barring the entail by suffering a recovery, and so disposing of the estate: whereas, by the new settlement, he was deprived of this most important right.

What, then, is the conclusion to be arrived at? I do not think it necessary to adopt either of the two antagonistic propositions of the plaintiff and defendants to the full extent to which those propositions have been sought to be carried: it is enough, for the present purpose, to say, that, even assuming the settlement of 1700 to have been left as a subsisting settlement, so far as its provisions were reconcilable with those of the later settlement, it is impossible, looking at these manifest and striking inconsistencies, or, I should rather say, irreconcilable contradictions, not at least to go the length of saying, that, if the two settlements are to be considered as co-existing and co-ordinate, the later one, where it alters or qualifies the first, must be considered as the dominant settlement,—as over-riding the earlier one, and making it subordinate to the terms of the later. An analogy to this will [151] be found in the well-known common case where an act of parliament, though not expressly repealed by a subsequent act, is, by being brought into contradiction with it, virtually repealed either in the whole or in part. We all know, that, where a later act of parliament contains provisions inconsistent with those of a former act, the effect is a virtual repeal, so far as the inconsistency goes. So, here, if these two settlements cannot be

reconciled with one another, then, assuming them to have a concurrent existence, the later must prevail over the earlier, where their provisions are inconsistent. This is quite enough for the present purpose: because, if here the later settlement has imposed the condition of inalienability upon the estate of the tenant-in-tail, even granting that the settlement of 1700 is still in existence, it must be taken to be in existence, subject to the conditions which the later settlement has introduced. And I have the less hesitation in adopting this view, because it seems to me to be perfectly consistent with what I find to have been the course pursued in the later legislation with regard to these same estates: and, as the successive possessors of this title and these estates no doubt had recourse to and had the advantage of the best legal assistance that the profession afforded, when we find that in all the subsequent legislation two things have been assumed,—a concurrent existence of both the settlements, but also the dominant power of the later one over the earlier,—so that, although the settlement of 1700 might be in existence, and it might be necessary to refer to it in the subsequent Estate Acts, yet it was always assumed that the later settlement imposed the condition of inalienability on the estates; and, when we find that the legislature has upon all occasions adopted this view in the Estate Acts which have since been passed, I think all this goes a very long way to confirm the view I am [152] now taking and propose to act upon, namely, that, without deciding whether the one settlement superseded and abrogated the other (though I am bound to say, that, if it were necessary to decide that question, the inconsistency between the two appears to be so irreconcilable that I should be prepared to go the length of saying that the later did supersede and abrogate the former), yet, assuming with the counsel for the defendants that the settlement of 1700 is still subsisting, it must be taken to be controlled and limited by the subsequent settlement, and therefore, if, according to the latter, these estates cannot be alienated, it follows that this provision operates upon the settlement of 1700, and renders alienation under it impossible. This disposes of the first point made by the defendants, and brings us to the second.

The second ground the defendants take is, that, assuming that the parliamentary settlement would, if valid, have the effect of rendering the tenant-in-tail incompetent to disentail the estate and aliene it, yet the settlement of 1700 is not affected by the parliamentary settlement, because the latter was altogether invalid. This is put on two grounds: and I think the best form in which I can put the argument for the defendants is to put it in the shape of this alternative proposition,—the estates created by the parliamentary settlement must be taken either to have been carved out of the reversionary estate in fee, or to have been created at the expense of the estate-tail, or to have been formed out of both. If they were carved out of the reversionary estate in fee, then, say the counsel for the defendants, the parliamentary settlement fails, because, the reversion being to the right heir of the Duke, and Earl Gilbert being such right heir, Earl Gilbert was incapacitated by the then-existing state of the law from taking any such reversionary estate, and, [153] therefore, he being the granting party, and the act having been obtained at his instance, he could not grant or be a party to the granting of that which was not in him. And if, on the other hand, the estate was either created at the expense of the estate-tail, or was created out of the estate-tail and the reversionary estate in fee, then, as the tenant-in-tail was an infant, and was not a party to this act, and the act was a private Estate Act, it would be inoperative to affect his rights, and consequently as against him was of no effect. This I understand to be the alternative proposition contended for on the part of the defendants. The first point depends upon the question of fact whether Earl Gilbert, in whom the reversion in fee would otherwise have been at the time of the parliamentary settlement, was a Jesuit priest, and had resorted to an establishment or college of Jesuits abroad for the purpose of being instructed in the Roman Catholic religion and becoming a Jesuit, so as to be within the disabling statute of 1 James I, c. 4. That depends upon certain evidence tendered by the defendants in this cause, and admitted subject to any exception which might be taken in this court. In the view I take of the case, it is not necessary to determine the question of the admissibility of this evidence. Any court which should be prepared to give effect to the position taken by the defendants would necessarily have to determine the question of the admissibility of the evidence: but, prepared as I am to hold, on the grounds I am about to state, that the fact of Earl Gilbert having been within the 1 James I, c. 4, would not affect the question now before us, I think it unnecessary to determine the

question of the admissibility of the evidence; and I shall therefore assume, for the purpose of the observations which I am about to make, that Earl Gilbert was at the time of the settlement of 1718, and of [154] the act of parliament of the 6 G. 1, c. 29, within the incapacitating provisions of the statute of 1 James 1, c. 4.

Assuming this, the first question which arises is, whether that statute would have the effect of incapacitating Earl Gilbert from taking a reversion in fee, so as to be a party to carving a further estate out of it. Then comes a question of a different nature, but not of less importance, namely, whether the estate with which we are now dealing was in point of fact carved out of the residuary estate in fee of Earl Gilbert.

As regards the first branch of the question, I am of opinion that the effect of the statute was not to incapacitate Earl Gilbert from being a party to this settlement and the act of parliament which establishes it. I abstain, however, for the present, from stating the grounds of my opinion on this point, as I shall have to enter at large, at a later stage of my judgment, into the question of the effect of this and other statutes on the capacity of Catholics to aliene their estates.

As regards the second branch of the question, though it is true, as was observed by my Lord St. Leonard in the House of Lords, that, as regards the estate in remainder introduced for the first time by the parliamentary settlement in favour of the heirs male of the body of the first Lord Shrewsbury, an estate was created at the expense of the reversionary estate in fee, and that estate was in fact carved out of the estate of Earl Gilbert, who was the reversioner in fee; yet, as regards the estate with which we have now immediately to deal, it appears to me plain that the estate was not one taken out of the reversion, but one created at the expense of, or at all events substituted for, the estate-tail created by the settlement of 1700. The settlement of 1700 gave an estate-tail to the eldest son of George. So does this parliamentary settlement; but with this difference, that, whereas the settlement of [155] 1700 gave an estate-tail with the ordinary incident of such an estate, the capacity to alienate upon suffering a recovery, the parliamentary settlement either created a new estate-tail, taking from it that incident, or, if the settlement of 1700 was kept alive, and the two are to be taken together, it took away that incident of the former estate-tail, and annexed to that estate the condition of its being for the future inalienable. It appears to me, therefore, a fallacy to say that the estate which we are now dealing with, namely, the estate-tail in the heirs male of the body of George, and afterwards in those of John, created by the parliamentary settlement, was an estate carved out of the reversionary estate in fee of Earl Gilbert. But it is the prior estate-tail, not the estate-tail in remainder carved out of the reversionary estate, of which Earl Bertram Arthur has taken upon himself to dispose.

But, even if the defendants' contention were right, and this estate was an estate taken out of the reversion of Earl Gilbert, and even if Earl Gilbert was incapacitated by the effect of the statute of James 1, as contended for on the part of the defendants, I should still say that that would not avail the defendants as a ground why this act of parliament should be held to be inoperative; and for this reason,—wherever the reversionary estate was, and it must have been somewhere, parliament took upon itself to deal with it, and in the plenitude of its legislative power disposed of it; and, if parliament thought fit to deal with this estate as the estate of a man who was capable of disposing of it, it is not for a court of law to entertain the question whether or not, if the reversionary estate had come into possession, some one might have asserted a right against the party in whom the reversionary estate was assumed by parliament to be, on the ground of his incapacity to take.

[156] And it should be observed that this objection is not taken by any one whose rights have been affected by parliament treating the reversionary estate as in Earl Gilbert, and disposing of it. It is no representative of Earl Gilbert who upon the present occasion asserts a right; it is no representative of the Duke of Shrewsbury who now holds these estates against the plaintiff: but persons deriving title from the tenants-in-tail, whose estate was anterior to the reversionary estate, and whose rights, except so far as they are established by the act, are expressly excepted from the saving clause.

This brings me to the other head of objection. It is said, that, assuming that these were estates taken from the estate of the tenant-in-tail, the tenant-in-tail was not a party to the act. Now, in one sense, he certainly was not a party to the act;

for, far from being a concurring party to it, he opposed it by his *prochein ami*. His uncle, Lord Fitzwilliam, appeared as his next friend, before the committee of the Lords. Objections were taken on his behalf to the proposed parliamentary settlement, upon the ground that he was tenant-in-tail under the settlement of 1700, and that, as such tenant-in-tail, he would have a right to bar the entail and aliene the estate, and that this right was about to be taken away from him by the bill. On the other hand, not only was the whole question gone into before the committee, and the rights of the infant fully understood there, but the matter had previously been referred to two judges, who, according to the practice which then prevailed in these matters, took all the evidence, had the settlement before them, and were made perfectly acquainted with the infant's rights. They reported upon the bill to the Lords, before whose committee the whole matter was again gone into and the evidence taken anew: so that the committee were [157] in full possession of all the facts,—of the existence of the infant heir, of the rights which he had under the settlement of 1700, and of the manner and extent to which those rights were about to be affected by this bill. After which, parliament, with a full knowledge of all the circumstances, deliberately and advisedly passed an act which contained a provision that the rights of that infant as to alienation should be for ever extinguished, except upon a certain condition. Nay, more, it introduced this latter condition for the special protection of his rights, so far as it thought fit to preserve them; and, having thus established and limited his rights as it thought fit in its discretion, it specially excluded him from the operation of the saving clause. It seems impossible to contend that the act of parliament is not binding and conclusive as to the rights of a party so circumstanced.

We have been reminded, indeed, that a private act of parliament has been said upon high authority to be little more, if anything, than a private conveyance between those who are parties to it; and, to a certain extent, I agree in that proposition. Recitals in a private act of parliament could never be held to bind persons who were not parties to the act. Provisions, however general in their terms, could not be held to affect the rights of parties who were not before parliament, and whose rights were never intended to be affected, more especially where there is a saving clause which preserves the rights of all parties save those excepted from it. Thus, if a tenant-for-life should obtain power to convey an estate in fee, no court would hold that it could have been the intention of the legislature to bind a remainder-man who was not a party to the act, or named in it, or excepted from the saving clause. But, if an act of parliament in positive and express terms professes to affect and does affect the rights of [158] parties named in it and excepted from the saving clause, it is quite impossible, as it seems to me, to maintain that a court of law is not bound to give effect to the provisions of such an act, although such parties may not have concurred in passing it.

This distinction in point of principle is illustrated by *Barrington's case*, 8 Co. Rep. 136, and by the cases of *Westby v. Kiernan*, 2 Ambl. 697, and *The Provost of Eton College v. The Bishop of Winchester*, 3 Wils. 483. The effect of *Barrington's case* is stated in Cruise's Digest, vol. 5, title, "Private Act," § 31, in these terms:—"In a case where the question was whether the act of the 22nd of Edw. 4, c. 7, which under certain circumstances authorises the proprietors of grounds in forests, after a felling, to inclose them without the King's licence, for seven years, to preserve the springing wood, should be construed so as to exclude persons having right of common; Lord Coke upon this point reports that the judges of the court of Common Pleas were of opinion that the commoners were not bound by the statute, for the following reasons. It appears by the preamble between what persons, and for and against what persons, this act was made; and the parties to this great contract by act of parliament are the subjects having woods, &c., within forests, chases, and purlieus, of the one part, and the King and the other owners of the forests, chases, and purlieus, of the other part; so that the commoners are not any of the parties between whom this act was made." Therefore, in that case, the act was held not to extend to dispossess the commoners of their rights of common: but, if it had appeared by the preamble, or by the enactment of the legislature, that the commoners had been persons whose rights the statute had been intended to affect, and did affect, however prejudicially, a court of law could not have held itself warranted in limiting the operation of the [159] clear and positive enactments of the statute, although it was a private act of parliament. The matter receives further elucidation from the case of *The Edinburgh Railway Company v.*

Wauchope, 8 Clark & F. 723. Lord Campbell there says: "I think it right to say a word or two upon the point that has been raised with regard to an act of parliament being held inoperative by a court of justice because the forms prescribed by the two Houses to be observed on the passing of a bill have not been exactly followed. There seems great reason to believe that an idea to that effect has prevailed to some extent in Scotland, for it is brought forward in these papers as a substantive ground of objection to the applicability of the later act of parliament, the objection being, that, this act being a private act, it is inoperative as to the pursuer, because he had not proper notice of the intention to apply to parliament to pass such an act. The defence was entered into in the court below, and the fact of want of notice was made the subject of inquiry; and the Lord Ordinary in the note appended to his interlocutor gave great weight to this objection. He said, 'he is by no means satisfied that due parliamentary notice was given to the pursuer previous to the introduction of this last act; undoubtedly, no notice was given to him personally, nor did the public notices announce any intention to take away his existing rights. If, as the Lord Ordinary is disposed to think, these defects imply a failure to intimate the real design in view, he should be strongly inclined to hold, in conformity with the principles of Donald (27th of November, 1832), that rights previously established could not be taken away by a private act of which due notice was not given to the party meant to be injured.' His Lordship seems, therefore, to have been of opinion, that, if this act did receive the construction that it would clearly take [160] away from Mr. Wauchope the right to this tonnage, it would have had that effect only if due notice had been given to him of the introduction of the bill into the House of Commons; but, that notice not having been given to him, it could not have such effect, but became wholly inoperative. I cannot but express my surprise that such a notion should ever have prevailed. There is no foundation whatever for it. All that a court of justice can do is, to look to the parliamentary Roll; if from that it should appear that a bill had passed both Houses, and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into parliament, nor into what was done previous to its introduction, or what passed in parliament during its progress in its various stages through both Houses."

These observations illustrate the question which is now before us, and make it clear, that, if an act of parliament, by plain, unambiguous, positive enactment, affects the rights even of parties who were not before the House (those parties being clearly pointed out by the bill, and expressly excepted from the saving clause), it is not for a court of law to consider whether the forms of parliament have been pursued,—whether those provisions which the wisdom of either House of parliament has provided for the prevention of any deception on itself, or of injury to the rights of absent parties, have been followed: it is enough for us if the provisions of the act are clear, express, and positive: if they are, we have only to carry the act into effect. It seems to me, therefore, that, as on this occasion the infant tenant-in-tail was represented before parliament, and the true state of the settlement and the rights of the parties taking interests and estates under it were brought to the attention and knowledge of the committee and of the legislature, and then the estate of the [161] infant tenant-in-tail taken under the former settlement was dealt with by this act, and the rights of the infant excepted from the saving clause, he and those who come after him as his representatives must be bound by the act.

This, then, brings us to that which is in fact the great question between these parties,—namely, the effect of what I have termed the parliamentary settlement. The question is, whether by the act of parliament the tenant-in-tail is prevented from disentailing the estate and alienating it as the late Earl has done. Now, if we had simply to deal with the clause of the act of parliament upon which this question arises (the 8th section of the 6 G. 1, c. 29), the matter would be much more free from difficulty than it perhaps now is. But we are told that we must not construe and give effect to the clause by reference solely to its terms. We are asked to interpret and give effect to it, looking at it not merely as an enactment specially intended to affect these estates alone, but as a provision of the general public law affecting the rights or disabilities of Catholics, introduced into this private act of parliament to keep it in harmony with the general law. It is said, that, whereas the persons who were to take estates under the settlement were Catholics, and therefore, by the law of the land, as it then stood, incapacitated from taking these estates, and the 2nd section had been

introduced to relieve them from that disability, and to give them an exemption from the then state of the law, the 8th section was added for the purpose of preventing the boon and privilege thus conceded from operating to the extent of enabling them to alienate the estate contrary to the existing law, by which the power of alienation was taken from Roman Catholics. The importance of this contention of the defendants is this: they say, that, this having been the [162] reason why this clause was introduced into this act of parliament, so soon as, by the alteration of the general law of the land, the disabilities of the Catholics were removed, the clause fell to the ground by the effect of the general legislation, and the tenant-in-tail held the estate relieved from the clog or incumbrance which had before been imposed upon it.

Now, this argument would be a very much more cogent one if it were the fact, that, by the then-existing laws relating to Roman Catholics, the power of alienating their estates had been taken away. But, upon carefully looking into the acts of parliament at that time affecting the rights of Catholics with reference to property, I cannot find that there is any thing that either directly or indirectly prohibited them from alienating their estates. And it would have been strange if it had been so; for, the very policy and object of the law being to prevent the real property of the country from accumulating in the hands of the Catholics, whereby they might obtain power and influence, it would have been contrary to that policy to enact, that, if an estate once got into a Catholic, he should not be capable to pass it away and get rid of it. I am not, surprised, therefore, that, when one turns to the statutes, one finds in them nothing in the shape of a prohibition against alienation. Difficulty, no doubt, sometimes arose as to alienation; but it arose entirely from the law saying that a Catholic should not acquire real property,—that he should not inherit, take, hold, or enjoy it; from this inability to take, it came in some instances to be contended that there was an inability to convey and transfer.

It will be expedient to pass briefly in review the statutes which imposed incapacity. The 1 Jac. 1, c. 4, an act directed against jesuits, seminary priests, and recusants, in s. 6 provides “that any person going or [163] sending any child or other person beyond the seas, to enter any college, seminary, or house of any Jesuits, priests, or any other popish order, to be instructed in or profess the popish religion, shall, in respect of himself only, and not in respect of his heirs or posterity, be incapable to inherit, purchase, take, have, or enjoy any manors, lands, tenements,” &c. The 3 Jac. 1, c. 5, one of the acts directed against recusancy, by s. 16, enacts that children sent beyond the seas to prevent their good education in England “shall take no benefit by any gift, conveyance, descent, devise, or otherwise,” until, being of the age of eighteen years, or above, they take a certain oath prescribed by another of the statutes against recusancy. In the mean time, the next of kin, not being popish recusants, are to have and enjoy the lands, &c., until the party otherwise entitled shall conform, after which the next of kin is to account for the profits. Next follows the 3 Car. 2, c. 2, which subjected any person going, or sending any child or other person, beyond the seas, to enter, reside, or be trained up in any popish religious or scholastic establishment, or in any popish family, to be instructed, persuaded, or strengthened in the popish religion, or to profess the same, on conviction thereof on any information, presentment, or indictment, to forfeiture of lands, tenements, estates, and goods. We come lastly to the 11 & 12 W. 3, c. 4, an “act for the further preventing the growth of popery.” The 4th section contains an enactment which relates to the subject under consideration. It is divisible into two parts. The first part relates to persons under the age of eighteen years, educated in or professing the popish religion; and enacts, that, if any such person “shall not, within six months after attaining that age, take the oaths of allegiance and supremacy, and subscribe the declaration set down in the 30 Car. 2, c. 2, such person shall, in re [164] spect of him or herself only, and not to or in respect of his heirs or posterity, be disabled and made incapable to take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments;” with a further provision, that, until these conditions be complied with, the protestant next of kin shall have and enjoy the lands, &c., without being accountable otherwise than for wilful waste. The second part of the section makes all papists, or persons professing the popish religion, in general, disabled and incapable to purchase any real estate, the term “purchase” being here to be taken in its technical and not its popular sense, and makes any such estate void and of no effect.

Now, in none of these statutes is there any prohibition against alienation. Difficulty arose only when a Catholic, disabled by any of these statutes from taking, but who had nevertheless in fact taken and acquired possession, proceeded to aliene. The question is one of considerable nicety; but the effect of the authorities seems to be, that, though incapacitated from taking for the purpose of personal enjoyment, the Catholic was not incapacitated from taking for the purpose of disposing of the estate. The matter early became the subject of legal consideration. In *Tredway's case*, Hobart, 73, the effect of the statute of the 3 Jac. 1, c. 5, came under consideration. There, one Edward Tredway having died leaving two sisters his heirs, and one of them having "deputed the realm without licence, to prevent (!) her religious education, and being and remaining a nun professed at Douai," it was said that she came within the statute, and that her lands were forfeited, and went to her sister Elizabeth. But Hobart says, "My Lord Chief Justice Montague and I agreed clearly that the moiety of Lettice" (who was the sister in question), "as to the state of the land, was not for-[165]-feited nor settled in Elizabeth" (the other sister), "for the statute is, that she shall take no benefit by descent, not that she should not take by descent. And it then proceeds to shew the meaning thereof, that the said profits during her unconformity shall be received by the next of kin, and they also shall be answerable unto her after her conformity." And further on he says, "Suppose that such an heir beyond sea shall bargain and sell his land to a stranger, which he may do, since his estate remains (as aforesaid), I hold that the bargain in such cases shall prevent the next of kin, and also take the land out of his hand if he entered, as in the common cases."

Afterwards came the case (which has been so much discussed at the bar) of *Thornby v. Fleetwood*, 1 Stra. 318, which raised the question whether a tenant-in-tail who was within the terms of the 1 Jac. 1, c. 4, could suffer a recovery, and so disentail the estate, and dispose of it. Upon looking carefully into the reports of that case, it seems to me that there was at all events a decision of this court that the tenant-in-tail, although within the terms of the 1 Jac. 1, c. 4, was not prevented from suffering a recovery and aliening the estates. It is true, there was a second point in the case in favour of the defendant, namely, that, as there was a second tenant-in-tail in remainder living, although the latter was equally within the statute, the lessor of the plaintiff in ejectment, who claimed as right heir of the original settlor, on the failure of the estate-tail, could not recover while he lived: but the ground upon which the decision of the court of Common Pleas proceeded, so far as appears from the language of the court, was, that the exception or reservation in favour of heirs in the statute qualified and limited the incapacity to take which otherwise would have been absolute, and that it was still competent for the Catholic to take, though [166] not for the purpose of immediate enjoyment, yet for the purpose of conveying away the estate. I own if the matter were *res integra*, individually, I should be very much disposed to think that the two judges of the court of Queen's Bench, Lord Chief Justice Parker and Mr. Justice Fortescue, who were for overruling the decision of the court of Common Pleas, were upon principle and reason right, and that, where by the provisions of an act of parliament a person is incapacitated from taking for the purpose of present enjoyment, such incapacity must incidentally carry with it an inability to alienate, as otherwise, by selling the property and taking the proceeds for his own use and benefit, a man would have a present benefit and enjoyment of a very substantial kind; and that all, therefore, that was meant by the reservation in favour of heirs in the act of James and other similar acts was, to enable the party to transmit the estate to those whose rights were reserved, independently of the technical requisite of the seisin of the estate in the person through whom it is to pass. The matter is, however, I think, *res judicata* in this court, not reversed by the decision of the House of Lords: for, although the case was not decided in favour of the defendant upon the same ground upon which it had been decided in this court, yet there was no reversal of the decision of the court of Common Pleas; and that decision has since received the sanction of very high authorities. In the case of *Mattem v. Binglee*, 2 Comyns, 570, where the question was, whether a papist who was within the terms of the 11 & 12 W. 3, could devise property which had come to him by descent, the court held that such a devise was good: and the Chief Justice Willes gave the reason for the judgment, in these terms:—"Though George Bedell was under eighteen at the time of the making of the statute of the 11th & 12th William 3, yet, after pro-[167]-fessing

himself a papist, and not taking the oaths, he is disqualified as well as other papists ; yet the disability incurred by this statute is very near the words in the statute 1 Jac. (1, c. 4), which do not prevent his having or being seised of the estate, and consequently he may dispose of it ; he may take any personal legacy or gift, —so cannot be resembled to a monk. He may bring waste,—nay, he may take a real estate sub modo ; he takes for the benefit of his protestant heir till he conforms, and for the benefit of himself when he conforms. The inheritance must be in somebody : it cannot be in the King, for it is given to another ; it cannot be to the next of kin, for he hath but the rents and profits : it cannot be in his heir, for *nemo est hæres viventis*. *Thorby v. Fleetwood*, under the statute of 1 James I., and the case in Hobart upon the 3 James I., shew that those who were papists were seised, notwithstanding those statutes ; and the clauses which give papists an action of debt and waste strengthen this construction. Besides, it seems most agreeable to the intent of the legislators, which was to encourage the bringing papists' estates into the hands of protestants, which is best done if they may devise or convey to them." So, again, in the case of *Jones v. Meredith*, 2 Comyns, 661, the question arose whether a papist who had not at the age of eighteen, or within six months of it, taken the necessary oaths, could mortgage. The main question indeed was, whether such a mortgage might be redeemed by the protestant next of kin, so as to oust the mortgagee ; as to which the court held that the protestant next of kin might do so ; but the power of the papist to mortgage came incidentally into question, and upon that Chief Baron Comyns says—"It is true, the words of the statute being that every person educated in the popish religion, or professing it, shall, in respect of himself only, [168] and not in respect of his heirs or posterity, be disabled to take, the seisin of the estate has been construed to remain still in him ; for, otherwise, it would be difficult to say how his heir could have the estate consistently with the known rules of law. So it was holden in *Tredway's case* upon the 1st James I. which is peened in the same manner ; and therefore a papist tenant-in-tail may make a tenant to the præcipe, and suffer a common recovery, as was resolved in *Thorby v. Fleetwood*, 12th Anne, and in *Lord Derwentwater's case*, 6th George I. So, he may devise the estate to a protestant. Resolved in Common Bench, in *Mattem and Bingley*, and in the case of *Maribod and Darrell*, H. 8th George 2, in B. R." And in the case of *O'Fallon v. Dillon*, an Irish case before Lord Chancellor Redesdale, 2 Sch. & Lef. 13, where a papist thus circumstanced had confessed judgments to a trustee in trust for the use of a settlement made on the marriage of his nephew, and afterwards suffered a recovery, it was held that the judgments were not a fraud on the disabling statutes, and that the recovery was good. The Lord Chancellor says, "The objection that the recovery suffered by Bryan did not bar the entail, seems to me ill founded. The statute of the 8th of Anne avoids recoveries to bar a protestant in remainder, or to defeat the gavelling clause in the 2nd of Anne, but cannot I think be construed to extend to a recovery, which has no such operation. Otherwise, the entail of estates vested in Roman Catholics must be perpetual, if the heirs of entail continued to profess that religion ; and their estates would never be subject to judgment debts. The policy of these acts, on the contrary, tended to encourage alienation and to let in debts." There is also *Ratcliffe's case*, which is reported in 1 Strange, 267, which arose upon the recovery suffered by Lord Derwentwater, then tenant-in-tail of those estates ; and [169] although in that case, as was pointed out by Sir Richard Bethell, the estate-tail had been created prior to the passing of the 11 & 12 W. 3, the case is still an authority for this, that, independently of the impediments to taking and acquiring estates by Catholics, there was nothing in that statute, or in any other, to prevent a Catholic from aliening an estate, if he once got possession of it.

These being the statutes directly affecting the capacity of Roman Catholics as regards property, and these the authorities as to their construction, Sir Richard Bethell, in his most able and luminous argument, sought to find in certain other statutes indirect parliamentary authority, by implication, for the proposition that Catholics could not aliene their estates ; and he first called our attention to two statutes of Elizabeth relating to popish recusants. He said, that, inasmuch as by those statutes it was provided that the estates of recusants should not be alienated, this shewed that it was the intention of the legislature that Catholics in general should not alienate their estates. But, when these statutes come to be looked at more carefully, it will

he found that they have not any application to this question. In both there is not any prohibition against alienation, except upon conviction of recusancy ; and, even then, there is no prohibition of alienation, if the recusant convict pays the fine which the statutes imposed upon those who did not conform to the protestant worship. It was simply a measure to guard against persons who had incurred such fines getting rid of their estates after conviction, so as to prevent the Crown from realizing the penalties. Therefore, the act says to a man thus circumstanced, " You shall not aliene your estate unless you pay the fine ; if you pay the fine, you may ; if you do not pay the fine, you shall not." This does not shew that there [170] was any general disability to prevent Catholics alienating, but quite the contrary. It is true, these statutes were passed before those upon which the questions have arisen which we are now considering ; it is true that they cannot control the effect of the later statutes ; but it is equally clear that they afford no aid to the argument of the defendants. Then Sir Richard Bethell had recourse to the act of the 3 G. 1, c. 18, which protects *bonâ fide* sales for valuable consideration against the doubts which had arisen upon the operation of the statutes of the 11 & 12 W. 3, and the 1 G. 1, c. 55. Now, it is plain that the 3 G. 1, c. 18, was intended to apply especially to the statute of the 1 G. 1, c. 55, though it had escaped Sir Richard Bethell's attention that it was so. When one turns to the statute of the 1 G. 1, c. 55, one sees plainly how the statute of the 3 G. 1, c. 18, came to be passed. This latter statute purports in its title to be a statute to explain the 1 G. 1, c. 55. What was the 1 G. 1, c. 55 ? Nothing that imposed any disability on a Catholic to aliene. It simply required that all Catholic estates should be registered : and, in case of non-compliance with the provisions of the act, it rendered such estates liable to be forfeited, upon action brought by any protestant plaintiff. The effect of a plaintiff recovering in such an action was, to give two thirds of the estate to the Crown and one third to the person who brought the action. Now, as in many instances it might happen, either that the estate was not registered at all, or that the registration was not attended with the formalities prescribed by the act, doubts would arise under such circumstances as to whether, the estate having become liable to forfeiture, a good title could be made against any person who might afterwards bring an action to recover it for himself and for the Crown under the provisions of the statute. So, again, with [171] regard to the 11 & 12 W. 3, to which also the statute of the 3 G. 1, c. 18, has reference. By the last clause of that statute, Roman Catholics were prohibited from acquiring by purchase any estates whatsoever : yet no doubt it happened, and frequently happened, that persons to whom estates-tail in remainder had been settled, or who had acquired estates by other means, so as to be, in the technical signification of the term, " purchasers," came into possession, and were not interfered with or molested by any one, owing to the generous spirit of forbearance which seems to have prevailed in those times on the part of those who might have taken advantage of these disabilities. Catholics thus in possession of estates might be desirous of selling them, perhaps proceeded to sell them ; and then doubts arose as to their being able to make a good title in consequence of the original inherent defect of their own title, in consequence of the disability to take as purchasers imposed by the statute. To provide against such cases, the act was passed ; and, although it does not cover all cases, but simply extends the statutory protection to the cases of *bonâ fide* sales for valuable consideration, it leaves the former law just where it found it, entirely untouched : and we are thus brought back again to the question, whether in the 11 & 12 W. 3 there is anything which prohibits alienation when once the estate has got into a Catholic. It appears to me plain and clear that there is nothing of the kind. Therefore, it seems to me, that, if we look to the general law, it is impossible to say that this restraint on alienation by Catholics, which was foreign to the general law, can be considered as having been introduced into this private act of special legislation as a leaf taken from the public statute-book. But, besides this, if we look at the true history of the passing of this private act, the whole of this very ingenious [172] edifice crumbles to pieces and falls to the ground : and, although I quite concur with Sir Richard Bethell that we ought to construe and must construe this act with reference to its own contents, and its own contents alone, yet, when we are asked to travel out of the act, and to apply to it, with a view to its construction, the general existing law relating to Catholics, on the ground that the clause in question was introduced as a part of the general existing law, then, for the purpose of ascertaining whether such a representation is correct, and for that purpose only, it becomes essential to inquire what were

the facts attending this piece of private legislation, or, to speak more correctly, of legislation for private purposes.

We have the history of the case before us. Evidence of the facts was tendered by the defendants, and was admitted, all objection to its reception being waived, as I think most judiciously and politely, by the counsel for the plaintiff. Now, the history of the case is this:—On the death of the Duke of Shrewsbury, in 1717, the settlement of 1700, which he had effected, of course came into operation; but, unfortunately, as regards their temporal interests,—in that sense of the word only do I use the word unfortunately,—those who were entitled to take were Roman Catholics, and affected by the Roman Catholic disability acts. It appears that Lord Harcourt, who took an interest in the affairs of this family, had an interview, shortly after the Duke's death, with a gentleman named Pigott, a conveyancer and eminent practitioner in his day, who was a Roman Catholic, and no doubt was in the confidence of the Roman Catholic families, and consulted by them on matters relating to their estates. Lord Harcourt pointed out to Mr. Pigott the disability under which those who were to take under the Duke's settlement laboured, observing that it was a great pity, [173]—I think that was the expression,—that the provisions of the settlement were such as they were, because those who were to take under it were Roman Catholics, and therefore disabled. Upon this Mr. Pigott suggested that there should be an estate bill, as there had been in *The Annulet case*, for the purpose of annexing the estates to the title, and getting over the difficulty of the incapacity of those who were to take the estates and enjoy them. Lord Harcourt saw the Bishop of Salisbury upon it; the bishop consulted his son, who was at that time, I think, Attorney-General to the Prince of Wales; and, after this consultation with his sons, it appears a conference took place between the bishop and Mr. Pigott. The bishop of Salisbury had no objection to assist in securing those who were entitled to the present estate against the possible contingency of the protestant next of kin seeking to invade their estates; but he stipulated for and insisted on a condition, that whereas, in the event of the issue of George and John, who were next in succession to the earldom, failing, the earldom would necessarily come to him, the estates of the late Duke of Shrewsbury, and which were now to be enjoyed by these persons, should be annexed to the earldom, so that they should come to him and his heirs. And I think we may safely conclude that his purpose was that they should be inseparably annexed to the earldom,—because it must have been palpable to so sagacious a man as the bishop, that, in the state of religious animosity which then prevailed between Catholics and protestants, a Catholic tenant-in tail, upon the probability of a failure of issue, would prefer to alienate the estates, rather than that they should come to so remote a kinsman, and that kinsman a protestant ecclesiastic. One readily understands, therefore, why the bishop should stipulate that the estates should be inseparably annexed to [174] the earldom. The condition has been denounced as a hard one; perhaps it was so; but with that we have nothing to do. Some repugnance seems to have been entertained to the proposal; and we find that more than one conference took place between the bishop and Mr. Pigott, and a Mr. Webber, who was employed as a go-between; but the bishop stood to his condition, and said that he had seen the King, and would not assent on any other terms; and the result was, that his terms were agreed to. Thereupon, the indenture of 1718, which was partly a settlement of the estates, and partly an agreement between the parties concerned that the bishop should go to parliament to obtain a private act to carry out the common purpose, was executed; and accordingly a bill was afterwards introduced, on the petition of Earl Gilbert and the bishop, but in point of fact promoted and prosecuted on the part of the bishop himself.

While the matter was pending before the committee, a petition was presented by Lord Fitzwilliam, the uncle of the infant heir of George, for, in the interval between the indenture of 1718 and the bringing in the bill before parliament, the marriage, upon the contemplation of which the settlement of 1718 was executed, had taken place, and a child had been born of that marriage, a boy, and consequently heir-in-tail under the settlement of 1700, as well as under the settlement of 1718, if the latter should receive the sanction of the legislature by the proposed act of parliament. Lord Fitzwilliam presented a petition on behalf of the infant heir, pointing out that his rights would be interfered with, and therefore opposing the bill, which went to take away the power of alienation. In the course of the argument before the committee, Mr. Peere Williams, who was counsel for the petitioners against the

bill, urged the rights of the infant, and pressed upon the com-[175]-mittee that they should not, by taking away from him the power of alienating the estates, remove the strong inducement which there would be to bring up the heir to these great estates as a protestant. And then was introduced this proviso upon the enactment prohibiting alienation, viz. that the tenants-in-tail should have,—of course they did not put it simply that this boy should have, but that any person in the same position should have, the power of alienating the estates, if they would take the oaths which in those days were the test of adherence to the protestant faith. Now, all this clearly shews, to my mind at least, that this was a matter not of general but of special legislation. I quite agree with my learned Brother Shee and Sir Richard Bethell, that the proviso was intended to apply to Catholics,—not, as it seems to me, with reference to the general law of the land, because, as I have already pointed out, by the general law Catholics were under no incapacity to alienate except such as arose from the disability to take,—but, as matter of special legislation, adapted to the particular case of the Catholic tenants-in-tail of these estates, prompted, perhaps, by the desire not altogether to supersede and set at nought the rights of this infant tenant-in-tail, thus prominently brought under the attention and consideration of the committee, yet at the same time to clog them with a condition which should render the power of alienation practically impossible. The original intention of the bill, as we know, was, that the restraint on alienation should be absolute. For, the bishop, who was the promoter of this bill, apprehended, that, if the estate-tail remained in the hand of a Catholic without a restraint upon alienation, it would, in all human probability, in the event of failure of issue, be alienated so that it should never come to the protestant line. But, when the rights of the infant tenant in-[176] tail were strongly urged, and Mr. Peere Williams suggested that the reservation of the right of alienation might be made an inducement to bring up the heir as a protestant, the bishop was probably not unwilling to solve the difficulty, by getting a condition annexed, which he knew would never be satisfied. All this, it is true, is, more or less, matter of surmise and speculation; but it is plain that it was with reference specially to this infant that this proviso was introduced. I cannot, therefore, looking at the history of the case, any more than I can, looking at what was then the state of the general law, come to the conclusion that the restraint on alienation in this estate-act was introduced for the purpose of making the act, reference being had to the prior enabling clause, conformable to the general law relating to Catholics.

But there is a further consideration which appears to me conclusive on this point. Although I agree that the proviso was introduced to meet the case of Catholics, because the party whose right of alienation it was the object to take away happened to be a Catholic, yet the provision as it stands is general, without any distinction of Catholic and protestant. Though framed on the model of the 4th section of the 11 & 12 W. 3, it contains no reference to education in or profession of the popish religion, such as occurs in the act of William. The section begins with a general prohibition of alienation, but then goes on to provide that any parties who will take certain oaths and make a certain declaration shall be relieved from the disability. Suppose that any one of these Catholic tenants had been converted to protestantism, and had brought up his son a protestant, can it be denied, that, if such protestant, on attaining the age of eighteen, had taken the oaths and made the declaration, he would have been able to aliene? But, if the proviso would have been available [177] to protestant as well as to Catholic, it cannot have been introduced as part of the general law directed solely against Catholics.

But, if the case does not come within the general law, the 10 G. 4, c. 7, can have no operation upon it. If either it formed no part of the general law that Catholics should not alienate, or if it be clear, looking at the history of this legislation, that this proviso was not introduced as part of the general law, but was a condition imposed by way of special legislation in this particular case, then it seems to me plain that the 10 G. 4, c. 7, cannot affect the question: for, I take it to be quite clear that all that the 10 G. 4, was intended to effect, when it repealed the acts which required certain oaths and declarations as the condition of the exercise of civil rights, and provided that no oaths should be required of Catholics to enable them to hold property, other than were required from the rest of the King's subjects, was to remove disabilities imposed by the general law. It never was intended to have, and cannot be held to have, the effect of getting rid of that which was a special provision in

a settlement. There can be no difference in this respect between a settlement by a private act and an ordinary settlement by deed. Now, suppose a man had settled or devised his estates upon certain limitations, but had made it a condition precedent to the taking of the estates, that any person who was to take should profess the protestant faith, and evidence that faith by certain specified acts and observances; I apprehend it to be perfectly clear that a general enactment removing disabilities created by the general law of the land never could be taken to apply to a disability thus specially created by will or settlement. A condition annexed to the enjoyment of an estate cannot be affected by an act of the legislature, unless the legislation is directed to the [178] condition thus specially created, and not merely to disabilities created by the general law. A man has a right to annex, by what I may call his private enactment, the terms and conditions upon which that which it is of his own free will to grant or withhold shall be taken: and you cannot get rid of such conditions, unless by legislative enactment specially directed to the particular case, or some particular class of cases to which it belongs. Considering, therefore, the 8th section of this private estate-act as a matter of special, and not of public legislation, I am clearly of opinion that its effect cannot be got rid of by that which was applicable only to the disability imposed on Catholics by the general law.

It is urged, however, as an argument in favour of the defendants, that, by the effect of the 10 G. 4, c. 7, the performance of the condition has become impossible. Assuming this for a moment, it seems to me to follow, as a necessary consequence in point of law, that alienation has become impossible. There is here a condition precedent upon alienation, and it is elementary knowledge that a condition precedent is a thing which cannot be got over. The law is stated by Blackstone in his usual lucid manner. He says, "Express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God or by the act of the grantor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a grant be made to a man in fee-simple, on condition, that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day (within which time the woman dies, or the grantor marries her himself); or unless he kills [179] another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determined: here, the condition is void, and the estate made absolute in the feeoffee. For, he has by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But, if the condition be precedent, or to be performed before the estate vests: as a grant to a man, if he kills another, or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for, he has no estate until the condition be performed." In the recent case of *Egerton v. The Earl of Brownlow*, 4 House of Lords Cases, 1, 129, Mr. Baron Parke fully confirms this doctrine. Speaking of a condition, he says, "Supposing it to be illegal, if it be a contingency or condition precedent, and the event does not happen, or if it be impossible, and therefore cannot happen, the party never obtains the estate: if it be a condition subsequent, he never loses what he has got." This I take to be the true rule of law upon this subject.

Now, here we have an estate tail from which the incident of alienability is taken away by positive enactment, but to which alienability may be restored upon the performance of a condition precedent. If the performance of the condition precedent is prevented, no matter how, and the condition does not take effect, that which was conditioned upon it cannot possibly take effect either. It cannot, therefore, avail the defendants to say that the condition has become impossible. But I think it would be going a great way to say that it had become impossible. Though by the general law it had been rendered wholly unnecessary that any oath should be taken or any declaration be [180] made by Catholics as a condition either of taking estates or of alienating them, all that was done was to dispense with oaths and declarations: there was nothing to make them illegal. If taking the estate was conditioned upon taking these oaths, and making this declaration, I do not see anything to prohibit a party from taking the oaths and making the declaration in order to entitle himself to alienate by the performance of the condition. But, however this may be, if impossibility of

performance of the condition has supervened, it seems to me that in point of law the power to alienate is gone.

It was, however, perhaps unnecessary to advert to this head of argument; for, if the case does not fall under the general law, and the 8th section of the 6 G. 1 is not affected by the 10 G. 4, c. 7, the case of the defendants falls entirely to the ground. For, subsequently to the passing of the 10 G. 4, c. 7, a private estate-act of the 6 & 7 Vict. c. 28, was obtained by John the sixteenth Earl, the then tenant-in-tail in possession of the estates, whereby the proviso of the 8th section of the 6 G. 1, c. 29, which qualifies what would otherwise be an absolute restraint on alienation, was in terms repealed. I quite go along with the argument of the learned counsel for the defendants, that, if the effect of the 10 G. 4, c. 7, had been to get rid altogether of the restraint on alienation imposed by section 8 of the 6 G. 1, c. 29, the mere enactment of a private estate-act professing to repeal a portion of that clause, upon a mistaken assumption that the whole continued to be the law, would not have the effect of restoring so much of the clause as it professed to leave untouched. I quite concur in the argument that a mistake as to the state of the law on the part of the legislature in a private act of parliament,—nay, I may say, upon the authority of the case to which Mr. [181] Grant, as *Amicus Curie*, was good enough to direct our attention yesterday,* even in a public act,—and legislation founded on such mistake, would not have the effect of making that the law which the legislature had erroneously assumed to be so. If, therefore, the 8th section and the restraint imposed by it had been removed by the general legislation of the 10 G. 4, I agree that the clause of the private act of the 6 & 7 Vict. would not have the effect of renewing the disability. But, if I am right in the conclusion at which I have arrived on the grounds I have explained, and the 8th section of the 6 G. 1 was not affected by the 10 G. 4, then, the private estate-act of the 6 & 7 Vict. having repealed the qualifying part of the clause, and having left the positive enactment against alienation unqualified and without any modification, the power to alienate upon the performance of the specified condition is at an end, and the possibility of alienation under any circumstances whatever is for ever done away with.

It seems to me, therefore, upon these grounds, that we must decide in favour of the plaintiff, and discharge this rule: and I have the less reluctance in doing so, because I feel satisfied that this decision is in conformity with the justice and equity of the case. I will not say that there was a family compact, if that expression is objected to: but I think it clear, upon all the facts, that there was a parliamentary compact in this case. The Catholic tenants, whether for life or in tail, under the settlement of 1700, found themselves in a position in which the enjoyment of their estates might at any moment be invaded and interfered with by the protestant next of kin. They desired to enjoy immunity from this unhappy state of things. At that time of day, when men had not learned the great and salutary lesson that they may worship the same God side by side according to their respective faiths [182] and forms of worship, in amity and peace, people did not foresee that a time would come when these penal laws,—which the animosity of religious warfare, and the struggle, as it were, of life and death, for the existence of the one religion or the other, if they did not render necessary, at all events excused,—would in process of time become unnecessary, and would be repealed. At that time, when every one looked forward to the continuance of those laws, it was a matter of the greatest possible moment and importance to these Roman Catholic proprietors to receive protection and immunity against the operation of the then-existing law, which disabled them from enjoying their estates. They obtained that protection through the intervention and influence of one who was interested in a particular settlement of these estates: they obtained it through the special legislation of parliament at his instance and procurement. They obtained it, however, as I read the act of parliament, on the condition that the estates should be inalienable, except on a contingency at that time most improbable, viz. the conversion at an early age of the successors of those to whom the estates stood limited from the Catholic to the protestant faith. Under this private and special legislation, the Roman Catholic proprietors enjoyed these estates during a long series of years, when, but for it, their enjoyment and possession might at any moment have interfered with it in a manner most prejudicial and disastrous to themselves.

* *Ex parte Lloyd*, 1 Sim. N. R. 248.

I cannot regret, then, that the conclusion which I arrive at, and which I trust I have arrived at independently of any other considerations than those which, sitting here to interpret the law, are the only ones which should influence my mind, should carry with it the consequence that those who have had the [183] benefit shall pay the price, that those who have had the uninterrupted enjoyment of these estates shall abide by the condition on which that enjoyment was secured to them.

WILLIAMS, J. I am also of opinion that this rule ought to be discharged.

I entirely agree with my Lord, that, notwithstanding the great importance of this cause to the parties concerned, notwithstanding the extraordinary extent of time and the extraordinary amount of ability and industry which have been bestowed upon the argument, yet, as in the result we feel no doubt whatever in our minds, we ought to take the usual course of forthwith pronouncing our judgment upon the questions submitted to us.

Now, the first objection that has been raised in this case to the title of the plaintiff is, that Earl Bertram was not within the 8th section of the 6 G. 1, c. 29, because he was tenant-in-tail under the settlement of 1700, or under that settlement and will of the Duke, and not under the statute or the settlement of 1718. I am of opinion that he was tenant-in-tail under the statute. It appears to me quite plain that the legislature meant to deal with the whole estate, and to enact, that, for the future, it should forever be enjoyed according to and under the limitations defined, and subject to the restrictions and qualifications prescribed, by the act, in conformity with the settlement of 1718. The legislature had surely the power to enact this by a private act just as much as by a public act, if they really intended so to do: and, that they did so intend, is to my mind quite manifest, both from the language of the statute and from the nature of the enactments. The 1st section not only enables the persons to whom the estates were limited by the settlement of 1718, to [184] take, hold, and enjoy them accordingly, any law or statute to the contrary notwithstanding; but it proceeds to enact that they shall and may have and hold the said manors, lands, &c.: and then the 12th section declares and enacts that the estates comprised in the settlement of 1700 and in the Duke's will, and no other, are intended to be "entailed and settled by virtue of the present act." And, as it is assumed by the counsel on both sides, that one of the main purposes of the act was to protect the estates from the penal consequences of the statutes against papists, I cannot see how that object could be carried into effect by its enactments, unless the papist takers under the successive limitations were to be regarded as holding under the act, and not under the settlement. The 11th section, respecting Broadstone Farm, is certainly a strong illustration of the intention; for, as to that portion of the estates to be dealt with, it is conceded by the counsel for the defendants that the course of limitations is at variance with that which the settlement would create.

I will next deal with the point raised by the defendants, that Earl Gilbert had been a member of a Jesuit College, and subject on that account to certain statutory disabilities, including an incapacity to take or to transmit the reversion, or to make a valid conveyance or settlement of it,—the reversion expectant, I mean, on the failure of the limitations under which an estate tail became vested in Earl Bertram. It was, therefore, argued that the estates subsequently acquired, limited by the statute, were not effectually limited, and thus the plaintiff's title failed.

Now, as to this, I take the law to be clear, that the legislature have the power to bind by a private act just as completely and stringently as by a public act, all those estates and persons whom it plainly intends to [185] bind. And, looking to the various provisions of the act, I think it clear that it did intend to bind all persons mentioned in the recital, and all estates which were or could be vested in them, or which had arisen or could arise by reason of the recited limitations, including, therefore, the Earl Gilbert, and all the estates vested or derived or derivable through all the recited limitations to him, and subject to all those interests in the successive limitations created by the act. It was assumed by some of the learned counsel that the act would fail to effect this, if, by reason of Earl Gilbert's disability, there was some one entitled to the estate who was not before the legislature when the act was in progress through parliament. But there is no foundation whatever for this assumption; and Lord Campbell has with great accuracy laid down the law in the passage in *The Edinburgh Railway Company v. Wauchope*, 8 Clark & F. 723, which has been cited by my Lord Chief

Justice : and it will be found that Lord Cottenham and Lord Brougham in that case expressed their views in substance to the same effect.

Now, it becomes unnecessary, in this view of the case, to consider whether there is any legal evidence of Earl Gilbert's incapacity, or to enter into a discussion as to the consequences of that incapacity, supposing it to have existed.

There remains, then, to consider whether the 8th section of this statute of the 6 G. 1 has been repealed by the acts passed for the relief of Roman Catholics. In support of this proposition, the great contention has been, that the restraint against alienation which was imposed by the 8th section of the act, applies only to persons who should happen to be Roman Catholics. But I am of opinion there is no foundation for this argument. The section is general in its terms of prohibition, and, if read in its ordinary and natural sense, [186] it applies to protestants as well as to papists ; and it appears to me that the general design and intent of the act requires that it should so apply.

The act is intitled "An Act for annexing the late Duke of Shrewsbury's estates to the earldom of Shrewsbury, and confirming Earl Gilbert's settlement in order thereto, and for other purposes therein mentioned." Now, without going into the question how far it is right to refer to the title of an act in aid of its construction, I would only say that in this instance the title appears to me to be an exact description of the intentions of the statute, apparent on the face of its enactments themselves. Without at all referring to the minutes of the proceedings before the committee of the House of Lords, it does seem to me quite impossible to read the recitals of the act, the recital of the Duke's settlement, the recital of the marriage-settlement of George Talbot, and the agreement contained therein, and the recital of the wish of Earl Gilbert that the estate should be annexed and go along with the earldom, for the better and more honorable support of the dignity,—with the acknowledged fact that those who were entitled under the limitations of the two settlements were papists, and on that account disabled from enjoying the estates,—without coming to the conclusion that two great objects were intended to be attained by the act, the one, that persons to whom the estates were successively limited under Earl Gilbert's settlement should, though they were papists, enjoy the same, any statute to the contrary notwithstanding,—and the other, that the estates should be annexed to the earldom.

The annexation could only be effected by limiting the estates to the same persons to whom the earldom was limited, viz. the issue male of the body of the first earl. It is true that the act in one respect abandons [187] this principle : for, until the death and failure of the issue of Earl Gilbert, the estate certainly would not go with the earldom. But this was necessary, in order to fulfil the other object of the act,—I mean the confirmation of Earl Gilbert's settlement, which he had entered into with an express desire to pay due observance to the intentions expressed in the settlement and will of the duke, by which he, Earl Gilbert, had been passed over. And it is obvious that the principle of the act was in effect very slightly departed from ; because, if he were a Romish priest, his having been thus passed over by the duke, and his own declaration of his resolution not to marry (announced in the settlement which he made on the occasion of the marriage of his brother, induced by his own persuasion), is fully explained, and the formal limitation of the estate, which it was thought right to introduce—to him and his first and other sons in tail,—after limitations to those persons whom the Duke had preferred to Earl Gilbert, was in fact nothing more than a limitation to him for his life.

But another thing was requisite in order to make the annexation to the earldom effectual, viz. that the successive tenants-in-tail should not have the power to alien.

It would be idle and illusory to call it an annexation to the earldom if it were in the power of any one of those tenants-in-tail to defeat the annexation at his pleasure ; and it was requisite that such a restraint should be imposed on the tenant-in-tail in possession, whether he were Roman Catholic or whether he were protestant. It seems to me plain, that, if, by the early death of George and John Talbot and of Earl Gilbert without issue, the bishop, under the limitations of the statute, had come into possession of these estates, the statute clearly meant that he should not have the power of alienating.

[188] Therefore, the argument which has been so much pressed on us, that the disability could only have been intended to apply to those upon whom the capacity to enjoy had been conferred by the early part of the act, seems to me to fail altogether.

But then it was argued that there prevailed, at the time the act passed, the doctrine that a papist could not alien, and that this 8th clause was merely a re-enactment of that restraint upon papists.

No doubt, the enactment with regard to a papist purchasing was of necessity an enactment of incapacity to alien the estate which he could not take, because what was never vested in him could not pass out of him. But, beyond this, I think there is no authority whatever to shew that there was any restraint upon papists to alien those lands which had vested in them, by reason of their having been purchased before the statute of William 3, or by reason of their having devolved on them by any means after that statute had come into operation.

Then, it was further argued that the proviso in the 8th section shews that the whole of the enactment was directed against papists only, because it was said that the proviso corresponds exactly with the enactment as to conformity in the statute of William 3. It was argued that the object of the statute of George was, as to these estates, to put papists, as far as respected their power of aliening, on the same footing on which they were put as to the enjoyment of lands generally by the statute of William 3.

But, in the first place, it must be observed that the 8th section wholly omits that mention of the popish religion which is to be found in the statute of William 3. It may be further observed, that the enabling clause does not correspond. By the earlier statute, an infant may retrieve his capacity by conforming at any [189] period during his life; whereas, in the statute of George, if he does not take the steps prescribed before he is eighteen and a half, he has lost the power of aliening irretrievably. But then, it was asked, Why was the proviso introduced at all, unless the clause itself was applicable to papists? Why should the taking of steps which amount to conformity in a papist, give them a right to alien, unless the restraint on alienation was meant to be applied to non-conforming papists, and non-conforming papists only? I think it is not at all difficult to imagine that the legislature were aware, that, probably for some generations, the heads of the Talbot Family would be papists, and might think it right, in order to induce their conversion from popery to protestantism, to confer a relief from the restraint of alienation on any one entitled to the earldom, who should, before he attained eighteen years and six months, and before, as Lord King expressed it in *Hill v. Filkin*, 10 Mod. 530, "he had fixed and riveted in his mind his religious principles," abjure what the legislature then regarded as errors most pernicious to the state and to the nation. This could only be done with propriety by giving a general relief from restraint to all tenants-in-tail who, within the age specified should conform to the prescribed course. The legislature might well resolve to sacrifice so far the intent of the annexation of the estates to the dignity, for the sake of holding out an inducement which might produce so important a result as reclaiming this great house from popery. On this point, I will only add, that there appears no little difficulty in suggesting the terms which, as it was contended, ought to be considered by implication as inserted at the commencement of the 8th section of the statute of George, so as to make it conform to the statute of William. According to the main argument, the 8th section [190] ought to be read as if it were thereby enacted that neither the first nor any other son of the body, &c., nor any person to whom any estate of inheritance shall come, shall alien, if he be a papist or a person professing the popish religion; but, in the 4th section of the statute of William, the enactment is extended to any person educated in the Roman Catholic religion, or professing the same.

As to the argument brought before us, that the saving clause of the 6 G. 1 does not except the Bishop of Salisbury or his family, but only those who were known to be papists, and that, therefore, it ought to be inferred that the 8th section was not meant to bind protestants, and only intended to bind papists, I will observe that it would have been idle to except the bishop and those claiming through him from the saving clause, because they plainly took nothing in the estate but what was given them by the act itself.

For these reasons, I am of opinion that the restraint of alienation contained in the 8th section is a restraint binding upon all the successive owners of estates of inheritance, and not peculiarly those tenants-in-tail of the estate who should happen to be Roman Catholics; and that, consequently, the restraint was in no way affected by the acts which were passed for their relief.

It is unnecessary, therefore, to consider what would have been the state of the case, if, according to the true construction of the act, the alienation had become restricted to the case of papists only.

But I think, that, even if that were so, the defendants would find great difficulty in answering the argument that the relief acts were only intended to remove the restraints to which Roman Catholics generally were subjected by the existing law, and not the restraints imposed on individual holders of estates, under special and peculiar statutes, as the conditions upon which the estates are to be holden.

[191] For these reasons, I am of opinion that the rule ought to be discharged.

I think it is a very clear case. If I am wrong, at all events, I have the consolation of knowing that I take the same view as was most deliberately taken by Earl John and his legal advisers, and all who had to consider and approve and sanction the statute of the 6 & 7 Vict. c. 28.

WILLES, J. I am of the same opinion, on both points. The first question is, whether the estate limited to those persons being heirs male of the first earl upon whom the title might devolve, was a valid estate when created. It is admitted, for the purpose of this case, that the present Earl of Shrewsbury answers that description; and the only question, therefore, is, whether the 6 G. 1, c. 29, the private act so often referred to, did effectually create that estate. No doubt, for the purpose of an ordinary conveyance containing a similar limitation, in order to make it valid, it would have been necessary that Earl Gilbert, in whom, unless he was disabled by the effect of the 1 Jac. 1, c. 4, and the 11 & 12 W. 3, the reversion in fee was vested at the time, should join in such conveyance, and that the remainder so limited should be carved out of the reversion in fee then existing in him: and, accordingly, the objection taken to the operation and effect of the private act, is, that, by reason of the position of Earl Gilbert, he being a Jesuit, educated abroad, and within the operation of the 1 Jac. 1, c. 4, or by the operation of the 11 & 12 W. 3, he being a Roman Catholic,—or by the operation of certain other statutes which have been referred to, not affecting merely persons so educated abroad or professing the Roman Catholic religion or educated therein, or being Roman Catholics, although not professing it, if any such persons there [192] were, but directed against persons so situated who brought themselves in to a state of recusancy by virtue of the provisions in those other statutes,—(it was argued that by the effect of some one or more of those statutes), the estate which otherwise would have been vested in Earl Gilbert was forfeited, or was, for the purpose of conveyance by him, a nullity. That was the objection taken to the sufficiency of the limitation under which the plaintiff claims. It appears to me that the objection fails: and I shall first of all exclude from consideration, by one observation, all those statutes under which it may be supposed that a case of forfeiture to the Crown accrued. That observation is this:—We are dealing with a case in which no proceedings were taken by the Crown to take advantage of any forfeiture,—a case in which neither the Crown nor any other person has set up these statutes adversely, but in which they are set up for the purpose of shewing simply that the estate was not in Earl Gilbert at the time. That excludes altogether all cases of forfeiture. It is familiar knowledge that a title cannot vest in the Crown except of record: and, for the purpose of divesting any estate which may have been forfeited by Earl Gilbert under a statute other than the 1 Jac. 1, and the 11 & 12 W. 3, it would have been necessary that there should have been an office found: and there was no office found. The authorities on that subject are referred to in *Low v. Prichard*, 5 B. & Ad. 765, in which the effect of a conveyance by an attainted felon was considered, and in which it was held that there might be a recovery in ejectment on the demise of a person in that position, there having been no office found: and an expression in Coke upon Littleton, which had been misapprehended, and explained. For that reason, I confine my observations to the effect of the 1 Jac. 1, and the 11 & 12 W. 3.

[193] In dealing with these statutes, I must first observe that they are repealed, in common with all the penal acts to which reference has been made in the course of the argument, and many others, by the statute 9 & 10 Vict. c. 56: and it is a question in my mind, whether, since the repeal of those acts, the present question is capable of argument. I say it is a question in my mind, but I give no opinion upon it, because no doubt the learned counsel who have so ably argued this case on the part of the plaintiff, if there were anything in it which they could have taken advantage of, would

have urged it upon us. I do not wish to pass by the point, because my mind is not quite clear upon it. I rather doubt whether this question can properly be raised since that repealing act. It is an act which saves certain cases within which the present does not fall. However, I give no opinion upon it, because the matter has not been argued, and I assume therefore, for this purpose, that the 1 Jac. 1, c. 4, and the 11 & 12 W. 3, are to have their full operation.

Now, I am satisfied, with reference to the construction of those statutes, to rest upon the series of authorities to which the Lord Chief Justice has already sufficiently directed attention, beginning with *Tredway's case*, Hobart, 73, upon the 3 Jac. 1, a case upon which it may be observed that the language of the statute was not the same as that of the 1 Jac. 1 and the 11 & 12 W. 3, because, whilst the 1 Jac. 1 says that a person in the position of Earl Gilbert shall not, so far as regards himself, &c., inherit, the 3 Jac. 1, says that a person within its provisions shall not take the benefit of any descent. It may be a verbal difference; but I am not at all sure that at the time some importance was not imputed to it. The 3 Jac. 1, seems to have been a statute under which the next of kin might have come in; under the 1 Jac. 1, a doubt might arise, possession [194] being vacant,—there being no person to enjoy the profits of the land,—whether it was not the Crown that was intended to come in. If it was, the remark that I have made, that there was no office found, would here apply, and would exclude the operation of the 1 Jac. 1. But I am rather disposed, looking at the concurrence of authorities upon the construction of the 1 Jac. 1 and 11 & 12 W. 3, to think, that, at a later period, it was supposed that the 3 Jac. 1 only expressed that which was intended by the different words of the 1 Jac. 1, and that, when the 1 Jac. 1 says that a person, as to himself only, and not so far as regards his heirs and posterity, shall not inherit, &c., that that means that he shall not take any benefit of the inheritance,—that that means, to use the expression of Chief Baron Comyns in the case of *Jones v. Meredith*, 2 Com. R. 661, to deal with the permanency of profits, and not with the seisin in the land; and, founding my opinion upon *Tredway's case*, and *Thornly v. Fleetwood*, upon *Ratcliffe's case*, 1 Stra. 267, and *Mallon v. Binglee*, reported in Comyns, 370, and more at large in Willes, 575, and *Jones v. Meredith*, and Lord Redesdale's opinion in the case referred to from the 2nd Schoales & Lepoy, 13, and upon the strong expression of opinion thrown out by Lord St. Leonards in the discussion of this case in the House of Lords, evidently upon a full consideration of the statutes in question, I can entertain no doubt that that is the true construction, that the permanency of the profits only was affected, and that the seisin in law, as distinguished from seisin in fact,—a distinction formerly familiar,—did descend, notwithstanding either the statute of 1 Jac. 1, or the statute of the 11 & 12 W. 3. I would here observe, that I think the effect of the act of Jac. 1, and that of the act of W. 3, was precisely similar, because, although the act of W. 3, as has been sufficiently pointed out in the argument, [195] does, in giving the enjoyment of the profits to the protestant next of kin, and giving the power of bringing an action of waste, differ from the provisions in the 1st of Jac. 1, there is a proviso in the 7th section of the former statute which appears to me to sustain the argument upon which it was held that the 11 & 12 W. 3 was intended to interfere with the permanency of profits only, and not with seisin. That is a proviso, that, if a person falling within the description of the 6th section,—because the proviso does not simply refer to persons to whose case the 7th section is more immediately directed, it applies to all classes of persons dealt with by section 6 and section 7,—shall “after become conformable and obedient unto the laws and ordinances of the Church of England, and shall repair to the church, and there remain and be as is aforesaid, and continue in such conformity according to the true intent and meaning of the said statutes and ordinances, that in every such case every such person and child, for and during such time as he or she shall so continue in such conformity and obedience, shall be freed and discharged of all and every such disability and incapacity as is before mentioned.” Therefore, it is easier to reconcile the position of the person who, in respect of himself only, and not in respect of his heirs and posterity, is disabled from taking, but who may at any moment by conformity entitle himself to take with the established notions of law, by saying that he was deprived of permanency of profits until he conformed, than by saying that the inheritance was, as it was contended by the defendants' counsel, in nubibus, or in gremio legis, during the period in which he was not to enjoy the profits of the land; in other words, the seisin in law descended upon him. Then, such a person, I apprehend, was capable of aliening; and for this

I refer to the authorities which have been mentioned. Specially, [196] however, it was said that he was incapable of suffering a recovery. Of course, it was said, and truly, that, in order to suffer a valid recovery, the person who does so must have the immediate freehold, or must have the power of giving it to some other person; and it was said that the intervention of the right either of the Crown or of the protestant next of kin, whichever it might be, to enjoy the profits until conformity of the person in whom the tenancy-in-tail was vested, prevented him from having such a freehold as that a recovery could be suffered. That depends, obviously, upon the question whether the estate which has been given away, and given to some other person, I will take it, for the sake of the argument, given to the protestant next of kin,—was an estate of freehold; but it is quite obvious, from the reasoning of the Chief Baron Comyns, in the case of *Jones v. Meredith*, 2 Com. R. 661, that it is not a freehold. It is at the utmost a chattel: and it is a chattel which is not vested in the person who has the right, until he takes the means of recovering it. I apprehend, that, before the entry of the protestant next of kin, there was no interest out of the Roman Catholic at all; it was a right given to them, which they might exercise; and, if they did exercise it, they might exclude the Roman Catholic until conformity, but no longer. It was a chattel interest, which could go to their executors; and I apprehend that the reasoning of Chief Baron Comyns is much sustained by the terms in which an action of waste is given in the 4th section of the 11 & 12 W. 3, namely, against the protestant next of kin and his personal representative. Now, therefore, you have the case of a man who has a seisin in law, but not a seisin in deed.

The question, therefore, is, whether the person who had the seisin in law without the seisin in deed could make a good tenant to the præcipe,—whether a reco-[197]-very, either real or common, might take place against such a person? That I find concluded by authorities, namely, the sections of Littleton, 680 and 681, in which, giving an instance, he takes occasion to lay down,—and that is confirmed in the Commentaries of Lord Coke, and I find the position is adopted in text-books upon the subject of real actions (see Roscoe on Real Actions, 8),—that a freehold in law is sufficient, without a freehold in deed, to make a good tenant to the præcipe. Consider the subject with reference to persons who might have occasion to bring real actions. They could not have been intended to be disabled from proceeding, by reason of a disability of this kind; but, although the permanency of profits was taken away, a sufficient freehold interest remained to make the individual a good tenant to the præcipe. As I am upon this subject, I intend to conclude what I have to say upon it, because, although it would suffice for the purpose of the present question to shew that Earl Gilbert had a sufficient estate in fee in him which he might alien without regard to that which is the peculiar conveyance applicable to the case of a tenant-in-tail, it may be convenient that I should here conclude what I have to say upon the subject of Roman Catholic disabilities existing at that time. Therefore I will go on to refer to certain arguments which have been advanced on the part of the defendants for the purpose of shewing that it was impossible that there could be a right to alien. Unquestionably, those persons who come within the latter branch of the 4th section of the 11 & 12 W. 3, could not alien. That is unquestionable; but it flowed not from any enactment, either general or special, that Roman Catholics should not be at liberty to alien land which was vested in them, but simply from the maxim, if it can be so called, *nemo dat quod non habet*. That class of cases is altogether [198] excluded. The question is, whether they could convey that which did vest in them either absolutely or sub modo with respect to the provisions of these acts of parliament. We really are called upon here to review a series of decisions to which I have already referred. But, putting them aside for the moment, let us consider the arguments which have been advanced as if those decisions had never taken place. It is said that that act of the 3 G. 1, c. 18, enabling Roman Catholics in certain cases and upon certain conditions to alien, or, rather, rendering valid and taking away all doubt as to the validity of their alienations in those cases, shews, that, in other cases, they could not alien. Now, my Lord Chief Justice has exhausted the argument upon that point, with the exception of a reference to one point which I believe he intended to state; and I will supply his argument by mentioning that point. It was said that the statute of the 3 G. 1 applied to cases falling within the 1 Jac. 1 and the act of W. 3, in which persons were disabled from taking, not absolutely, but disabled from taking as far as they themselves were concerned. That was the argument that was

advanced. The Lord Chief Justice has pointed to the 1 G. 1, c. 55, to which I will not refer further. I do not agree that the 3 G. 1, meant to deal only with the persons who were affected by the first clause of the 4th section of the 11 & 12 W. 3, and with conveyances made by them. I rather think that the observation which was thrown out by my Brother Williams in the course of the argument, namely, that it might apply even to persons falling within the latter clause of the 4th section, who had been allowed to enter upon and enjoy the lands which they had purchased, notwithstanding they were Roman Catholics, is a well-founded observation; and I find that, at a time very much nearer to the period when the 11 & 12 W. 3 was passed, [199] at a time before the 18 G. 3, the first act for removing these disabilities, had passed, and when the matter was more considered and probably better understood than it is at present, that view was taken of the effect of the 3 G. 1. I refer to the case of *Macarthy v. Hawley*, in the Irish Queen's Bench, in Hilary term, 1771, in which a question arose upon the construction of the Irish act of parliament. Now, no doubt the code existing there was a different code from that adopted in England; in some respects much more stringent; but the enactments were introduced for the same purpose: the general scope was the same, and the object to be attained was the same; and the provisions of these enactments were very much more frequently put in force and considered in courts of law there than they have been here. I refer to a passage in the judgment of Lord Annaly in page 202 of Howard's Popery Cases, where he says, speaking of the 3 G. 1, and of the case of *Pellum v. Fletcher* (stated, 6 Bacon's Abridgment, 130, 7th edition), to which reference has been made on the part of the defendants, as shewing that the 3 G. 1 did not apply to the case of persons falling within the later clause of the 4th section: "A mortgage was made to a papist, who assigned to a protestant for full consideration. A subsequent mortgagee brought an ejectment against the protestant assignee, and he recovered by reason of the disability of the first mortgagee, as the assignment of the mortgage and the trial was before the 3rd George I., English, which was enacted to make such assignments to protestants good." Therefore, whether that be or be not a correct view of the operation of the statute, at least in the minds of the lawyers at that time it was a view which might well have been taken, and it was a view which might have led to the passing of the 3 G. 1, and may explain this enactment, without reference to the sup-[200]-position that the legislature was under any impression that conveyances by persons falling under the first clause of the 4th section of the 11 & 12 W. 3 were invalid conveyances. That adds to the argument by which my Lord Chief Justice has already sufficiently established that the 3 G. 1 does not affect the question. I would only add upon that, that, having looked into one of the earlier editions of Blackstone's Commentaries, published before the 18 G. 3, therefore whilst this law was in force, I find, that, in the list of disabilities, both to take and to alien, given in the second volume of the Commentaries (the chapter I do not remember), he speaks of the disabilities of various persons to alien, and of others to take, of others to hold, and so on: but, speaking of the disability of Roman Catholics, under this 11 & 12 W. 3, he treats it as a disability to take, not as a disability to alien. That goes also to sustain the argument. I therefore hold as I have already stated; and I am further of opinion, that, if this were not so,—if Gilbert were incapable of aliening by a private conveyance,—that the effect of the act of parliament is to enable him to make the remainder effectual, and it would be going contrary to the intention of the legislature expressed with reference to those persons affected by the 11 & 12 W. 3, that they should take, notwithstanding the law against Roman Catholics, to hold that the subsequent remainders should be void, because they fall within the provisions of another statute in *pari materia*. I will add to the cases which have been cited with reference to private acts of parliament, that of *Bullock v. Fladgate*, 1 Ves. & B. 471, where Sir William Grant held that an act of parliament, enacting that certain trustees should hold in trust lands discharged of the trust, had the effect not merely of discharging the land of the trust, but also the effect of giving the trustees the fee, al[201] though at that time it was outstanding in another person. It appears to me that this act of parliament deals with estates, and changes the property, if necessary; and has the effect also of enabling the person in whom it was at the time, if that were necessary.

It appears to me, therefore, that the first proposition is thus established in favour of the plaintiff, namely, that the limitation in the 6 G. 1, c. 29, was valid, notwith-

standing any disability of Earl Gilbert at the time : and, if that limitation was effectual, the only remaining question is, whether the remainder-in-tail was barred by the disentailing assurance of 1856.

With reference to that, it is necessary first of all to look at the private acts, and then to consider the effect of the Roman Catholic Relief Act. First, under the private act, was Earl Bertram a person who was bound by the restriction of alienation in section 8 of the 6 G. 1 ? Now, the 8th section restrains the persons who are mentioned in it from aliening, notwithstanding the estates which they took under the act of parliament. Much of the argument for the defendants upon this point needs the addition of the proposition that the 8th section is a prohibition to alien the estates taken under the act of parliament : but the 8th section, read according to its plain language, is a restriction to alien, not the estates taken under the act of parliament, but the land affected by the act of parliament : with respect to that land, a common recovery is not to be suffered : and no estate taken under this act of parliament or otherwise could be affected except by suffering a common recovery of the land. Such a mode of assurance is expressly prohibited : and it is expressly prohibited to certain persons who are named and described, and amongst those persons comes Earl Bertram, who executed the disentailing assurance in the year 1856, [202] which by the act of 3 & 4 W. 4, c. 741, is substituted for a common recovery, and stands on the same footing. It seems that Earl Bertram was issue male of George who took the first estate for life under the statute : he was issue male of George : and the issue male of George are excepted from the saving clause of the statute, and therefore are bound by its provisions : and, whether the act, by reason of the word "other," is to be construed as saying George and his issue male, and John and his issue male, and any other person or persons who take under this act of parliament,—whether, by reason of the word "other," it is to be considered that that section impliedly alleges that George and John and their issue male take under the act of parliament or not, appears to me perfectly immaterial : and I shall assume for argument sake that the section says that George and John and their issue male take estates under the act of parliament : if that be so, it appears to me that that is the strongest proof, that, when the same section talks of estates accruing and coming to the persons who are to be bound, it meant estates which accrued or came by the confirmation effected by the act of parliament. If that be so, it is a legislative declaration that what is meant by accruing or coming is, coming within the limitations of this act of parliament. Now, supposing it is not so, take the other supposition, and see whether anything more can be made of the case. I apprehend not : because, immediately following, in the same section, are other words describing the persons who are to be bound, thus,—“or any persons respectively to whom the premises are respectively before assured, conveyed, or limited,”—clearly shewing that the words “come, descend, or accrue” by force of the act of parliament, are used upon the assumption that the act of parliament is effectual and does convey the estates. Whether the [203] act of parliament is effectual, and does convey the estates or not, appears to me, therefore, to be perfectly immaterial, because the language which is used must be construed similarly throughout. The 9th and 10th sections have been referred to : and it appears to me that they farther clearly shew what was the meaning of the 8th section : because there powers are given to all the persons who take under the act of parliament, and those powers are given to persons described in this way,—mentioning George and John and the heirs male of their bodies respectively, “and also to and for all and every other person and persons to whom the said lands, tenements, hereditaments, and premises are by this act limited successively as aforesaid.” It is quite obvious, construing this as a private conveyance, that the powers were intended to be given equally to George and John and to their heirs male respectively, as to those persons who take estates carved out of the reversion in fee existing in Gilbert. Taking the whole therefore together, it is sufficiently clear by the fact that Bertram is issue male of George, who is expressly mentioned : and, if that be not sufficient, from the use of the word “limited” in precisely the same sense as the former words of the 8th section, on which a doubt has been raised ; and, lastly, by the fact of the persons named in the act being prohibited suffering a common recovery of the lands, and not simply of any estate which they may take under the act of parliament. I must not, however, be understood as expressing the slightest doubt that the construction put on this act of parliament by

my Lord and my Brother Williams is a valid construction, and that in that view also Earl Bertram, who executed that disentailing deed of 1856, was at the time restrained from alienation.

Hitherto my observations have applied altogether to the effect of the private act. Now, assuming that Earl [204] Bertram would have been bound by the effect of the 8th section of the private act of parliament, but for the Roman Catholic Relief Act, then comes the great, and to my mind only considerable question in the case, namely, whether the effect of the Roman Catholic Relief Act was to do away with that restriction. I should have been clearly of opinion that the Roman Catholic Relief Act did away with the restriction if I had been satisfied that this 8th section had been made out to be part of the general law against Roman Catholics. There could be no doubt, I should think upon that subject. I should think there could have been no doubt that the 10 G. 4 was intended to sweep away all enactments by which Roman Catholics generally were in a different position, I will not say from the protestant subjects of the realm, but from any other subjects of the realm; that is the purport of the recital of the 10 G. 4, c. 7. We are bound to give it effect to the utmost.

It appears to me, however, that this 8th section is clearly not applicable to Roman Catholics only, and confined to them; it is a section which is clearly applicable to all persons, of whatever religion they may be, who may become tenants-in-tail successively of this estate: and I might content myself with putting this question to any person who contended the contrary,—Assuming that I am right in saying that it applied to persons of all religions, and assuming that the descendants of Earl George had become protestants at the time of the passing of the 10 G. 4, c. 7, and that the descendants of the bishop, a matter not impossible, had become and were Roman Catholics at the time of the passing of the 10 G. 4, how would the matter have stood? A protestant would have been tenant-in-tail, and restrained from alienation (assuming him to have been an adult, and not to have taken the oaths within [205] the time prescribed by the 6 G. 1), and a Roman Catholic would have been tenant-in-tail in remainder, and, on failure of issue male of George, he would have been entitled to step in and enjoy the estates. That might have been the position of the parties here, if their religion had been as I have supposed. The effect of the 10 G. 4, c. 7, cannot be to affect a protestant when it could not affect a Roman Catholic: it must be to put all on an equal footing: but the effect of the “Roman Catholic Relief Act,” in the case put, would, according to the defendants’ argument, be, that a protestant tenant-in-tail would be thereby enabled to bar the remainder in a Roman Catholic, which would be absurd. The same absurdity would have followed if the remainder had taken effect, and the bishop’s descendants had come into possession before that act. Then it is only necessary to see whether the 8th section is or is not applicable to protestants as well as to Catholics. You have only to look at it and to examine the 4th section of the 11 & 12 W. 3, for the purpose of seeing that it is applicable to persons whatever their religion may be: and the 4th section of the 11 & 12 W. 3, as already pointed out by my Brother Williams, related, in the first branch of it, to persons who had been educated as Roman Catholics, or persons who professed the Roman Catholic religion, and, in the latter branch of it, to persons who were Roman Catholics, or who professed the Roman Catholic religion. The distinction is obvious; but I need not wait to discuss it, because it does not affect the present question; it related to persons who had been educated as Roman Catholics, or who professed the Roman Catholic religion. The 8th section of the private act is general. It says that no person shall alien unless he takes the preliminary steps. And I will put a case which will at once shew that those general words in a general [206] enactment were intended to be construed generally. Suppose that young George, as he has been called, the son of George, had remained a Roman Catholic up to the time when he was of age, and consequently had not taken the oaths between eighteen and eighteen and a half. Suppose he attained twenty-one, and then he had become converted to the established religion, and had conformed, would he have been enabled to bar the estate tail? It is perfectly clear that he would not. According to the contention on the part of the defendants, the act would have applied to him, because he would have been a Roman Catholic at the time during which the oaths were to be taken as a condition of alienation, but, having subsequently changed to protestantism, the act would still operate upon him. There is a case, therefore, in which a protestant would be restrained from alienation. Therefore, the general words are not restrained by the operation of the

proviso, because there is a case in which the proviso might apply, and in which the general words would be applicable to protestants as well as to Roman Catholics. If, therefore, that effect could have been produced, the general words are applicable to protestants as well as to Roman Catholics. It has suggested itself to my mind, that this is only analogous to that which was the decision of the majority of the court of Exchequer, and the decision of the court of Exchequer Chamber, in the case of *Miller v. Salomons*, 7 Exch. 475, *Salomons v. Miller*, 8 Exch. 778, and because, although in this particular piece of legislation,—the 11 & 12 W. 3,—these oaths were, as to Roman Catholics, made the condition of enjoying estates, yet, with respect to various other civil rights, it was necessary to take the oaths, whether the person who took them was a protestant or Roman Catholic. And the effect of one of these various statutes, which upon all [207] hands was admitted to be intended to apply, that is, intended in the mind of the legislature to apply to Roman Catholics alone, was, that, when the disabilities of Roman Catholics were taken away by the 10 G. 4, c. 7, by reason of the general words of the enactment, Jews were prevented from sitting in parliament; and it was only last year that that was modified. Therefore, even taking this 8th section with reference to the general state of the law, and construing it with reference to those statutes in which like general words were used, it must be held to be general in its application. Then, that being so, the Roman Catholic Relief Act of the 10 G. 4 is wholly inapplicable.

I should be content, so far as I am concerned, to leave the argument there. But there is another which has occurred to my mind connected with the course of legislation between the 11 & 12 W. 3, and the 10 G. 4, to which, perhaps, I ought to refer. By the 11 & 12 W. 3, the result was, as everybody knows who has attended to the argument. By the 18 G. 3, the effect of that statute of the 11 & 12 W. 3 was taken away, and Roman Catholics were enabled to enjoy, provided they took a certain oath which Roman Catholics could conscientiously take. From the time of the passing of the 18 G. 3, the Roman Catholics who took such oath had equal rights to enjoy, and of course to alien, as their protestant fellow subjects. The 18 G. 3, however, required that Roman Catholics should take the oath either within six months after the accruing of the title, or within six months after the passing of the act. Time passed on. The 31 G. 3 was passed, not with reference to the enjoyment of land, but for the purpose of enabling Roman Catholics to hold various offices from which they were disqualified before that act passed. It had no reference to land. Between that time and the 43 G. 3, it was discovered that there were [208] various persons who, mistaking the effect of the 43 G. 3, supposing they could take the oath prescribed therein at any time, had omitted to take it within six months after the passing of the act or accruing of the title, so that titles which were affected by the 11 & 12 W. 3, at the time of the passing of the act, and with respect to which the oaths were not taken within six months after the passing of the act, and titles with respect to which the oaths were not taken within six months after the accruing of the title, were open to be assailed under the 11 & 12 W. 3. The legislature accordingly passed the 43 G. 3; and that act enabled a Roman Catholic, by taking the unobjectionable oath mentioned in the 18 G. 3, at any rate to put himself in the same position as a protestant. Therefore, it is not true to say, that, at the time of the passing of the 10 G. 4, there was an incapacity or disability on the part of Roman Catholics to hold and enjoy or alien land. They had the right, upon taking oaths to which they could have no conscientious objection. It would be an abuse of terms to say that the holding or enjoying, or aliening of land, was a civil right which they did not enjoy. It seems to me, therefore, that the 1st section of the 10 G. 4, c. 7, is excluded not only by the consideration of the 8th section, in the view that I have endeavoured to present as affecting persons of all religions, but it also is excluded by the fact that Roman Catholics could before it passed hold and enjoy, and could alien lands by the express provision of the statute to which I have referred.

Accordingly, it appears to me that the only section of the 10 G. 4, c. 7, which can affect the case, is the 23rd section. Now, what is the 23rd section? The 23rd section was passed for the purpose of giving Roman Catholics, without taking any oath at all, the same rights which they enjoyed under the 18 G. 3 and [209] the 43 G. 3, upon taking the oaths prescribed by the former statute. That explains the whole enactment. That gives something for the 23rd section to operate upon, which entirely satisfies its language, without leaving anything to operate upon such provisions as the

8th section of the 6 G. 1, even supposing that it was in its terms applicable to Roman Catholics only. I may here refer to a case which occurred before Lord St. Leonards, when Chancellor of Ireland,—the case of *O'Connell v. O'Callaghan*, 7 Irish Eq. Rep. 596. There, the effect of the 23rd section was fully considered; and it was held by Lord St. Leonards that the effect of it was that which I have already mentioned. That completely explains the section, and without the necessity for disturbing this special provision, which, no doubt, was not in the contemplation of the legislature or the Roman Catholics affected by it at the time, because we find that there afterwards passed the 6 & 7 Vict. c. 28, which has been so often referred to, by which the proviso was taken away, and there remained the absolute restriction against alienation at the time of the deed of 1856, which was therefore a void deed.

I shall make but one further observation on the 8th section: I do not agree that the only object of the oaths mentioned in the 8th section was to test the religion of the individual; the only object was, not to test whether the person was a protestant, or, rather, to speak more correctly, to shew that he was not a Roman Catholic; that was not the only object of those oaths; the object of the oaths was further that, the person who should be capable of aliening was a person who was attached to the reigning family; they were not merely to establish that the person was not a Roman Catholic, and therefore, according to the notion of those times, a dangerous person to the state, but to test whether he [210] was a loyal subject. And, assuming that the oaths of supremacy and the declaration against transubstantiation had been entirely done away with by subsequent statutes, although the former certainly had not; for, we all know what the legislature did last session: still, unquestionably the oath of allegiance remains as it was settled at the revolution, and that is an oath which might be taken; for, unless the law has been altered by some statute of which I am not aware, any person in this kingdom that is of an age to understand it may be called upon to take that oath. In no point of view, therefore, is this 8th section one which comes within the provisions of the 10 G. 4, c. 7.

It appears to me that the estate in respect of which the plaintiff claims was well and effectually created by the 6 G. 1, c. 29, and that the disentailing deed executed by the late Earl Bertram in 1856, for the purpose of barring that estate, was a void deed. The rule, therefore, ought to be discharged.

BYLES, J. Notwithstanding the ability, research, and industry with which the defendants' case has been both prepared and conducted, I am of opinion, after anxious attention and full consideration, that there is no solid defence to this action.

The whole case has been so fully expounded and illustrated by my Brethren who have preceded me,—especially by my Lord Chief Justice, that I should, under ordinary circumstances, have thought it unnecessary to add a word; but, for the guidance of the defendants, and for their benefit, I think it is right they should know the grounds upon which the judgment of each member of the court proceeds. I will therefore very shortly state the reasons which have induced me to come to the conclusion that the plaintiff is entitled to our judgment.

[211] The plaintiff contends that the private act, 6 G. 1, c. 29, knits and annexes the estates to the title and dignity of Earl of Shrewsbury, to attend and wait upon the earldom, and that the statute in terms prohibits alienation. He admits that there was once a conditional power to aliene, but shews that that power not only was never exercised, but was repealed and taken away by another statute, 6 & 7 Vict. c. 28, s. 32, before any alienation was attempted.

These things being so, the plaintiff alleges that he has only to come into a court of law and prove (what is here admitted) that he is Earl of Shrewsbury, and he thereby proves his title to the estate. This is his position; and at first sight it certainly appears an impregnable one; but it is assailed by the defendants in three ways.

First, the defendants alleged that the alienation by Earl Bertram was effectual against the plaintiff, because it is said that Earl Bertram had, under the settlement of the year 1700, an estate-tail, with the ordinary incidents of an estate-tail, including the power of alienation, which estate tail is anterior and paramount to any estate tail created by the settlement of the year 1718. It is added that the estate-tail created by the deed of 1718 is alone made inalienable by the act of parliament.

But the act of parliament, 6 G. 1, after shortly reciting the settlement of 1700, and fully reciting the subsequent settlement of 1718, in terms expressly ratifies and confirms the later settlement, and all the uses, trusts, and estates therein limited. Now, the

settlement of 1718, intended, as it was, partly to confirm and partly to vary the provisions of the settlement of 1700, and incorporated as it is in the act of parliament, and sustained by it, must have this effect,—it must necessarily rescind and cancel all those provi-[212]-sions in the deed of 1700 which are inconsistent with the settlement of 1718, and must obliterate and destroy all those estates and interests created by the settlement of 1700 which are inconsistent with the estates and interests created by the settlement of 1718.

But Earl Bertram enjoyed an estate-tail in possession under the parliamentary settlement of 1718; whether he enjoyed under the settlement of 1700 also or not, at all events he enjoyed under the parliamentary settlement of 1718, an estate in special tail-male, which for the purposes of this objection must be treated as inalienable. How is it possible that he could also enjoy in possession at the same time an estate incompatible with it, that is to say, an estate in tail general, with the ordinary incidents of a power to bar and alien? And, if it were possible to conceive the estate-tail created by the settlement of 1700 as co existing with the estate-tail created by the settlement of 1718 and by the act of parliament, yet the words of the 8th section would apply to both: for, it provides that “no heirs male of the body of George Talbot, nor any other person to whom any estate of inheritance shall come by force of the act of parliament, shall alien.” What? Not the estate, as my Brother Willes has already observed, but “any of the lands settled, or any other thing do which may tend to the disherison of the heirs inheritable by force of the settlement of 1718, or the act of parliament, or whereby any of them shall be barred or put from entry into the premises.” Now, if, notwithstanding this enactment, the estate-tail created by the deed of 1700 could be aliened, so as to interfere with the plaintiff’s right of entry and present enjoyment, there would be a violation of the express words of the statute, and that, not to further, but to frustrate the clear intent of the [213] legislature, which was to prohibit alienation or any act tending to the prejudice of any taker under the parliamentary settlement of 1718.

The second objection raised by the defendants is this: they say that you must read the restraining clause in section 8 and the proviso together: and they add, that, so reading them, two things are clear,—first, that the restraint imposed on alienation by that clause applied to Roman Catholics only,—and next that it affected them no otherwise than by introducing into the act the mention of the general law of the land, or, in other words, declaring it: that, therefore, when, by the statutes passed for the relief of Roman Catholics, and especially by the act of the 10 G. 4, the Roman Catholic disabilities were removed, this restraining clause was in effect thereby repealed.

Now, in construing the act of parliament, 6 G. 1, I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the act: for, that would be to admit parol evidence to construe a record: but such discussions (they being by consent of counsel on both sides before us) may legitimately serve as hints for suggesting a point of view from which when the provisions of the act are once regarded those provisions will of themselves appear to be harmonious and clear. An act of parliament read from this point of view may at once interpret itself, although to its real history no authority be attributed, and the whole of that history be treated as conjecture,—conjecture not the less useful because it may happen to coincide with the fact.

Making this legitimate use of the history of the act, and no farther use, we find that there was a family compact between the persons to whom the estate was limited by the duke’s settlement and will, on the one hand, and the bishop and his issue, on the other. The [214] donees under the duke’s settlement and will laboured under incapacities, and they thus needed legislative relief. The bishop on his part had no possible future right to the estate although he had a possible, future right to the title: he thus needed legislative assistance to annex the estates to the title: the Catholic donees, therefore, on their part agreed to extend the limitation of the estate to the bishop, and he on his part agreed to exert his court and parliamentary influence to free them by act of parliament from any incapacities. But the ultimate limitation to the bishop would have been of little use to him, if the power of alienation had been left to his predecessors in estate. Accordingly, the bill was originally drawn with an absolute and universal prohibition of alienation by any one: the prohibition of alienation was afterwards partly relaxed by parliament with a view not to take away from

the infant son of George Talbot and other infants in the like circumstances the inducement to conform to the established religion: but the proviso in favour of alienation was so framed (probably by those interested in preventing alienation) as that it should be pretty sure never to operate, for, an infant of eighteen is not likely of his own head to renounce the religion of his fathers, and less likely still to be trained in apostacy, that he might aliene the family inheritance. This provision has been justified by the event: for, although nearly one hundred and forty years have elapsed, no attempt has been made to take advantage of the proviso.

Turning now from this brief summary of the history of the act, to the act itself, we may expect to find there what, when our attention is directed to it, we do actually and independently find,—we find a clearly-expressed intention to annex the estates inalienably to the earldom.

[215] To say nothing of the title of the act (which I apprehend is no part of the act, and ought not in strictness to be referred to, according to the most recent decision on the subject, in the court of Exchequer, in the case of *Salkeld v. Johnson*, 2 Exch. 283), this annexation of the estate to the earldom, as a main object of the act, appears, first from the preamble, and next from the express enactment to that effect at the end of section 2, and again from the prohibition of alienation. There is, as I have said, an express and universal prohibition of alienation, with an exception, however, in favour of infants taking certain oaths. The restraining clause is so comprehensive in its terms and has so much light thrown upon it both by the preamble and by the 2nd section, that it seems to me clearly to include, and to have been manifestly intended to include, both protestant and Roman Catholic owners of the estate. You cannot construe it otherwise without doing grievous and arbitrary violence to the language. If so, the first branch of this objection fails. Nor, even if the restraining clause had been confined to Catholics, would such a restriction have been declaratory of the general law of the land, but would have been inconsistent with it. Amongst the *sylva sylvarum* of the repealed laws, in which we have so long wandered, the able counsel for the defendants have been repeatedly requested by the court to point out, if they can, any general statute which prohibits alienation by a papist as such, and makes that alienation absolutely void. None such has been pointed out: and, no wonder: for, the acquisition of estates, and not the alienation of them, by Roman Catholics was the danger at which the statutes against popery struck. No doubt, there was a disability to aliene in cases where Roman Catholics could not take, as in some cases they could not, by purchase, and in [216] others could not even by descent, for, no one can convey that which he has not. In other cases, there was an inability in Roman Catholics to aliene to Roman Catholics: but, in those cases, the inability was common to alienors, both protestants and Catholics, and arose from the disability, not of the alienor, but of the alienee. There were other cases in which the claim of the next of kin, or heirs, claiming under the statute, would affect the title. But, so far as we can learn or discover, there was no general law prohibiting the alienation of land by Catholics, still less one making alienation utterly void after the decease of the alienor, as is done in this private act. How, then, can it be said that the special restriction on alienation, even if it had been confined to such alienors as were Roman Catholics, was but parcel of the general law of the land?

To fortify the conclusion that the 8th section was part of the general law, assistance is sought from the proviso engrafted on the 8th section, which proviso, it is said, is taken from the statute 11 & 12 W. 3, c. 4, s. 4. But, how can that be? Besides other distinctions between the two statutes, which have been pointed out at the bar, there is this grand distinction,—the oath and declaration mentioned in the statute of G. 1 are made a condition precedent to aliening an estate, but the oaths and declaration mentioned in the statute 11 & 12 W. 3, c. 4, s. 4, are made a condition precedent to taking an estate: the two statutes apply to different persons, the one to the alienor and the other to the alienee. There is this further distinction: the proviso in the statute of G. 1 is general in its terms: but the enactment in the 11 & 12 W. 3, c. 4, is, in terms, expressly confined to persons educated in the Roman Catholic religion, or professing it. An examination, therefore, of the proviso is far from fortifying the suggestion that the enactment of [217] the 6 G. 1 was a re-publication or a declaration of the general law.

The restraint on alienation appears, therefore, from the act itself, compared with public acts, to have been no part of the general law, but a private compact against

alienation, binding on successive owners of the estate, for the sake of knitting the estate to the earldom.

If that be so, then the statute 10 G. 4, c. 7, could not repeal the restraint. The preamble of the 10 G. 4, c. 7, is this: "Whereas, by various acts of parliament, certain restraints and disabilities are imposed upon the Roman Catholic subjects of His Majesty, to which other subjects of His Majesty are not liable,"—from which it would seem that this great statute contemplated relief from restraints and disabilities imposed on His Majesty's Roman Catholic subjects generally by the statutes affecting them generally, that is to say, created by public acts of parliament, properly so called, and by statutes imposing restraints, that is to say, operating without license and consent in invitoe but that it should touch restraints applying to certain individuals, voluntarily adopted and submitted to by them as part of a contract, whether that contract be or be not embodied in an act of parliament, seems foreign to its object. Moreover, if the statute applied to private arrangements between parties of different religions, then, instead of introducing that equality of civil rights between Catholics and protestants which was the great object of the act, it would introduce a startling inequality. Private restrictions in favour of protestants would be avoided by the general words of the act, but private restrictions in favour of Catholics would remain valid. For example: a restriction as to a charitable endowment, that it should be enjoyed by a Roman Catholic if and so long as he should be a [218] Roman Catholic, would be valid: but a restriction in a charitable endowment, that it should be enjoyed by a protestant if and so long as he should remain a protestant, or a condition that he should be subject to any test of protestantism, would be void. In a word, property might on this construction be tied up in favour of Roman Catholics as it could not be tied up in favour of protestants.

For these reasons, I think the general catholic relief acts do not touch the clause restraining alienation, or affect the condition precedent contained in the proviso.

Rightly, therefore, the Shrewsbury Estate Act, 6 & 7 Vict. c. 28, recites as still subsisting both the restraining clause in the act 6 G. 1 and the proviso. That statute, after reciting the restraining clause, repeals the proviso, and so in effect re-enacts the clause against alienation, and restores to it that universal and inevitable operation which the clause was originally intended to have. It was after this re-enactment of the restraining clause, and while it existed in its integrity and universality, that Earl Bertram affected to alienate.

Then it is alleged, thirdly, that this private estate act (the 6 G. 1, c. 29) is but a contract between the parties to it: that the limitations under which the present plaintiff claims were carved by the act of parliament out of a reversion in fee of Gilbert Earl of Shrewsbury; that Earl Gilbert was a Jesuit priest, resident in a Roman Catholic seminary abroad, and therefore laboured under a special incapacity to inherit, take, or enjoy under the 1 Jac. 1, c. 4, s. 6; and that, as he consequently had nothing, he could give nothing to the plaintiff, and the plaintiff could take nothing from him.

I do not at all agree to this view of the effect of a private act of parliament,—that it is necessarily to be construed as a mere contract. The rule that it is to be construed [219] as a contract or a conveyance is a mere rule of construction. You are, it is true, so to construe a private act as to effectuate the intentions of the parties, and bind their interests, and theirs only, as they intended them to be bound, and so as not to prejudice or affect the interests of strangers: but that is only if the act admits of such a construction. The legislature, in passing a private act, is as omnipotent as in passing a public act: and, if the words of the act do clearly and inevitably comprehend the estates or rights of strangers, a court of law must hold those estates or rights of strangers bound. Now, here, the statute treats Earl Gilbert, as having had a reversion in fee in himself; the act not only gives the plaintiff his estate out of that reversion, but expressly excepts Earl Gilbert out of the saving clause. Were the case, therefore, such that not only in law Earl Gilbert cannot be deemed to have consented, but that even in fact he never did consent, and had no estate as to which he could consent, yet he and that reversion are bound. Were the statute a tyrant, yet its decree, being clear, is irresistible.

But, supposing the act to be construed exactly like a mere contract, and to convey no more than such a contract between the parties to the act would convey, yet a statutory contract to which Earl Gilbert was a party would convey all that he had,

or might have had, were it not for his personal incapacity; but, surely, when the legislature recognizes what he has, and establishes what he does, and incorporates his contract into the statute law of the land, it impliedly, but very clearly, removes all his incapacity.

Lastly, it must not be assumed that Earl Gilbert, or any other in whom the reversion in fee was, would be a necessary party to a compact forming a proper foundation for a private act of parliament binding the fee. [220] Whoever had an estate-tail in possession could in effect dispose of the reversion in fee by suffering a recovery. The power of the reversioner was nothing, and the value of the reversion in fee nothing. So valueless, indeed, is such a reversion, that it has been held that a reversion in fee expectant on the determination of an estate-tail is not even assets for the payment of debts: see Comyns's Digest, Assets (B.). The estate-tail, at the time of the passing of the 6 G. 1, was in the infant son of George, which infant was duly represented before the House of Lords by his next friend. Assuming Earl Gilbert, therefore, to have been utterly incapable, and not capacitated, or not even to have been a party to the arrangement, still parties were present and represented who were competent to bind the reversion in fee.

Whether, therefore, the evidence adduced to prove that Earl Gilbert was a Jesuit priest, residing in a Roman Catholic seminary abroad, was admissible or not, it becomes unnecessary to inquire. The third and last objection made by the defendants to the plaintiff's title seems to me, therefore, to fail.

The result is, that no solid answer has been given to the plaintiff's claim as Earl of Shrewsbury, to whom, as such, the estates have been given by act of parliament; and the rule must be discharged.

Rule discharged (*a*).

[221] IN THE EXCHEQUER CHAMBER.

THE EARL OF SHREWSBURY *v.* SCOTT AND OTHERS. Feb. 18th, 1860.

Affirmance of judgment of the Common Pleas.

The defendants having appealed against the decision of the court of Common Pleas, the case was argued before Pollock, C. B., Wightman, J., Bramwell, B., Channell, B., Hill, J., and Blackburn, J., on the 1st, 2nd, and 3rd instant, by Sir Richard Bethell, A. G., for the defendants. The Court, without hearing Sir Fitzroy Kelly, for the plaintiff, took time to consider; and now their judgment was delivered by

POLLOCK, C. B. This was an appeal from the judgment of the court of Common Pleas on certain points reserved on the trial of the cause before the Lord Chief Justice Cockburn. The case is reported in the 6 C. B. (N. S.) p. 1. It was an action of ejectment brought to recover the mansion of Alton Towers, in the county of Stafford, and certain lands held therewith by the Earls of Shrewsbury.

At the trial, a verdict was directed for the plaintiff, subject to certain points of law arising upon the construction of various documents and acts of parliament referred to. In Hilary Term, 1859, a rule was obtained by Shee, Serjt., to enter a verdict for the defendants. Cause was shewn against this rule in Trinity Term, by Sir Fitzroy Kelly (then Attorney-General), Mr. Rolt, Mr. Manisty, Mr. Ellis, and Mr. Hannen; and the rule was supported by Shee, Serjt., Sir Richard Bethell (the present Attorney-General), Mr. C. Hall, Mr. Badeley, and Mr. Archibald. The hearing of the case occupied eight days. The court of Common Pleas, by a unanimous judgment, delivered *seriatim*, discharged the rule.

The present Attorney General has been heard before us during a portion of three days on the appeal from the judgment of the Common Pleas. He has argued the points in favor of the plaintiff in error more elaborately perhaps than they were argued in the court below: but nothing new has been elicited; nor has any point been presented to our attention, which was not before the court below. While the

(*a*) The judgment was pronounced in Trinity Term: but, the case being about to be argued before the Exchequer Chamber, on appeal, the reporter thought it convenient to prepare it at once.

argument was proceeding, we had an opportunity of considering it from day to day. At the close, we thought it would not be necessary to hear the counsel for the respondent; and, on the fullest consideration, we think it is not; and I have now to deliver the unanimous judgment of this court in favor of the plaintiff,—agreeing, as we do, with the court of Common Pleas, that the rule to enter the verdict for the defendants ought to be discharged.

It is unnecessary to state the facts of the case at length: they are fully set out in the preambles to the two private acts, 6 G. 1, c. 29, and 6 & 7 Vict. c. 28. From these recitals, it would appear, that, in the year 1700, Charles, Earl and Duke of Shrewsbury, by indentures of lease and release of the 30th and 31st of October, made a settlement of his manors, lands, &c., to the uses therein stated. At that period, by the 11 & 12 W. 3, c. 4, s. 4, persons professing the Roman Catholic religion, from and after the 29th of September, 1700, unless they took certain oaths and subscribed a certain declaration within six months of attaining the age of eighteen years, were (as to themselves only) made incapable of inheriting; and the next of kin which should be a protestant was to have and enjoy the lands, &c., of such Roman Catholic. The branch of the Talbot family descended from John the tenth earl were then Roman Catholics. There was another branch, of whom William Talbot Bishop of Salisbury was the head, the members of which appear to have been protestants.

Earl Gilbert, on the marriage of his younger brother [222*a*] George, by indentures of the 3rd and 4th of March, 1718, made another settlement of the estates; and to this settlement William Lord Bishop of Salisbury (afterwards Bishop of Durham) was a party. That settlement differed in some respects from the settlement of 1700: indeed, to effectuate all the objects of that indenture, it was deemed necessary to have a private act of parliament to confirm it. Accordingly, it was by the settlement of 1718 agreed that Earl Gilbert, George Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot should endeavour to obtain a private act of parliament, and give their consent thereto, for settling the said manors, lands, &c., on the said William Lord Bishop of Salisbury, and the issue male of his body, after the death of Gilbert, George, and John, and failure of issue male of their bodies,—not according to either settlement, but,—“in such manner as should be advised.” Accordingly, a private act of parliament was obtained, which, after reciting both settlements, contains a recital that Earl Gilbert was desirous that the settlement should be further extended in manner thereafter mentioned, and that the manors, lands, &c., should be annexed to and go along with the title and dignity of Earl of Shrewsbury.

With the above recitals, the private act 6 G. 1, c. 29, was passed: and we are of opinion, that, although it was merely a private act, it is, with reference to those persons and those matters with which it professes to deal, and which are within the scope of its enactments, of as much force, and as binding, as any public act of the legislature relating to the most important interests of the community.

Now, by that private act, the 6 G. 1, c. 29, s. 2, it was enacted, that, on failure of the issue male of George and John Talbot and Gilbert Earl of Shrewsbury, respectively, the lands (claimed in this action) shall be and remain to the use and behoof of every person (being issue [222*b*] male of the body of the first Earl of Shrewsbury) to whom the title of Earl of Shrewsbury shall descend.

The issue male of George, John, and Gilbert, respectively, have failed. The plaintiff (below) is issue male of the first Earl of Shrewsbury to whom the title has descended, and consequently he is entitled to the property in question as tenant-in-tail, unless something can be shewn to disentitle him.

This mode of viewing the case renders it unnecessary to determine whether the settlement of 1700 and the estates thereby created continued in existence, notwithstanding the subsequent settlement of 1718 and the private act of 6 G. 1, or whether it is correct to say (a question rather of words) that they were abrogated, superseded, or set aside by the subsequent settlement and the private act of parliament. Nor is it necessary to determine the effect of the deed of 1718. The governing instrument is the private act of parliament. It incorporates the two settlements (modifying the first); and they (controlled by the private act) become part of the parliamentary arrangement by the legislature.

We think this view of the case is an answer to the points first presented to our attention by the learned Attorney-General, as counsel for the appellants, viz. that Bertram Arthur Earl of Shrewsbury was tenant-in-tail under the settlement of 1700,

and had a title paramount which was not affected, and could not be, by the settlement of 1718, and therefore not by the private act of 6 G. 1 which confirmed it, and (as was argued) did not touch the settlement of 1700.

Settlements and conveyances can affect the estates only which the parties to them possess. It is a legal possibility that Earl Bertram may have had two estates in tail-male of the lands in question,—one, under the settlement of 1700,—the other, under the settlement of 1718, carved out of the reversion undis-^[222c]posed of by the settlement of 1700: and the two would present this singular result,—that the latter he could enjoy, but could not alienate; while the former he could (possibly) alienate, but could not enjoy. But the act of parliament deals with the lands themselves, and not merely with the estates (real or imaginary) which may be carved out of the fee-simple: and by the act the lands, manors, &c., are to go to the plaintiff (below),

It remains to be considered whether anything has been done to disentitle the plaintiff (below) to that which the private act has so clearly given him by the section already cited. There is a particular and express clause, viz. the 8th, against any alienation of the lands by the descendants of George (son of Gilbert of Batchcoate), or of John, or of any person to whom any estate of inheritance in the lands shall come: which renders it unnecessary to say what might have been done, but for that 8th section of the private act, 6 G. 1, c. 29. But by that section nothing is to be done which may tend to the disherison of the heirs inheritable by force of the recited settlement or that act; and any such alienation shall, after the death of the alienor, be void, as was observed in the court below. The manors, lands, &c., are not to be aliened, to the disherison of the plaintiff (below). What the tenants may do with their estates is immaterial. It is enough to say they could not effectually do anything to the disherison of the heirs inheritable by force of the said recited settlement or of that present act of parliament,—of which heirs inheritable the plaintiff (below) is undoubtedly one.

If, then, the restraint upon alienation in clause 8 had been absolute and unqualified, the title of the plaintiff below would have been clear. But it was not absolute: it was qualified by a proviso, which enabled the tenant-in-tail,—who should within six months after he attained the age of eighteen years take certain ^[222d]oaths and subscribe a certain declaration, and thenceforth continue a protestant until he should attain the age of twenty-one, and, after attaining that age, while he continued to be a protestant, to alien the same premises, or any part thereof, as freely as he might have done if that act had never been made.

Now, it may be observed, —first, that no tenant-in-tail of the manors, lands, &c., has fulfilled the conditions required by the proviso to enable him to alienate. What effect the act for the relief of Roman Catholics had upon the 8th section and its proviso will be adverted to presently. But, —secondly, it may be observed (and this is far more important) that the proviso in the 8th section is absolutely repealed by the 32nd section of the private act of 6 & 7 Vict. c. 28: and the effect of that repeal we apprehend to be, that, for all matters occurring subsequent to the repeal, the private act of 6 G. 1, c. 29, must be read as if there never had been any such proviso: see *Kay v. Goodwin*, 6 Bingh. 576, 4 M. & P. 311. And, as the private act repealing the proviso was passed in the year 1843, and the disentailing deed was not executed till the year 1856, the power of alienation (if any ever existed under any circumstances) was not exercised until thirteen years after the repeal of the proviso to the 8th section, upon which alone it could (apparently) be founded, and was therefore utterly void on the death of Earl Bertram.

We are aware that a large portion of the argument of the counsel of the plaintiff in error was directed to prove that the 8th section of the private act of 6 G. 1, c. 29, was entirely swept away by the Roman Catholic Relief Act, 10 G. 4, c. 7. But, in our judgment, it was not; for, there is no allusion, direct or indirect, to the private act of 6 G. 1, c. 29, in the Roman Catholic Relief Act or in any of the acts at any time passed on the subject. But we are told, that, upon a large ^[222e]and broad view of the statutes, and looking at the policy of the legislature as displayed and disclosed from time to time, the inevitable conclusion is that the 8th section was repealed and swept away as if it had never existed. We, however, come to a different conclusion: and, as the legislature in the year 1843 recognized the existence of the private act, by reciting it in the preamble of the 6 & 7 Vict. c. 28, and, more than

that, dealt with it in the 32nd clause, by repealing part of the 8th section, viz. the very proviso that is said to have been swept away by the Roman Catholic Relief Act, it cannot be that a private act of parliament affecting the succession to an inheritance, and which created important rights and claims in certain persons designated in the act, is to be deemed merely by implication or inference to have been repealed, when parliament has itself, in language unmistakeable, recognized its continuance as a private act, and has dealt with it by distinctly repealing in terms the important proviso upon the true construction of which so much (no doubt) depended, until its repeal has rendered it unnecessary to construe it at all.

We think nothing can be more plain than that the repeal of the proviso in the 8th section of the 6 G. 1, c. 29, by the 6 & 7 Vict. c. 28, s. 32, was a legislative recognition that the act itself remained unrepealed, and that the 8th section (without the proviso) should from the passing of the 6 & 7 Vict. c. 28, operate absolutely in restraint of alienation. And, even if the private act of 6 & 7 Vict. c. 28 had not passed, we are of opinion that the 6 G. 1, c. 29, s. 8, was not repealed by the Roman Catholic Relief Act, 10 G. 4, c. 7.

It was, indeed, contended, from a comparison of the language of the 11 & 12 W. 3, c. 4, s. 4 (to which our particular attention was directed) with that of the proviso to the 8th section, that the 8th section was merely a part of the general law affecting Roman Catholics, [222/] and was to be construed in conjunction with those statutes which created a general disability: and that, by implication and construction, the 8th section ought to be considered as repealed, when they were repealed. But we think we should not be justified in regarding the 8th section as part of the general law against Roman Catholics. The portion of it which resembles the language of the statute of W. 3 is enabling rather than disabling: and, though the 8th section (as a whole) is disabling, there is nothing to shew that the 8th section was confined to Roman Catholics. In its terms it applies to all persons who might become tenants-in-tail by virtue of the private act of parliament.

We think that these considerations dispose of the points argued before us, in a manner to leave no doubt as to the judgment we ought to pronounce, and to render it unnecessary to advert to the cases cited. In our opinion, whether there was under the settlement of 1700 a prior estate, and paramount to the estate which Earl Bertram might (but for the statute) have taken under the settlement of 1718, we think the positive enactments of the statute vest the manors, lands, &c., in the plaintiff as tenant-in-tail, not under either settlement, but by virtue of the provisions of the act of parliament: and, we think, that, as the 8th section of the 6 G. 1, c. 29, was not repealed by the Roman Catholic Relief Act, but the proviso has been repealed in 1843, by the 6 & 7 Vict. c. 28, s. 32, the disentailing deed executed subsequently, in 1856, cannot prevent the right of the plaintiff (below) from prevailing. We therefore give judgment that the rule be discharged, in affirmance of the decision of the court of Common Pleas.

I ought to add, that, in this judgment, we are unanimous, but that I alone am responsible for the reasons and the form in which they are presented.

Judgment affirmed.

[223] SMITH v. ROCHE. April 27th, 1859.

[S. C. 28 L. J. C. P. 237; 5 Jur. N. S. 918. See *Pegge v. Lumpeter Union*, 1872-74, L. R. 7 C. P. 371; L. R. 9 C. P. 373.]

The declaration stated that the plaintiff was the mother of two illegitimate children of which the defendant was the father, that the plaintiff, having relinquished all immoral intercourse with the defendant, had at his request undertaken and then had the care and nurture of the said children, and that, in consideration of the premises, and that the plaintiff would, at the request of the defendant, continue to take charge of the said children, and to supply them with such things as should be necessary for their use and benefit, he the defendant promised the plaintiff to pay her the sum of 50l. a year for and during a time not yet expired:—Held, that the declaration disclosed a sufficient consideration for the defendant's promise.—The third plea stated, that, after the making of the promise and before any part of the money

claimed by the plaintiff began to accrue or become due or payable, one of the said children died:—Held, no answer to the action.

This was an action for the breach of an agreement to pay for the support of the defendant's illegitimate children.

The declaration stated, that the plaintiff, being then sole and unmarried, and having theretofore always conducted herself with chastity and decorum, was seduced by the defendant, who then debauched and carnally knew the plaintiff, she then being so sole and unmarried as aforesaid, and by means of which said seduction and carnal knowledge the said plaintiff then became and was pregnant, and afterwards, and before the making of the promises thereafter mentioned, was delivered of a bastard child, to wit, a daughter, which said child had been and was begotten by the defendant, and afterwards, and before the making of the promises thereafter mentioned, was delivered of another bastard child, to wit, a son, which said last-mentioned child had been and was begotten by the said defendant, and is now living: that afterwards, and before the making of the promises thereafter mentioned, the said plaintiff, being so sole and unmarried as aforesaid, and having wholly relinquished and given up all cohabitation and immoral intercourse with the defendant, had, at the request of the defendant, undertaken and then had the care and nurture of the said children; and thereupon, afterwards, in consideration of the premises, and that the plaintiff would, at the request of the defendant, continue to take charge of the said children, and to supply them with such things as should be ne-[224]-cessary for their use and benefit, he the defendant then promised the plaintiff, she then being so sole and unmarried as aforesaid, that he the defendant should or would pay or cause to be paid to the plaintiff the sum of 50l. a year *for and during a term which has not yet expired (a)*, to be paid quarterly, that is to say, on the 1st day of February, the 1st day of May, the 1st day of August, and the 1st day of November in each and every year during the time aforesaid, the first of such quarterly payments to be due and payable on the 1st day of February, 1853: Averment, that, although the plaintiff had done all things necessary, and all things had occurred and happened, and all conditions had been performed, necessary to entitle the plaintiff to have the defendant to pay to the plaintiff the said sum of 50l. a year by the quarterly payments therein before in that behalf mentioned; yet the plaintiff in fact said, that afterwards, and before the commencement of this suit, a large sum of money, to wit, the sum of 62l. 10s. of the said yearly sum of 50l., for one year and one quarter of another year, which elapsed before the commencement of this suit, became and was due and payable from the defendant to the plaintiff under and by virtue of the said promise of the defendant in that behalf, yet the defendant had not at any time paid the same, or any part thereof, to the plaintiff, and the said sum of 62l. 10s. and every part thereof remained wholly due and unpaid.

Third plea, to the first count,—that, after the making of the promise in that count mentioned, and before any part of the money in that count claimed by the plaintiff began to accrue or become due or payable, one of the said children died.

[225] Demurrer, to the third plea, the ground of demurrer stated in the margin being, “that the death of the said child does not afford any answer to the defendant's promise to pay the yearly sum for and during the life of the plaintiff.” Joinder.

Haman (with whom was Petersdorff, Serjt.), in support of the demurrer. The declaration discloses a sufficient consideration for the defendant's promise. It will be contended on the part of the defendant that there was no consideration for the defendant's promise to pay the 50l. a year, inasmuch as the law casts upon the mother the duty and obligation of supporting her illegitimate offspring. The 71st section of the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, enacted that “every child which shall be born a bastard after the passing of this act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen; and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: Provided always that

(a) These words were at the trial substituted for the following, “during the life of the plaintiff.”

such liability of such mother as aforesaid shall cease on the marriage of such child, if a female." And s. 72 enacted, that, "when any child shall hereafter be born a bastard, and shall by reason of the inability of the mother of such child to provide for its maintenance become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry after the father of such child, apply to the next general quarter sessions of the [226] peace within the jurisdiction of which such parish or union shall be situate, after such child shall have become chargeable, for an order upon the person whom they shall charge with being the putative father of such child to reimburse such parish or union for its maintenance and support; and the court to which such application shall be made shall proceed to hear evidence thereon, and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person in that respect as to such court shall appear to be just and reasonable under all the circumstances of the case: Provided always that no such order shall be made unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony to the satisfaction of such court: Provided also that such order shall in no case exceed the actual expense incurred or to be incurred for the maintenance and support of such bastard child while so chargeable, and shall continue in force only until such child shall attain the age of seven years, if he shall so long live: Provided also that no part of the moneys paid by such putative father in pursuance of such order shall at any time be paid to the mother of such bastard child, nor in any way be applied to the maintenance and support of such mother." The mode of proceeding is somewhat modified by the 7 & 8 Vict. c. 101, ss. 1, 2, 3, and 6. The 2nd section provides that "any single woman who may be with child, or who may be delivered of a bastard child after the passing of this act, or who has been delivered of a bastard child within the period of six calendar months before the passing of this act, may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within [227] the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child: and if such application be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father or such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts." [Byles, J. The mother is chargeable for sixteen years, "if of sufficient ability;" the putative father for seven years only.] Yes. There have been several comparatively recent decisions upon the construction of contracts of this sort. In *Jennings v. Brown*, 9 M. & W. 496, the reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child and keep secret their connection: and it was held that the maintenance of the child was a sufficient consideration to sustain an assumpsit. The court there said: "The father might have had the child affiliated on him, and the consideration must be understood to be for ordinary provision. We think that a sufficient consideration." In *Linnegar v. Hold*, 5 C. B. 437, the father of an illegitimate child promised the mother, that, if she would abstain from affiliating the child, he would pay her 2s. 6d. per week for its maintenance: the mother did so abstain, and suffered the time limited by the statute for obtaining an order of affiliation to expire: and it was held that the promise bound the father, and that indebitatus assumpsit lay, the consi-[228]deration having been executed. So, here, it is implied that the mother will not affiliate the children, but will take upon herself their sole support and maintenance. The next case is *Hicks v. Gregory*, 8 C. B. 378. There, the reputed father of an illegitimate child, upon ceasing to cohabit with the mother, wrote to her as follows,—“As I always promised that you and your child should never want, I will allow you 100l. a year for your life and little Emma's, to begin from the 1st of July, and to be paid quarterly, which I think will be sufficient to keep you in great comfort. Of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you:” and it was held by

Wilde, C. J., and Maule, J., that the letter disclosed a sufficient consideration for the promise to pay the annuity, viz. the mother's properly bringing up the child. It is true that Williams, J., did not assent to the judgment there; but the doubt which that learned judge entertained does not detract from the case as an authority here (*a*)¹. *Crowhurst v. Laverack*, 8 Exch. 208, is also to a certain extent an authority for the plaintiff. There, the father and mother of an illegitimate child entered into the following agreement,—"Agreement made between L. of, &c., and S., single woman, respecting the maintenance of a certain illegitimate female child. L. agrees to pay 45l. to the child, as follows,—12l. to be paid down, and the remaining 33l. in four equal payments in four years,—the first of such payments, 8l. 5s., to be made on the 30th of December, 1836, and every succeeding 30th of December till the period of four years do expire: but, if the child should die before the four years do expire, the payments to [229] cease at such decease." The 12l. was paid at the time, and the agreement was placed in the hands of the attesting witness. The mother having afterwards heard that the father had got possession of the agreement, obtained against him an affiliation order for payment of a weekly sum, which was duly paid. Subsequently the mother married, and joined with her husband in an action against the father, one count of the declaration being for necessities supplied to the child by her before her marriage, and another count for necessities supplied by her and her husband after their marriage: and it was held, that, if the meaning of the agreement was that the father would make the stipulated payments if the mother would support the child, then the agreement was without consideration; but that, if the meaning of it was that the mother would undertake the sole maintenance, without affiliating the child, in which case there would be a good consideration, then the agreement had not been performed. "According to the literal construction of this agreement," said Parke, B., "the defendant undertakes to pay if the female plaintiff will support the child: and, in that case, there is no consideration for the agreement, since she was by law bound to do so. If the meaning is that she will undertake the sole maintenance of the child without affiliating it, in which case there would be a good consideration, then the agreement has not been performed." [Willes, J. Suppose the mother and child were out of the kingdom, what would be her legal obligation? Besides, the mother is only bound by law to maintain her illegitimate off-spring provided she is of sufficient ability.] If the mother has by the terms of the contract taken upon herself a greater obligation than was already imposed upon her by law, that will be a sufficient consideration for the defendant's promise. Then, as to the third [230] plea, which is based on the assumption that the death of one of the children put an end to the contract altogether. It is submitted that it could not in any case afford an answer to any part of the claim. The contract is, that, in consideration that the plaintiff at the defendant's request had undertaken the care and nurture of the children, and that she would at the request of the defendant continue to take charge of the said children and to supply them with such things as should be necessary for their use and benefit, the defendant would pay the plaintiff 50l. a year. "Children" is nomen collectivum, embracing any number there might be. Suppose, instead of children, the word had been "family," would the fact of the family being reduced to one have made any difference in the construction of the contract?

Lush, Q. C. (with whom was Tompson Chitty), contra (*a*)². There is no con-

(*a*)¹ The doubt of Williams, J., was, that the father only intended to confer upon the plaintiff (the mother) a bounty, which he might recall at pleasure.

(*a*)² The points marked for argument on the part of the defendant were as follows,—

"That the third plea is good in law:

"That the first count of the declaration is bad in substance; that there is no sufficient consideration alleged for the defendant's promise in that count; that the children of the plaintiff being illegitimate, she was bound by law to support and maintain them, and no duty was cast upon the defendant to do so; that the moral obligation of the defendant to support the children was not a sufficient consideration for the defendant's promise:

"That, supposing the promise of the defendant to be founded on a sufficient consideration, then, as the consideration was the plaintiff's continuing to take charge of the said children, and to supply them with necessities, the defendant was discharged

sideration stated in the declaration for the plaintiff's promise,—the plaintiff's promise [231] to maintain the children being no more than the law had already cast upon her, and there being no obligation legal or otherwise on the defendant. By the 71st section of the 4 & 5 W. 4, c. 76, the liability of the mother in respect of her illegitimate children is, not merely to maintain them, but to maintain them as part of her family. [Cockburn, C. J. That provision was not intended to apply to any but such as come within the scope of the poor laws.] The language is general. [Cockburn, C. J. The whole scope of the act has reference to the relief of the poor.] The ground of decision in all the cases cited on the other side, was, that there was something more to be done than merely maintaining the child. In *Jennings v. Brown*, part of the consideration was, that the connection should be kept secret; in *Linnegar v. Hodd*, that the mother would abstain from affiliating the child; and in *Hicks v. Gregory*, that she would conduct herself well, and bring up the child properly. Besides, in all these cases, the question arose upon the construction of the contract, and not upon demurrer. So, in *Crouchurst v. Laverack*, part of the consideration was assumed to be, the mother's abstaining from affiliating the child. [Crowder, J. Must we not construe this contract as meaning that the children were not to be affiliated?] The declaration should then have alleged that as part of the consideration. [Cockburn, C. J. How do you distinguish this case from *Hicks v. Gregory*? The very same argument might have been urged there that you are relying upon here.] Parts of the judgment in that case are very unsatisfactory. The Lord Chief Justice does not at all advert to the liability of the mother to maintain the child. That case was cited in *Crouchurst v. Laverack*, but without producing any impression. The third plea shews that the performance on the plaintiff's part of that which was the consideration [232] for the defendant's promise had become impossible. [Willes, J. Suppose this had been an annuity given by a will in these terms, for the support of the two children, would it cease or abate by the death of one?] The court of Chancery in that case would probably construe the devise in favor of the survivor. [Willes, J. Suppose there be a recognizance of bail for two, and one dies!] That is a totally different question. If a guarantee were given for a thing to be done by two, and one of them died, the guarantee would before the late Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 3, be gone. The whole consideration must be performed. [Cockburn, C. J. Why is the payment of the 50l. a year to be limited to the joint lives of the two children? Is the surviving child to be left destitute?] The contract is indivisible: it is an entire contract for the payment of 50l. a year for the use and benefit of the two children.

COCKBURN, C. J. I am of opinion that the plaintiff is entitled to our judgment upon this demurrer. There are two questions,—first, whether the first count of the declaration discloses a good cause of action,—secondly, whether, assuming that it does, the third plea affords an answer to it. The action is brought to recover certain instalments of an annuity. The declaration, after stating that the plaintiff was the mother of two illegitimate children of which the defendant was the father, goes on to allege that the plaintiff, having relinquished and given up all cohabitation and immoral intercourse with the defendant, had, at the request of the defendant, undertaken and then had the care and nurture of the said children, and that thereupon, in “consideration of the premises, and that the plaintiff would, at the request of the defendant, continue to take charge of the said children and to supply them [233] with such things as should be necessary for their use and benefit, he the defendant then promised the plaintiff, she then being so sole and unmarried as aforesaid, that he the defendant would pay or cause to be paid to the plaintiff the sum of 50l. a year for and during a term which has not yet expired.” It is contended that there was no consideration for this promise of the defendant, inasmuch as the law had already imposed upon the plaintiff an obligation to do that which is set forth as the consideration, viz. her having undertaken the care and nurture of the children: and, in support of this objection, reference has been made to the statute for the relief of the poor, 4 & 5 W. 4, c. 76, the 71st and 72nd sections of which provide that the mother of a bastard child, so long as she remains unmarried or a widow, is bound to maintain it as part of her family until the age of sixteen or marriage, and define the extent of the liability of

from his liability by its being impossible for the plaintiff, by reason of the death of one of the said children, to perform the consideration for the defendant's promise.”

the putative father. But, when we look into the statutes, we find that this liability of the mother is to be taken with this qualification,—that she is of ability to maintain the child. If she be not of ability, the obligation as respects her becomes ineffectual and inoperative, and the maintenance of the child thus left destitute is cast upon the parish. Besides, the woman has a right to call upon the father to contribute to the support of his illegitimate offspring. Now, this contract would practically have the effect of depriving her of this latter advantage. The 7 & 8 Vict. c. 101, ss. 2, 3, and 6, secure to the mother assistance from the father, provided she is unable to maintain the child herself. She may go before the magistrate for an order upon him for that purpose; but the making of that order is in the discretion of the magistrate, and is to be exercised by him with a due regard to all the circumstances of the case,—one of which circumstances would be the [234] ability or non-ability of the mother to support the child herself; another would be, whether or not the father had already made provision for that purpose. It would be monstrous to suppose that the magistrate, when he found that the father had already made a sufficient provision for the maintenance of his illicit offspring, should allow him to be harrassed by an order of affiliation. Now, if the general effect of this contract would be to deprive the mother of that means of compelling the father to make contribution, it would throw upon her the obligation to maintain the children herself. The general effect of the contract is to cast that burthen upon her. If so, there is, independently of the statutes referred to, a good and sufficient consideration to support the defendant's promise; which may in effect be taken to be this,—“If you, the mother of my two illegitimate children, will continue to take charge of them, and to supply them with such things as may be necessary for their use and benefit, I will pay you 50l. a year.” Read in that way, I think the declaration is good, and discloses a sufficient consideration for the defendant's promise, even assuming the proposition laid down by the court of Exchequer in *Crouchurst v. Laverack*, 8 Exch. 208, to be tenable, viz. that the obligation imposed upon the mother by the poor law acts prevents her undertaking to maintain the child from enuring as a consideration for the defendant's promise to make the stipulated payments.

Then, as to the third plea, which sets up in answer to the declaration, that, after the making of the promise, and before any part of the money in the declaration claimed began to accrue or become due or payable, one of the said children died. The question is, whether, the contract being to pay 50l. a year for the maintenance and support of the two children, the death of one of them necessarily puts an end to it. When [235] we look at the circumstances set forth in the declaration,—that the plaintiff, being the mother of two illegitimate children of which the defendant was the father, had undertaken the charge of them, and, at the defendant's request, had further undertaken to continue to take charge of and to supply them with such things as should be necessary for their support; and that the defendant, in consideration of this, promised to pay the plaintiff 50l. a year,—I do not see, that, because one of the children has died, the plaintiff, who has done all in her power to perform the contract on her part, should be deprived of the benefit of it. It is unnecessary to say how long the annuity is to be payable: it may be for the plaintiff's life; but it is enough, for the purpose of the present plea, to say that it is for a term not yet expired. For these reasons, I am of opinion that a sufficient consideration is disclosed upon the face of the declaration, and that the third plea affords no answer to it.

CROWDER, J. I am of the same opinion. Looking at the statement of the contract in the declaration, I think there is ample consideration on the face of it to support the promise. The objection is, that the consideration is insufficient, because the plaintiff has undertaken to do no more than she was already bound to do by the 4 & 5 W. 4, c. 76, s. 71. Now, without giving any opinion as to whether or not that statute has the application to the matter in hand which it is assumed to have, it appears to me, that, taking the argument to the fullest extent,—that, by force of the 71st section, the plaintiff was already bound to maintain the children as part of her family,—the consideration here goes far beyond that, and far beyond any obligation which the law has cast upon her. She undertakes to support the children in all events and for an unlimited time. [236] Suppose she should become so reduced in circumstances as to absolve her from the obligation imposed on her by the statute, that would not relieve her from this contract, to continue to take charge of the children and to supply them with all things necessary for their use and benefit. The

consideration is clearly sufficient. I also perfectly agree with the Lord Chief Justice that the effect of the contract is that the plaintiff was to continue to support the children so that they should not be a burthen on the defendant: and that is an ample consideration for the defendant's promise, and is quite independent of any question arising upon the poor-law acts. The next question is, whether the third plea affords any answer to the declaration. It seems to me that it does not. Looking at the consideration and the promise alleged in the declaration, I find that the promise is not confined to the maintenance of the children: the way it is alleged is this,—The declaration begins with stating the intercourse resulting in the birth of two children, and that, the intercourse having ceased, the plaintiff had at the request of the defendant undertaken and then had the care and nurture of the children: it then goes on to aver, that, in consideration of the premises, and that the plaintiff would at the request of the defendant continue to take charge of the said children, and to supply them with such things as should be necessary for their use and benefit, he the defendant then promised the plaintiff that he would pay her 50*l.* a year, &c. I see no reason why the defendant should not for that consideration undertake to pay the 50*l.* a year. Then, one of the children having died, can the plaintiff prove that she has performed that which was the consideration for the defendant's promise? She has continued to take charge of the children and to supply them with all things necessary, so as to relieve [237] the defendant from the burthen of supporting them, until the death of them, and she still continues to support the surviving child. She has, therefore, done all she could do to perform her part of the contract. I therefore think the plea, which alleges that one of the children had died before any of the money claimed by the declaration became payable, affords no answer to the action.

WILLES, J. I entirely concur in the opinions pronounced by my Lord and my Brother Crowder.

BYLES, J. I am of opinion that the declaration in this case is perfectly free from objection. The obligation which the law casts upon the mother of an illegitimate child is, to maintain it provided she be of sufficient ability to do so. The 71st section of the 4 & 5 W. 4, c. 76, which enacts that the mother of every child which shall be born a bastard, shall, so long as she shall be unmarried or a widow, be bound to maintain such child as a part of her family, until such child shall attain the age of sixteen, seems to me to refer to the old statute of 43 Eliz. c. 2, s. 7, which provided "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, in that manner, and according to that rate, as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed, upon pain that every one of them shall forfeit 20*s.* for every month which they shall fail therein." Now, an illegitimate child was not within that provision. It seems to me that the object of the [238] subsequent statute was, to compel the mother of an illegitimate child to maintain it in the same manner and to the same extent as the obligation was before imposed by law upon the parents of legitimate children, viz. subject to her being of sufficient ability. Here, the obligation which the mother takes upon herself is, to maintain the children solely and absolutely; and wherever they may be, and wherever she may be: and, further, she is to take charge of them,—such charge as is comprehended in the terms "care and nurture." There is, therefore, in my judgment, abundant consideration for the defendant's promise. As to the plea, it seems to me to afford no answer whatever to the declaration. There is no provision in the contract for the cesser of the annuity on the happening of the death of one of the children. The plaintiff has done all that in her lay to perform her part of the bargain. I should say,—though it is unnecessary to decide that,—that the mother's promise to supply the children with necessaries was to continue so long as either of the children should live: but that the annuity should continue to be payable to her notwithstanding the death of both. It seems to me to be precisely the same as if the defendant had paid a sum in gross. In that case, he clearly could not have maintained an action to recover back any part of the money if one or both the children had died. For these reasons, I am of opinion that our judgment must be for the plaintiff upon both grounds.

Judgment for the plaintiff.

[239] THE HODDESDON GAS AND COKE COMPANY (LIMITED), *App.*,
HASSELWOOD, *Resp.* April 29th, 1859.

[S. C. 28 L. J. C. P. 268; 5 Jur. N. S. 1013; 7 W. R. 415.]

There is no obligation upon a gas company registered under the 19 & 20 Vict. c. 47, to continue to supply a customer with gas for any particular period: nor does the circumstance of quarterly payments, or the hiring of a meter by the year, or of the company being the only one in the neighbourhood, afford any ground for implying a contract to that effect.

This was an appeal against a decision of the judge of the Hertford county-court on a plaint in which William Haselwood was plaintiff and the Hoddesdon Gas Company were defendants.

The plaintiff was the proprietor of a large school at Hoddesdon, having between sixty and seventy boys. The school had been for several years lighted and heated with gas supplied by meter to the plaintiff by the defendants. The defendants are a company having limited liability under the 19 & 20 Vict. c. 47, and have been in the habit of supplying the town of Hoddesdon with gas since 1849, and have the sole and exclusive supply of gas at that place. The company have no special act.

The plaintiff sought to recover the sum of 30l. for loss and damages sustained by him by reason of the defendants' wrongfully cutting off the gas from his school on the 4th of May, 1859, contrary to the contract between him and the company. The cause was tried on the 25th of May last, with a jury, when the following evidence was adduced on the part of the plaintiff:—

William Haslewood, the plaintiff, stated that he lived at Hoddesdon, and kept a school there; that the defendants had supplied his school with gas from the year 1849 up to the 4th of May last; that he was in the habit of paying for the gas quarterly, according to accounts rendered to him by the company, viz. on the 1st of February, the 1st of April, the 1st of August, and the 1st of November; that he also hired of the company a meter, at 5s. a year, but paid for it quar-[240]-terly. [The quarterly accounts, and receipts for gas and rent of meter, given by the company to the plaintiff, were put in and read.] That on the 27th of January last, being four days before the end of the current quarter, the secretary to the company, called to look at the meter, and remarked that it had not registered so much as in the corresponding quarter in the previous year, which ended on the 1st of February, 1858; that he looked at the meter, and found that it stood at 110,800 feet; that on the 1st of November, 1857, it stood at 105,700, shewing the consumption for that quarter, less the four days, as indicated by the meter, to be 5100 feet of gas; that the consumption for the corresponding quarter ending on the 1st of February, 1857, was 17,800 cubic feet; that the secretary said he was not at all satisfied at such a difference, and that he should charge considerably more than the meter indicated; and that he (the plaintiff) received the following letter from the company on the 5th of February, 1858:—

Hoddesdon Gas and Coke Company (Limited).

“Board Room, 5th February, 1858.

“Sir, —The Secretary having reported the quantity of gas registered by the meter in your school during the last quarter, which to the directors is very unsatisfactory, they have to request you will allow their man to remove it on Saturday morning at 11 a.m. for the purpose of testing its accuracy.

“S. WARNER, Chairman.”

To this letter the plaintiff sent the following reply, addressed to the chairman:—

“Hoddesdon, February 5th, 1858.

“Sir, —The discrepancy in the quantity of gas consumed, comparing it with the consumption of last year, may be fairly accounted for by the fact of not having occasion to use our gas-stoves the present mild season [241] until within the last ten days: indeed, Mr. Allen only fixed them last week. I will not permit your man to remove the meter: but I have no objection to Mr. Hunt doing so for the purpose of

testing its accuracy, sending it to the maker of the meter for that purpose : and, under any circumstances, I am willing to abide by the quantity consumed in the corresponding quarter of former years prior to the introduction of the stoves.

“WILLIAM HASSELWOOD.”

The plaintiff further stated, that, on the 8th of February, the meter was taken away by Mr. Hunt and Mr. Ship, and a new meter put up on the 15th of February : that he paid into court 8l. 18s. 9d. in a cross-plaint in this court (then standing for trial), for the quantity of gas as indicated by the meter on the 27th of January, and also for 2000 feet in addition from the 27th of January until the 15th of February : that he disputed the difference, 1l. 1s. 9d. claimed by the company for 2900 feet ; that, on the 27th of April, he received a letter from the defendants, and sent a letter to the chairman, dated the 25th of March, 1858, as follows :—

“To the Chairman of the Hoddesdon Gas Company.

“Sir, Your secretary has charged my gas for the quarter ending February 1st at 10,000, whilst the meter gave 5100. Now, I can find no reason that the latter quantity should not be correct. Your manager has inspected the meter weekly since the 16th of February, and found the consumption, with two gas stoves going, 1000 weekly. From the 1st November to our school breaking up on the 16th December, in consequence of the mild season, our stoves were not in operation or fixed, and our consumption then would be about 300 weekly from the 16th December to the 26th January. Our vacation we do not light the school [242] premises : therefore, taking the consumption from November 1st to December 16th, seven weeks, at 300 would be 2100, and from January 26th to February 15th, three weeks at 1000, 3000, would make the total 5100. A cheque for the proper amount may be had by your manager at any time.

W. HASSELWOOD.”

On the 16th of April, the plaintiff received a letter from the Gas Company as follows :—

“Hoddesdon Gas and Coke Company (Limited).

“16th April, 1858.

“Sir,—I beg to inform you it was resolved at a meeting of the directors held this day, that the gas account as furnished to you from the last meeting, amounting to 7l. 13s. 9d., be adhered to, the directors feeling fully satisfied it was under the actual consumption. To prevent further unpleasantness, it is requested the amount be paid forthwith.

S. WARNER, Chairman.”

On the 24th of April, the plaintiff inclosed the defendants a cheque for 5l. 17s., which he conceived to be all that was due to them ; and, on the 27th, he received a letter from the secretary, as follows :—

“27th April, 1858.

“Sir,—The directors beg to acknowledge your note addressed to their chairman, and to inform you they are fully convinced the charge made for gas from November 1st to 15th February is less than the actual consumption. Under these circumstances, they will feel obliged by your forwarding the balance. Your failing to do so before the 3rd of May will compel them to discontinue the supply of gas from that date.”

Some further correspondence took place between the plaintiff and his attorney and the secretary of the com [243] pany, which resulted (the plaintiff declining to pay what the company demanded) in the supply of gas being cut off on the 4th of May, 1858.

Evidence was given by the plaintiff of the cost of putting up the gas-stoves, which, in consequence of the defendants' refusal to supply him (there being no other gas-works in the town), had become useless.

One of the plaintiff's witnesses, a gas-fitter, who was present when the meter was removed on the 8th of February, stated, on cross-examination, that the company's manager on that occasion called his attention to the condition of the connection of the inlet-pipe with the meter : and that he judged, from the general appearance of

the meter that the pipe connecting it with the main had been disconnected from the meter and connected again in a rough and unbusiness-like manner.

On the part of the defendants, it was submitted that there was no obligation on them to continue to supply the plaintiff with gas after the expiration of the notice contained in their letter of the 27th of April; and the learned judge was pressed to nonsuit the plaintiff; but he declined to do so.

The defendants then proved, by their secretary, that they were a company duly registered under the 19 & 20 Vict. c. 47, and their deed of settlement was produced; and that it was their practice, when the consumer fails to pay for the gas on demand, to give him a week's notice, and then to cut off the supply: and it was proved that this practice also prevailed with the gas-companies in London. They also called their manager, who stated, that the appearance presented by the connecting-pipe clearly shewed that it had been frequently disconnected from the meter, the worm of the screw being much worn; and that no person has any right to interfere with any pipe-connections with the meter, without a servant of the company being present.

[244] In leaving the case to the jury, the judge said that there was evidence to go to them of a contract to supply the plaintiff with gas, which could not be determined without proper notice; that, in this case, the gas was cut off after a week's notice, when the amount claimed was in dispute; that it should be remembered that the company had an absolute monopoly in the supply of gas, and the plaintiff could not tell whether they would ever supply him again; and that, if they were of opinion that the defendants were not justified in cutting off the gas, they would find a verdict for the plaintiff. As to the damages, he observed that no offer had been made to restore the supply, and that he must assume that the plaintiff had been put to great expense in fitting up the stoves, and that it would cost a considerable sum to restore the premises to their former state; that they had had evidence of this; and that they must take it into consideration, and give the plaintiff the amount claimed, or such sum as they should think him entitled to for the injury he had sustained.

The jury returned a verdict for the plaintiff, damages 30l.

The defendants appealed on the following grounds,—“first, misdirection,—secondly, the reception of evidence which ought to have been rejected,—thirdly, that the verdict was against evidence,—fourthly, that the judge should have nonsuited the plaintiff, or directed the jury to find for the defendants, as there was no evidence to go to the jury in support of the plaintiff's case; and also that the judge was wrong in leaving it to the jury to say whether the defendants acted wrongfully in cutting off the gas from the plaintiff's premises, that being for the court, and not for the jury; and also that the judge erred in telling the jury, that, in estimating the damages, they might [245] take into their consideration the amount claimed for the expense the plaintiff had incurred in putting up the stoves and gas-fittings, and also in allowing evidence to be given of the sum so expended, inasmuch as that was not the necessary and natural consequence of the defendants' act.

Lush (with whom was Codd), for the appellants (*a*). The facts are shortly these:—The defendants, who are traders in gas, not incorporated by any special act of parliament, in the year 1849 agreed to supply the plaintiff's house with gas. The plaintiff, at a cost of about 30l., put up the necessary apparatus and fittings for receiving the gas. The supply was continued down to the month of May, 1858. For the quarter ending the 15th of February in that year, the meter, in the opinion of the defendants, indicated less gas than had been consumed; and, partly by taking into consideration

(*a*) The points marked for argument on the part of the appellants, were as follows:—

“1. That there was no contract proved by which the company were liable to supply gas for any certain time:

“2. That there was no evidence of any contract by the company to supply gas for any specific period, and that the company might have discontinued the supply at any time, without notice:

“3. That the company were not bound to supply the gas after the expiration of the notice contained in the letter of the 27th of April, 1858:

“4. That the [evidence of] special damage was not the natural and necessary consequence of the gas being discontinued, and was therefore inadmissible, and that the ruling of the judge was erroneous.”

the quantity consumed in the corresponding quarter of the previous year, and partly by guess, they added a certain number of cubic feet to the quantity so indicated, and charged the plaintiff with the number of feet so made up. The plaintiff refused to pay the [246] full amount so charged, and, while that matter was in dispute, the defendants cut off the supply. The question is, whether under the circumstances they were justified in so doing. [Cockburn, C. J. What contract is there to supply? and, for how long? I see none. How does this case differ from that of any other tradesman,—a butcher or a baker, for instance,—who is at liberty at any moment to discontinue the daily supply of a customer?] There can be no difference. [Willes, J. It must be remembered that the defendants have the monopoly of the supply of gas to this town.] As there is no contract to supply for any specific time, so neither is there any duty or obligation of any kind cast upon the company to continue the supply. There is no act of parliament. At all events, they could not be bound to continue the supply beyond the period indicated by their notice of the 27th of April. The direction of the judge as to the evidence also was clearly wrong.

Baylis, for the respondent. The relative position of the parties and the surrounding circumstances must be looked at to see whether there was not an implied contract to continue the supply of gas, at all events, for a reasonable time. Express contract, it must be admitted, there was none. [Cockburn, C. J. What are the surrounding circumstances from which you would imply a contract?] The plaintiff has been supplied with gas by the company for several years, and he has been put to considerable expense in erecting stoves and fittings. The supply has hitherto been paid for quarterly: and it is but reasonable, that, like a hiring or a tenancy, it should be determinable only by a reasonable notice: *Baxter v. Nurse*, 6 M. & G. 935, 7 Scott, N. R. 801. [Cockburn, C. J. Suppose an ordinary tradesman's bill to have been paid quarterly for a long series [247] of years, could you infer from that a contract for a quarterly notice before discontinuing the supply? Willes, J., referred to *Huffell v. Armistead*, 7 C. & P. 56.] In Chitty on Contracts, 5th edit. 21, the rule is thus stated,—"It is clear that a promise to a particular effect may be implied in any given case from the circumstances of the parties having invariably, on former and similar occasions, adopted any particular terms or course of dealing." It is not an immaterial circumstance here that the plaintiff hired the meter by the year. It is submitted that there was abundant evidence of an implied contract on the part of the company that the supply should not be suddenly stopped. [Willes, J. There might be something in your argument, if the supply had been causelessly stopped in the middle of a quarter: but here the plaintiff had notice that his supply would be discontinued at the end of the quarter because he declined to pay the company's demand.] Because the plaintiff would not submit to an extortionate demand. [Cockburn, C. J. Could you compel your oil-merchant to continue to supply you with oil against his will? What difference is there in this respect between oil and gas (a)?] The company call themselves the Hoddesdon Gas-Light and Coke Company; and they have the monopoly of the neighbourhood. This may be assimilated to the case of an ancient mill, where the rights and obligations of the tenants and of the mill-owner are reciprocal. The London gas-companies have by their acts of parliament power to cut off the supply (b). [Crowder, J. The company have no otherwise a monopoly here but because they happen to be the only manufacturers of the article in the place. Suppose there were a concern calling itself the Hoddesdon [248] Brewery Company, could you say, that, because the company so chose to designate itself, it thereby became bound to supply all the Hoddesdon people with beer? Suppose this company chose to discontinue business, would their obligation continue?] That case might fall within the principle of the dictum of Parke, B., in *Burton v. The Great Northern Railway Company*, 9 Exch. 507.

Codd, in reply, was stopped by the Court.

COCKBURN, C. J. I am of opinion that our judgment must be in favour of the appellants. The learned judge of the county-court, it seems, put it to the jury that there was evidence of a contract on the part of the company to supply the respondent with gas, which could not be legally determined without notice. I think that was

(a) Or between gas and coke?

(b) See the 16th and 17th sections of the Gasworks Clauses Act, 1847, 10 & 11 Vict. c. 15.

erroneous. I see no evidence whatever of a contract. It is said that a contract need not be express, but may be implied from the surrounding circumstances. That, no doubt, is so in many cases: but there are no surrounding circumstances here to warrant any such inference as the judge has drawn. What are the facts? The company is formed for the purpose of supplying the town and neighbourhood with gas. The respondent, being desirous of having his premises lighted and warmed with gas, adapts them for its reception by the putting up of stoves and fittings, and hires from the company a meter for the purpose of measuring the quantity consumed. I see nothing that was to bind the respondent to take gas for a single minute longer than he was minded so to do. If there be no implication of a contract on his part to take, so neither could there be any implication of a contract on the part of the company to continue the supply for any definite time. I am fully alive to the arguments of [249] inconvenience which have been suggested by Mr. Baylis: but the same sort of argument would equally be applicable to an infinite variety of articles besides gas, which the comfort and convenience of life render necessary to the consumer. It is altogether a question of degree. We cannot imply a contract from the accidental circumstance of this company having a monopoly of the supply of gas to this neighbourhood. I see nothing whatever to bind either the one party to take or the other to furnish the supply any longer than their convenience, or their caprice, if you will, may induce them to take or to supply.

CROWDER, J. I also think that the judge was wrong in telling the jury that there was evidence from which they might imply a contract for the supply of gas until some notice was given to determine it. Where a gas-company is incorporated by an act of parliament, there is usually an express obligation imposed upon it to continue the supply until a certain notice is given. But this is not a company so incorporated. It happens that this company are the sole manufacturers of gas in the town in question: and we are called upon thence to infer an obligation or a contract to supply. I see no ground whatever for any such inference. The judge ought not to have nonsuited the plaintiff.

WILLES, J. I am of the same opinion. I cannot see how any contract to continue the supply of gas generally, or until notice, can be inferred from the circumstances stated in this case. If at any point of time a contract could be implied, it would be implied from the fact of the respondent having incurred the expense of putting up the gas-fittings and stoves. I apprehend nobody could doubt that it was perfectly competent to the company to decline to commence to supply the [250] respondent with gas. Having commenced it, was there any implied contract to continue it? If there was, for what time was it to endure? If for a quarter of a year or a year, it is manifest that the consumer would not have an equivalent for the expense he had incurred at the outset. The only reasonable contract that could be implied would be, to continue the supply so long as the fittings should last, or until the consumer had had a sufficient enjoyment thereof to repay him for the expense thereof. What a complicated sort of contract that would be to imply for the parties! And yet it is the only one that could be implied. Seeing that there is this difficulty, the only conclusion I can come to is that there is no contract at all, except that the supply is to be determined at the will and pleasure of either party. The circumstance of the meter being hired at a yearly rent, and of the gas-accounts having always been paid quarterly, amounts to nothing. I have already referred to a case (*Huffell v. Armistead*) to shew, that, in the case of a tenancy, the mere fact of the payments having been made weekly will not warrant the inference of a contract for a week's notice to quit. If even the respondent was entitled to reasonable notice, he is put out of court by the notice which was served upon him before the end of the quarter.

BYLES, J. I am of the same opinion. I can add nothing to what has been said by my Lord and my two learned Brothers.

Judgment of nonsuit.

[251] BERNSTEIN v. BAXENDALE AND OTHERS. April 16th, 1859.

[S. C. 28 L. J. C. P. 265; 5 Jur. N. S. 1056; 7 W. R. 396.]

It is impossible with precise accuracy to define what are "trinkets" within the meaning of the 1st section of the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68.—But, semble

that the closest approximation is this,—that they must be articles of mere ornament, or, if ornament and utility be combined, the former must be the predominating quality.—For instance, bracelets, shirt-pins, rings, brooches, and ornamented tortoiseshell and pearl port-monnaies, however small their intrinsic value, are “trinkets.”—So, silk watch-guards are “silks in a manufactured state,” within the act.—Also, smelling-bottles, and the like, are “glass,” within the act.

This was an action against the defendants, who were common carriers trading under the firm of Pickford & Co., to recover the value of certain fancy articles contained in a package or box which had been delivered to them by the plaintiff to be carried from London to Bristol, but which had been lost through the defendants' negligence.

The account of the goods mentioned in the declaration, which was delivered pursuant to a judge's order, was as follows:—

	£	s.	d.
6 doz. Ivory bracelets	24/-	7	4 0
6 „ Black bracelets	12/-	3	12 0
6 „ ditto	18/-	5	8 0
6 „ Silk guards	15/-	4	10 0
6 gross <i>Dress buttons</i>	45/-	13	10 0
2 „ <i>Pearl studs</i>	15/-	1	10 0
3 doz. Agate bracelets	60/-	9	0 0
24 „ Ivory bracelets	21/-	25	4 0
12 „ Ivory bracelets	7/-	4	4 0
6 „ Shirt-pins	18/-	5	8 0
6 „ Common gilt rings	12/-	3	12 0
12 „ Brooches	15/-	9	0 0
7 „ Bracelets	27/-	9	9 0
15 „ <i>Leather port-monnaies</i>	18/-	13	10 0
12 „ <i>ditto</i>	33/-	19	16 0
6 „ <i>ditto</i>	48/-	14	8 0
3 „ Tortoiseshell ditto	72/-	10	16 0
1½ „ Pearl ditto	96/-	7	4 0
7 „ <i>ditto</i>	12/6	4	7 6
[252]			
2 „ <i>Patent ditto</i>	27/-	2	14 0
2 „ <i>ditto</i>	36/-	3	12 0
2 „ <i>ditto</i>	48/-	4	16 0
2 „ <i>Russia ditto</i>	72/-	7	4 0
2 „ <i>Leather cigar-cases</i>	36/-	3	12 0
2 „ <i>ditto</i>	84/-	8	8 0
1 „ <i>ditto</i>	108/-	5	8 0
1½ „ <i>ditto</i>	48/-	3	12 0
3 „ German-silver boxes	24/-	3	12 0
2 „ ditto	33/-	3	6 0
1 „ ditto	45/-	2	5 0
6 „ ditto, gilt	9/-	2	14 0
3 „ Smelling-bottles	22/-	3	6 0
2 „ Glass flagons	30/-	3	0 0

£229 1 6

The defendants paid into court 106l. 7s. 6d. to cover the items in italics in the above account; and, as to the residue, they defended on the ground that the nature and value of the contents of the package were not disclosed, as required by the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1, which enacts that no common carrier for hire shall be liable for the loss of any articles of the description following, inter alia, “jewellery, watches, trinkets, gold-plated articles, glass, silks in a manufactured or unmanufactured state,” contained in any parcel or package which shall have been delivered to be carried for hire, when the value of such articles shall exceed 10l.,—unless, at the time of the delivery thereof at the office, &c. of such common carrier for

the purpose of being carried, the value and nature of such articles shall have been declared by the person sending or delivering the same.

[253] Byles, J., before whom the cause was tried at the sittings in London after last Trinity Term, was of opinion that the bracelets, shirt-pins, gilt-rings, and brooches, were "trinkets," and the smelling-bottles and glass flagons were "glass," within the meaning of the statute; but that the tortoiseshell and pearl port-monnaies and the German-silver boxes were not "trinkets," nor the silk watch guards "silks." He, however, thought it more convenient to direct that a verdict should be entered for the plaintiff for the full amount claimed, reserving leave to the defendants to move to enter the verdict for them if the court, upon an inspection of the several articles, should think that all were unprotected by the statute, or to reduce the damages to the amount of the value of such of them as they should think not to be within the act.

Bovill, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly. He referred to *The Attorney-General v. Harley*, 5 Russ. 173, where "ivory fans" and "seals" were held to be "trinkets"; and to *Davey v. Mason*, Carr. & M. 45, where Lord Abinger ruled that an "eye-glass and gold-chain" did not come within the description of "trinkets," by reason of their being articles of utility as well as ornament.

Petersdorff, Serjt., and Quain, now shewed cause. The recital of the act shews plainly the description of things it was intended to embrace,—“Whereas, by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail-contractors, [254] stage-coach proprietors, and common carriers for hire is greatly increased: and whereas, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail-contractors, &c., by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail-contractors, &c., with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses.” The first section then proceeds to enact, “that no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following,—that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, lace, or any of them contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10l., unless, at the time of the delivery thereof at the office, [255] warehouse, or receiving-house of such mail-contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter (s. 2) mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.” None of the articles in question fall within this enactment. They are not articles of any intrinsic value. The definition of “trinket” in all the Dictionaries carefully excludes articles of utility, such as these bracelets, brooches, and pins, which are mere fastenings for dress. Webster describes it as “a small ornament, as a jewel, a ring, or the like;” Richardson, “any small piece of ornament or decoration, of more ornament than use;” and Dr. Johnson, “ornaments of dress: superfluities of decoration:” and this latter is adopted by Bailey. [Cockburn, C. J. Richardson’s definition

seems to me to be the best,—a thing “of more ornament than use.” Can a thing be said to be the less an ornament, because there may be superadded to it the quality of utility? In *Darcy v. Mason*, Carr. & M. 45, Lord Abinger ruled that silk dresses made up for wearing are not “silks,” nor an eye-glass with a gold chain attached to it, for the purpose of being hung round the neck of the wearer, “trinkets,” within this enactment. [Byles, J. Would you say that gold spectacles are not trinkets?] Certainly. [Cockburn, C. J. Perhaps spectacles can hardly be an “ornament” independently of their utility.] In *Peters v. Fleming*, 6 M. & W. 42, a “breast-pin” and a “gold watch-chain” were held to come within the description of necessities for which an infant might [256] contract. The silk guards are not “silks” within the statute. “Silks,” according to Webster, means “cloths made of silk,” not every article into the composition of which silk enters. The word clearly never could have been intended to apply to every article made of silk which a carrier may be called upon to carry. Then, as to the tortoiseshell and pearl port-monnaies, they are clearly articles of use exclusively: the circumstance of their being more or less ornamented cannot change their character. [Byles, J. In *The Attorney-General v. Hurley*, 5 Russ. 173, a testatrix directed all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeathed the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches, to B.: by a subsequent testamentary disposition, she gave all her trinkets of every denomination, her jewels excepted, to C., and, in another part of the same instrument, directed her jewels to be sold: afterwards, by a third testamentary instrument, she bequeathed to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds. The testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, and of various diamond rings, besides those which were specifically bequeathed: and it was held, that the diamond necklace and cross, and the diamond rings not specifically mentioned, were to be sold, and did not pass to B.; and that the pearl necklaces passed to B., under the gift of “necklaces of every description,” and did not pass to C. under the gift of “pearls.”] The question there was, what was the intention of the testatrix, not what was the proper description of the article per se. The result of the cases seems to be, that, if the articles are purely articles of personal decoration or adornment, they are trinkets; but that, if [257] they have a use, the mere addition of ornament will not make them trinkets. “Glass,” in the statute, evidently means such articles of glass as would in their transport expose the carrier to risk of breakage. That cannot apply to the smelling-bottles here. [Byles, J. Why not? In *Owen v. Burnett*, 2 C. & M. 353, 359, Bayley, B. says: “Glass is mentioned generally: and why is the act not to apply to glass of every description, if of the requisite value? It is a commodity which requires particular attention, and in respect of which the carrier is exposed to great risk and hazard from its brittle nature. The word ‘glass’ is unqualified and unlimited; and I cannot see that we are justified in saying it applies to glass in a small compass only, and not of every description.”] The German silver fusee-boxes cannot in any view rank amongst articles of “personal ornament” or “superfluities of decoration.” [Cockburn, C. J. We are all agreed that these are not trinkets.]

Bovill, Q. C., and C. Pollock, in support of the rule. All these goods, it must be remembered, are sent by a person who describes himself as a dealer in fancy articles. The degree of usefulness of the article cannot determine its character. A “fan” and a “seal” are both useful; and yet they have been considered as trinkets,—*The Attorney-General v. Hurley*, 5 Russ. 173. Neither is its adaptability to personal decoration the test. A tooth-pick or a gold pencil-case, it could hardly be contended, would not be a trinket within this act. The port-monnaies are not mere purses, but are highly ornamented, and evidently more for show than use. The silk guards are within the express words “silk in a manufactured state, wrought up with other materials.” [Cockburn, C. J. We incline to think these two latter articles are within the protection of [258] the act. But, as to the fusee-boxes, we think they are not.]

COCKBURN, C. J. I am of opinion that the rule should be made absolute so far as to reduce the damages to 11l. 17s., being the value of the “German-silver boxes,” which I am of opinion do not properly fall within the definition of “trinkets,” and therefore are not within the protection of the 1st section of the Carriers’ Act. As to the other articles, viz. the bracelets, shirt-pins, rings, brooches, and tortoiseshell and pearl port-monnaies, I think they all fall properly within the description of “trinkets.”

There is a distinction between some of the articles, which are more especially articles of ornament with reference to dress, and others which, though of a somewhat ornamental character, do not constitute ornaments of dress, but are only occasionally produced. As to the former,—bracelets, shirt-pins, rings, and brooches,—they are clearly articles of personal decoration and adornment, and literally fall within the description of “trinkets.” It is said, that, inasmuch as they are also articles of utility, they cease to be trinkets. But I do not agree to that. Their main and principal object plainly is that of ornament. It is true they may also be applied to some useful purpose; yet, inasmuch as they are essentially ornamental, I do not think the fact of their being capable of being turned to some use raises any difficulty. But, even supposing their main object was utility for the purpose of dress, if made part of the ornament of apparel, they equally fall within the strictest definition of “trinkets.” The other articles, viz. the port-monnaies and the smelling-bottles, are more difficult to deal with. Still I think, that, though not worn so as to be constantly exhibited to view, and though to a certain extent articles of use, and perhaps of necessity, yet, if an orna-[259]-mental character is given to them to such an extent as to make that their main and primary object, I think they may fairly and properly be considered to fall within the description of “trinkets” in the general sense of the word. If that may be taken to be the true definition of trinkets generally, *a fortiori* ought that sense to be given to the word in this act of parliament, the object of which is to protect the carrier against the risk of having to take charge of packages of great value in small compass. In that respect, there can be no difference in point of risk and danger to the carrier whether the article is designed to be carried in the pocket or exposed on the dress of the party. With regard to the boxes, I do not think they can be said to be “trinkets.” They are common and ordinary things. Indeed, it would be difficult to make them more plain. There is nothing at all of an ornamental character about them. I think the plaintiff is entitled to recover in respect of them. The only remaining articles are the “silk guards.” These, I think, clearly are within the act. The words used in the statute are, “silks” (in the plural) “in a manufactured or unmanufactured state,”—the largest that could be used. It is said that the word “silks,” in the plural, applies not at all to unwrought silk, but to manufactured only. When the statute speaks of silks, would they be the less silks because made up into articles of wearing-apparel? Indeed, the value would be thereby increased; and certainly the danger against which it was the object of the statute to protect the carrier would not be diminished. I therefore think these articles were within the protection of the act, and consequently that the plaintiff is not entitled to recover in respect of them.

CROWDER, J. I also am of opinion that the plaintiff is entitled to recover only to the extent of the value of [260] the German-silver boxes, beyond the amount paid into court. As to the bracelets, shirt-pins, rings, and brooches, I cannot conceive anything that would more appropriately be described as “trinkets” than these. They are all articles of ornament, though, as is ordinarily the case with things which are used for ornament, they have some semblance of utility. As to the port-monnaies, I must confess I entertained some doubt at first. But, upon an inspection of them, it is evident that they are mainly for the purpose of show, and therefore must fall within the description of trinkets. With regard to the smelling bottles and glass flacons, it cannot be denied that they are “glass,” though possibly they also might be called trinkets. They are not the less glass because some ornament is superadded. But, as for the “German-silver fusee-boxes,” they clearly are not trinkets within the meaning of the act: they are as plain articles as could possibly be conceived. The only remaining question is as to the “silk guards.” Looking at the language of the act, I cannot arrive at any other conclusion than that it does embrace articles like these, which are clearly “silks in a manufactured state, wrought up with other materials.” There is no reason why the silk should be deprived of the quality there mentioned because it is wrought into articles of this description.

WILLES, J. I am of the same opinion. As to the boxes made of German-silver and brass, the plaintiff is entitled to recover. They cannot according to any fair definition of the word be called trinkets: obviously their principal object is use, and whatever ornament is put upon them is only so much as is necessary to make them sell. The only other part of the case upon which I wish to add a word is, as to the silk guards. No doubt, the question involved in this case is a very [261] important

one: and the case of *Davey v. Mason*, Carr. & M. 45, has never been acquiesced in as an authority by persons interested in the subject, and it was under discussion in *Hart v. Earendale*, 6 Exch. 769. The question there arose as to whether "silk hose" were silks within the act. In the course of the argument (though that is not noticed in the report) the court intimated a strong opinion that the ruling of Lord Abinger in *Davey v. Mason* could not be sustained. The only doubt seems to be that raised by the word being "silks," in the plural, which seems rather to point to "cloths made of silk," in which sense, Webster observes "the word [silk] has a plural, silks, denoting different sorts and varieties, as, black silk, white silk, colored silks." If, therefore, there were no other language in the act, I should be inclined to say silks meant cloths made of silk. But I find other words in the act which are inconsistent with holding it to be confined to the plural of silk. The object of the additional words, "in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials." As to the other parts of the case, I entirely concur in what has been said by my Lord and my Brother Crowder, and have nothing to add.

BYLES, J. I quite concur with the rest of the court in their correction of the impression I entertained at nisi prius. I felt myself governed by the case of *Davey v. Mason*, Carr. & M. 45; but I now learn for the first time that the ruling in that case has been reflected upon, and that the matter is to be dealt with as if it were res integra. If so, I agree that the word "silks" in the statute must be held to comprehend silk wrought up into textile fabrics, cords, ribbons, &c. With regard to the port-monnaies, I also agree with the opi-^[262]mions which have been expressed: these were certainly more ornamental than useful. Upon the whole, I think a correct conclusion has been arrived at, and that the verdict must be entered only for the value of the boxes,—11l. 17s.

Rule absolute accordingly.

ANDREWS v. GARRETT. April 15th, 1859.

The plaintiff, a tailor, having furnished goods to the defendant's son (an infant) while at Addiscombe, the defendant, repudiating all liability on his part, on the ground that the goods were not necessities, wrote to the plaintiff as follows:—"Should you think fit to keep entirely from him, by yourself or agent, and not trust him any further sum, or molest him in any way, and he does not, through your influence, introduction, or advice, contract any further debt, I will pay you one moiety, and try to provide the means for him to pay the other. If you do not at once agree to this, you are open to take any step you may think proper: but, in case you do, I wish to have the account sent to him here per return of post."—The plaintiff sent the account, but did not in terms accept the proposal contained in the above letter, though he did not in fact molest the son: and some months afterwards he caused his attorney to write to the defendant intimating his willingness to accept from him one half his claim, but reserving to himself his rights against the son for the remaining half:—Held, that these letters did not constitute such an agreement as to entitle the plaintiff to sue the father for the moiety of the account.

This was an action upon a special agreement. The first count of the declaration stated, that, before and at the time of the making of the promise of the defendant thereafter mentioned, one Newson Dunnell Garrett was indebted to the plaintiff in a certain sum of money, to wit, 69l. 10s. 6d., and thereupon it was agreed between the plaintiff, the defendant, and the said Newson Dunnell Garrett that the defendant should become debtor to the plaintiff in and agree to pay to the plaintiff one moiety of the said sum of money in which the said Newson Dunnell Garrett was so indebted to the plaintiff as aforesaid, and that he should become such debtor in lieu and instead of the said Newson Dunnell Garrett, and that the defendant should with the assent of the said Newson Dunnell Garrett become such debtor and agree as aforesaid, ^[263]and that the plaintiff should accept the defendant's so becoming such debtor and agreeing as aforesaid in full satisfaction and discharge of the said debt so due from the said Newson Dunnell Garrett to the plaintiff as aforesaid, and all the damages, causes, and rights of action in respect thereof; and that thereupon, in consideration of the said agreement, the defendant did become such debtor to the plaintiff, and agree

to pay him one moiety of the said sum of money in which the said Newson Dunnell Garrett was so indebted to the plaintiff as aforesaid, and that he did become such debtor in lieu and instead of the said Newson Dunnell Garrett, and that the defendant did, with the assent of the said Newson Dunnell Garrett, become such debtor and agree as aforesaid; and the plaintiff did then accept and receive the defendant's so becoming such debtor and agreeing as aforesaid in full satisfaction and discharge of the said debt so due from the said Newson Dunnell Garrett to the plaintiff as aforesaid, and all the damages, causes, and rights of action in respect thereof: Breach, that, although the plaintiff had done all things necessary, and all things had occurred and happened necessary, and all conditions precedent had happened and been performed necessary to entitle the plaintiff to be paid by the defendant the said moiety of the said debt so due from the said Newson Dunnell Garrett to him the plaintiff as aforesaid, yet the defendant had not paid the same or any part thereof, but had omitted and neglected so to do.

There was also a count for goods bargained and sold and sold and delivered, and for money found due upon accounts stated.

The defendant pleaded, to the first count, that it was not agreed as alleged, that the said Newson Dunnell Garrett was not indebted to the plaintiff as alleged, that he (the defendant) did not become debtor [264] to the plaintiff or agree to pay him as alleged, and that the plaintiff did not accept or receive the defendant's becoming debtor to the plaintiff as alleged; and, to the residue of the declaration, never indebted. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in Middlesex after last term. The facts were as follows:—The plaintiff is a military tailor carrying on business in Cork Street, the defendant a maltster and general merchant residing at Aldburgh, in the county of Suffolk. In 1855, the defendant sent his eldest son, N. D. Garrett, then seventeen years of age, to Addiscombe, with a suitable allowance, regimentals being provided by the college. Shortly after his arrival there, the plaintiff went down to Addiscombe, and was there introduced to the defendant's son, whom he supplied with clothes to the amount of 69l. 10s. 6d. between the 10th of December, 1855, and the 10th of June, 1856. It appeared, that, between June, 1855, and December, 1856, the youth had obtained goods from three other London tailors to the amount of 155l. 18s. 3d. These supplies were wholly unnecessary, and made without the knowledge of the defendant, who, when he discovered his son's reckless proceedings, wrote to the plaintiff, as follows:—

“Mr. Andrews.

“26th January, 1857.

“Sir,—I have just been informed, and am deeply distressed at the shameful way you and others have been trying to ruin my boy by supplying him with goods, &c., on credit. I now inform you, that, as you have no shadow of excuse, and no authority from me, I do not hold myself liable for one farthing, and am perfectly ready to defend any action for the same. The following is without prejudice on either side: Should you think fit to keep entirely from him, by [265] yourself or agent, and not trust him any further sum, or molest him in any way, and he does not, through your influence, introduction, or advice, contract any further debt, I will pay you one moiety, and try and provide the means for him to pay the other. If you do not at once agree to this, you are open to take any step you may think proper; but, in case you do, I wish to have the account sent to him here per return of post.

“N. GARRETT.”

Shortly after the receipt of the above letter, the plaintiff sent the defendant a letter intimating that he inclosed the account, as requested. On the 16th of November, 1857, the plaintiff again wrote as follows:—

“N. Garrett, Esq.

“9 Cork Street, 16th Nov. 1857.

“Sir,—Some months ago, I wrote to you about your son's account: you promising payment of your son's account if I did not annoy him at Addiscombe. I have fulfilled my promise. Your son, I hear, is about to leave for India. I must, therefore, request that you will fulfil yours by sending me a cheque by the first opportunity.

“GEORGE ANDREWS.”

In January, 1858, the defendant's attorney wrote to the plaintiff, as follows :—

“Mr. Andrews.

“9th January, 1858.

“Sir,—I am directed by Mr. Garrett, of Aldboro' Suffolk, to inform you that his son, Mr. N. D. Garrett, will leave England on the 20th instant, and further to inform you, that, if you like to call at my office on or before Friday next at 12 o'clock, the Messrs. Garrett will be prepared to meet any process you may feel disposed to issue against either of them : and, further, without any prejudice to either party, Mr. Garrett, sen. [266] is disposed to renew his offer in part made in January last, if you come here and agree to the terms that will be submitted to you ; but, if you do not do so, he will withdraw the said offer entirely, and defend any action you may bring.
“G. BASHAM.”

On the 19th of January, the defendant's attorney received from the plaintiff's attorneys a letter to the following effect,—

“9 New Square, 19th January, 1858.

“Sir, Our client is willing to accept from Mr. Garrett, sen. half the claim upon him, reserving to himself his rights, whatever they may be, against Mr. Garrett, jun. for the remaining half : or, he will take 60*l.* in discharge of his whole claim against both.”

On the part of the defendant it was submitted, that, in the absence of evidence that the plaintiff had accepted the proposal contained in the defendant's letter of the 26th of January, 1857, there was no case to go to the jury. And, his Lordship being of that opinion, the plaintiff was nonsuited, with leave to move to enter a verdict for a moiety of the account, if the court should think him entitled to recover.

Powell now moved for a rule nisi. He submitted that there was abundant evidence of acceptance by the plaintiff of the defendant's proposal [Cockburn, C. J. There are two difficulties in your way. In the first place, you have to shew that the plaintiff accepted the offer contained in the defendant's letter of the 26th of January, 1857. In the next place, assuming that there was a quasi acceptance of that offer, did not the plaintiff abandon that by afterwards authorizing his attorneys to express his willingness to take half his demand, but reserving his right to proceed against the son for the other half ? Willes, J. Where is the contract by [267] the plaintiff that he would absolutely abstain from molesting the defendant's son ? That was the consideration for the promise of the defendant to pay a moiety of the debt. There was nothing to prevent the plaintiff from suing the son the next day.] The sending the invoice pursuant to the request contained in the defendant's letter, was as distinct an assent to the terms proposed, as if plaintiff had said in so many words “I agree to each and every of the terms of your letter.”

COCKBURN, C. J. I am of opinion that there should be no rule in this case. If it had stood entirely upon the defendant's letter of the 26th of January, 1857, and the plaintiff's answer thereto, there might have been some room for doubting whether the plaintiff's letter might not be construed as amounting to an acceptance of the terms offered. It might be capable of that construction : but, at the best, it is very vague, and leaves the matter in ambiguo. The plaintiff's subsequent conduct has very properly been referred to, to shew what he meant,—whether he really intended to adopt the proposition of the defendant, which was in substance this, that, if the plaintiff would keep away from his son, and would abstain from giving or facilitating his obtaining further credit, and from in any way molesting him, the defendant would pay the moiety of the plaintiff's demand. Some months afterwards, being informed that the son was about to leave England, the plaintiff causes his attorney to write to the defendant's attorney to signify his willingness to accept from the defendant one half the amount of his claim, reserving to himself his rights, whatever they might be, against the son for the remaining half,—thus abandoning the terms originally offered, and proposing fresh terms. Another proposition is afterwards made by the plaintiff's attor-[268]neys, still inconsistent with the proposal contained in the defendant's letter of the 26th of January, 1857. The plaintiff's last letter affords a safe criterion for the construction of the first. He evidently meant to say, that he adopted the proposal as to part,—that he would not supply the young man with further goods, and would accept half the amount

from the father, but does not consent to waive his right to have recourse against the son for the balance. I therefore think the consideration fails.

CROWDER, J. I am of the same opinion. This was an action upon a special agreement by which the defendant agreed to pay to the plaintiff one moiety of a debt due to the plaintiff for goods supplied to the defendant's son: and the only question is whether such an agreement was constituted by the defendant's letter of the 26th of January, 1857, and the plaintiff's answer thereto. It appears to me that the letters do not constitute a complete agreement. The defendant proposes to pay the plaintiff one moiety of his demand, if the plaintiff will consent not to molest the son or to give him any further credit. It is clear that the father meant to stipulate that his son should not be in any way molested for the residue of the debt. What is the plaintiff's answer? All he does is to send the account. It is said that that was virtually an acceptance of all the terms proposed. I cannot accede to that: it rather seems to me that the plaintiff was studiously endeavouring to evade an acceptance of the terms proposed. The correspondence which took place in January, 1858, seems to shew that both parties considered the matter to be then open. I think it is impossible to say that there has been such a clear and distinct agreement as will entitle the plaintiff to maintain this action.

[269] WILLES, J. I am of the same opinion: and I think it is unnecessary to add anything to what has fallen from my Lord and my Brother Crowder as to the necessity of a distinct acceptance of the terms offered by the defendant's letter, to bind the latter. *McIvor v. Richardson*, 1 M. & Selw. 557, and *Morley v. Tinkler*, 1 C. M. & R. 692, are authorities to establish that, if any were wanted. Then, as to the terms which were to be accepted by the plaintiff before he could be entitled to call upon the defendant to pay the moiety as proposed,—the first is, that the young man shall not be molested. Now, "terror of suit is a damnification:" *Broughton's case*, 5 Co. Rep. 24 a. A threat of proceedings would be a molestation: *Gibbons v. Fouillon*, 8 C. B. 483. The father clearly intended that his son should be free from personal annoyance. If the plaintiff intended to avail himself of the father's promise quoad the moiety, he should have distinctly accepted the terms of the letter. There is another important line in the letter of the 26th of January, 1857, which has not been accepted, viz. that the plaintiff should abstain from leading the son into any further extravagance. To that part of the letter there is no answer whatever. Mr. Powell said, and was obliged to say, that the effect of the defendant's letter of the 26th of January, 1857, was to give the plaintiff a right of action against the defendant for the moiety of the account, if he in fact did abstain from molesting the son or inducing him to get further into debt. But it is clear that no such agreement was ever entered into between the parties.

BYLES, J. I also think the nonsuit was right. The plaintiff's letter is not an acceptance of the proposal contained in the defendant's letter. If not, there was no contract. The subsequent correspondence clearly [270] shews that the decision of the Lord Chief Justice as to the legal construction of the two material letters is quite in accordance with the intention of the parties.

Rule refused.

VALENTE v. GIBBS AND OTHERS. May 4th, 1859.

[S. C. 28 L. J. C. P. 229; 5 Jur. N. S. 1213; 7 W. R. 500.]

By a charterparty it was agreed that the ship, then lying at Genoa, should sail "on or before the 30th of July, 1859," to Monte Video and Lima (with goods for third parties), and thence proceed with all convenient dispatch to Callao, where the master was to report his arrival to the agents of the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship, and to the owners for taking in certain specified light freight, and thirty days over and above the lay days, at 7l. per day; and then came the following provision,—“Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above named rate of demurrage or compensation.”—The vessel did not leave Genoa until the 8th

of September:—Held, that this was not a detention during the “voyage,” within the meaning of the penalty clause.

This was an action brought by the plaintiff against the defendants to recover 287l., being the alleged balance of f. eight due under the charterparty hereinafter mentioned: and by the consent of the parties, and by a judge's order, the following case was stated for the opinion of the court, without pleadings

The plaintiff is the master and owner of the ship “Palma.” The defendants are merchants carrying on business in London.

On the 7th of June, 1856, a charterparty, of which the following is a copy, was entered into between the plaintiff and the defendants:—

“London, 7th June, 1856.

“It is hereby mutually agreed between Captain A. Valente, owner of the ‘Palma,’ 278 tons register, new measurement, on the one part, and Messrs. Antony Gibbs & Sons, merchants and agents, on the other part, as follows:—

“That the said vessel, now lying at the port of Genoa, shall sail on or before the 30th of July, 1856, [271] to Monte Video and Lima, and thence proceed with all convenient dispatch to the port of Callao, Peru, where the captain shall immediately report his arrival to Messrs. Gibbs & Co., of Lima.

“That the said vessel, being then tight, staunch, strong, and well conditioned for the voyage, Messrs. W. Gibbs & Co. shall, within forty-eight hours after such report being received, send to the captain or his agents orders for loading a cargo of guano at the Chincha Islands, to which place the vessel shall at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which shall be given to the captain by the charterers' agents free of expense within twenty-four hours of his application.

“After completing her loading of guano, and having obtained her necessary pass from Pisco, the vessel shall return for her final clearance to Callao, where the captain shall have the liberty of taking in passengers, light goods, and specie on freight for the benefit of the ship. The charterers to have the option of shipping the light goods at current rates.

“The ship shall convey from Callao to the islands any specie that may be required for the payment of the cargo and any tools (sent alongside by the charterers' agents whilst the vessel is at anchor in Callao) free of freight, and shall supply, free of charge, either on board or alongside at the guano ports, any water that may be required by the agents of the charterers, not exceeding eight tons.

“At the Chincha Islands, the vessel to be placed under the Manqueras to load, or, at the option of the charterers, the cargo to be placed in the ship's boats, and in them conveyed on board at ship's expense and shippers' risk.

“Such sacks as shall be supplied by the charterers, at their discretion, shall be filled with guano by the [272] owner, and the mouths of the sacks sewn up at owner's expense, the charterers providing twine; and the sacks shall be used for lining the vessel.

“The owner to find necessary dunnage, and to be responsible for damage by negligence.

“The owner to be liable for all damage arising from side lights or ports.

“The guano shall be stowed so that a clear space may be left round the vessel under the deck for the purpose of examining the cargo and removing any water which may have been shipped: and every convenient opportunity shall be taken to examine the guano, and means used to prevent and lessen damage.

“The quantity of guano to be shipped shall not exceed one third above the vessel's register tonnage, new measurement, except with the consent in writing of the charterers' agents at Callao, and which consent the charterers undertake shall be given to all ships which their agents have not fair and reasonable grounds for believing to be overloaded, when such consent may be withheld; and, if any vessel proceed to sea without such written consent, and loss should be sustained by the charterers upon the guano, and whether the same be of the nature of a particular or general average or of charges upon the guano, all such loss, as between the said owner and charterers, shall be deemed to have arisen from the improper loading of the vessel: and the amount of such loss shall be borne and paid by the said owner to the said charterers; but, in case of loss of the nature of particular average, the owner shall only pay such amount

as may exceed 3l. per cent. upon the net value of the limited cargo of guano hereby agreed to be shipped.

"No guano or other dead weight shall be received on board except from the charterers or their agents.

"Should political or other circumstances prevent [273] there being sufficient laborers at the loading places, as many of the crew as shall not be absolutely necessary for the safety of the ship shall be sent on shore to load the cargo, they receiving the usual laborers' daily pay while so employed.

"Ten running days (Sundays excepted) for each one hundred tons, new register measurement, to be allowed the charterers for loading the ship at the islands; nevertheless, in no case shall the charterers have less than thirty nor more than eighty such days in all,—said days to commence from the day the master gives notice in writing of being ready to receive and take on board, and to cease when the charterers' agents give notice that the vessel may leave the islands.

"Thirty days to be allowed the owner for taking in light freight and specie, as above specified, over and above the lay days allowed to the charterers for loading the ship, and the owner for taking in light freight and specie. Each party shall be permitted to detain the vessel for those purposes respectively for thirty days, the charterers paying to the owner, or the owner paying to the charterers, as the case may be, at the rate of 7l. per day as agreed compensation for such detention.

"Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation.

"The owner of the vessel to pay all port-charges, and the ship to be consigned to Messrs. W. Gibbs & Co., of Lima, to whom the customary agency for doing the ship's business shall be paid by the owner.

"The captain to sign bills of lading at such rate of freight as charterers or their agents may direct, and without prejudice to this charterparty.

"The said vessel shall, after completing her loading [274] as before mentioned, proceed to any safe port in the United Kingdom, calling at Cork for orders from Messrs. Anthony Gibbs & Sons (and for which she is to remain until return of post from London), unless ordered in writing to proceed direct to any given port by Messrs. W. Gibbs & Co., and there, according to bills of lading and charterparty, deliver the cargo, which is to be discharged and taken from alongside at the rate of not less than thirty-five tons per working day.

"The freight to be paid in manner hereinafter mentioned, at the rate of 4l. 10s. sterling in full per ton of 20 cwt. net weight of guano at the Queen's beam, subject, however, to a deduction for the water contained in damaged guano.

"The master to be supplied in the Pacific with a sum not exceeding 300l., free of interest and commission; but the cost of insurance to be borne by the owner: and the amount so to be advanced, and the cost of the insurance thereof, shall be in part payment of the freight at the exchange of 50d. per dollar currency. And, should the charterers or their agents think fit to advance the master beyond the said sum of 300l. any sum for repairs, stores, or other disbursements whatsoever, such sums, with interest, commission, and insurance, shall be in part payment of freight, at the exchange aforesaid. And it is hereby expressly agreed that the receipt of the master for any such sum or sums of money as shall be supplied or advanced to him by the charterers as aforesaid, shall be conclusive and binding upon the owner, and he shall thereby be prevented, as between him and the charterers, from inquiry into the necessity for or the appropriation of the sum of money which in such receipt or receipts shall be acknowledged to have been received: and all contributions to general average losses which (if any) shall become payable in respect of any such advances as aforesaid, shall be borne and paid by the owner.

[275] "The freight to be paid in manner following, that is to say, 400l. in cash on arrival at the port of discharge, three months' interest, at the rate of 5l. per cent. per annum, being deducted, and the balance, after deducting all such sums of money as shall become payable to the charterers under the provisions herein contained, on the true and right delivery of the cargo, by bills upon Messrs. Anthony Gibbs & Sons, at three months' date, or in cash less interest at 5l. per cent. per annum, at charterers' option.

"The charterers are hereby authorized to retain and deduct from the freight all

such damages and sums of money, as well liquidated as unliquidated, to which the owner shall become liable to the charterers by virtue of or in any wise in relation to this charterparty; it being the intention of the parties that all claims and demands of whatever nature which shall accrue to the said charterers shall be treated as payments made by the charterers on account of freight.

"The charterers to have the liberty of naming the docks in which the ship is to discharge.

"Penalty for non-performance of this charterparty, the estimated amount of freight.

"The act of God, the Queen's enemies, fire, and all and every dangers and accidents of the seas, rivers and navigations, of whatever nature and kind soever during the said voyage, always excepted."

At the time of the making of the charterparty, the vessel mentioned in it was lying in the port of Genoa loading a general cargo for Monte Video and Lima. She completed the loading of such cargo, and, on the 8th of September, 1856, sailed from Genoa to Monte Video and Lima; and, after delivering her cargo there, proceeded, in accordance with the terms of the charterparty, to Callao and the Chincha Islands, and was there loaded by the defendants with a cargo of guano: [276] and thence sailed, agreeably to the terms of the charterparty, to a safe port in England, where she delivered the guano to the order of the defendants.

The vessel remained at Genoa until the 8th of September in procuring her cargo, and not by reason of being prevented from sailing by any of the perils excepted.

After the delivery of the cargo, the plaintiff applied to the defendants for payment of the freight of the said guano, and received from them the whole of such freight (besides 56l. for eight days' demurrage at the Chincha Islands), except the sum of 287l., which the defendants claimed to deduct from the freight upon the ground that they were entitled to demurrage or compensation at 7l. per day for the days during which the vessel remained at Genoa from the 30th of July, 1856, to the 8th of September following, as above stated. In fact, the plaintiff's account for freight and demurrage was overpaid by the defendants to the extent of 24l. 17s. 9d., if the defendants were entitled to deduct the said sum of 287l.; the payments for freight having been made from time to time during the discharge of the cargo, and before the whole amount to become due was ascertained.

The court was to be at liberty to draw any inferences of fact from the facts already stated which a jury might draw.

The question for the opinion of the court was,—whether, under the circumstances, the clause in the charterparty marked with the letter A. in the margin hereof applied to the period during which the vessel remained at Genoa after the 30th of July and before she set sail on the voyage, and entitled the defendants, without regard to the question whether any actual damage had been sustained in the particular case, to deduct from the freight the sum of 7l. per day [277] for the time intervening between the 30th of July and the 8th of September, 1856.

If the court should be of opinion that the defendants were not entitled to deduct such sum, then judgment was to be entered up for the plaintiff for 287l., and costs of suit.

If the court should be of opinion that the defendants were entitled to deduct such sum, then judgment of *nolle prosequi*, with costs of defence, was to be entered up for the defendants.

GIBBS AND OTHERS v. VALENTE.

This was a cross-action brought by the defendants in the former action, against the plaintiff in that action, to recover the sum of 24l. 17s. 9d., which is the amount overpaid by the plaintiffs in this action, if their construction of the charterparty is the correct one.

This case was stated for the opinion of this court, without pleadings.

The facts are the same as those stated in the former case, which may be referred to for all the purposes of this case, with the same power for the court to draw inferences.

The question for the opinion of the court was, whether, under the circumstances, the clause in the charterparty marked A. in the margin of the case in the other action,

applied to the period during which the vessel remained at Genoa after the 30th of July and before she set sail, and entitled the plaintiffs in this action to deduct from the freight the sum of 7l. per day for the time intervening between the 30th of July and the 8th of September, 1856.

If the court was of opinion that the plaintiffs were so entitled to deduct such sum, the judgment was to be entered up for the plaintiffs for 24l. 17s. 9d., and [278] cost of suit. If the court should be of opinion that the plaintiffs were not so entitled, judgment of *nolle prosequi*, with costs of suit, was to be entered up for the defendant in this action.

J. Wilde, Q. C. (with whom was Honyman), for the plaintiff (*a*). The question is as to the meaning of the clause marked A. in the charterparty,—“Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation,”—viz 7l. per day. Are the defendants entitled to deduct from the freight payable under the charterparty the 7l. per day for the delay which took place here, without regard to whether or not they sustained any actual damage? That clause, it is submitted, was intended to be limited to any delay or detention occurring in the course of the voyage. Now, the voyage contemplated in this charterparty was to commence from one of two periods, viz. the vessel's leaving Genoa, or her sailing from Callao. At any rate it could not commence before the ship's leaving Genoa. To entitle them to succeed, the defendants must shew that the voyage commenced on the 30th of July, 1856, although the vessel was then lying in the port of Genoa, where she remained for [279] nearly six weeks after that day. [Cockburn, C. J. The word “voyage” has received a construction in cases of insurance, where it has been held to be reckoned from the time the vessel breaks ground. I am at a loss to see how this voyage can be said to have commenced on the 30th of July.] In *Crow v. Falk*, 8 Q. B. 467, the plaintiff and defendants agreed by charterparty that a ship, then at Liverpool, of which the plaintiff was master, should with all convenient speed be made ready, and should at Liverpool receive and load from the charterers' agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage,—restraints of princes, &c., “during the said voyage,” always mutually excepted: and the ship was to be loaded at Liverpool without detention: and the defendants thereby agreed to load the vessel at Liverpool as in the charterparty stated, with the said cargo: on general demurrer to a declaration in assumpsit assigning for breach of the above agreement that the defendants did not load the ship at Liverpool without detention, but detained her at Liverpool an unreasonable time (not negating restraints of princes, &c.), it was held, that the exception as to the restraints of princes, &c., was applicable only after the ship quitted Liverpool. Lord Denman said: “The end of the voyage is expressly marked out: the beginning is not; but the voyage could not begin before the ship's loading was completed: the exception is confined to the time during the voyage; and the breach takes place before it begins” And Patteson, J., said: “‘During the said voyage’ can apply only to the time after the voyage commences. In a policy of insurance, the word ‘at’ would be inserted, in order to cover the time while the vessel was in port.” Notwithstanding some doubt cast upon that case by the court of Exchequer in *Bruce v. Nicolopulo*, 11 Exch. 129, it is submitted that it is good law, and applicable here.

[280] Then, there is no statement in the case, and nothing from which it can be inferred, that the ship was improperly or unnecessarily detained at Genoa. It was understood at the time of the making of the charterparty that the vessel was lying at the port of Genoa loading a general cargo for Monte Video and Lima. [Crowder, J. If there was a warranty to sail on or before the 30th of July, 1856, the delay until the 8th of September, unaccounted for, would be unreasonable.] It might be that the charterers might have been entitled to give up the charterparty on that account, or

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the stipulation as to the payment to be made in case of the detention of the vessel, does not apply to a detention anterior to the commencement of the voyage:

“2. That the payment therein stipulated for is not to be made, except in cases where the opposite party sustains some damage by reason of the detention:

“3. That, under the circumstances stated in the case, there was no unnecessary detention within the meaning of the stipulation in question.”

they might have a claim for damages in respect of any injury they sustained by reason of the delay: but the penalty of 7l. a day was to attach only upon an unnecessary detention. [Crowder, J. For anything that appears in this case, the detention was unnecessary.] That, it is submitted, is not to be a matter of conjecture or surmise. The onus lay on the defendants, who seek to enforce the penalty, to shew that the detention was unnecessary.

Willes, for the defendants (*a*). With respect to the point last urged, it is submitted it was not incumbent on the defendants to shew that the delay and detention complained of was unnecessary, the matter being peculiarly within the knowledge of the plaintiff. In *The King v. Turner*, 5 M. & Selw. 206, 211, Bayley, J., says: "I have always understood it to be a general rule, that, if a negative averment be made by one [281] party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." Besides, here it is sufficiently shewn that the delay was unnecessary. The plaintiff engages to sail from Genoa on the 30th of July, and the vessel does not start until the 8th of September. *Prima facie* that imports unnecessary delay. The main question is, when did the voyage commence? The voyage contemplated was, a voyage from Genoa to Callao (touching at two intermediate ports), and thence to the United Kingdom. The injury to the charterers from undue delay on the voyage is the same wherever the delay takes place: the penalty clause, therefore, is as applicable to a detention at Genoa as to a detention at any other period. The case of *Brace v. Nicolopulo*, 11 Exch. 29, shews that the word "voyage" has not acquired any definite meaning. The sense in which it is used must be ascertained from the context. The general rule of construction is very clearly stated by Lord Wensleydale, in *Green v. Pearson*, 6 House of Lords Cases, 61, 106:—"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted at least in the courts of law in Westminster Hall, that, in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." "When, indeed (p. 108), by any course of decisions words have acquired a particular signification, it may be presumed that the framer of the instrument uses them in the sense so acquired, and it is fitting so to construe them." [282] [Cockburn, C. J. The vessel was carrying a cargo from Genoa to Monte Video and Lima for other persons. It is only when she gets to Callao that she is chartered to the defendants. That is a reason for saying that the voyage the parties are speaking of is the period during which the one party was to have the use of the vessel and the other to pay the hire, and would seem to shew that the word voyage is to be taken in the more limited sense contended for by Mr. Wilde.] The parties agree that the start shall take place on or before the 30th of July. That is a condition precedent. [Cockburn, C. J. It is a warranty, entitling the charterers to throw up the charterparty, or to sue for damages for a breach. But, will it make that a voyage which is not a voyage?] The question is, whether a sailing from Genoa is a sailing on a voyage. [Cockburn, C. J. Was it a sailing on the voyage intended by the charterparty?] The defendants' case does not depend on the voyage commencing on the day named: the simple question is, whether the penalty clause embraces a detention before the starting of the ship. [Cockburn, C. J. The delay complained of is, the ship's not being on her way by the time agreed. Your argument in effect seeks to substitute "time" for "voyage."] Regard being had to the object of the contract, and the intention of the parties, the word is fairly capable of that construction. The rule for the construction of contracts laid down by Pothier, *Traité des Obligations*, Partie 1, ch. 1, art. vii., § 91, is as follows:—"On doit, dans les conventions, rechercher quelle

(*a*) The points marked for argument on the part of the defendants were as follows:—

"That the clause marked A. applies to all detentions which were unnecessary, and which took place subsequently to the time when it was agreed that the vessel should set sail,—that full effect cannot be given to the intention of the parties without so holding,—and that the words used admit such an interpretation."

a été la commune intention des parties contractantes, plus que le sens grammatical des termes,"—we must look to the general intention rather than criticize the words.

Wilde, in reply. The language of the charterparty is entirely free from ambiguity. "Voyage," in its [283] plain and ordinary sense, means the passage of the ship from one port to another (*a*). [Byles, J. Could this question arise on a policy of insurance?] Clearly not: even if the ship were warranted to sail on a given day, unless the insurance was "at and from," the risk would not attach until the sailing of the vessel (*b*). In *Rosswolls v. Harrison*, 3 Exch. 444, where freight was by the charterparty payable on "the final sailing of the vessel from the port of loading," Cardiff, it was held that the words meant the final departure of the vessel from the port, so as to be out of the limits of the artificial port, and at sea. The only real injury to the charterer is, the detention of the vessel whilst his goods are on board.

COCKBURN, C. J. I am of opinion that the plaintiff is entitled to judgment. The defendants seek to set off against the plaintiff's claim for freight under the charterparty certain penalties which they allege to have been incurred by the plaintiff by reason of an unnecessary detention of the vessel in the course of the voyage. The question for our determination is, what is the meaning of the term "voyage" in this clause of the charterparty,—the detention having occurred at Genoa, from which the vessel was to have sailed on or before the 30th of July, but from which she did not sail until the 8th of September. The answer set up by the plaintiff is twofold,—first, that the voyage to a detention on which the penalties were to attach was, the voyage from Callao to Pisco and the Chincha Islands, and thence to a safe port in the United Kingdom,—secondly, that, at all events, the penalties could not attach to a detention occurring prior to the ship's [284] sailing from Genoa. The inclination of my opinion is, that the plaintiff is right in his first contention. But it is unnecessary to decide that, because we are all clearly of opinion that he is right upon the second. The term "voyage" has a well-recognized meaning, and has on various occasions received a legal interpretation. Still, no doubt, it is susceptible of a certain degree of flexibility; and, if the context clearly shewed that it was intended by the parties to have a larger meaning than that which in common parlance belongs to it, we must so construe it. But, unless we can see beyond all doubt that the word is not used in its ordinary sense, we must give it its generally received signification. I see nothing in this case to justify us in holding that it means more than the transit from the terminus à quo to the terminus ad quem. Mr. Willes suggests that the interests of the parties would be as seriously affected by an antecedent delay as by a delay occurring subsequently to the sailing of the vessel. That may be so. But, on the other hand, there is nothing in the context to shew that the word voyage was used in any other than its ordinary sense. It is true, the plaintiff has agreed that the vessel shall sail on or before the 30th of April. For a breach of that engagement the defendants, if damaged, may have a remedy. But, when we find that the penalties for the ship's detention are in terms made to apply to the voyage, and not to the time fixed for her departure from Genoa, if we were to put upon the charterparty the construction contended for on the part of the defendants, we should be on a mere surmise straining the meaning of the language which the parties have used, and making a contract for them which they have not made for themselves. The case of *Crow v. Falk*, 8 Q. B. 467, is an authority in point: and, although it seems to have been reflected on by the [285] court of Exchequer in *Bruce v. Nicolopulo*, 11 Exch. 29, it was not necessary on that occasion to overrule it, and I for one am not disposed to dissent from it. Whether, therefore, we construe the word voyage according to the ordinary and popular sense, or in the sense ascribed to it in the case of *Crow v. Falk*, or in that which it bears in marine assurance policies, I think the plaintiff in the first action is entitled to our judgment, and the defendant in the second.

CROWDER, J. I am of the same opinion. The question turns upon what is to be considered the voyage contemplated by this charterparty. It is insisted on the part of the defendants that the voyage commenced on the 30th of July, because of the stipulation in the charterparty that the vessel should sail from Genoa on or before that day. It is clear that the ship's sailing on the day named was a condition precedent to the charterers' obligation to take to the charterparty; and that the breach of that

(a) See *Gether v. Capper*, 18 C. B. 866.

(b) See *Arnould on Insurance*, 2nd edit. 390.

engagement on the plaintiff's part would give the charterers a right to sue for any damages they might thereby have sustained. But it does not follow that the voyage is to be taken to commence on the 30th of July, so as to make the clause as to detention during the voyage apply at and from that day. It seems to me to be quite clear that there has been no unnecessary detention during the voyage, so as to entitle the defendants to claim the stipulated penalty of 7l. per day. To entitle the plaintiff to judgment, it is only necessary to hold that the voyage did not commence until the vessel broke ground. I incline to think that the voyage here agreed on is the voyage which commenced at Callao, as was contended by Mr. Wilde. The charterers had no interest in the intermediate voyages. It is, however, unnecessary to decide that; for, I think it is quite clear upon the [286] language of the charterparty that the voyage did not in any sense commence before the ship left the port of Genoa; and that is sufficient to entitle the plaintiff to judgment.

WILLES, J. I am of the same opinion. I see no reason why the word "voyage" in this charterparty should receive an interpretation different from its ordinary acceptance. The charterparty contains a stipulation that the vessel shall sail from Genoa on or before the 30th of July, 1856. When she sails, the voyage commences. Before her departure, no voyage exists to which the penalty could attach. It may be, according to the case of *Glaholm v. Hays*, 2 M. & G. 257, 2 Scott, N. R. 471, that, as the vessel did not sail on the day named, the charterers might have declined to employ the ship. Whether the penalty of 7l. a day would attach to any detention after the vessel left Genoa and before she arrived at Callao, it is not necessary to determine. It is enough to say that there was no voyage to which it could attach before the vessel sailed from Genoa. The result will be that the plaintiff in the first case is entitled to recover the entire freight, and that, in the second action there will be judgment for the defendant.

BYLES, J. I am of the same opinion. In construing all written instruments, the words are to be taken in their ordinary grammatical, popular, and natural sense, unless the so taking them would lead to some absurdity, repugnance, or inconsistency with the rest of the document. The defendants here seek to enlarge the natural and ordinary sense of the word voyage. It lies, therefore, on them to shew that construing the words used according to their natural and ordinary sense would lead to some absurdity or inconsistency. So far from their being able to shew that, I think it is [287] perfectly clear that the voyage did not commence at all events until the departure of the vessel from Genoa. I may add that circumstances might have arisen which would have made the construction for which the defendants contend inconvenient to them. Upon the failure of the vessel to set sail on the day stipulated, the charterers were at liberty to throw up the charterparty, and sue the plaintiff for unliquidated and unlimited damages.

Judgment accordingly.

RE JANE DENTON. April 30th, 1859.

The court permitted an affidavit verifying the notarial certificate of an acknowledgment under the 3 & 4 W. 4, c. 74, to be received, notwithstanding an erasure in the jurat, being satisfied that there had been a substantial compliance with the statute, and the erasure arising from circumstances over which the parties had no control.

A commission for taking the acknowledgment of a married woman under the 3 & 4 W. 4, c. 74, was addressed to certain persons described as resident at Winconsin, in the territory of Minnesota, in the United States of North America. After the issuing of the commission, but before the swearing of the affidavit verifying the notarial certificate, Minnesota had been constituted one of the states of the Union: and, accordingly, when the affidavit came to be sworn, the word "territory" in the jurat was erased, and the word "state" inserted in lieu of it. In consequence of this erasure, the officer of the court declined to receive the acknowledgment. Application was thereupon made to Byles, J., at Chambers, to direct him to do so; but that learned judge refused to make an order.

W. S. Cross, on a former day in this term, moved for a rule to the same effect. The rule of Hilary Term, 1853, r. 140, which provides that "no affidavit shall be

read or made use of in any matter depending in [288] court, in the jurat of which there shall be any interlineation or erasure," applies only to matters depending in court. In *Re Mary Bingle*, 15 C. B. 449, the court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit,—there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn. So, in the subsequent case of *In re Chandler*, 1 C. B. (N. S.) 323, the court allowed a special commission for taking the acknowledgment of a married woman in America, the certificate of the taking thereof, and the affidavit of verification, to be filed, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not shew where the affidavit was sworn. [Byles, J. Is there any difference between the expression "in court," and "proceeding before the court?"] The statute has been substantially complied with, and the erasure has arisen from circumstances over which the parties had no control.

COCKBURN, C. J. The rule of Hilary Term, 1853, is apparently positive and general in its terms : we will, however, look into it.

Cur. adv. vult.

CROWDER, J., now said,—We have considered this matter, and, inasmuch as it is clear that there has been a substantial compliance with the 3 & 4 W. 4, c. 74, we are of opinion, that, under the circumstances, the affidavit may be received, notwithstanding the erasure.

Fiat.

[289] MOORE AND OTHERS v. RAWLINS. May 5th, 1859.

[S. C. 28 L. J. C. P. 247. On point as to forfeiture, see *Bigg's case*, 1865, L. R. 1 Eq. 314. On point as to registration, see *Crowther v. Thorley*, 1883, 48 L. T. 647; *In re Russell Institution*, [1898] 2 Ch. 76; *In re Jones*, [1898] 2 Ch. 91.]

A company consisting of more than twenty-five members, was formed under a deed of settlement which contained, inter alia, the following provisions,—2. That the object and purpose of the company shall be to enable each member to become the possessor of a freehold, copyhold, or leasehold house, of the estimated value of 150l. in respect of every share, &c. 4. That the sum of money necessary for carrying the object of the company into effect shall be raised by means of the monthly subscriptions of the members, and of rent, &c., and by the sale of superfluous houses and land, and of houses and land which may not be immediately wanted for the purposes of the company, and by such other ways and means as are hereinafter provided. 5. That the business of the company shall be, to take on lease or to purchase, either for years or in fee, land or ground within the distance of twenty miles from St. Paul's, of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and to take down and rebuild, or to repair, any existing houses or buildings on the land or ground so taken or purchased; and to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto. 32. That the directors may employ as many servants and workmen as the business of the company may require. 34. That the directors may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, and generally to do all such acts, matters, and things as are usually done by builders. 36. That the directors may authorize the trustees to enter into and make contracts for erecting, completing, or carrying on all or any erections and buildings and other works, or for the supply of any articles or materials necessary for the purpose of carrying the object of the company into effect, as they may think expedient. 50, 51. The erection of houses, and the number, size, and description thereof, to be in the discretion of the directors. 63. That the company should be finally wound up when all the members have received allotments of houses :—Held, that, notwithstanding the general words of the 5th and 34th clauses, it being apparent on the whole deed that the powers thereby given to the directors and

trustees were only ancillary to the main object and purpose of the association, viz. the enabling each member to become the possessor of a freehold, copyhold, or leasehold house, and not the carrying on the building business "for any purpose of profit,"—the company was not one which required registration under the 7 & 8 Vict. c. 110.—The 45th clause provided, that, if any member shall from any cause whatever permit any monthly subscription on any share or shares held by him or her to be in arrear for six months, such share or shares, and all moneys paid in respect thereof, shall, at the expiration of such six months, become absolutely forfeited to the company:—Held, that the neglect of a member to pay his subscriptions and fines for six months, operated a forfeiture of his share or shares, at the option of the directors.

The following case was stated for the opinion of this court, by consent, without pleadings:—

The plaintiffs seek to recover from the defendant upon his covenant with them, as the trustees of a certain company called the Third Equitable Union Building Company, the sums of 5l. and 14s., making together the sum of 5l. 14s., the said sum of 5l. being the amount of ten months' subscription alleged by the plaintiffs to be due from the defendant in respect of two shares by the plaintiffs alleged to be held by the [290] defendant in the said company, and the said sum of 14s. being the amount of fines alleged to be due in respect of the non-payment of the said subscriptions.

The company, at the time of its formation, and at all times subsequently, was intended to consist, and has always consisted, of more than twenty-five members: and the capital of the company to be raised in the modes provided by the deed of settlement was the sum of 18,000l.

The company was and is constituted and regulated by a deed of settlement made and executed by the parties thereto, and bearing date the 1st of December, 1851. The following are some of the clauses:—

"That the object and purpose of the company shall be to enable each member to become the possessor of a freehold, copyhold, or leasehold house (with or without a shop) of the estimated value of 150l. or thereabouts in respect of every share, and so in proportion in respect of every additional half-share which he or she may subscribe for or take up, to be held by such member in the first instance as tenant to the company at an annual rent payable monthly, until its dissolution, and afterwards as absolute owner and proprietor.

"That each person executing these presents, and subscribing 5s. per month to the funds of the company, shall, so long as he or she shall continue to pay the same, be deemed a member, and the holder of one share in the company: and every additional 2s. 6d. per month subscribed and paid by such member shall entitle him or her to an additional half-share: Provided always, that no member shall subscribe for less than one share, or for more than thirty shares, and that the whole number of shares in the company shall not exceed five hundred at any one time.

"That the sum of money necessary for carrying the object of the company into effect shall be raised by [291] means of the monthly subscriptions of the members, and of the rents to be paid by the members for the houses which shall be allotted to them, and by the sale of superfluous houses and land, and of houses and land which may not be immediately wanted for the purposes of the company, and by such other ways and means as are hereinafter provided.

"That the business of the company shall be to take on lease or to purchase either for years or in fee, land or ground within the distance of twenty miles from St. Paul's Cathedral, London, of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and to take down and re-build, or to repair any existing houses or buildings on the land or ground so taken or purchased, and to make and sell bricks, and to purchase and sell all kinds of building-materials, and to contract for and perform all kinds of work in the building business, and in relation thereto.

"That two special meetings called for the purpose, and held at a distance of not less than fourteen days nor more than thirty-five days from each other, may by the resolution of a majority at each meeting consisting of two thirds of the number of votes given at such meeting, amend, alter, or repeal, either wholly or in part, all or

any of the clauses or provisions of this deed : and in lieu thereof, or in addition thereto, may make any other regulations or provisions of any nature or kind soever, whether altering, enlarging, or abridging, or otherwise affecting the original constitution of the company, or the purpose for which the same was established, and may increase or diminish the number of shares in such manner and to such extent as they may think proper ; and three such special meetings may in like manner dissolve the company.

[292] "That the directors may appoint such persons as they may think proper to fill the several offices of secretary and solicitor to the company, and may revoke such appointments at their pleasure, and may employ as many servants and workmen as the business of the company may require, and may remove or suspend such servants and workmen, and may appoint others in their place, and may take security from any officer or servant of the company ; and such officers, servants, and workmen shall receive such salaries, allowances, wages, or compensation for their respective services as the directors shall think fit.

"That the directors may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building-materials, and erect, finish, and repair houses and other buildings, and generally to do all such acts, matters, and things as are usually done by builders ; subject, nevertheless, to such restrictions as may from time to time be imposed upon them by the resolutions of any general meeting.

"That the directors may from time to time authorize the trustees to enter into any contract or agreement with any person or persons for the purchase or taking on lease of any freehold, copyhold, or leasehold lands, or other hereditaments, which in the judgment of the directors it may be desirable to purchase or take for the purposes of the company, upon such terms and conditions as to the directors shall seem fit ; and to complete or otherwise carry into effect such contract or agreement, or (if they shall consider it expedient so to do) to rescind such contract or agreement, or to vary the terms thereof ; it being the true intent and meaning of these presents, that, in all contracts, purchases, and acquisitions which shall be authorized by the directors to be entered into, made, and obtained by the trustees for or on behalf of the company, the [293] directors shall exercise their uncontrolled discretion in as full and ample a manner as if they were acting on their own account ; and that all purchases and acquisitions made and obtained by the order or direction of the directors for or on behalf of the company, shall be as binding and conclusive on all the members thereof as if the same respectively had been entered into, made, and obtained with the full concurrence and approbation of such members.

"That the directors may from time to time authorize the trustees to enter into, make, and sign such contracts and agreements with any person or persons, whether members or otherwise (but only according to the respective trades, occupations, or businesses of such person or persons), for erecting, completing, or carrying on all or any erections and buildings and other works or for the supply of any articles or materials necessary for the purpose of carrying the object of the company into effect, as they may think expedient ; and may order and direct in what manner the several buildings and works shall from time to time be carried on ; and may authorize the trustees to lay out and expend in such manner as they may think advantageous for the company, and best calculated to carry the object thereof into effect, all such moneys as shall from time to time be received or come to their hands on account of the company from any source whatever.

"That the directors may from time to time authorize the trustees to sell and dispose of any houses or land which may not be immediately wanted for the purposes of the company, and to sell any improved ground rent or rents, and the money to arise from or to be produced by any such sale, after deducting the costs attending the same or incident thereto, shall be applied to the general purposes of the company ; and the receipt of the trustees or of any two of them shall [294] be an effectual discharge for the purchase-money, and shall exonerate the person paying the same from seeing to the application thereof.

"That, at every monthly meeting, every member shall, between the hours of 7 and 10 o'clock in the evening, pay to the secretary, or to some other person appointed by the directors to receive the same, the sum of 5s. in respect of every whole share, and the sum of 2s. 6d. in respect of every half share, held by such member, together with any fine or fines or other sum or sums of money which may have been incurred

or be payable by such member; and, if any member shall from any cause whatever omit to pay his or her monthly subscription on the day on which the same shall be due, he or she shall, at the next monthly meeting, pay as a fine the sum of 3d. for every whole share and the sum of 2d. for every half-share in respect of which such default shall have been made; and, if such monthly subscription so in arrear and unpaid shall not, together with the fine which shall have accrued in respect thereof, be paid at the next succeeding monthly meeting, the member so making default shall pay the further sum of 3d. for every whole share and 2d. for every half-share in respect of which such default shall have been made; and, if such monthly subscription so in arrear and unpaid, together with the fines which shall have accrued in respect thereof, shall not be paid at the second monthly meeting next succeeding that on which the same originally became due, the member so making default shall in addition to the fines already incurred by him pay the sum of 1s. for every whole share and the sum of 6d. for every half-share in respect of which such default shall be made, for each and every subsequent month during which such default shall continue: Provided always, that any money which may be paid by any member, [295] shall be considered as paid and shall be applied in satisfaction of the fines (if any such there be) which may have been incurred by him or her, and the balance only which shall remain after satisfaction of such fines shall be considered as a payment made in respect of the monthly subscription of such member; and that, where the money paid by any member shall not, after the satisfaction of such fines as aforesaid, be sufficient to pay the whole amount of the monthly subscriptions due by such member, such money shall be applied in payment of the monthly subscriptions which shall have been the longest in arrear.

"That, if any member shall from any cause whatever permit any monthly subscription on any share or shares held by him or her to be in arrear for the period of six calendar months after the same shall have become due, such share or shares, and all moneys paid in respect thereof, shall, at the expiration of such six calendar months, become absolutely forfeited to the company for the benefit of the other members thereof: and, upon any such forfeiture of all the shares held by any member, the person so making default shall cease to be a member of the company, and to have any interest therein or in the property belonging thereto: Provided, nevertheless,—

"That the directors may at any time (if they in their discretion shall think fit so to do, but not otherwise,) restore to any member the whole or any portion of the shares which may have been forfeited for non-payment of any monthly subscription, or for any other cause, upon such terms and conditions, and upon payment of such sum or sums of money, as they may think proper to impose or require.

"That the directors may at any time, or from time to time, sell and dispose of any shares which may have become forfeited to the company, in such manner as [296] they shall think fit, either by private contract or public auction; and, if the purchasers thereof shall in the opinion of the directors be persons proper to become members of the company, the directors may admit such persons to become the holders of such shares, but, if not, then such shares shall be again offered for sale by private contract or public auction, until the purchasers thereof shall in the opinion of the directors be fit and proper persons to be admitted members of the company.

"That it shall be lawful for the directors (if they shall at any time think it advantageous so to do) to apply any portion of the funds of the company in purchasing at a fair and reasonable price, for the benefit of the company, any share or shares which the holder thereof may be desirous of selling, and may from time to time re-issue the same, or any of them, in such manner as they may think expedient.

"That, when any land or ground shall from time to time be purchased or taken for the purposes of the company, the directors shall with all convenient speed cause to be erected and built thereon such number of houses, of such forms and dimensions, and of such class, size, and description, as they shall think fit, or complete and finish any houses which at the time of purchasing or taking such land or ground may have been begun to be erected or built thereon.

"That, in determining the number and the size and description of the houses to be erected and built or completed and finished as aforesaid, the directors shall be guided by the number of members of which the company shall consist, and the number of shares and half-shares held by each member: and they shall cause such a number of houses of the estimated value when completed of 150l. each, or as near as may be

of that value (such value arising either from size or situation [297] or other advantage belonging thereto), to be erected as shall at least be equal to the number of members holding single shares; and such houses shall be called single-share houses: and the directors shall also cause such a number of houses of the estimated value when completed of 225l. each, or as near as may be of that value (such value arising as aforesaid), to be erected as shall at least be equal to the number of members holding one share and a half; and such houses shall be called one-and-a-half-share houses: and the directors shall also cause such a number of houses of the estimated value when completed of 300l. each, or as near as may be of that value (such value also arising as aforesaid), to be erected as shall at least be equal to the number of members holding two shares; and such houses shall be called two-share houses: and the remaining houses to be erected and built on the land or ground so purchased or taken shall when completed be of such value as the directors shall think proper, so that every remaining member may have a house or houses of such estimated value in the whole as shall be equivalent as near as may be to the number of shares and half-shares held by him, in the proportion of 150l. to each share.

“That, when and as often as in the judgment of the directors sufficient progress shall have been made in or towards the erection of any number of houses of any class or description to enable them to make an allotment thereof, they shall cause notice in writing to be given to every member of their intention to allot the same, and of the day when such allotment is so intended to be made; and every member who shall be desirous of having any such houses allotted to him or her, shall, two days at least before the day appointed for such allotment, give notice in writing to the secretary of his desire to stand the allotment.

[298] “That, whenever any allotment of houses shall have been determined upon, the houses to be allotted shall be arranged in such order as the directors shall think fit, and shall be numbered progressively beginning with No. 1; and the names of all those members having given notice of their desire to stand to such allotment who shall at the time of such allotment being made, but not otherwise, possess the requisite number of shares to entitle them to have such houses allotted to them, shall be written upon certain slips of paper of an equal shape and size in all respects, with the number of the registered share or shares thereon in respect of which each such slip shall be so put in; and all such slips of paper shall be placed in some convenient box or bag to be provided for that purpose, and be well shaken up or mingled together; and some person to be appointed by the members present at the meeting at which such allotment shall be made, shall draw out such slips one by one until a number equal to the number of houses to be allotted shall have been drawn out; and the member whose name shall be written on the slip which shall be first drawn out shall be the person to whom the house numbered 1 shall be considered as allotted, and the person whose name shall be written on the slip secondly drawn out shall be the person to whom the house numbered 2 shall be considered as allotted, and so in like manner until all the said houses shall have been allotted: And every person to whom any house shall be so allotted as aforesaid shall accept and take the same as the house to which he or she shall be entitled by virtue of the share or interest in respect of which such allotment shall have been made; and, in case he or she shall refuse to accept the same, such last-mentioned share or interest shall be absolutely forfeited to the company, and may be disposed of by the directors as they may think fit: Pro [299]-vided always, that, if by any accident or design, two or more slips shall be taken out of the box or bag at one time, all the slips so drawn out shall be immediately replaced in the box or bag, which shall be shaken before any other slip shall be drawn out therefrom.

“That any member to whom any house or houses may be allotted, whether voluntarily or compulsorily, shall at or before the third monthly meeting subsequent to such allotment being made to him or her, pay up all arrears of subscriptions and fines payable by him or her on account of the share or shares in respect whereof such allotment shall have been made to him or her; and, in default thereof, the directors may declare that the house or houses so allotted to such member, and the share or shares held by such member in respect whereof such allotment shall have been made, shall be absolutely forfeited to the company; and the same may thereupon be disposed of by the directors in such manner as they shall think fit.

“That, when every member shall have obtained a house or houses answerable to the share or shares subscribed for by him or her, or shall have obtained other satis-

faction in respect of such share or shares, and all subscriptions, rents, fines, and payments shall have been made good on the part of all the members, then and immediately thereupon the accounts of the company shall be finally wound up; and, after such accounts shall have been duly audited, the same shall be printed, and a copy sent to each member, and the company shall terminate; and the trustees, with the advice of the solicitor of the company, shall prepare and execute, at the expense of each member, such deeds or documents as may be requisite or expedient for absolutely vesting in each member, or his or her legal representatives, the house or houses which may have been allotted to him or her; and the conveyance [300] or assignment of such house or houses to such member shall operate as an effectual release from him to the directors and trustees and other officers of the company.

"That the trustees in whom any property belonging to the company shall for the time being be vested, shall dispose of the same in such manner as the directors shall from time to time direct; and every such disposition shall be binding upon all the members of the company.

"That every member or other person desirous of disposing of any share, shall give notice thereof in writing to the directors, addressed to the secretary, stating the number of such share, and the name and place of residence of the person to whom the same is intended to be transferred.

"That, whenever the directors shall be satisfied that the person to whom any share is proposed to be transferred is a fit and proper person to become a member, and shall have signified the same, such share may then, but not till then, be transferred to such person.

"That the instrument by which any share shall be transferred shall be in such form as the directors shall prescribe, and shall contain a covenant on the part of the transferee to abide by the rules and regulations of the company, and to indemnify the trustees, and such other covenants as the directors shall require, and shall, when executed, be deposited with the secretary of the company."

[Either party was to be at liberty to refer to any other clauses of the deed.]

The company was established on the 1st of December, 1851, and has since then carried on its affairs under and in conformity with the said deed.

The company has not been certified, registered, or inrolled under any act or acts of parliament.

[301] The largest number of shares subscribed for is 476; but these have been reduced by forfeitures for non-payment of subscriptions to 276; and these 276 shares are now held by 124 members.

One Charlotte Ryder was one of the original shareholders in the company. She held two shares in it, that is to say, the shares numbered 334 and 335, and paid all her subscriptions on them from the time of agreeing to take them until she parted with them as hereinafter mentioned.

"On the 25th of September, 1852, the said Charlotte Ryder, by an indenture made between the said Charlotte Ryder, therein called the vendor, of the first part, the now defendant, therein called the purchaser, of the second part, and the now plaintiffs, therein called the trustees, of the third part (a copy of which was annexed to and was to be taken to be part of the case), purported to assign and transfer to the now defendant, his executors, administrators, and assigns, her said shares in the capital or joint-stock of the company, and all benefit and advantages and privileges attending the same, To hold the same to him and them, subject to the several covenants, provisoes, and conditions contained in the said indenture of the 1st of December, 1851."

The defendant executed the indenture of the 25th of September, 1852, which contained the following words: "And this indenture further witnesseth, that the said purchaser (meaning the defendant), for himself, his heirs, executors, and administrators, doth hereby covenant with the said trustees (meaning the plaintiffs), and with each and every of them, severally and respectively, and with their and each and every of their respective executors, administrators, and assigns, that he the said purchaser shall and will well and truly perform, fulfil, obey, and keep all and singular the covenants, provisoes, and agreements in the said deed of settlement [302] contained, which respectively are or ought to be performed, fulfilled, observed, obeyed, and kept by him the said purchaser as a member of the said company, and also all and every the rules and regulations for the time being of the said company made and established in pursuance thereof, as fully and effectually, and in the same or in like manner, to all

intents and purposes, as if the said purchaser had been a party to and had signed and sealed the said deed of settlement: And this indenture further witnesseth, that the said purchaser, for himself, his heirs, executors, and administrators, doth hereby further covenant with the said trustees, and with each and every of them severally and respectively, and with their and each and every of their respective executors, administrators, and assigns, that he the said purchaser, his executors and administrators, shall and will, as well in respect of the shares hereby assigned, as in respect of any other share or shares which with the approbation of the directors of the said company the said purchaser may hereafter become the proprietor of, well and truly pay or cause to be paid all such subscriptions, fines, and sum or sums of money, as now are, or shall or may from time to time or at any time hereafter become, due in respect of the said shares hereby assigned, and every such share as aforesaid, and shall and will make all and every such payments at the times and place and in the manner specified by the directors, or otherwise by or in pursuance of the said deed, and without any deduction or abatement whatsoever, according to the true intent and meaning of the same deed: And this indenture further witnesseth, that the said purchaser, for himself, his heirs, executors, and administrators, doth hereby, in proportion to his interest for the time being in the said company (which interest shall be ascertained by the number of shares which he may hold [303] therein as shewn by the books of the company), but not further or otherwise, covenant with the said parties hereto of the first part, and with each and every of them, severally and respectively, and with their and each and every of their respective heirs, executors, administrators, and assigns, that he the said purchaser, his executors and administrators, shall and will, from time to time, and at all times hereafter, well and effectually save, defend, keep harmless, and indemnified, the said parties hereto of the first part, and each and every of them, and their several and respective lands, goods, chattels, and effects, from and against all costs, losses, charges, damages, and expenses which they or any or either of them shall or may pay, incur, or sustain by reason or in consequence of entering into any contract or engagement for or on the behalf of the company, or for or on account of any act, deed, matter, or thing whatsoever which shall or may be done or executed by them, or any or either of them, in the execution of their office as trustees of the said company, or by the authority of the directors thereof.

The defendant, after the execution of the said indenture of the 25th of September, 1852, paid his subscriptions on the said shares so purported to be assigned and transferred, down to the 1st of July, 1857.

If the said deed of settlement and deed of transfer are valid and binding on the defendant, and if he continued so long to be a member of the company, there were at the commencement of this action on the 18th of May, 1858, due and in arrear from the defendant, ten monthly subscriptions in respect of the said two shares, and also fines in respect of the non-payment of the said subscriptions, of which subscriptions and fines the defendant had from time to time due notice.

In March last, more than six, namely, eight, of the said monthly subscriptions having become due from [304] the defendant in respect of the said two shares, if the said deeds were valid and binding on the defendant, and if he had not ceased to be a member, the secretary of the company made a written application to the defendant for payment of subscriptions and fines, stating therein, that, unless the arrears on his shares were paid on or before the next subscription night, the matter would be placed in the solicitor's hands; to which on the 10th of March the defendant wrote and sent to the secretary an answer, as follows: "I am in receipt of your letter of the 1st March; but, as I ceased altogether to be a member of the Third Equitable Union Building Company some months back, and as I have now no further interest whatever therein, as provided in the 45th clause of the deed of settlement, I presume this circumstance was overlooked when the letter was sent me." This letter was received in due course of post, and laid before the directors: and their secretary, on the 24th of March aforesaid, sent, by their order, an answer to it, in the following words: "27 Catherine Street, Islington, 24th March, 1858. Mr Rawlins. Sir, Your letter was read to the directors at their last meeting, who have directed me to inform you that they have not forfeited your shares, and so request payment of the arrears on the next subscription night, or proceedings will be commenced against you. Geo. Barfield, Secretary."

The defendant had been informed by one of the directors previously to the execu-

tion of the indenture of September, 1852, that the company was duly registered: but had discovered, before he refused to pay subscriptions or fines, that it was not so registered.

The defendant contends, that, by reason of the said company not being certified, inrolled, or registered under any statute or statutes, and the other facts stated in this case, the company at all times was and is il-[305]-legal. He also contends, that, by reason of the matters aforesaid, the deed of settlement and the deed of transfer are not binding on him, and that he is not liable for subscriptions or fines, or otherwise, by virtue of the covenants contained in those deeds, or either of them, or otherwise.

He also contends, that, under the circumstances stated, and by virtue of the 45th and other clauses of the deed of settlement, and the facts stated in this case, he ceased to be a shareholder, and his shares became forfeited, and he became discharged from liability for subscriptions and fines accruing after the expiration of six months from the time when any subscription or fine had been in arrear for six months, or, at all events, after the receipt of his letter of the 10th of March, 1858.

Since the commencement of this action, the defendant has paid to the plaintiffs, and they have accepted, the sum of 4l. 11s., being the said eight monthly subscriptions on the said two shares, and the fines in respect thereof, being the amount of all subscriptions or fines that became or were alleged to be due before or at the time of the receipt by the company of the said letter of the 10th of March, 1858: and it has been agreed between them that that amount shall be considered as struck out of the claim in the action.

After the receipt of the said letter of the 10th of March, 1858, and before this suit, two further monthly subscriptions, and the fines in respect of the non-payment thereof, amounting in the whole to the sum of 1l. 3s., became due and in arrear from the defendant to the plaintiffs, if the deeds were valid and binding on him, and he had not ceased to be such member as aforesaid, and still are unpaid.

The question for the opinion of the court was, whe-[306]-ther the plaintiffs or the defendant were entitled to judgment.

If the court should be of opinion that the plaintiffs were entitled to judgment, it was to be entered for the sum of 1l. 3s., being the amount of the said two monthly subscriptions and fines: otherwise, for the defendant: in either case, with costs on the higher scale, unless the court should otherwise order.

David Keane (with whom was S. Temple, Q. C.), for the plaintiffs (*a*). The defendant has entered into a covenant with the plaintiffs to perform all the covenants contained in the deed of settlement of this company, and the rules and regulations made in pursuance thereof. The answer attempted to be set up is, that the deed of settlement is void by reason of the non-inrolment of the company. None of the friendly society acts make inrolment a condition to the validity and legal existence of the society: and the 7 & 8 Vict. c. 110, s. 2, is applicable only to joint-stock companies which are established "for any commercial purpose, [307] or for any purpose of profit, or for the purpose of assurance or insurance." The point seems to have been already decided by the court of Queen's Bench in a case of *The Queen v. Whitmarsh*, 15 Q. B. 600. There, a company called the Chartist Co-operative Land Company was established under a deed which provided, amongst other things, that it should not authorize or require anything to be done contrary to law; that the company's business should be purchasing land and erecting thereon dwellings to be allotted to the members, and raising a fund out of which sums should be paid to or applied for the benefit of the

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the deed of settlement and deed of transfer are valid, and have always since the execution of the latter of them been binding on the defendant:

"2. That the company is not an illegal association, and that it is not and never was within any statute requiring inrolment or registration:

"3. That the defendant did not cease and has not ceased to be a shareholder, and that the deed gave no option to him to determine his liability by availing himself of his own breach of contract and the indulgence of the directors:

"4. That the defendant, by paying the amount of his subscriptions and fines up to the 10th of March, 1858, has deprived himself of the right, if any, to say that he is not liable for the subscriptions and fines accruing due between that date and the 18th of May, 1858, the day on which this action was commenced."

allottees, and raising money for the purposes aforesaid by selling, &c., interests in or charges on the estate to be purchased : that the directors might recommend allotments of land, dividends of profits, and the setting aside money for a reserve fund ; that the shareholders from time to time selected by lot from those to whom no allotment had been made should receive allotments of the land purchased ; that, before a shareholder should receive his allotment, a dwelling should be erected on it and certain sums laid out in stocking it by the directors ; that the allotment should be charged with a rent-charge for the benefit of the company, at the rate of 5l. for every 100l. expended by them ; that the rent-charges might be retained for the benefit of the company, or sold, &c., as the directors should think fit ; and that, when the funds of the company should exceed the amount necessary to provide allotments for all the shareholders, a dividend out of the profits should be declared among the shareholders : and it was held that the company appeared by the deed not to be established for any commercial purpose or purpose of profit within the 7 & 8 Vict. c. 110, s. 2, and was therefore not entitled to registration. Lord Campbell, in giving the judgment of the court, says : “ With respect [308] to the powers conferred upon the directors of selling land that might be purchased, they are not given for any purpose of profit by purchase and re-sale, but as subsidiary only to the governing purpose of providing allotments in respect of which the sale or other transfer of parcels of land might occasionally become convenient. It would be accidental only, if profit arose from the exercise of these powers ; and the exercise of them was clearly not the purpose for which the company was established.” That was followed and approved in *Bear v. Bromley*, 18 Q. B. 271. The object and purpose of this company are expressly declared by the second clause of the deed of settlement to be, to enable each member to become the possessor of a freehold, copyhold, or leasehold house. The third and fourth clauses provide for the raising the funds necessary for carrying that object into effect. The fifth clause is as follows :—“ That the business of the company shall be, to take on lease or purchase, either for years or in fee, land or ground within the distance of twenty miles from St. Paul’s Cathedral, London, of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which have been begun to be erected on the land so taken or purchased, and to take down and re-build, or to repair, any existing houses or buildings on the land or ground so taken or purchased, and to make and sell bricks, and to purchase and sell all kinds of building-materials, and to contract for and perform all kinds of work in the building business, and in relation thereto.” It will be contended on the part of the defendant, that the introduction of these latter words in the fifth clause makes this a company established for “ a commercial purpose ” or “ a purpose of profit.” But that is subsidiary only to the objects mentioned in s. 2, not for the purpose of making profits in the ordinary sense of [309] commercial profits. [Crowder, J. There was no provision at all like this fifth clause in the deed of settlement in *The Queen v. Whitmarsh*.] There was not. The directors might have made more bricks or bought more materials than were required for the legitimate purposes of the company : they have power to get rid of the superfluous materials. So, the provisions in the 34th, 35th, 36th, and 38th clauses,—to enable the trustees to make and buy bricks, &c., to contract for the purchase or leasing of land, &c., to contract for the erection of buildings and the supply of materials, &c., and to sell houses or land not immediately wanted,—are all subservient to the special purpose for which the company is established. [Willes, J. The 50th and subsequent clause would seem, according to *Hickman v. Cox*, 3 C. B. (N. S.) 523, to constitute a partnership.] That would not alter the effect of the deed, so far as regards its liability to inrolment. The 63rd clause provides for the dissolution of the company when every member shall have obtained a house or houses answerable to the share or shares subscribed for by him or her, or shall have obtained other satisfaction in respect of such share or shares, and all subscriptions, rents, fines, and payments shall have been made good on the part of all the members. The profits to the members here are limited to profits in the shape of houses and land : they are not the usual and ordinary commercial profits. [Cockburn, C. J. In the cases you refer to, the business of the company was expressly limited to the erection of houses and fitting them for habitation for its members. But here the company are, in addition, to carry on a business out of which profits may be made. As regards those with whom they deal, they are as much a commercial association as any other company established for the mere purposes of trade. They are (by clause 5) to make and sell

bricks, and to purchase and sell all kinds of building [310] materials, and to contract for and perform all kinds of work in the building business,—and (clause 34) generally to do all such acts, matters, and things as are usually done by builders,—and (clause 38) they are to sell and dispose of any houses or land which may not be immediately wanted for the purposes of the company, and to apply the proceeds of such sales to the general purposes of the company. Instead of dividing in money the profits thus made, the directors are to invest them in houses and land, and the members are to receive them in another form.] Notwithstanding all these provisions, there is nothing to differ this case from that of *The Queen v. Whitmarsh*. The object of the association is, the acquisition of freehold houses and land by the several members: all beyond that is merely subsidiary to the general scope of the undertaking.

The second point relied on by the defendant is, that he ceased to be a member of the company when he allowed his subscriptions to be six months in arrear: and for this he founds himself upon the 45th clause, which provides, “that, if any member shall, from any cause whatever, permit any monthly subscription on any share or shares held by him or her to be in arrear for the period of six calendar months after the same shall have become due, such share or share, and all moneys paid in respect thereof, shall, at the expiration of such six calendar months, become absolutely forfeited to the company for the benefit of the other members thereof; and, upon any such forfeiture of all the shares held by any member, the person so making default shall cease to be a member of the company and to have any interest therein or in the property belonging thereto.” [Byles, J. That is, the non-payment of the subscriptions for six months shall be a forfeiture at the election of the directors.] Like a policy of insurance, which is void for non-payment of premiums, at [311] the election of the directors; or a lease, which is to be null and void on failure of the lessee to perform the covenants, at the election of the lessor,—*Rede v. Farr*, 6 M. & Selw. 121; *Doe d. Bryan v. Banks*, 4 B. & Ald. 401; *Armstrong v. Woodward*, 6 B. & C. 519, 9 D. & R. 536. The fact of the defendant having executed the indenture of the 25th of September, 1852, is an answer to the objection that he has not executed the deed of settlement.

Lush, Q. C. (with whom was Aspland), for the defendant (a). The main question is, whether this is not a joint-stock company established “for a commercial purpose” or “a purpose of profit,” within the 7 & 8 Vict. c. 110, s. 2. These words “for any purpose of profit” have been interpreted to mean, to obtain profits for the company, not profits for the members inter se. In *The Queen v. Whitmarsh*, 15 Q. B. 600, the sole object of the scheme was, to purchase land and erect houses thereon for the members: there was no intention to get profits by dealing or contracting with the public, as there is here. [Willes, J. The company, to carry out [312] its object by means of the subscriptions, would require 75,000l., and they would be fifty years getting it.] The 2nd clause states the object of the association to be, to enable each member to become the possessor of a freehold, copyhold, or leasehold house of the estimated value of 150l., or thereabouts, in respect of each share which he may subscribe for: not a word is said as to its being by subscriptions only. The 4th clause provides “that the sum of money necessary for carrying the object of the company into effect shall be raised by means of the monthly subscriptions of the members, and of the rents to be paid by the members for the houses which shall be allotted to them, and by the sale of superfluous houses and land, and of houses and land which may not be immediately wanted for the purposes of the company, and by such other

(a) The points marked for argument on the part of the defendant were as follows:—

“That, on the facts stated, he is not liable to any part of the sum claimed, and is entitled to the judgment of the court,—that the company, not being inrolled, certified, or registered, was an illegal company,—that the deed of settlement was illegal,—that, if not illegal, at all events the covenants in the deed of settlement and deed of transfer were not binding on the defendant,—that such was especially the case, as the defendant, who never executed the deed of settlement, executed the deed of transfer after an assurance that the company was duly registered,—and that, if the deeds were ever binding on the defendant, his membership and liability ceased before any of the subscriptions or fines now claimed became due, and he has paid all subscriptions and fines that became due when he was a member.”

ways and means as are hereinafter provided." That clearly is not confined to business between the members. Then comes the 5th clause, which provides that the business of the company, amongst other things, shall be, "to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto." By clause 8, the affairs of the company are to be conducted by a board of fifteen directors, who by clause 32 are empowered "to employ as many servants and workmen as the business of the company may require." The 34th clause contains nothing to limit the power of the directors: it provides "that the directors may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, and generally to do all such acts, matters, and things as are usually done by builders." By the 36th clause it is provided that "the directors may from time to time authorize the trustees to enter into, make, and sign such [313] contracts and agreements with any person or persons, whether members or otherwise (but only according to the respective trades, occupations, or businesses of such person or persons), for erecting, completing, or carrying on all or any erections and buildings and other works, or for the supply of any articles or materials necessary for the purpose of carrying the object of the company into effect, as they may think expedient,"—that object manifestly being to carry on a trade for the purpose of raising money to enable each member to become the possessor of a freehold house. By clause 37, the directors are empowered to authorize the trustees to borrow 60,000l. The 65th clause provides that "all moneys which shall be received from subscriptions, or from any other source whatever, shall from time to time, within two days after the receipt thereof, be paid into the bankers, to the credit of the trustees." Thus, the deed provides all the powers which the directors want and which are usually vested in the directors of a trading company. It goes, therefore, far beyond those in the cases cited, of *The Queen v. Whitmarsh*, 15 Q. B. 600, and *Bear v. Bromley*, 18 Q. B. 271. [Cockburn, C. J. I agree with you, that the undertaking would come within the 7 & 8 Vict. c. 110, if the primary object were the buying and selling of houses and land, and the making and selling of bricks, and the buying and selling of materials. But this power is only thrown in incidentally in the 4th and 5th clauses. What the company primarily had in view was, the erection of houses for the members, the rest was subsidiary and in subordination to the main object and purpose. Byles, J. All these provisions in the deed were to eventuate in the division of the purchased land, with the houses erected upon it, among the members. There is to be no division of profits until the whole affairs of the company are wound up.] There is nothing to limit the [314] general words of the 32nd clause to the ulterior objects of the company. The deed contemplates that the directors shall carry on a building trade, the profits of which were to assist them in the ulterior objects of the company. It cannot be successfully contended that the forfeiture for non-payment of the subscriptions for six months is absolute. The 7th section of the 7 & 8 Vict. c. 110, makes the deed illegal. [Willes, J. If this is a company within the 2nd section, the deed no doubt is illegal and void for want of enrolment. That was decided in *The Agricultural Cattle Insurance Company v. Fitzgerald*, 16 Q. B. 432.]

Keane, in reply. Looking at the clauses 34, 35, and 36, it is clear that the directors have no power to do anything except for the purposes mentioned in the 2nd clause. [Cockburn, C. J. How is the fact?] If the company had carried on business in the way suggested, the fact would doubtless have appeared in the case. Could it be doubted that any member of the company might have had recourse to a court of equity to restrain the directors from acting otherwise than according to the purpose and object indicated by the 2nd clause of the deed? The question is, whether the company, as such, are to make profits. *In re the Stanton Iron Company*, 21 Beavan, 164, the Master of the Rolls held the company not to be within the winding up acts. Now, a company which is not within the winding up acts, is not within the 7 & 8 Vict. c. 110,—*In re the London and Manchester Direct Independent Railway Company, Ex parte Barber*, 1 McN. & G. 176. [Willes, J. That is inconsistent with the decision of this court and of the majority of the Exchequer Chamber in *Hickman v. Cox*, 18 C. B. 617, 3 C. B. (N. S.) 523.] This court held that the deed constituted the parties partners as against third persons.

[315] COCKBURN, C. J. Our judgment in this case must be for the plaintiffs. If, indeed, it were clear from the deed of settlement of this company that it was

competent to the directors under the powers contained in the clauses 2, 3, 4, and 5, to carry on the business of making and selling bricks, and purchasing and selling building materials, and contracting for and performing all kinds of work in the building business,—and so working for other people, independently of the main purpose for which they are constituted, viz. the enabling each member to become the possessor of a freehold, copyhold, or leasehold house,—I should have been of opinion that it was a company within the 7 & 8 Vict. c. 110, and that registration was necessary to enable them to enforce contracts entered into with them; for, although the ultimate object of the association is the erection of buildings for its members only, yet, if the means or part of the means to that end were that the company should carry on business, that immediate and primary purpose would bring it within the act, and it would be immaterial by what means the profits were eventually to be realized for the company. If, for instance, the profits of the business so carried on were to be invested in land upon which houses were to be erected for the members or subscribers, that arrangement for the ultimate disposition of the profits would not take the case out of the operation of the statute. If the 5th clause was intended to enable the company so to carry on business for profit, then I should say that this case was clearly distinguishable from *The Queen v. Whitmarsh*, 15 Q. B. 600, and that the deed of settlement was void and incapable of being enforced. The whole question, therefore, turns upon the construction of the 5th clause. I am strongly inclined to think, that, under that clause, it was part of the intention of the promoters of the company that they should make [316] and sell bricks, and purchase and sell all kinds of building materials, and should contract for and perform work in the building business generally, and not merely as subsidiary to the main object and purpose of the company. At the same time, it must be confessed that the matter is open to considerable difficulty. I cannot say that my doubts are altogether removed; but, as my learned Brothers all think that it would not be competent to the directors under this deed so to carry on business, I do not entertain so strong an opinion as to induce me to differ from them. All that I desire to be understood as laying down is, that, if it were clear from the language of the deed that the company were to carry on business for profit dehors the main object for which they are associated, that would have brought them within the 7 & 8 Vict. c. 110.

CROWDER, J. I am of opinion that this is not a company established for the purpose of profit, within the 2nd section of the 7 & 8 Vict. c. 110. Looking at the deed of settlement, it seems to me that this case is entirely governed by *The Queen v. Whitmarsh*, 15 Q. B. 600. The main purpose of the deed in both cases was precisely the same,—that each member should become entitled to a freehold, copyhold, or leasehold house, by paying certain monthly subscriptions. It is said, on the part of the defendant, that *The Queen v. Whitmarsh* does not govern the present case, because by the 4th and 5th clauses of this deed of settlement power is given to the directors to enter into the regular trade of builders, and to contract for that purpose with third persons. Looking at those clauses, in conjunction with other clauses in the deed, I am unable to bring myself to that conclusion. The 4th clause provides that the sum of money necessary for carrying the object of the company into effect shall be raised by [317] means of the monthly subscriptions of the members, and of the rents to be paid by the members for the houses which shall be allotted to them, and by the sale of superfluous houses and land and of houses and land which may not be immediately wanted for the purposes of the company, and by such other ways and means as are thereafter provided. The “other ways and means,” it is said, are pointed out by the 5th clause, which is as follows,—“That the business of the company shall be, to take on lease, or to purchase, either for years or in fee, land or ground, &c., of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and to take down and rebuild or to repair any existing houses or buildings on the land or ground so taken or purchased; and to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto.” It is urged on the part of the defendant, that, although the earlier part of this clause is strictly confined to the object of the company as described in clause 2, yet, when you come to the latter part, that gives the trustees authority to carry on the general business of brick-makers and builders,

and that is one of the ways and means of raising money referred to in the 4th clause. These latter words of the 4th clause, I incline to think, refer to the 37th clause, which enables the directors to authorize the trustees to borrow money on mortgage. These moneys when raised are to be applied to the building, &c. of houses for the purpose and object of the association: and that, I think, satisfies the words of the 4th clause. The 5th clause is certainly not free from ambiguity: but still I think it may fairly be confined to such buildings as are im-[318]-mediately connected with the primary object of the company. Part of the business of the company is, to make and sell bricks, to purchase and sell all kinds of building-materials, and to contract for and perform all kinds of work in the building business, and in relation thereto. Suppose they enter into a contract with a builder to erect a house or houses on part of the land purchased or taken by them, the trustees may sell bricks and other materials to the contractors, as fairly incident to the main purpose for which the company was formed. The purchase of building-materials would be absolutely necessary. Suppose they have purchased more than they can use, surely they must have authority to dispose of the overplus. As to the latter part of the clause, which enables them to contract for and perform all kinds of work in the building business, and in relation thereto,—though the language is not very precise and definite, the construction I put upon it (taking it in conjunction with the 32nd and 36th clauses) is, that the trustees may themselves employ servants and workmen, or may contract with a builder to do the required works. So viewing it, it seems to me to be a strained construction (there being only three lines in the deed which can be suggested as conferring that power upon them) to say that the trustees were to carry on the business of builders for profit. A reference to subsequent provisions of the deed will confirm this view. Thus, the 50th clause provides, that, when any land or ground shall from time to time be purchased or taken for the purposes of the company, the directors shall with all convenient speed cause to be erected and built thereon such number of houses of such forms and dimensions, and of such class, size, and description as they shall think fit, &c.: and the 51st clause provides, that, in determining the number and the size and description of the houses to be erected [319] and built or completed and finished as aforesaid, the directors shall be guided by the number of members of which the company shall consist, and the number of shares and half-shares held by each member, and erect houses of corresponding value. If the directors may build houses for anybody, what sensible construction can be given to these two sections? They are plainly inconsistent with a general power to carry on the building business. Then, what is to become of the houses when erected? That is provided for by the 52nd, 53rd, and 54th clauses. They are to be allotted amongst the members according to the value of their several interests in the company. Then the 63rd section provides for the dissolution of the company when the object of its formation has been accomplished. Looking at the whole of the deed, I find no clause shewing the meaning of the last three lines of the 5th clause to be as contended for by the defendant. Though not free from ambiguity, I am strongly of opinion that the words of that clause do not enable the directors to carry on business for profit in any way to bring them within the 2nd section of the 7 & 8 Vict. c. 110. For these reasons, I am of opinion that the plaintiffs are entitled to judgment.

WILLES, J. I concur in giving judgment for the plaintiffs. The view I take of the case is in accordance with that of my Lord Chief Justice. But I am glad to find that the view taken by my Brothers Crowder and Byles of the construction of this deed (and which I adopt as the most wholesome one) enables the court to give judgment for the plaintiffs, notwithstanding the 7 & 8 Vict. c. 110, which would have made the deed void if the construction contended for by the defendant could have been put upon it. There is no doubt in the minds of any of us as to the law ap-[320]-plicable to the case. If the 5th and 34th clauses were to be read as giving the directors power generally to enter into building operations, unquestionably the company (though the extent of profit would be limited by the object of its formation) would still be a company established for a purpose of profit within the statute, and consequently would require registration. The only question is, whether, looking to the whole scope of the deed, these clauses are not to be restricted to that which is manifestly the main object and purpose of the company's formation. If the words of the two clauses I have referred to are to be read by themselves, separated and disjointed from the rest of the deed, they would seem to give the directors such a power as would enure to

make the deed void : but, for the reasons given by my Brother Crowder, and having regard to the maxim that "general words may be aptly restrained according to the subject-matter or person to which they relate," it seems to me that we ought if possible to put such a construction upon this deed as to make it valid. Generally speaking, a deed ought to be read as if there were no act of parliament affecting it in existence : if, so construing it, it comes within the language of an avoiding statute, it must necessarily be held void. There are many cases where the general rule of construction, that, where the words are ambiguous, they shall be read in a sense which will make the deed consistent and legal, has prevailed. Thus, in *Payler v. Homersham*, 4 M. & Selw. 423, a release contained in a deed, which recited that the defendant stood indebted to his creditors in several sums set opposite to their respective names, and that they had agreed to take of the defendant 15s. in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said 15s. in the pound paid to them before executing the release, each and [321] every of them did release the defendant from all manner of actions, debts, claims, and demands in law and equity, which they or any or either of them had against him, or thereafter could, should, or might have, by reason of anything from the beginning of the world to the day of release,—was held to release nothing but the respective debts, and all actions and demands touching them : for, the general words of release had reference to the particular recital, and were to be governed by it. A class of cases more immediately applicable here is that which is referred to in the case of *The Poulterers' Company v. Phillips*, 6 N. C. 314, 8 Scott, 593. The company of poulterers comprises all poulterers in London and within seven miles thereof, and no one can be of the livery of a company in London, unless he be a freeman of the city : it was held in that case, that a bye-law authorizing the company to admit into the livery of the company any freeman of the company, was a valid bye-law, and must be intended to imply any freeman of the company who was also free of the city. Looking at the professed object of this company, and seeing that it would make the deed illegal and void if the 5th and 34th clauses were to receive the general construction contended for on the part of the defendant, and legal if they receive the more limited construction put upon them by my Brother Crowder, I am inclined to think that the latter is the right construction, and therefore that the plaintiffs are entitled to judgment.

BYLES, J. I also agree with the opinion pronounced by my Brother Crowder. I entertain a strong opinion, upon the authorities, that our judgment should be for the plaintiffs. This is not a company established for any commercial purpose, or for any purpose of profit, within the 2nd section of the 7 & 8 Vict. c. 110. *The Queen v. Whitmarsh*, 15 Q. B. 600, distinctly decides, [322] that, the primary object of an association being to purchase land and build houses thereon for its members, and not the making of profits from trading, it does not require enrolment. Now, what are the ultimate objects of this company, and the means by which they are to be attained ? These sufficiently appear from the 2nd and the 63rd clauses of the deed of settlement, viz. to enable each member to become the owner of a house of the estimated value of 150l. in respect of each share held by him. That is the object to which all the proceedings of the company are to be directed : and, as soon as that object is attained, it is imperative on the company to dissolve itself and wind up its affairs. [His lordship read the 63rd clause.] It seems clear, therefore, that the ultimate object of the society was, to furnish each of its members with a freehold, copyhold, or leasehold house of the value of 150l. : and that nobody was at liberty to deviate in any degree from the course which was to carry out that purpose. How were they to do this ? Their business was (clause 5) to take on lease or to purchase land of freehold, copyhold, or leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and they were to take down and rebuild, or to repair any existing houses or buildings. Where ? Not anywhere : but "on the land or ground so taken or purchased." They are also to make and sell bricks, and to purchase and sell all kinds of building materials. In addition to what has fallen from my Brother Crowder, viz. that this might be intended to authorize the directors to sell any surplus materials they might have accumulated, it may be that they might make bricks and sell them together with other building materials to such of their members as might choose to build their own houses. They were also to contract [323] for and perform all kinds of work in the building business and in relation thereto,—but only on the land so taken and purchased.

It seems to me that the carrying on the building business in any other way would be entirely beyond the scope and object of the company's formation. If the directors or trustees deviate from the main object of the society, they infringe the deed of settlement; for, it appears by clauses 33 and 34 that everything is to be done under the control and superintendence of the directors. The 34th clause especially gives the directors power in respect of building operations. They may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, and generally do all such other acts, matters, and things as are usually done by builders,—but subject to such restrictions as may from time to time be imposed upon them by the resolutions of any general meeting. Suppose there be any general words in some part of the deed which are not quite susceptible of the meaning given to them by my Brother Crowder, I conceive the directors would be acting contrary to the scope of the deed and to the law of the land, if they took advantage of them to carry on trade in a manner not contemplated by the deed or the purposes for which the company was formed. For these reasons, I fully concur in the judgment pronounced by my Brother Crowder, and, upon the authority of the case of *The Queen v. Whitmarsh*, which is not distinguishable from the present, I think the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

[324] DODD v. PONSFORD. April 30th, 1859.

The plaintiff agreed to supply the defendant with a quantity of bricks, upon the following terms:—"Terms of payment, four months' account, and at the end of four months a settlement shall be made, and eight months longer will be given or your paying interest on the amount at the rate of 5 per cent.; and, if a further three months is required, it will be given, on your paying the current rate of interest on the amount."—Held, that the payment of the interest was not a condition precedent to the defendant's having the eight months' and three months' further credit.

This was an action for goods sold and delivered. The writ was indorsed as follows:—

"November and December, 1857, and January to May, 1858.

Goods, viz. bricks	£275 18 0	
Ditto	72 10 0	
January to May, 1858.		£348 8 0
Goods, viz. bricks	£39 16 7	
Ditto	56 8 2	
		95 4 9
		<u>£443 12 9"</u>

By a judge's order, dated the 14th of August, 1848, the last items (95l. 4s. 9d.) were struck out of the particulars: and, by agreement of the parties the following case was stated for the opinion of the court:—

The plaintiff is a brick-maker, and the defendant is a builder. The goods in question were supplied by the plaintiff to the defendant under the following circumstances:—In October, 1857, the defendant contracted to lease to a Mr. Charles Maidlow certain land in Hill Road, for the purpose of building upon, and applied to the plaintiff to supply Maidlow with the requisite bricks. The plaintiff thereupon sent Maidlow a memorandum, of which the following is a copy:—

"Mr. Dodd, City Wharf, New North Road, Hoxton, 12th October, 1857.

"To Mr. Charles Maidlow.

"Stocks	30s.	} per thousand, delivered to Hill Road, St. John's Wood.
$\frac{1}{2}$ and $\frac{1}{2}$	26s.	
Place	21s.	

[325] "To the amount of 500,000, to be delivered within four months from this date, and give the accommodation of eight months' further credit for that quantity,

bearing interest at 5 per cent. per annum : and, should a further three months' credit be required after that period, interest to be paid at the current rate of the time, if Mr. Ponsford will give his note of hand to see me paid as above."

The delivery of this memorandum gave rise to the following correspondence :—

"2 Craven Terrace, Paddington,
31st October, 1857.

"Sir,—Mr. Charles Maidlow has brought a memorandum from you as to the price of your bricks delivered to Mr. Ponsford's freehold ground : but, there being no name, and the note being addressed to Mr. Maidlow, I will thank you to write to Mr. James Ponsford, stating the lowest price you will supply him with bricks, and at what date bills you will require the payment to be made. The bricks will be delivered on Mr. James Ponsford's account, and be paid for by his acceptance, should your terms be approved.

"For JAMES PONSFORD,
"B. WHEELER."

"Mr. Dodd.

"31st October, 1857.

"Sir,—I hereby agree to supply you with the following bricks,—stocks 29s., grizzles 25s., and place 20s., delivered on your ground, Hill Road, St. John's Wood. Terms of payment, four months' account from the above date, and, at the end of four months, a settlement shall be made, and eight months longer will be given on your paying interest on the amount at the rate of 5 per cent. ; and, if a further three months is [326] required, it will be given, on your paying the current rate of interest on the amount.

"For HENRY DODD,
"THOMAS FERGUSON."

"J. Ponsford, Esq.

"11 & 12 Wharfs, North Side, Paddington Basin,
"10th November, 1857.

"Sir,—Please favor me with a note stating whether you accept the prices and terms named in my letter to you of the 31st ult. as those upon which Mr. Dodd will supply you with bricks delivered to and upon your estate at Hill Road, St. John's Wood : and also say the names of the parties authorized to receive such bricks and sign the receipts for the same. I trouble you with this as I am only acting as an agent in the transaction, and wish to satisfy Mr. Dodd, my principal, that the matter is to be carried out as he supposed and intended.

"For T. FERGUSON,
"H. MAY."

"J. Ponsford, Esq."

"66 Queen's Gardens, Hyde Park,
"14 November, 1857.

"Sir,—Your letter dated the 31st October I have received relative to the bricks you are delivering to Mr. Charles Maidlow for the houses he is building upon my land in Hill Road, St. John's Wood. I have no objection to make to your proposition : I will rely upon your delivering upon my land in Hill Road the whole quantity of bricks for which I send you from time to time a written order ; and I will trust upon your procuring Mr. C. Maidlow or his foreman's signature to each delivery note, so that there may be no dispute with him when your account is about to be settled.

"Mr. Thomas Ferguson.

"JAMES PONSFORD."

The supply of bricks commenced on the 2nd of November, 1857. It went on till the 13th of February, 1858, when it amounted to 275l. 18s.

[327] An account of the bricks so supplied was on the 27th of February, 1858, delivered by the plaintiff to the defendant, but nothing further was done at the end of four months from the 31st of October, and therefore no settlement was then made (whatever may be the meaning of that expression in the aforesaid letter of the 31st of October, 1857), nor was any settlement subsequently made or requested by either party, unless and in so far as the contrary hereafter appears.

The next supply was on the 9th of March, 1858 ; and the supplies continued until the 7th of May. On the 31st of March, a second account was delivered by the plaintiff to the defendant, in which the bricks supplied during March were added to

the previous account, making an aggregate of 314l. 7s. In April, the following letter was sent by the defendant's agent to the plaintiff's agent :—

"2 Craven Terrace, Paddington,
"April 14th, 1858.

"Sir,—Mr. Ponsford has instructed me to inform you that Mr. Charles Maidlow will only require bricks to finish the two houses he is now building; and he should prefer settling the whole account of bricks had for Mr. Maidlow's houses at one time. I will shortly ascertain the quantity of bricks that will be required for Hill Road, to finish Mr. Maidlow's houses, and communicate with you thereon.

"Mr. Ferguson.

"B. WHEELER."

On the 19th of April, the plaintiff sent the defendant a detailed account shewing the daily supplies of bricks from the 2nd of November, 1857, to the 31st of March 1858, and making the amount of those supplied to be 314l. 7s. The account was inclosed in a letter, of which the following is a copy :—

[328] "City Wharf, New North Road, Hoxton,
"19th April, 1858.

"Sir,—Mr. Dodd desires me to present his compliments and furnish your account for bricks of Mr. Maidlow to 31st March last, amount 314l. 7s. Your private account to same date, 61l. 8s. 3d., was forwarded to Mr. Wheeler on the 1st inst. Will be obliged by your saying whether you will give a cheque for the amounts, or whether a bill at short date.

"James Ponsford, Esq.

"For HENRY DODD,
"EVAN DAVIES."

On the 7th of May the supply ceased. On the 11th of May another account was sent by the plaintiff to the defendant, accompanied by a letter, of which the following is a copy :—

"City Wharf, New North Road, Hoxton,
"11th May, 1858.

"Sir,—By the desire of Mr. Dodd, I beg to forward your account to the end of April, amount at your debit in the sum of 434l. 18s. 6d. viz. bricks delivered to Mr. C. Maidlow in the sum of

	£341	10	6
and bricks on your private account	93	8	0
	<hr/>		
	£434	18	6

"For H. DODD,
"EVAN DAVIES."

"James Ponsford, Esq.

Weekly accounts were every week sent by the plaintiff to the defendant of the goods supplied to Maidlow. Also a monthly account, that a sufficient check might be kept on him.

On the 24th of May, another account was sent by the plaintiff's attorney to the defendant, accompanied by a letter of which the following is a copy :—

[329] "7 Staple Inn, 24th May, 1858.
"Yourself and Dodd.

"Dear Sir,—I enclose you a copy of the account, shewing that there is 443l. 12s. 9d. due from you to Mr. Dodd; and, as the condition of the arrangement has been avoided on your part, he now requires me to demand payment.

"Permit me ask, as between him and you (doubtless two honorable men), whether, there being no dispute as to your liability, it is worth while engendering hostility by entering into litigation.

"Will you excuse me for the suggestion: but, looking at the relative position of you and Maidlow, and the influence which that position naturally gives you over him: and also looking that, in this instance, the material for the buildings has been supplied upon your responsibility, whether you cannot easily, as a matter of business and of right, require from him a mortgage of the buildings for the amount which you

have to pay to Mr. Dodd, as I have no doubt of Mr. Dodd's right to recover the amount immediately. I trust that you will appreciate my motive in endeavouring to settle the matter amicably.

"G. A. MACPHAIL.

"J. Ponsford, Esq."

On the 26th of June, the defendant wrote to the plaintiff's attorney, as follows:—

"66 Queen's Gardens, Hyde Park,
"26th June, 1858.

"Dear Sir, — Your letter of the 24th ultimo I have received, from which I learn that Mr. Dodd is determined not to abide by the agreement which I have made with him through his agent Mr. Ferguson in his sale of the bricks to me. Such being the case, it is my determination to defend any action he may instruct you to [330] commence against me: and I shall rest my case upon the agreements there are between us. I again repeat I am ready and willing to carry into effect the agreements there are between us, and with the view to the settlement of the accounts.

"G. A. Macphail, Esq.

"JAMES PONSFORD."

On the 5th of July, further accounts were sent by the plaintiff's attorney to the defendant,—one being a detailed account of the supply from the 2nd of November, 1857, to the 18th of February, 1858, being all that were supplied during the first four months, and shewing the amount 275l. 18s., the other being a similar account of the residue of the supply to the 7th of May, 1858, and shewing the amount to be 72l. 10s. The accounts were accompanied by a letter of the plaintiff's attorney, of which the following is a copy:—

"7 Staple Inn, 5th July, 1858.

"Yourself and Dodd.

"Dear Sir,—Herewith I send you the first and second series of the account of bricks for the four months respectively; also the first and second series supplied on your account to Maidlow for the like periods. The amount together is 443l. 12s. 9d. I must request a settlement of the amount immediately, and will thank you to send me a cheque or the name of your solicitor in the course of to-morrow forenoon.

"James Ponsford, Esq.

"G. A. MACPHAIL."

The accounts forwarded in the above letter were duplicates of those sent in the aforesaid letter of the 24th of May. Immediately on receipt of the accounts, the defendant wrote to the plaintiff's attorney a letter, of which the following is a copy:—

[331] "66 Queen's Gardens, Hyde Park,
"6th July, 1858.

"Dear Sir,—I have received your letter and Mr. Dodd's account. I imagine that you cannot have seen the agreement made by Mr. Ferguson for Mr. Dodd with me on the 31st of October last, or you would not lend yourself to write to me in the manner you do. I again state that I am ready and willing to settle the accounts in accordance with that agreement.

"JAMES PONSFORD.

"G. A. Macphail, Esq."

In the afternoon of the same day, viz. the 6th of July, the writ was issued. No interest was ever paid by the defendant, or demanded by the plaintiff.

The court was to be at liberty to reject any portion of the case that they might think not admissible in evidence, and to draw such inferences of fact as they might think proper.

The question for the opinion of the court was, whether at the time of the issuing the writ the money claimed, or any part thereof, had become payable by the defendant to the plaintiff, under the facts above stated. If it had, judgment was to be entered, with costs, for the plaintiff, for 341l. 8s., or such part thereof as was then payable. If it had not, judgment for the defendant was to be entered as on nolle prosequi.

Lush, Q. C. (with whom was Gray), for the plaintiff. The question turns upon the meaning of the plaintiff's letter of the 31st of October, 1857, in which the terms

of payment proposed are as follows, "Four months' account, and, at the end of four months, a settlement shall be made, and eight months longer will be given on your paying interest on the amount at the rate of 5 per cent., and, if a further three months is required, it will be given on your paying the current [332] rate of interest on the amount,"—and the defendant's letter of the 14th of November, accepting these terms. The obvious meaning is, that the defendant shall have a current account of four months, and, at the expiration of that time, a credit of eight months upon condition that he pays 5 per cent. interest upon the amount then settled and ascertained; and then a further credit of three months, on paying the current rate of interest. [Crowder, J. Is the defendant to pay the eight months' interest in advance?] It is enough for the argument to say that the settlement of the account at the end of the four months was to be a condition precedent. [Crowder, J. The parties could hardly have contemplated a pre-payment of the interest.] The words are "on your paying," which is the same thing as "on condition of your paying." At all events, the account must be settled and assented to. [Byles, J. When the one party sends an account, and the other says nothing, is not that a settlement of the account?] It is submitted that it is not. The mere absence of objection at the time would not estop the defendant from insisting that the account was wrong, if the plaintiff afterwards sued him for the amount. It must be such an adjustment as would bind both parties. If the construction contended for be not the correct one, then it would follow that all the interest is to accumulate until the end of the last period named. There is nothing in the language of the letter to warrant that: and it is most improbable that the plaintiff contemplated that he was to lie out of his money for fifteen months without receiving any interest in the meantime. It will be embarking in interminable speculation and conjecture, to disregard the plain language of the contract.

Phipson, *contra*. The action is prematurely brought. [333] The contract must be construed in a reasonable way, regard being had to the position of the contracting parties. The expression "terms of payment" overrides the whole. "On your paying," means no more than "terms of paying." The plaintiff was to get 5 per cent. for eight months' credit. If the 5 per cent. were to be pre-paid, the plaintiff would obtain more than that rate of interest. The last part of the proposal throws some light upon the former part,—“If a further three months is required, it will be given on your paying the current rate of interest on the amount.” That is, the current rate of interest during the period. The payment of interest cannot be a condition precedent there: and the expression used must be read in the same sense in both parts of the agreement. The plaintiff's letter to Maidlow of the 12th of October explains this. [Crowder, J. We are all of opinion that the words "on your paying interest" do not make the payment of interest a condition precedent.]

Lush, *in reply*. If the parties had meant current rate of interest in the sense of average, they would have said so.

COCKBURN, C. J. I am of opinion that our judgment must be for the defendant. The construction I put upon the contract is, that the account is to be delivered at the end of four months; that the account so delivered is to be settled, in the shape of an adjustment, so that both shall be agreed upon the sum which is to constitute the amount, and then a credit of eight months is to be given "on the defendant's paying interest on the amount at the rate of 5 per cent." It is contended, on the part of the plaintiff, that the payment of the interest is a condition precedent to the defendant's having the eight months' credit. It seems to [334] me that that is not a reasonable construction; but that it means, bearing that rate of interest, to be paid in the ordinary way, principal and interest at the same time. Then, if a further credit of three months is required, the defendant is to have it on paying the current rate of interest, the rate of interest usually paid during such period. Upon this construction of the contract, the defendant is entitled to judgment, the plaintiff having brought his action too soon.

The rest of the court concurring,
Judgment for the defendant.

IN THE MATTER OF JOHN THISTLETHWAITE ALLEN. April 18th, 1859.

[S. C. 28 L. J. C. P. 256 ; 5 Jur. N. S. 1011 ; 7 W. R. 397.]

This court has no general jurisdiction to interfere with the lists of voters for members of parliament, in cases in which no appeal lies under the 6 & 7 Vict. c. 18.—The name of a voter appeared in the list of voters for a borough, and also in the list for the county. His qualification in respect of the latter being objected to, and he not appearing to support his vote, the revising-barrister, intending to strike his name out of the county list, by mistake expunged it from the borough list :—Held, that this court had no power to give him relief, or to make any order under the 6 & 7 Vict. c. 18, s. 67.

The name of John Thistlethwaite Allen appeared upon the list of voters for the county of Bedford, and also upon the list for the borough of Bedford. Having been served with a notice of objection to his qualification for the county, he did not appear to prove it, and the revising barrister accordingly proceeded to strike out his name ; but, instead of striking it out of the county-list, to which the objection referred, he by mistake struck it out of the list of borough voters. Upon an affidavit disclosing these facts,

Couch moved for a rule or order to direct the returning-officer for the borough of Bedford to restore Mr. Allen's name to the register. He referred to the 67th [335] section of the 6 & 7 Vict. c. 18, which enacts, "that, whenever by any judgment or order of the said court [of Common Pleas], any decision or order of any revising-barrister shall be reversed or altered, so as to require any alteration or correction of the register of voters for any county, or for any city or borough, notice of the said judgment or order of the said court shall be forthwith given by the said court to the sheriff or returning-officer, as the case may be, having the custody of such register, and the said notice shall be in writing under the hand of one of the masters of the said court, and shall specify exactly every alteration or correction to be made in pursuance of the said judgment or order in the said register ; and such sheriff or returning-officer respectively shall, upon the receipt of the said notice, alter or correct the said register accordingly, and shall sign his name against every such alteration or correction in the said register, and shall safely keep and hand over to his successor every such notice received by him from the said court as aforesaid, together with the said register." [Willes, J. That section only applies where an appeal is pending against a decision of the revising-barrister.] Here, there could be no appeal: this application, therefore, is to the general jurisdiction of the court. [Crowder, J. What general jurisdiction has this court over the register of voters ?] Unless the court has power to do this, the voter is without remedy.

CROWDER, J. It is doubtless a hard case ; but I do not see how we can relieve the party. The jurisdiction conferred upon us by the act is a limited one. Beyond the power given us by the 67th section, we have no right to interfere in any way with the lists of voters.

BYLES, J. I think the House of Commons would be [336] very much astonished if we usurped such a power as we are here called upon to exercise.

Rule refused.

THE WOLVERHAMPTON NEW WATERWORKS COMPANY v. HAWKESFORD.

April 28th, 1859.

[S. C. 28 L. J. C. P. 242 ; 5 Jur. N. S. 1104 ; 7 W. R. 464. Discussed, *Portal v. Emmens*, 1876, 1 C. P. D. 215, 664. Referred to, *Fallace v. Falle*, 1884, 53 L. J. Q. B. 461 ; 13 Q. B. D. 109. Considered, *Abergavenny Improvement Commissioners v. Straker*, 1889, 42 Ch. D. 89. Referred to, *Stevens v. Chown*, [1901] 1 Ch. 903 ; *Derwent Corporation v. Toner*, [1902] 2 Ch. 193 ; [1903] 1 Ch. 759 ; *Attorney-General v. Ashbourne Recreation Ground*, [1903] 1 Ch. 106. For subsequent proceedings see 7 C. B. N. S. 795 ; 11 C. B. N. S. 456.]

The 21st and subsequent sections of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), do not authorize an action against a "subscriber to the under-

taking" for calls.—Whether a party may be a "shareholder," without being on the register,—quære?—A count alleged that the defendant subscribed a certain sum to the undertaking, and that certain portions thereof were called for, and places and times appointed for the payment thereof, and that the defendant had due notice of the premises, and that the plaintiffs (the company) did all things necessary to entitle them to have the calls paid, but that the defendant made default:—Held, that the count disclosed no cause of action,—inasmuch as it did not shew that the defendant was a "shareholder" within the act.

This was an action against the defendant, a subscriber to the Wolverhampton New Waterworks Company, for calls. The second count of the declaration stated, that the defendant subscribed 6000l. towards the undertaking and works which were by the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.) authorized to be executed, and divers portions thereof, amounting to 4500l., were called for by the plaintiffs, being the company constituted by the said act, and the plaintiffs appointed certain places and times for the payment thereof respectively, and the defendant had due notice of the premises, and the said times elapsed, and the plaintiffs did all things necessary to entitle them to have the said sums, amounting to 4500l., paid to them by the defendant; yet the defendant made default in paying the same, contrary to the said act, and the same are still in arrear and unpaid and due from the defendant to the plaintiffs.

The defendant pleaded, sixthly, to the second count, on equitable grounds, that divers other persons subscribed large sums of money respectively towards the said undertaking therein mentioned, which, at the times of the making of the said alleged calls in the [337] second count mentioned, remained and still were wholly unpaid, and that the plaintiffs did not, nor did any other persons, at any time call for the payment by the said other subscribers, or any of them, equally with the defendant, of the said sums subscribed by them respectively, or any part thereof.

He also demurred to the second count; the ground of demurrer stated in the margin being, "that the second count shews no contract under seal, and no undertaking by the defendant to pay the moneys called for, nor any liability on the defendant to pay the same." Joinder.

The eighth plea, to the second count, stated that the subscription in that count mentioned was and is the execution by the defendant of a certain indenture made and executed, before the passing of the said act, by and between the defendant and the other persons therein and hereinafter mentioned, of the one part, and Thomas Spencer and George Lees Underhill, both respectively hereinafter mentioned, of the other part, and which said indenture was signed, sealed, and delivered by the parties thereto respectively, and was and is to the tenor following, that is to say, "Subscription contract This indenture, made the 20th of December, 1854, between the several persons whose names and seals are respectively subscribed and affixed to the schedule hereunto annexed, being subscribers to the undertaking hereinafter mentioned, of the first part, and Thomas Spencer, of, &c., and George Lees Underhill, of, &c., trustees for the purpose of enforcing and giving effect to the covenants hereinafter contained, of the second part, Witnesseth that each of the said several parties hereto of the first part doth hereby for himself and herself, his and her heirs, executors, and administrators, but to the extent only of the sum or amount of [338] subscriptions set opposite his or her name in the said schedule, and not further or otherwise, covenant, promise, and agree, to and with the said Thomas Spencer and George Lees Underhill, their executors and administrators, and doth hereby bind himself and herself, and his and her heirs, executors, and administrators, in manner following, that is to say, that each of them the said several persons parties hereto of the first part hath subscribed and doth subscribe the sum set opposite his or her name in the said schedule, to be recoverable by action at law, for the purpose of enabling the company, to be hereafter incorporated by act of parliament under the name of the Wolverhampton New Waterworks Company, to supply with water the town and parish of Wolverhampton, and the parishes of Tettenhall and Codsall, in the county of Stafford, and also the parishes and places following, that is to say, Donington, Albrighton, and Boningale, or Boning hall, in the county of Salop, and for that purpose to take and acquire land and other hereditaments, and to divert streams, brooks, rivulets, and springs, and to appropriate and impound the water thereof; and also to enable the said company to make and

maintain the works hereinafter mentioned, that is to say, a reservoir situate in a certain valley between Ruckley Wood Farm and Neachley Hill, extending from within a short distance of the road leading from Albrighton to Ruckley to a dam or embankment near to the Shrewsbury and Birmingham railway, in the parishes of Donington and Tong, in the said county of Salop, and also a surface or supply reservoir and pumping station situate in a certain place near to the Holyhead Road, to the north side thereof, at or near to King's Wood, in the parish of Tettenhall aforesaid, with all proper works, roads, approaches, and conveniences thereto respectively belonging, and from such pumping station [339] to make and maintain an aqueduct or aqueducts from the said last-mentioned reservoir to the centre of the town of Wolverhampton, with branches to the said service reservoir and pumping station situate in a certain place in the said parish of Tettenhall aforesaid, and belonging to the Wolverhampton Waterworks Company, and to lay down conduct, main, and other pipes, with all necessary and proper works and conveniences thereto respectively belonging, such works to be constructed in the manner and to the extent defined and shewn on certain plans and sections of the said several works which were deposited with the clerks of the peace of the said counties of Salop and Stafford respectively on or before the 30th of November last, with full power and authority to the directors of the said company from time to time to alter and vary the sites or spots at which the several intended works before mentioned shall commence and terminate, and the lines and levels thereof; and also to fix and determine, and from time to time to alter and vary, the extent and situation of the said works, and to change the name of the proposed undertaking, and to substitute in lieu thereof such other name or names as the said directors shall think proper; and to enter into such contracts and agreements with land-owners and others or with any company or companies, for any purposes whatever in any way affecting or connected with the said undertaking; and to make application to parliament for an act or acts, and thereby to take powers to execute all or any of the said works; and also to purchase, take, and hold the works of the Wolverhampton Waterworks Company, and all reservoirs, aqueducts, mains, pipes, and other works and lands, and other the property, estate, and effects of the same, and all powers, rights, and privileges which may have been or may be vested in the [340] said company under the acts hereinafter mentioned, that is to say, the Wolverhampton Waterworks Act, 1845 (8 & 9 Vict. c. cxxv.), and the Wolverhampton Waterworks Amendment Act, 1850 (13 & 14 Vict. c. lxxiv.), and for that purpose to repeal either wholly or in part, and to alter and amend the said acts; and also to take powers to enable the Wolverhampton Waterworks Company to sell and transfer to the said intended Wolverhampton New Waterworks Company their said works, lands, and other their said property, estate, and effects, and the rights, powers, and privileges connected with or belonging to the same; and also to take powers to enable the said intended Wolverhampton New Waterworks Company to transfer to and vest in the corporation of the town of Wolverhampton, or some other board of commissioners to be by the said act or acts appointed, the whole undertaking of the said company or companies, and the works, lands, and other the property and estate, rights, and privileges connected with or belonging to the same, and to abandon if they think fit, or defer the application to parliament in respect of, the whole or any part or parts of the said proposed undertaking; and generally to do and perform all such acts, deeds, matters, and things, as they in their discretion shall deem necessary or desirable for the attainment of such objects, or any of them: And this indenture witnesseth, that each of them the said persons parties hereto of the first part doth hereby for himself and herself, his and her executors and administrators, further covenant, promise, and agree to and with the said Thomas Spencer and George Lees Underhill, their executors and administrators, that he and she, and his and her heirs, executors, and administrators, shall and will well and truly pay or cause to be paid the full amount subscribed by him or her, or such part thereof as shall not have [341] been paid by him or her at the time of his or her execution of these presents, and at such places and times and in such manner as may be required by any act of parliament which may be passed in the next or any subsequent session of parliament for the purposes aforesaid, or as the directors or others authorized by such act shall lawfully direct or appoint; it being the express meaning and intention of each of them the said parties hereto of the first part, that the amount so subscribed by him or her shall be recoverable from him or her, his or her heirs, executors, and administrators, by the said parties hereby of the

second part, or the survivor of them, his executors or administrators, by action at law, in case default should be made in payment thereof. In witness," &c.

THE SCHEDULE REFERRED TO.

Subscriber's name and surname at full length.			Amount of subscription.		Amount paid up.		
			£		£		
John Williams	Description.	Place of abode.	6000	Seal.	600	Date of signature.	Witness.
George Holyoake			6000		600		
George Edwardes			6000		600		
Thomas Thorneycroft			6000		600		
Charles Corser			6000		600		
Henry Heane			6000		600		
John Hawkesford			6000		600		
Samuel Loveridge			6000		600		
Thomas Thorneycroft Kesteven			6000		600		
Francis Lyttleton Holyoake Goodricke			6000		600		
Joseph Griffin Walker			6000		600		
Frederick Charles Perry			6000		600		
Charles Edward Molineux			6000		600		
Henry Underhill			6000		600		

[342] ALPHABETICAL LIST OF SUBSCRIBERS.

Name.	Sums subscribed.	Sums paid up.
	£	£
Corser, Charles	6,000	600
Edwardes, George	6,000	600
Goodricke, Sir Francis L. H., Bart.	6,000	600
Hawkesford, John	6,000	600
Heane, Henry	6,000	600
Holyoake, George	6,000	600
Kesteven, Thomas Thorneycroft	6,000	600
Loveridge, Samuel	6,000	600
Molineux, Charles Edward	6,000	600
Perry, Frederick Charles	6,000	600
Thorneycroft, Thomas	6,000	600
Underhill, Henry	6,000	600
Walker, Joseph Griffin	6,000	600
Williams, John	6,000	600
Total amount of subscriptions	£84,000	
Total amount of sums paid up		£8,400

Averment that the subscription in the second count mentioned was and is the subscription aforesaid, and not any other or different subscription; and that no places or times for the payment of the amount subscribed by the defendant, as subscriber, by virtue of the said indenture, or any part thereof, in satisfaction of the covenant therein contained, ever was appointed by the plaintiffs, or at all.

The plaintiffs demurred to the sixth plea; the ground of demurrer stated in the margin being, "that the 21st section of the Companies Clauses Consolidation Act, 1845, does not make it imperative to call up subscriptions *pari passu*, and that the plea shews no ground entitling the defendant to have them all called up *pari passu*. Joinder.

[343] They also demurred to the eighth plea; the ground of demurrer stated in the margin being, "that the eighth plea does not deny the appointment of time and

place absolutely, but merely that no time or place was appointed for payment in satisfaction of the covenant; and the parts sued for of course would not be payable in satisfaction of the covenant." Joinder.

Mellish (with whom were Bovill, Q. C., and Hawkins, Q. C.), for the plaintiffs (*a*). The first question is as to the validity of the second count. By the 7th section of [344] the Wolverhampton New Waterworks Company's Act, 18 & 19 Vict. c. cli., the persons named (including the now defendant), and all other persons and corporations who have already subscribed or who shall hereafter subscribe to the undertaking by that act authorized, and their executors, administrators, successors, and assigns respectively, are incorporated, with the usual powers. By s. 17 the qualification for a director is declared to be "the possession in his own right of one hundred shares at least in the undertaking." By s. 19, the now defendant is named as one of the first directors. The 21st section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), enacts that "it shall be lawful for the company from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the company." And the 26th section provides, "that, in any action or suit to be brought by [345] the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act." The second count follows the words of that section: and it is difficult to see what objection there can be to it. [Cockburn, C. J. It will be said that subscription must be under

(*a*) The points marked for argument on the part of the plaintiffs, were as follows:—

"The second count is good, according to the Companies Clauses Act, 8 & 9 Vict. c. 16, s. 21, and s. 2 (which explains the word undertaking), and s. 8, which shews that a subscriber, if his name is not on the register, is not a shareholder, and according to the special act, 18 & 19 Vict. c. cli., s. 7, which incorporates all who had subscribed or should subscribe to the undertaking. It is sufficient to say that defendant 'subscribed,' without saying how, and it was so held in *The Great Northern Railway Company v. Baddulph*, 7 M. & W. 243.

"The 6th plea is bad, for, amongst other reasons,—first, that, if equity would restrain, it would not grant a perpetual injunction, but only restrain till the other subscribers were called upon: but, secondly, that the plea shews no obligation to call on all *pari passu*, and the 21st section of the Companies Clauses Consolidation Act does not create such an obligation, and there may be numberless cases imagined why all should not be called upon.

"The 8th plea is bad, because the 21st section, by making the subscriptions payable to the company, gives the company a right of suit, and the plea must be taken to admit, as alleged in the second count, that times and places were appointed for payment, and then to assert that such times and places were not appointed for payment in satisfaction of the covenant, which, whatever it may mean, is not required by the 21st section. The payment of the portions sued for, of course, was not appointed to be made in satisfaction of the whole covenant.

"The only substantial question is, whether the 21st section gives the company a right of suing subscribers who are not shareholders. If the form of subscription gives a right of action to no one, and the 21st section does not give a right of action to the company, the enactment that the subscriptions are to be paid is nugatory.

"It is not necessary for the plaintiffs to contend that the trustees of such a covenant as appears in this case cannot sue. They only have to contend that the company may sue."

seal.] *The Great North of England Railway Company v. Bidulph*, 7 M. & W. 243, is a distinct authority to shew that this is a proper mode of declaring against a subscriber. Parke, B., there says: "It has been suggested that there is a distinction between proprietors of shares and subscribers: upon that part of the case, however, we give no opinion. The first and second counts allege a liability in the defendant as a subscriber: and it is contended that it ought to have been alleged in those counts that his subscription was by deed. I think the answer given to that argument on the part of the plaintiffs is a satisfactory one. It does not follow that the parliamentary deed should contain the names of all the persons who subscribed; for, the subscription is not confined to the parties named in the deed. But, assuming that the defendant was of necessity a party to it, it is evident that the company need not, and indeed could not, be made a party to such deed; because it is required to be executed before the existence of, and as a preliminary to the formation of, the company. That is a conclusive reason why the company ought not to sue upon the deed." [346] [Cockburn, C. J. A man may be a subscriber, and yet may not take shares.] The company is entitled to register the original subscribers. [Cockburn, C. J. There must be a period during which a subscriber is not a shareholder.] If that be so, what construction can be given to the 7th section of the special act? By force of that section the subscriber becomes a shareholder: *The London Grand Junction Railway Company v. Freeman*, 2 M. & G. 606, 638, 2 Scott, N. R. 705, 750, per Lord Deuman, C. J. In *The West London Railway Company v. Bernard*, 13 Law J., Q. B. 68, a railway act (6 W. 4, c. lxxix.) in addition to the usual general clause giving a short form of declaration in an action for calls against proprietors of shares for the time being, enacted, by s. 129, that the parties who had subscribed or should thereafter subscribe to the undertaking, should pay such sums as should from time to time be called for: and that, in case of default, it should be lawful for the company to sue for and recover the same in any court of law or equity. The defendant had subscribed the parliamentary contract, but was not registered as a proprietor in the share register book or otherwise. By various resolutions of the directors, calls were from time to time made on the proprietors of the company: and it was held that the defendant was liable to a special action against him as a subscriber, under s. 129, for such calls, there being no distinction between subscribers and proprietors. Lord Denman there says: "In the case of *The London Grand Junction Railway Company v. Freeman*, we looked at all the sections of an act of parliament similar to the present, with a view to the question now raised, and we were of opinion that 'subscribers,' 'proprietors,' and 'owners of shares,' were words indiscriminately used, and all pointing to the same set of persons." [Willes, J. The 7 & 8 Vict. c. 110, s. 3, shews what is meant by "sub-[347]-scribers," viz. "persons who shall have agreed in writing to take or have taken any shares in a proposed company, or in a company formed, and who shall not have executed the deed of settlement, or a deed referring thereto." That is adopted in the Companies Clauses Consolidation Act, 1845. But any person who has agreed in writing to take shares is assumed by s. 8 (a) to be a person entitled to shares. If upon the register, he may be sued in the way pointed out by ss. 22-28. If not, he may be sued in debt upon the statute. This is an action of debt upon the statute.]

Then, as to the pleas. The sixth, which is pleaded as an equitable plea, clearly discloses no equitable ground of defence. Both that plea and the eighth, are clearly bad for the reasons suggested in the points for argument.

Phipson (with whom was Milward), for the defendant (b). The real question is,

(a) Which enacts that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company."

(b) The points marked for argument on the part of the defendant were as follows:—

As to the demurrer to the second count,—"That the count is bad on the following grounds, 1. That, if it is founded upon the subscription contract, it is bad, because the plaintiffs are not shewn to be nor were they parties to it, and therefore cannot sue on it, 2. That, if it is founded on the 8 & 9 Vict. c. 16, s. 21, it is bad, first, because that section, read with the context, is a mere general statement of the liability to calls, properly so called, and is not meant to transfer to the company a

whether it is competent [348] to the company to sue for calls, unless the persons sued are put upon the register and sued as shareholders in the manner pointed out by the 8 & 9 Vict. c. 16. Assuming that the covenantees in the subscription contract might sue the covenantors, they cannot sue in the name of the company, who are no parties to that deed. The 8th section of the general act defines who are shareholders. In *The Nerry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118, 126, Parke, B., says: "By the 8th section of the general act, all persons who have subscribed to the company, or have otherwise become entitled to shares in it, are to be deemed shareholders, which the interpretation clause explains to mean, 'shareholders, proprietors, or members of the company.' Then, by the 9th section, the [349] company are required to enter in a book to be called 'The register of shareholders' the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the company. By the 28th section, this register is made *prima facie* evidence of a party therein named being a shareholder: it is not, however, conclusive; for, he may notwithstanding shew that his name has been put there without his consent. By the 27th section, the company, in actions for calls, must prove that the defendant was a shareholder in the undertaking at the time the call was made,—that is a shareholder in the sense of the 8th and 9th sections. The result is, that there is no register until after it is sealed; and no person who was not an original subscriber can be liable as a shareholder, unless his name is on a sealed register. Probably that is required both in the case of an original subscriber and a transferee of scrip. It is only necessary in this case to say that a transferee is not liable for calls until after his name is entered on a sealed register." The question is, whether the 21st section enables the company to sue in any other way than as thereafter mentioned, viz. those who are shareholders? In the case of *The Great Northern Railway Company v. Biddulph*, the question arose upon a private act, which contained no such clause as the 8th section of the 8 & 9 Vict. c. 16; and by the 129th section of that act it was enacted "that the several parties who have subscribed or who shall hereafter subscribe for or towards the said undertaking, shall and they are hereby required to pay the sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said company under and by virtue of the powers of this act, at such times, and at such [350] places, and to such persons, as shall be directed by the said directors: and, in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said company to sue for and recover the same," &c. There is no such provision as that in the Companies Clauses Consolidation Act. It is true there is a declaratory enactment in s. 21, that "the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company:" but

right of action which, even if existing, belongs to the persons with whom the covenants in the subscription contract were made, and not to the plaintiffs: and, secondly, because the calls claimed are ordinary calls upon the shareholders, and not any special calls for payment of the sum subscribed, and made upon the subscribers irrespectively of their being shareholders,—3. That the count does not shew the contract to be under seal, or any consideration for the defendant's contract."

As to the sixth plea,—“That the sixth plea to the second count of the declaration, on equitable grounds, is good, on the following grounds,—1. That it is the evident intention of the legislature in the Companies Clauses Consolidation Act, 1845, that those who became shareholders should all pay rateably,—2. That a court of equity would not allow the directors so to proceed as partially to call upon some shareholders to pay a deposit and calls, and not call upon the other shareholders,—3. That a court of equity would take care that all the shareholders should be put upon an equal footing with respect to the liability to pay calls.”

As to the demurrer to the sixth plea,—“That the second count of the declaration is bad, on the ground above set forth in support of the argument on the demurrer to that count.”

As to the demurrer to the eighth plea,—“That the plea is good in substance, and that the second count, to which it is pleaded, is bad, on the grounds above set forth.”

that liability is to be enforced only in the manner afterwards pointed out, when they have been registered as shareholders. The cases of *The West London Railway Company v. Bernard*, and *The London Grand Junction Railway Company v. Freeman*, are open to the same observation. The Companies Clauses Consolidation Act does not give the company power to sue subscribers: the power to make calls and to sue is confined to shareholders. [Cockburn, C. J. Why is not a subscriber a shareholder? The being registered does not constitute him a shareholder. Byles, J. The 3rd section of the 8 & 9 Vict. c. 16, defines "shareholder" to mean "shareholder, proprietor, or member of the company."] The 8th section shews what that means,—“Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company.” For anything that appears here, the defendant may have sold his scrip, and the vendee may [351] now be registered as the owner of the shares in respect of which the defendant is being sued. [Willes, J. It does not appear upon this record that any person has been substituted for the defendant upon the register. Until the company have recognized some person to whom he has transferred his scrip, they have a right to hold the defendant. Is it necessary, to bring him within the 21st section of the Companies Clauses Consolidation Act, that his name should appear upon the register?] It is submitted that it is. He is to pay moneys called for in the manner thereafter mentioned,—that is, when calls are duly made upon shareholders. The 9th section is important: it makes it compulsory on the company to keep a register of shareholders. All difficulty would have been avoided if the plaintiffs had declared in the general form prescribed by the 26th section. With regard to the sixth plea, that is based upon the assumption that subscribers may be sued as such under the 21st section: but all the subscribers must be called upon *pari passu*. In *Preston v. The Grand Collier Dock Company*, 2 Railway Cases, 335, 358, the Vice-Chancellor says: “This court never would allow the directors of a company so to proceed as partially to call upon some shareholders to pay a deposit and calls, and not call on the others.” [Byles, J. Is this a case for a perpetual injunction? The plea is, that the plaintiffs are suing prematurely.] *The Queen v. The Londonderry and Coleraine Railway Company*, 13 Q. B. 998, and *The Queen v. Wing*, 17 Q. B. 645, were also referred to.

Mellish, in reply. In order to make a subscriber liable for calls, it is not necessary that he should be on the register of shareholders: and, if it were so, it must upon this record be assumed that the defendant was on the register, for the count contains a general aver-[352]ment that the plaintiffs have done all things necessary to entitle them to demand payment of the calls from him. There is no substantial difference between this count and the form given by the statute. A call includes subscribers as well as registered shareholders. In the case of *The Newry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118, 121, Parke, B., says: The sections which empower the company to make calls contain no express direction that the same application shall be made to each individual for the same portion of the sum originally subscribed. Probably the directors may be under an obligation to do so, but I am certainly of opinion that it is not a condition precedent to their right to recover the amount of the call. If it were so held, the affairs of these companies would be in the greatest confusion; for, suppose a notice by accident mislaid, the consequence would be, that the shareholder for whom it was intended would not be bound to pay his call, and those who had already paid on individual notices, and who might be supposed to have paid on the faith that the call was made on each equally, would have a right to claim from the directors the money they had paid, on the ground that it was paid under a mistake of the facts. That construction would be fraught with such evil consequences, that I think it impossible (putting a reasonable interpretation on the act of parliament,) to say that the legislature intended that what they have not expressly declared, but which is only implied, should amount to a condition precedent.”

COCKBURN, C. J. I am of opinion that our judgment upon this demurrer must be for the defendant, on the ground that the second count of the declaration discloses no cause of action. The liability upon which this count is framed is entirely the creature of the sta-[353]tute 8 & 9 Vict. c. 16. Independently of the statutory liability, the action must have been brought by the covenantees in the deed, and

could not have been brought by the company, between whom and the defendant there is no privity of contract. It is, however, contended on the part of the plaintiffs that a liability is imposed upon the defendant by the 21st section of the Companies Clauses Consolidation Act, taken in conjunction with the provisions of the special act. But I think the liability does not depend upon that section alone, but also upon the subsequent sections which form the code which regulates the rights and liabilities of persons who have subscribed to the undertaking or have been placed in the position of those who have so originally subscribed. It is true that the 21st section provides that "the several persons who have subscribed any money towards the undertaking, or their legal representatives, respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company." But that section is only one of a series of provisions having reference to the payment of subscriptions: and, when the other sections are taken into consideration, and especially the 22nd and 26th, it appears to me to be plain that the persons called upon are not liable as subscribers simply, but as shareholders. I think it is quite unnecessary for the purpose of the present case to decide whether or not the parties, to be liable as shareholders, need be upon the register of shareholders. That may be open to some doubt. But, whether or not the legislature intended that subscribers should be deemed shareholders within the interpretation clause, I think they clearly intended that only holders of shares should be liable to the statutory remedies for calls. The 22nd and 26th sections [354] speak of shareholders; and the latter, which gives the form of declaration, in terms speaks of shareholders only: it provides, that, "in any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued by virtue of this and the special act." Now, the second count here gives the go-by to the question whether the defendant is a holder of shares in the undertaking; it merely states that he subscribed a certain sum towards it. The distinction between a subscriber and a shareholder is not an imaginary one, but it is one of a real and substantial character: because the party who had originally subscribed to the undertaking may have ceased to have any interest therein, and may have transferred it to one who has become liable in his stead in respect of the share subscribed for. It is plain, therefore, in point of reason and justice, that the 21st section of the statute was never intended to be taken alone: and, reading it in conjunction with the sections which follow, it is clear that the liability for calls was meant to be imposed upon the person who is at the time the call is made a holder of shares. I do not think it is enough for the plaintiffs to say that this is a matter which the defendant should have pleaded by way of answer to the action. The plaintiffs should have shewn the defendant's liability on the face of the declaration. They rely for this purpose upon the statute: and this, for the reasons I have given, in [355] my opinion, fails. In the view which I take, it becomes unnecessary to say whether or not the sixth or eighth plea would have been of any avail.

CROWDER, J. I am of the same opinion. I will merely add a word as to the general averment whence Mr. Mellish contended it must be assumed that the defendant was a shareholder. It seems to me that that would be giving far too large a scope to those general words. Besides, assuming that they might be held sufficient to embrace the fact of the defendant's having been placed upon the register of shareholders, I apprehend he might have displaced himself therefrom by a transfer before the making of the calls.

WILLES, J. I also am of opinion that the second count discloses no liability in the defendant either at common law or by virtue of the provisions of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. In order to establish a liability at common law, it was necessary to shew that the subscription-contract was entered into with the company who sue. The count does not and could not so allege. Then it is said that a liability is created by virtue of the 21st section of the 8 & 9 Vict. c. 16. In considering that question, it must be assumed that there is no liability at common law. Consistently with the statement in the count that the defendant subscribed to

the undertaking, it must be taken that the defendant entered into a contract with some other persons on behalf of the company, or which was to enure to their benefit when they should be incorporated by a special act of parliament. What is there to shew that the defendant covenanted with the company? It is said that that is shewn by the 21st section of the Companies Clauses Consolidation Act. [356] *Prima facie*, and read by itself, that section would seem to make out the proposition contended for by the plaintiffs; and I was at first inclined to think that that gave the plaintiffs a right to sue; but, upon consideration, it appears to me that the proposition cannot be sustained. There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue. If the 21st section had stood alone, stopping at the words "appointed by the company," as at present advised, I think there would have been an action of debt at the suit of the company in respect of calls on the amount subscribed. It has been observed by Mr. Phipson that there is nothing in that section to intimate that the payment is to be made to the company. But, looking [357] to the general scope of the act, it is obvious that it is intended that the payment should be to the company, and not to the parties with whom the contract is made. However, all difficulty on that score is removed by the subsequent words, which shew that the 21st section was intended to form one of a series of enactments which at once create the liability and prescribe the form of remedy; for, it goes on to provide as follows,—“and, with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word ‘shareholder’ shall extend to and include the legal personal representatives of such shareholder.” Then follows a series of enactments, from s. 22 to s. 28, giving the company a remedy for the recovery of calls against shareholders. Reading the 21st section by the aid of the light thrown upon it by the subsequent sections, it appears to me that the remedy was intended to be enforced only in the particular mode prescribed, against persons who are shareholders. And I incline to think, that, under these provisions, the shareholder against whom this remedy is given must be one whose name appears upon the register of shareholders,—though I agree with my Lord in thinking that it is unnecessary to pronounce any positive opinion upon that. It is enough to say that the particular remedy is given against “shareholders” only; and that a “subscriber” is not liable under the statutory provisions, unless he is also a “shareholder.” It appears to me also that Mr. Mellish’s second argument is not sustainable. The second count commences with stating that the defendant subscribed a certain sum towards the undertaking in question. It then goes on to say that divers portions thereof were called for by the company, and times and places were appointed for the payment thereof, that the defendant had notice, and that the said times elapsed. It then avers that the plaintiffs [358] did all things necessary to entitle them to have the money paid to them by the defendant, but that he made default. The question is whether the statement that the plaintiffs did all things necessary to entitle them to have the calls paid to them, is sufficient to shew that the defendant not only subscribed, but that he was at the time the calls were made in the position of a person liable to pay such calls. It seems to me that it is not. Assuming that registration as a shareholder was necessary, and that the company had placed the defendant upon the register of shareholders, it is quite consistent with this count that the defendant may have transferred his shares so as to have ceased to be a shareholder before the calls in question were made. It is not, therefore, a sufficient statement that the

defendant was a shareholder at the time of the making of the calls. I cannot help observing that the departure from the form of declaring prescribed by the statute is a circumstance which is not to be left out of consideration. Upon the whole, the conclusion at which I arrive, in concurrence with the rest of the court, is, that a "subscriber," as such, is not liable, and that the second count of this declaration does not shew that the defendant was more than a subscriber.

BYLES, J. I am entirely of the same opinion. It seems to me that there is nothing on the face of the second count to shew that the defendant ever was a shareholder in this company, but only that he was a subscriber to the undertaking. I entirely agree with my Lord and my two learned Brothers that quā subscriber he is not a shareholder, and therefore not liable to be sued upon the statute for calls. As to the general averment, it appears to me that nothing that could have been done by the plaintiffs would make the defendant liable if he were not a shareholder; and [359] that averment seems to refer to matters done after the call and notice. As to whether, to constitute a person a shareholder, it is essential that his name should be upon the register of shareholders, it appears to me to be a matter open to some doubt, and one upon which I desire at present to offer no opinion.

Judgment for the defendant.

SIR G. L. GLYN, BART. v. THE ABERDARE VALLEY RAILWAY COMPANY.
April 29th, 1859.

[S. C. 28 L. J. C. P. 271; 5 Jur. N. S. 1011; 7 W. R. 443.]

By the 68th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, it is provided, that, if the party entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, and if the compensation claimed shall exceed the sum of 50l., and the party so entitled desire to have such question of compensation settled by a jury, he may give the promoters notice of such his desire, and, unless they be willing to pay the amount so claimed, they shall within twenty-one days issue their warrant to the sheriff to summon a jury to settle the same: and s. 54 enacts that either party may have the question of compensation tried by a special jury, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant:—Held, that the service of a notice under s. 54 is not a waiver of a notice previously given under s. 68, so as to entitle the company to an extension of the period of twenty-one days for issuing their warrant.

The first count of the declaration stated that the defendants, being a railway company, mentioned in and incorporated by an act of parliament passed in a session of parliament holden in the 18 & 19 Victoria (c. exx.) intituled "An act for making a railway through part of the Aberdare Valley, in the county of Glamorgan, to join the Vale of Neath railway," and the plaintiff having an interest in certain pieces or parcels of land in the parish of Aberdare, in the county of Glamorgan, containing by estimation 2 a. 3 r. 29 p. or thereabouts, the said pieces or parcels of land had been taken by the defendants, as and being promoters of the undertaking to make the said railway, for the execution by them of the works of the said railway, [360] and the plaintiff was entitled to compensation for his interest therein; and the defendants, as such promoters as aforesaid, had not made compensation to the plaintiff for the said pieces or parcels of land so taken as aforesaid under the provisions of the said act or of any act incorporated therewith; and the compensation claimed by the plaintiff for his interest in the said pieces or parcels of land so taken by the defendants as aforesaid exceeded the sum of 50l.; and the plaintiff, being so entitled to compensation as aforesaid, and being desirous to have the question of compensation settled by a jury, gave notice in writing of such his desire, to the defendants, as such promoters as aforesaid, stating in the said notice the nature of his interest in the said pieces or parcels of land so taken as aforesaid, in respect of which he claimed compensation, and the amount of compensation so claimed by him; and the defendants, as such promoters as aforesaid, were not willing to pay the amount of compensation so claimed by the plaintiff, nor

did they enter into a written agreement, nor did they within twenty-one days after the receipt of the said notice issue their warrant to the sheriff of the said county of Glamorgan to summon a jury for settling the same in manner provided by law: Averment, that, by reason of such default to issue their warrant as aforesaid, the defendants became and were liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by him as aforesaid, to wit, the sum of 900l.; and that, although, before this suit, all things had happened and had been done, and although all times had elapsed, necessary to entitle the plaintiff to recover the said amount of compensation so claimed by him of the defendants as aforesaid; yet, that the defendants had not paid the same, or any part thereof.

There was also a count upon an account stated.

[361] Second plea to the first count, that the said notice was, after the giving thereof, varied and waived by a further notice given to the defendants by the plaintiff, of his desire to have the said question of compensation settled by a special jury; and that the defendants did, within twenty-one days after the delivery to them of the said secondly-mentioned notice, issue their warrant to the said sheriff of the county of Glamorgan, according to the exigency thereof.

Second replication to the second plea,—that the said notice of the plaintiff's desire to have the question of compensation settled by a special jury was given to the defendants before they had issued their said warrant to the said sheriff of the county of Glamorgan.

Demurrer to the second plea. The ground of demurrer stated in the margin was,—“That it is not necessary to give notice of the desire to have the question of compensation settled by a special jury at the same time as the notice of the desire to have it settled by a jury, and that the twenty-one days mentioned in the 8 & 9 Vict. c. 18 run from the receipt of the notice of the desire to have the question of compensation settled by a jury.” Joinder.

The defendants joined issue on the second replication to the second plea, and also demurred thereto,—the ground stated in the margin being, “that the said replication shews no answer to the second plea, which alleges a substituted notice, and a compliance therewith in due time.” Joinder.

Coleridge, for the plaintiff. The second plea, which alleges that the notice given under the 68th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, was varied and waived by the notice subsequently given (under s. 54), of the plaintiff's desire to have a special jury, affords no answer to the declaration. [362]-tion. The 68th section of that statute enacts, that, “if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50l., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit: and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of [363] compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts.” The declaration shews that the company had notice under that section of the nature of the plaintiff's interest and the amount of compensation claimed by him. The

answer sought to be set up by the plea is, that that notice was varied and waived by a subsequent notice of the plaintiff's desire to have the question of compensation settled by a special jury, and that the company issued their warrant within twenty-one days after the delivery to them of the last-mentioned notice. The clause which provides for the special jury is the 54th, which enacts, that, "if either party desire any such question of disputed compensation as aforesaid to be tried before a special jury, such question shall be so tried, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant to the sheriff: and for that purpose the promoters of the undertaking shall by their warrant to the sheriff require him to nominate a special jury for such trial; and thereupon the sheriff shall, as soon as conveniently may be after the receipt by him of such warrant, summon both the parties to appear before him, by themselves or their attorneys, at some convenient time and place appointed by him, for the purpose of nominating a special jury (not being less than five nor more than eight days from the service of such summons); and at the place and time so appointed the sheriff shall proceed to nominate and strike a special jury in the manner in which such juries shall be required by the laws for the time being in force to be nominated or struck by the proper officers of the superior courts, and the sheriff shall appoint a day, not later than the eighth day after the striking of such jury, for the parties or their agents to appear before him to [364] reduce the number of such jury, and thereof shall give four days' notice to the parties; and, on the day so appointed the sheriff shall proceed to reduce the said special jury to the number of twenty, in the manner used and accustomed by the proper officers of the superior courts." The words of the 68th section are absolute, and are in no way affected by the provision contained in s. 54. [Willes, J. The 68th section entitles the party to have the amount of compensation settled by a jury; and the 54th section entitles him to have a special jury; but I see nothing in the last-mentioned section requiring the notice for the special jury to be served twenty-one days before the company issue their warrant.]

Karslake, for the defendants. It was competent to the plaintiff to waive his notice, and he has done so; and the company had a further period of twenty-one days for issuing their warrant, from the service of the second notice. If this were not so, the company might be placed in a position of great difficulty and hardship; for, the landowner might always give a notice under s. 68, and then on the 20th day require a special jury, and then the company would be compelled to issue a fresh warrant instant. [Cockburn, C. J. If a special jury be required at the last moment, so that the company are unable to issue their warrant for a special jury within the period limited, that might be a very good answer to a complaint made against them on that score.] The whole tenor of these compensation clauses shews that the delivery of the second notice must necessarily waive and supersede the first notice.

Coleridge, in reply. The declaration shews that the land has been taken, and therefore the earlier sections do not apply.

[365] COCKBURN, C. J. I am of opinion that the plaintiff is entitled to judgment. Construing the 68th section by the 38th, 39th, and 54th, it seems to me that the company are clearly in the wrong. The twenty-one days are to be computed from the time of the giving of the first notice, under s. 68. The language of that section is plain and precise. It might have been a very reasonable thing for the legislature to have extended the time for issuing the warrant in the case of a second notice being given for a special jury. But they have not done so. The 54th section makes no provision for an extension of the time, but merely says that the question shall be tried before a special jury, "provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant to the sheriff." Whatever inconvenience may ensue, we can do no other than construe the words as we find them.

CROWDER, J. It may be that inconvenience may in some cases result from the construction we put upon the 68th section. But there is nothing in the 54th section to authorize us to say that the company are entitled to the extension of time here claimed. They may always avoid the inconvenience by issuing their warrant promptly.

WILLES, J. I am of the same opinion. Consistently with the language of this plea, the notice of the plaintiff's desire to have the compensation assessed by a special jury may have been given in abundant time before the expiration of twenty-one days after the service of the first notice, to enable the company to issue their warrant.

Mr. Karslake, therefore, was compelled to rely upon the general proposition, that the giving a notice for a special jury after a previous notice of [366] assessment by a common jury has the effect of extending the time for the issuing of the warrant to twenty-one days after service of the second notice. But I find nothing in the act to warrant that. The 68th section enacts, that, if the party entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, and if the compensation claimed shall exceed 50l., and the party so entitled desire to have such question of compensation settled by a jury, he may give the promoters notice of such his desire, and, unless they be willing to pay the amount so claimed, they shall within twenty-one days issue their warrant to the sheriff to summon a jury to settle the same; and the 54th section enacts that either party may have the question of compensation tried by a special jury, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant. It may be, —probably it is,—that the notice under s. 54 must be a reasonable notice. But that is all that can be required for the protection of the company against any possible inconvenience that may arise. In practice, we know that companies usually do cause special juries to be summoned. And they may always protect themselves from the inconvenience which Mr. Karslake has suggested as likely to arise, by proceeding with reasonable celerity. There are no words in the 54th section to extend the period for issuing the warrant.

BYLES, J. I am of the same opinion. Whatever inconvenience may be suggested to arise, the language of the 54th section is free from all ambiguity.

Judgment for the plaintiff.

[367] WEEKS v. HENRY GOODE AND ANOTHER. April 16th, 1859.

A lien may be waived by the party's setting up a claim to retain the chattel upon a different ground, and making no mention of the lien.—In trover against A. and B. for a lease, the evidence of conversion was as follows:—A demand having been made upon A., he declined to give up the lease until certain rent due to B. was paid; but he added that it was more B.'s business than his own, and, as he was not in, he (A.) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff, receiving neither lease nor letter, issued his writ on the following morning: Held,—affirming the doctrine of *Boardman v. Sill*, 1 Campb. 410, n., that this amounted to an absolute refusal, notwithstanding the defendants had at the time (though it was not mentioned) a lien upon the lease for a small sum due to them for business done by them as attorneys for the plaintiff.

This was an action of trover for a lease.

The cause was tried before Crowder, J., at the sittings in London after last term. The evidence of demand and refusal was as follows:—The plaintiff stated that he called upon the defendant Henry Goode, and demanded the lease, but he declined to give it up until the rent due to Phillip Goode was paid; but he added that it was more Phillip Goode's business than his own, and, as he was not in, he (Henry) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff received neither lease nor letter: and he issued his writ on the following morning.

For the defendants evidence was given of a lien which they had on the lease for business to the extent of between 2l. and 3l. done for the plaintiff in a county-court.

On the part of the plaintiff it was insisted, that, as this claim was never mentioned at the time of the refusal, the alleged lien in respect of it was waived: and for this the case of *Boardman v. Sill*, 1 Campb. 410, n., was cited. That was trover for some brandy which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. It was thereupon contended that the defendant had a lien on the

brandy for the warehouse-rent, and that, till [368] this was tendered, trover would not lie. But Lord Ellenborough considered, "that, as the brandy had been detained on a different ground, and as no demand of warehouse-rent had been made, the defendant must be taken to have waived his lien, if he had one."

The learned judge thought the conduct of the defendant Henry Goode amounted to an absolute refusal, and he accordingly directed the jury to find for the plaintiff: but, it having been suggested by counsel that *Boardman v. Sill* had been overruled or shaken, he reserved him leave to move.

J. Brown now moved accordingly. The question is whether the defendants' lien, which they undoubtedly had, was waived by the assertion of a right to detain the chattel upon another ground. The law was undoubtedly so laid down in *Boardman v. Sill*, which seems to have been acted upon by this court in *Dirks v. Richards*, 5 Scott, N. R. 534, 4 M. & G. 574, Carr. & M. 626. There, in detinue for a picture, it appeared that it had been entrusted by the plaintiff to one Bye for sale, that Bye deposited it with the defendant, an auctioneer, and that, when the plaintiff demanded it (without tendering anything for warehouse-rent), the defendant refused to deliver it up until a debt of 8l. due to him from Bye was discharged: and it was held that the repudiation of the plaintiff's title precluded the defendant from afterwards setting up a lien on the picture for warehouse-rent. Here, if the plaintiff had waited for an absolute refusal before he brought his action, probably this case could not have been distinguished from *Boardman v. Sill*. But, to waive an existing lien, there must at least be an absolute refusal upon a ground which is inconsistent with it. [Cockburn, C. J. Was not the answer of the defendant Henry, coupled with his subsequent conduct, equivalent to an absolute refusal to give up the lease? The refusal was on the ground of an alleged lien for rent, which could not be sustained, no mention being made of the other claim.] In *Trent v. Hunt*, 9 Exch. 14, 20, Alderson, B., delivering the judgment of the court, says,—“It is clear that the right of a man to do an act with regard to the property of another, depends upon the authority or right which he really has to do the act, and not upon that which he says he has,” citing *Crowther v. Ramsbottom*, 7 T. R. 654. That seems to be inconsistent with the doctrine of *Boardman v. Sill*. In *Searfe v. Morgan*, 4 M. & W. 270, the plaintiff sent a mare to the defendant, a farmer, to be covered by a stallion belonging to him. The mare was taken to the defendant's stables, and covered accordingly. The charge for covering not being paid, the defendant detained the mare. A demand of her was afterwards made, but the defendant refused to deliver her, claiming a lien not only for the charge on that occasion, but for a general balance due to him on another account: and it was held that the defendant was entitled to a specific lien on the mare for the charge for covering her; and that the claim made by the defendant to retain the mare for the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum. [Willes, J. In that case Parke, B., refers in his judgment to *Boardman v. Sill*. There is a subsequent case in the Exchequer, of *Jones v. Tarleton*, 9 Exch. 675, which seems to be more applicable to the present. There, in trover by the owner of certain pigs against a carrier who had detained them under a claim of lien, it was held not to be necessary, in order to entitle the plaintiff to recover, that he should prove an actual tender of the carriage-money, if it appear that he was ready to pay it, but that the defendant refused [370] to deliver the goods except on payment of an alleged old balance, which the jury found not to be really due.]

COCKBURN, C. J. *Searfe v. Morgan*, 4 M. & W. 270, was a very different case from the present. It however recognizes the case of *Boardman v. Sill*, 1 Campb. 410, n., which is expressly applicable here. We therefore think the ruling of my Brother Crowder was right, and therefore there will be no rule.

The rest of the court concurring,
Rule refused.

REYNOLDS AND OTHERS v. GOODWIN. April 15th, 1859.

An action having been brought in this court for goods sold by the plaintiffs in England, and delivered to the defendant in India, the court refused to stay the proceedings under the 61st section of the Indian Insolvent Debtors Act, 11 & 12 Vict. c. 21,

under which act the defendant had duly obtained his discharge; but left him to any remedy the statute gave him, by plea.

This was an action for goods sold and delivered, money paid, interest, and money found due on accounts stated.

The defendant was a merchant in India, and the goods in question had been ordered in England and sent by Messrs. Grindley & Co. In the year 1854, the defendant petitioned for his discharge under the 11 & 12 Vict. c. 21, "to consolidate and amend the laws relating to Insolvent Debtors in India," and the debt in question was inserted in his schedule, and notice given to the agents of Grindley & Co. in India, and the defendant duly obtained an order for his discharge.

Holl, upon an affidavit of these facts, moved (after an unsuccessful application to a judge at chambers) to stay the proceedings. The 5th section of the statute enables persons imprisoned within the respective limits [371] of the towns of Calcutta, Madras, and Bombay, for any debt, damages, &c., to petition the supreme court for relief. The 6th section requires a schedule of debts, &c. to be filed. The 7th section enacts, that, "upon the filing of any such petition as aforesaid, it shall be lawful for the said court, and the said court is hereby authorized and required, to order that all the real and personal estate and effects of such petitioner, whether within the territories within the limits of the charter of the East India Company or without, except the wearing-apparel, bedding, and other such necessities of such petitioner and his family, not exceeding in the whole the value of 300 Company's rupees for each petitioner with his family, and all debts due to him, and all the future estate, right, title, interest, and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, and all debts growing due to him before the court shall have made its order in the nature of a certificate as hereinafter mentioned, do vest in the official assignee for the time being of the said court, and that all books, papers, deeds, and writings in any way relating to such petitioner's estate and effects in his possession, or under his custody or control, shall be deposited with such assignee; and such order shall be entered of record in the said court, and such notice thereof shall be published as the said court shall direct; and such order, when so made, shall by virtue of this act relate back to and take effect from the filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects, and debts as aforesaid in the said official assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes [372] and in manner hereinafter mentioned: Provided always, that, in case, after the making of any such vesting-order, the petition of any such petitioner shall be dismissed by the said court, such vesting-order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes," &c. &c. The 43rd section provides and enacts, "that, unless it shall appear to the satisfaction of such court that all the property of the insolvent is situate, and all the debtors and creditors resident, within the limits of the charter of the East India Company, then, until the expiration of twelve calendar months from a notice to be published in the *London Gazette* of the petition or adjudication of or against any insolvent as hereinafter is mentioned, the assignee or assignees shall reserve the full amount of one third part of all the property of the said insolvent which shall have been got in, and shall make a dividend amongst the creditors of the said insolvent, to the amount of the remaining two third parts only, which third part so to be reserved as aforesaid shall in the meantime be invested or disposed of in such way as such court shall order, and shall not remain in the hands of such assignee or assignees; and at the expiration of the said term of twelve calendar months it shall be lawful for the assignee or assignees of such insolvent to apply to such court for a return of the said third part so reserved as aforesaid, in order that the same may be so distributed amongst the creditors as to place them all upon an equal footing; and upon such third part so reserved as aforesaid being restored to such assignee or assignees, such assignee or assignees shall forthwith proceed to take an account of the debts of the said insolvent admitted and established in the said court, and of the sum or sums which shall or may have been paid by way of dividend to any of such creditors, and shall distribute the fund then in [373] the hands of such assignee or assignees, so as to place all the creditors of the said insolvent, whether Indian or

British or foreign, upon a just and equal footing, and so as that every creditor whose debt or claim shall be admitted or established in the said court shall receive a rateable and proportional part of the assets of the said insolvent, according to the amount of his debt, without reference to the time at which such debt shall have been claimed." Then the 61st section enacts, "that, if any such insolvent, his heirs, executors, or administrators, shall, after such order for discharge in the nature of a certificate under this act as aforesaid, be sued or arrested either on mesne or final process, or execution shall issue against his or their property, for any debt, claim, or demand from which the said insolvent shall have been discharged by such order, on his or their application to any court having power to stay such proceedings, or to discharge from such arrest, or to set aside such execution, and, upon proof to the satisfaction of such court of such order, and that the debt or claim for which such proceedings are had is the same from which the said insolvent has been discharged by such order as aforesaid, such proceedings shall be stayed, and he or they shall be discharged from such arrest, and such process of execution shall be set aside, and all further proceedings in the suit in which such arrest or execution was shall also be stayed, and the said court shall have power to award costs to the said insolvent, or his heirs, executors, or administrators as aforesaid, in case the said proceedings shall appear to the said court to have been taken after notice of the said order, and without any reasonable cause for impeaching the same, or to have been otherwise oppressive or vexatious." [Byles, J. Was the debt here payable in England?] No doubt it was. [Willes, J. You had better look at the case of [374] *Gibbs v. Fremont*, 9 Exch. 25, before you admit th t.] The 59th section enacts, that, where the estate pays one third of the insolvent's debts, or where creditors to that amount consent, the court may grant an order nisi for the final discharge of the insolvent, appoint a time for hearing, and direct notices to be given: and then comes a proviso which may give rise to some difficulty,—“Provided always, that such order shall not affect any creditor without the limits of the charter of the East India Company, unless notice of the said order nisi shall have been directed to be given in the *Gazette* in manner aforesaid, and a period of twelve calendar months shall have elapsed between the date of the said order nisi and the date of the said order to make the same absolute.” The learned judge at Chambers thought that proviso referred to creditors residing without the limits. [Willes, J. The 83rd section, which is an analogous provision, throws some light upon that proviso. That section says, “that, in case any fiat in bankruptcy, whether under the provisions of this act or otherwise, shall be issued against such insolvent trader as aforesaid, upon which such insolvent shall be declared a bankrupt before such order for discharge in the nature of a certificate as hereinafter mentioned, then and in such case such order shall not operate as a discharge from the debt, claim, and demand of any creditor who shall not have been resident within the limits aforesaid at any time between the filing of the insolvent's petition or the adjudication, as the case may be, and the making of such order.”] It is submitted that these plaintiffs were creditors in India, though residing in England. [Byles, J. Why not put this matter upon the record?] It would be a needless expense to plead this, if the court has power to give relief in the summary way pointed out by s. 61. [Byles, J. Nobody doubts the power of the [375] court: the only question is, whether this is a proper case for the exercise of it.]

COCKBURN, C. J. The impression of the court is decidedly adverse to the application. We should be very reluctant to adopt a course which would preclude the plaintiffs from taking the opinion of a court of error.

WILLES, J. The expense would not be materially increased by putting this defence (if it is one) upon the record: for, the 74th section of the statute makes certified copies of the proceedings evidence in all courts.

The rest of the court concurring,
Holl took nothing.

COX v. MUNCEY. April 29th, 1859.

No action will lie for enticing away an apprentice, unless there be a valid contract of apprenticeship.

The first count of the declaration stated, that, by deed dated the 18th of October, 1853, one Kimpton Muncey, being then an infant of the age of sixteen, or thereabouts, by and with the consent of the defendant, his father, did put himself apprentice to

the plaintiff, to learn his trade and business, to wit, the trade and business of a stone and marble mason and letter-cutter, and with him after the manner of an apprentice to serve from the 18th of October, 1853, until the 25th of December, 1857, during which time the said apprentice was by the terms of the said deed faithfully to serve the plaintiff, and not to absent himself from the plaintiff's service unlawfully day or night, but in all things as a [376] faithful apprentice to behave himself towards the plaintiff and all his during the said term; and for the true performance of the said deed by the said apprentice on his part, the defendant did by the said deed covenant with the plaintiff; and the plaintiff did by the said deed agree to give the said apprentice 1s. per week for the first two years, and 2s. 6d. per week for the last two years of the said term, and that he the plaintiff his said apprentice the art of a stone and marble mason and stone-cutter, which he then used, by the best means that he could, should teach and instruct, and cause to be taught and instructed, finding unto his said apprentice sufficient meat, drink, pocket-money as aforesaid, lodging, and all other necessities during the said term: and, by the said deed, it was agreed, that, for the considerations aforesaid, the plaintiff should be paid the sum of 15l. on the said 18th of October, and a further sum of 14l. 10s. at Christmas, 1853; and the plaintiff hath in all things performed the terms and conditions of the said deed on his part, except so far as he was prevented therefrom by the unlawful act and default of the said apprentice hereinafter mentioned: Breach, that the said apprentice did not during the said term faithfully serve the plaintiff, but wrongfully and unlawfully absented himself from the plaintiff's service for divers long spaces of time during the said apprenticeship, whereby the plaintiff lost the benefit, profit, and advantage which he would otherwise have derived from the service of the said apprentice for a long time, to wit, for two years.

The second count stated that, in consideration that the plaintiff would, at the defendant's request, take the said Kimpton Muncey as his apprentice, to learn the trade and business in the first count mentioned, and upon the terms and conditions therein mentioned, he, the defendant, promised the plaintiff that the said [377] Kimpton Muncey should faithfully serve the plaintiff during the said term, and as in the said first count mentioned: Breach, that, although the plaintiff did thereupon accordingly take and receive the said Kimpton Muncey as such apprentice as aforesaid, upon the terms as aforesaid, and duly performed the said contract on his part in all things save and except as far as he was by the default of his said apprentice hereinafter mentioned prevented from so doing, yet the said apprentice did not nor would faithfully serve the plaintiff as aforesaid, but, during the said apprenticeship, for divers long spaces of time, wrongfully and unlawfully absented himself from the plaintiff's service, against the will of the plaintiff, whereby the plaintiff was damaged as in the first count mentioned.

The third count stated that the said Kimpton Muncey then being such apprentice to the plaintiff as aforesaid, and before the said term of apprenticeship was expired, the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his aforesaid trade and business, and to deprive him of the service of the said Kimpton Muncey as such apprentice as aforesaid, and of the profits, benefits, and advantages which might and would otherwise have arisen from such service, whilst the said Kimpton Muncey was such apprentice as aforesaid, to wit, on the 24th of December, 1854, unlawfully, wrongfully, and unjustly enticed, persuaded, and procured the said Kimpton Muncey to depart from out such service of the plaintiff, and to enter the service and employment of the defendant: by means of which enticement, persuasion, and procurement, the said Kimpton Muncey, whilst he was such apprentice as aforesaid, wrongfully and unjustly departed from out of the said service of the plaintiff, and entered into the [378] service and employment of the defendant, and had remained and continued, and been wrongfully and wilfully harboured, kept, and detained in the defendant's said service and employment for a long space of time, to wit, from thence hitherto, whereby the plaintiff had, to wit, for the space of two years, lost and been deprived of the service of the said Kimpton Muncey in his aforesaid trade and business, and of the profits, benefits, and advantages which might and would otherwise have arisen and accrued to him from such service, and had been and was otherwise greatly injured in his aforesaid trade and business: averment, that all things necessary to entitle the plaintiff to maintain this action existed and had happened before suit. Claim, 150l.

First plea,—as to the first count of the declaration,—that the alleged deed is not the defendant's deed, nor did he the defendant covenant as alleged.

Tenth plea,—as to the second count,—that the said Kimpton Muncey did not become nor was he an apprentice to the plaintiff, nor bound to serve him as such apprentice.

Fifteenth plea,—as to the second count,—that the full sum or sums of money received or given, paid, agreed, or contracted for, with or in relation to the said Kimpton Muncey as such apprentice in the second count mentioned, was not truly inserted or written in words at length, or at all, in any indenture or other writing which contained the covenants, articles, contracts, or agreements relating to the service of the said Kimpton Muncey as such apprentice as in the second count mentioned, or otherwise, contrary to the form of the statute in such case made and provided.

Nineteenth plea,—to the third count,—the same as the fifteenth plea.

The plaintiff joined and took issue upon all the de-[379]-fendant's pleas. He also demurred to the tenth, fifteenth and nineteenth pleas, the grounds of demurrer stated in the margin respectively being as follows,—As to the tenth plea, "that it affords no answer to the second count, admitting, as such plea does, that the plaintiff received Kimpton Muncey as an apprentice;" as to the fifteenth plea, "that it affords no answer to the second count admitting, as such plea does, that the plaintiff received Kimpton Muncey as an apprentice;" and, as to the nineteenth plea, "that it affords no answer to the third count, nothing in that plea appearing to justify the admitted enticement by the defendant to quit the plaintiff's service, and enter his own." Joinder.

The cause was tried before Crowder, J., at the sittings in London after last Trinity Term, when it appeared that the defendant's son, Kimpton Muncey, had been apprenticed to the plaintiff, a stone-mason in the City Road, by an indenture of the 18th of October, 1853; that the consideration-money or premium agreed to be paid with the apprentice was 30*l.*, but that, in order to diminish the amount payable for stamp-duty, it was arranged that 29*l.* 10*s.* should be inserted in the indenture as the premium paid, and that sum was accordingly so inserted, but not in words at length. It also appeared that the youth had served the plaintiff under the indenture for a considerable time, and that he had been induced by the persuasions of the defendant to quit his service.

On the part of the defendant it was insisted, that, the indenture of apprenticeship being void by force of the statute 8 Ann. c. 9, ss. 35, 39 (*a*), for not truly and [380]

(*a*) The 35th section enacts, that "the full sum or sums of money received, or in anywise directly or indirectly given, paid, agreed, or contracted for with or in relation to every apprentice, shall be truly inserted and written in words at length in some indenture or other writing which shall contain the covenants, articles, contracts, or agreements relating to the service of such apprentice, and shall bear date upon the day of the signing, sealing, or other execution of the same; upon pain that every master or mistress to or with whom, or to whose use, any sum of money whatsoever shall be given, paid, secured, or contracted for or in respect of such apprentice as aforesaid which shall not be truly and fully so inserted and specified in some such indenture or other writing, shall, for every such offence, forfeit double the sum so given, paid, secured, or contracted for."

And the 39th section enacts "that all such indentures or writings as aforesaid wherein shall not be truly inserted and written the full sum and sums of money received, or in anywise directly or indirectly given, paid, secured, or contracted for, with or in relation to such apprentice as aforesaid, or whereupon the duties payable by this act shall not be duly paid, or lawfully tendered, or which shall not be stamped, or lawfully tendered to be stamped, according to the tenor and true meaning of this act, within the respective times herein for that purpose severally and respectively limited, shall be void and not available in any court or place, or to any purpose whatsoever, and the apprentice whom the same shall concern or relate to shall in such case be utterly incapable of being free of any city, town, corporation, or company, and of following or exercising the intended profession, trade, or employment, any charter, law, or custom to the contrary notwithstanding."

in words at length setting forth the consideration or premium paid, the plaintiff was not entitled to maintain this action.

On the other hand, it was submitted, that, assuming the indenture to be void, it was enough, to entitle the plaintiff to recover, that the party enticed away was his apprentice *de facto*.

The learned judge, not being required to leave anything to the jury, directed a verdict for the defendant on the first and second counts, and for the plaintiff on the third, for the agreed damages of 13l.

[381] Hawkins, in Michaelmas Term, obtained a rule nisi to enter a verdict for the defendant on the nineteenth plea to the third count, on the ground that the evidence given by the defendant at the trial proved the plea, and that the verdict on such plea was against the evidence. He cited *The King v. The Inhabitants of Baildon*, 3 B. & Ad. 427, *The King v. The Inhabitants of Amersham*, 4 Ad. & E. 508, 6 N. & M. 12, *The King v. Low*, 3 C. & P. 62, and the statute 55 G. 3, c. 184, Sched. Apprenticeship.

The court directed that the rule and the demurrers should come on together for argument.

W. G. Harrison, for the plaintiff (a). The statute 8 Ann. c. 9 was recently under discussion in this court in the case of *Westlake v. Adams*, ante, vol. v., p. 248. The question now turns entirely upon the third count of the declaration and the nineteenth plea. If that plea means that there was no valid indenture of apprenticeship, it is an immaterial traverse. [Byles, J. Can there be an apprentice otherwise than by indenture?] An apprenticeship *de facto* is sufficient for the present purpose. [Cockburn, C. J. The apprenticeship being under a void deed, can you rest upon anything but the deed?] The youth was serving under a [382] contract which the law would imply. The 35th section merely enacts that the consideration shall be truly set forth in the writing, where the law requires a writing. The defendant has been guilty of an unjustifiable interference with the rights of the plaintiff with regard to his servant. He is a wrong-doer. In *Barber v. Dennis*, 6 Mod 69, 1 Salk. 68, the widow of a waterman, who, as was said, by the usage of Waterman's Hall, may take an apprentice, had her apprentice taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover: it was objected that "the supposed apprentice here was no legal apprentice, if the indentures be not inrolled pursuant to the act of parliament of 5 Eliz. c. 4, and, if he were not a legal apprentice, the plaintiff had no title." But Holt, C. J., said "he would understand him an apprentice or servant *de facto*, and that would suffice against them, being wrong-doers." [Cockburn, C. J. What was the state of the statute-law at that time?] The statute of Elizabeth required an apprenticeship by deed, in order to qualify the party to exercise a trade. But that statute was repealed by the 54 G. 3, c. 96. In order to entitle the plaintiff to maintain this action, it is not necessary that the contract should be an absolutely valid and binding contract, as in cases of the seduction of a daughter or servant. The 39th section of the 8 Ann. c. 9, only shews that the legal relation of master and apprentice was not created here. [Cockburn, C. J. It is of the violation of that relation that you complain.] In *Keane v. Baycott*, 2 H. Bl. 125, an infant slave in the West Indies executed an indenture by which he covenanted to serve B. for a certain term of years as his servant, and B. covenanted to do certain things on his part: B. then came to England with the slave. In an action against A. who had se[383]duced him from the service of B., A. was not permitted to allege that the contract was void, as being made by an infant and a slave, and therefore that the declaration, which stated him to be retained as a servant

(a) The points marked for argument on the part of the plaintiff were as follows: -

"That it is immaterial to the validity of the defendant's contract whether there was a binding contract of apprenticeship or not, and that therefore no good excuse is offered by him for the alleged breach of his contract, nor any justification afforded for the grievances complained of in the last count of the declaration: That the pleas demurred to are founded upon the assumption that the defendant's liability is dependant upon the validity of such contract of apprenticeship, and are therefore bad: And that a sufficient consideration for the defendant's contract arose out of the plaintiff's taking the apprentice at the defendant's instance upon the alleged terms and conditions."

for a term of years, was not proved; for, the court held that the effect of such a contract might be the manumission of the slave, and consequently that it was for his own benefit, and, being for his own benefit, that it was at most only voidable by the infant himself. [Cockburn, C. J. There, the slave was considered as the servant of the plaintiff; and the action was for enticing him from his service. But here the plaintiff brings his action on the footing of the youth being an apprentice.] There is an apprenticeship of some sort. [Cockburn, C. J. An apprentice contracts to serve and the master to teach: we cannot confound that with a mere contract to serve.] In the argument in *Westerdell v. Dale*, 7 T. R. 306, 310, it is said: "The statute 5 Eliz. c. 4 requires the apprentice to be bound for seven years, saying that all other indentures 'are void to all intents and purposes;' and yet it has been holden in cases of settlement-law,—*Per v. St. Nicholas, Ipswich*, Burr. S. C. 91,—and in actions for enticing away an apprentice,—*Parker v. Smith*, C. B. 1785,—that an indenture for a shorter period is not absolutely void, but only voidable, and that at the election of the parties themselves, for that third parties cannot set up the objection." [Willes, J. *Keane v. Boycott* was cited in *Sykes v. Dixon*, 9 Ad. & E. 693, 1 P. & D. 463, and Lord Denman said: "It was argued, on the authority of *Keane v. Boycott*, that the objection" (that the agreement was invalid under the 22 Car. 2, c. 3, s. 4, for want of mutuality) "was not one which a third person could take; and that might be so where the servant was de facto continuing in the service; but not here, where he had quitted his master, and taken his chance [384] in hiring himself to the defendant." All that the statute of Anne means is, that, if you defraud the revenue in the stamp, you shall have no power over your apprentice, and, possibly also, that he shall derive no benefit from the contract: but that is all. *Shepherd v. Hall*, 3 Campb. 180, is a case almost in point. There it was ruled that an indenture of apprenticeship is not void by the 8 Anne, c. 9, although it was originally agreed between the master and apprentice's father that a premium of 20l. should be paid, and the master afterwards, to reduce the amount of the duty, agrees to take 19l. 19s. 6d., which is the sum inserted in the indenture, and actually paid. Lord Ellenborough says: "The sum agreed upon must mean the sum finally agreed upon, which in this instance was 19l. 19s. 6d.; and, the duty being paid upon that sum, the indenture is valid, and the plaintiff has a full consideration for the premium." So, here, the sum inserted was 29l. 10s.; and that was the sum actually paid. [Cockburn, C. J. The sum agreed for was 30l.; and it was paid thus,—29l. 10s. as the consideration for taking the apprentice, and 10s. towards the purchase of the stamp. But it was incumbent on the master to find the whole stamp.] In *King v. Low*, 3 C. & P. 620, it was held that the statute of Anne does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of stamp-duty.

Garth, *contra* (a), was stopped by the court.

[385] COCKBURN, C. J. We all are strongly of opinion that the count for enticing away the apprentice cannot be sustained. The language of the statute 8 Ann. c. 9 is clear and peremptory. There is no valid contract of apprenticeship. But we incline to think, that, if the action had been brought on the footing of the youth being the servant of the plaintiff, the defendant would have been liable, there being evidence of enticement. We are, therefore, much disposed to allow the declaration to be amended, and to send the cause down again, unless the parties will agree to a *stet processus*,

(a) The points marked for argument on the part of the defendant were:—"That the tenth plea was good,—first, because the fact of Kimpton Muncey becoming the plaintiff's apprentice was a condition precedent to the defendant's liability as stated in the second count,—secondly, because the tenth plea amounts in substance to a denial of the contract, and of the fulfilment of the conditions of that contract as alleged in the second count: And that the fifteenth and nineteenth pleas are good,—first, because they shew, that, under the provisions of the statute 8 Anne, c. 9, the contracts upon which the second and third counts are respectively founded are void and illegal,—secondly, because the existence and validity of a contract or relation of apprenticeship is indispensable to the plaintiff's right of action upon either the second or third count; and the fifteenth and nineteenth pleas shew that no such contract or relation existed as alleged in those counts."

which would be very desirable, seeing that there could not be a new trial without payment of costs.

A *stet* processus was ultimately agreed to.

[386] *HOWKINS v. BENNET.* April 28th, 1859.

A verdict and judgment having been taken for the plaintiff, subject to a special case, to be settled by a barrister, and the referee having settled it, the defendant obtained a rule to set aside the judgment, on the ground that the plaintiff had neglected to take the necessary steps to set the case down for argument. Cause was shewn upon an affidavit stating that the delay had arisen partly from the refusal of the defendant to pay a moiety of the referee's fees for settling the special case, and partly from the fact of the plaintiff's attorney having been until within two days of the application for the rule engaged in negotiations for obtaining a loan of money on mortgage for the defendant, to enable him to settle the plaintiff's claim:—The court discharged the rule, with costs.

The Common Serjeant, in Hilary Term last, obtained a rule calling upon the plaintiff to shew cause why the judgment signed and entered up by the plaintiff in this cause pursuant to a rule of court should not be set aside, the plaintiff not having taken the necessary steps duly to set down the special case stated between the parties for argument, in compliance with the conditions upon which the judgment was allowed to be so signed and entered up.

The rule was obtained upon affidavits which stated, in substance, that the judgment had been entered up pursuant to a rule whereby it was ordered that a special case should be stated for the opinion of the court, to be settled by Mr. Couch; that the parties duly attended before the referee for the purpose of getting the case settled; and that that gentleman's clerk, on the 19th of February, 1858, wrote to the plaintiff's attorney informing him that the special case had been settled, and was then ready to be delivered; but that, notwithstanding this intimation, neither the plaintiff nor his attorney had taken up the special case.

Lush, Q. C., now shewed cause. The defendant is not entitled to make this rule absolute, inasmuch as the affidavits upon which he has obtained it suppress two material facts which ought to have been disclosed, and which the plaintiff's affidavits now supply,—first, that the plaintiff's attorney had proposed that each party should pay a moiety of the fees of the referee for settling the case, but that the defendant declined to contribute, secondly, that, down to the 22nd of January, 1859, negotiations had been pending between the [387] defendant and the plaintiff's attorneys for raising a large sum upon mortgage of certain property of the defendant's, in order to enable him to satisfy the plaintiff's claim. The court called on

The Common Serjeant to support his rule. It is the plaintiff's duty to do all that is necessary to bring the special case forward for argument, otherwise the defendant may have the judgment standing against him for ever. [Cockburn, C. J. Have you any authority for saying that the duty of forwarding a special case is cast exclusively upon the plaintiff? Where the parties agree to take a cause out of the ordinary course of decision by a jury, is not their position altered in that respect? But, what do you say to the other point?] The court cannot take notice of the matters suggested as to the negotiations for a mortgage. It is true the plaintiff's attorneys have been engaged in such negotiations; but that was on behalf of other clients, and not for the plaintiff.

COCKBURN, C. J. There is no pretence for this application. The defendant ought, under the circumstances, to have acceded to the plaintiff's proposal to pay his moiety of the referee's fees for settling the case. The rule must be discharged, with costs.

The rest of the court concurring,

Rule discharged, with costs.

[388] KEARNS v. THE CORDWAINERS' COMPANY. THE CORDWAINERS' COMPANY v. KEARNS. May 10th, 1859.

[S. C. 28 L. J. C. P. 285; 5 Jur. N. S. 1216. See *Lyon v. Fishmongers' Company*, 1875-76, L. R. 10 Ch. 689; 1 App. Cas. 667.]

By the 53rd section of the Thames Conservancy, 1857 (20 & 21 Vict. c. cxlvii.), it is enacted that "it shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a licence to make any pier, jetty, &c., immediately in front of his land, and into the bed of the said river, upon payment of such fair and reasonable consideration as is by this act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose." And by s. 179 it is enacted that "none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owners or occupiers of any lands, tenements, or hereditaments on the banks of the river, &c. are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made:" Held, that it was competent to the conservators under this act to grant to the owners of a wharf a licence for the projection of a jetty or landing-stage into the bed of the river in front of their premises, although such erection might in some degree obstruct the enjoyment by the adjoining owners of the free navigation of the river,—such right of enjoyment by them in common with the rest of the public, not being a right contemplated by the saving clause.

By an order of *nisi prius* made the 25th of June, 1857, it was ordered that a verdict should be entered for the plaintiffs in these causes respectively for the claims in the declarations, subject to the award, order, arbitrament, final end, and determination of a barrister, to whom the causes and all matters in difference between the parties were referred, and who was empowered to direct that verdicts should be entered for the plaintiffs or the defendants respectively, or nonsuits, as he should think proper, and also to say what should be done between the parties on the agreement in the pleadings in these causes mentioned,—the costs of the causes and the costs of the reference and award to be in the discretion of the arbitrator; and, in the event of any application to the court on the subject of the order, the reference, or the award or certificate, the court was to be at liberty, if it should think fit, to refer back to the arbitrator the whole or any part of the matter of the order, or the award or certificate, upon such terms and with such directions as the court should think proper.

The agreement of the 12th of January, 1855, above referred to, and which was made between one James Josiah Millard, as agent for the Cordwainers' Company, of the one part, and the plaintiff, John Kearns, of the [389] other part,—after reciting that certain premises situate and being No. 12 Bankside, Southwark, on the east side of Horse-shoe Alley, were the property of the Cordwainers' Company, and that the said John Kearns was desirous of taking a lease thereof from the said company,—it was agreed that the said John Kearns should, at his own cost, before the 25th of December, 1855, expend 250l. in substantially repairing the premises, to the satisfaction of the surveyor of the said company; in consideration whereof the said James Josiah Millard, on behalf of the said company, agreed that the said company should (provided the commonalty of the said company should consent thereto) grant a lease by indenture under their common seal, of the said premises, together with the joint right, with the other tenants of the said company, to the use of the wharf on the river Thames in front of the said premises, for the purpose of landing and shipping goods, with the appurtenances, &c., for the term of twenty-one years from the 25th of December, 1854, at the yearly rent of 100l., payable quarterly, on the four usual quarter-days: And it was further agreed that application should be made by the said company to the corporation of the city of London and such other parties as the corporation might direct, or as might be necessary, for a grant or licence to erect a permanent platform or landing-place on the river side of the said wharf, at the expense of the said company, with as little delay as might be; and that, when and so soon as the same platform or landing-place should be completed and finished, the right of user

of the same, in common with the other tenants of the said company, should be demised by the said company to the said John Kearns for the then residue of the said term, at a further yearly rent of 10l., the same platform or landing-place to be held in common with [390] the other tenants of the said company, and subject to the like terms and conditions as those to be inserted in the lease thereby agreed to be granted, so far as the same relate to the joint user by the tenants of the said company of the wharf and premises agreed to be demised.

The arbitrator by his award made on the 27th of February, 1858,—reciting the order of reference,—awarded as follows:—

“I direct that the verdict in the first cause above mentioned, viz. *Kearns v. The Cordwainers' Company*, be entered for the plaintiff in respect of the claims in the declaration, for 1000l., and that the costs of the said cause, to be taxed, be paid by the defendants; and, as to the second cause above-mentioned, viz. *The Cordwainers' Company v. Kearns*, I direct that a verdict be entered for the defendant in respect of the claim in the first count of the declaration, and that a verdict be entered for the plaintiffs in respect of the claim in the second count of the declaration, for 5s.: And further I award and determine, as to what is to be done between the parties on the said agreement in the pleadings in these causes mentioned, in manner following, that is to say, I direct that the Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do tender to the said John Kearns a lease in the terms and in the words set forth in a certain draft of a lease marked A. by me, and with my name written thereon by my own hand, and that the said John Kearns do execute the said lease upon its being tendered to the said John Kearns as herein directed: And I do further direct that the Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London should forthwith, and as soon as it can be done, apply to the proper authorities for a grant or licence to erect a permanent platform or landing-stage on the river side of a [391] certain wharf opposite the Bankside premises occupied by the said John Kearns, being 20 feet in width, excluding the stairs in front of Horse-shoe Alley, and extending out into the stream as far as Walker's line, or as near thereto as such authorities will permit by their licence: and I further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do proceed without delay to erect such permanent platform as soon as the said grant or licence has been obtained: and I direct, that, as soon as the said platform has been erected, the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do demise the same to the said John Kearns on the terms mentioned in the said agreement: And I direct, with respect to the said second action, that each party, plaintiff and defendant, do bear their own costs and expenses incurred by him in respect of his witnesses, counsel, attorney, or otherwise, in attending before me as arbitrator during this reference: And I do further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do pay the costs of this reference, and of the award.”

Montague Smith, Q. C., on behalf of the Cordwainers' Company, in the following Easter Term, obtained a rule calling upon Kearns to shew cause why the award should not be set aside, on the grounds,—“that the said award is not certain nor final, and exceeds the authority of the arbitrator in the following respects, viz. that it is left uncertain who are the proper authorities or persons to be applied to and who have power to make the grant or licence to erect the jetty, and that to erect the platform or jetty to the extent of Walker's line without the consent of all persons entitled to object would subject the Cordwainers' Com [392] pany to legal proceedings,—that the direction that the said company shall demise the platform itself to the said John Kearns is an excess of authority, or the direction is uncertain and ambiguous,—that the arbitrator has not settled the plan to be annexed to the lease,—that the award is not final, in not making provision for a counterpart of the lease, or leaves those matters open and uncertain,—and that the directions in the award relating to the platform or jetty cannot be carried out.”

T. Jones, in Trinity Term last, shewed cause. He submitted that the award substantially and completely disposed of all the matters in difference between the parties; that the agreement of the 12th of January, 1855, assumed that the persons whose assent to the erection of the platform was necessary was matter within the knowledge of both parties; that the Thames Conservancy Act, 1857, 20 & 21 Vict.

c. cxlvii., authorized the conservators thereby appointed to grant the required licence ; and that, if the company should by acting upon the licence expose themselves to any legal proceedings, they were still bound by their agreement to incur that inconvenience.

COCKBURN, C. J. The arbitrator directs the company to erect the platform or jetty upon obtaining the assent of "the proper authorities." Suppose the adjoining owners refuse their assent, upon being applied to, can it be said that the agreement binds the company to erect the platform notwithstanding? I think the award should be sent back to the arbitrator to define who are the proper authorities.

After some discussion, the rule was, by consent, made absolute in the following terms:—"Upon reading, &c., it is ordered that the award be referred back [393] to the said arbitrator, with power to him to amend the same, &c. : And it is further ordered that it be referred back to the said arbitrator, on the evidence already adduced before him, and that he shall be at liberty, if he shall think fit, to re-consider the damages assessed in the first action, and the costs of such action and reference ; but, nevertheless, this term of the rule is not to be deemed an intimation by the court that the arbitrator should either increase or reduce the said damages or alter the said costs : And it is further ordered that the costs of the second reference before the said arbitrator and incidental thereto shall be in the discretion of the said arbitrator, and that each party shall bear his and their own costs of and occasioned by this application to the court : And it is further ordered that this court shall be at liberty to remit the said award already made or any award to be hereafter made on the matters referred by the order of nisi prius made in these causes on the 25th of June, 1857, or by this rule, or any or either of them, from time to time, to the said arbitrator, upon such terms and with such directions as this court shall think proper : and that, in the event of the said arbitrator declining to act or dying before he shall have made his award or before the reference shall be finally concluded, the said parties may, or, if they cannot agree, the Lord Chief Justice, or any other judge of this court, may, if he shall think fit, on application by either of the said parties hereto, appoint a new arbitrator : And it is further ordered, that, in case the said arbitrator should increase or reduce the said damages as stated in the said award, that he be at liberty to alter the same accordingly ; and, if the amount payable to the said John Kearns in respect of damages and costs or otherwise shall be reduced below the sum of 700*l.* already paid to the said John Kearns, he the said John Kearns [394] shall repay to the said company the difference : And it is lastly ordered that all further proceedings in these causes be stayed, except such as shall be taken before the said arbitrator, until the fifth day of the term next following the publication by such arbitrator of such award, or until this court shall otherwise order."

By his second award, made on the 12th of February, 1859, the arbitrator,—after reciting the order of reference, and that he had duly, made his award thereon and also reciting, that, "afterwards, on the 11th of June, 1858, by a rule of the said court [of Common Pleas] made in the said causes, it was ordered by the said court, with the consent of the said parties, their counsel and attorneys, that the said award so made and published by him as aforesaid should be and the same was thereby referred back to him as such arbitrator, with power to him to amend the same, so that the same, when amended, should, subject to any alteration pursuant to the said rule, stand in the words in the said rule and hereinafter expressed and set forth, with a view to the opinion of the said court being taken on the question whether the grant or licence of the conservators would alone protect the company from all proceedings, as raised in the amended award ; and that by the said rule, and by the like consent, it was further ordered that the costs of the said second reference before him, and incidental thereto, should be in the arbitrator's discretion, and that each party should bear his and their own costs of and occasioned by the application to the said court for the said rule, and that the said court should be at liberty to remit the said award then made, or the said award thereafter to be made from time to time to the arbitrator, upon such terms and with such directions as the court should think proper,"—made his further award as follows:—"Now, I, the said [arbitrator], having [395] taken upon myself the burthen of this award, and having examined upon oath all such witnesses as have been tendered to me for examination by the said parties to the said actions at law and to the said agreement hereinbefore mentioned ; and, having read and considered such letters, papers, plans, and documents as have been brought before me, and having

heard what was to be said by both parties, and having duly considered all the matters submitted to me, do award and determine as follows, that is to say, I direct that the verdict in the first cause above mentioned, that is to say, *Kearns v. The Cordwainers' Company*, be entered for the plaintiff in respect of the claims in the declaration, for 1000l., and that the costs of the said cause, to be taxed, be paid by the defendants; and, as to the second cause above mentioned, that is to say, *The Cordwainers' Company v. Kearns*, I direct that a verdict be entered for the defendant in respect of the claim in the first count of the declaration, and that a verdict be entered for the plaintiffs in respect of the claim in the second count, for 5s.: And further I award and determine as to what is to be done between the parties to the said agreement in the pleadings in these causes mentioned, in manner following, that is to say, I direct that the Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do tender to the said John Kearns a lease in the terms and in the words set forth in a certain draft of a lease marked A. by me, and with my name written thereon by my own hand, and that the said John Kearns do execute the said lease upon its being tendered to the said John Kearns, as directed; and I award and direct that the plan to be drawn in the margin of the lease so to be tendered shall be a copy of the plan I have annexed to the said draft, and signed: And I do further direct that the Master, Wardens, and Commonalty of the Mys-[396]tery of Cordwainers of the city of London should forthwith, and as soon as it can be done, apply to the conservators of the river Thames for a grant or licence to erect a permanent platform or landing stage on the river side of a certain wharf opposite the Bankside premises occupied by the said John Kearns, being twenty feet in width, excluding the stairs in front of Horseshoe Alley, and extending out into the stream as far as Walker's line, or as near thereto as such conservators will permit: and I further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do proceed without delay to erect such permanent platform, if and as soon as the said grant or licence has been obtained: but, if the said court of Common Pleas shall be of opinion, on the true construction of the Thames Conservancy Act, 1857 (20 & 21 Viet. c. cxlvii.), and of the agreement set out in the declaration in the action by the said John Kearns against the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London,—a copy of which agreement is appended to and is to be taken as part of this award,—the grant or licence of the said conservators alone would not protect the said Master, Wardens, and Commonalty from all proceedings by other parties, then, in lieu of the direction above given for the said Master, Wardens, and Commonalty to apply to the said conservators, and make the platform on obtaining their grant or licence alone, I direct that the said Master, Wardens, and Commonalty shall apply to the said conservators and to such other parties as may be necessary for grants or licences and consents to erect such platform extending to Walker's line or as near thereto as such conservators and other parties will permit; and, further, that the said Master, Wardens, and Commonalty do proceed without delay to erect such platform if and as soon as [397] such grants or licences and consents shall have been obtained, and to such extent as such conservators and other parties will permit: And I direct, that, as soon as the said platform has been erected, the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do grant to the said John Kearns a right of user of the same in common with the other tenants of the company, on the terms mentioned in the said agreement,—the grant to be settled by me, in case the parties differ as to its terms: And I order that the said John Kearns shall execute a counterpart of the said lease and grant, and shall pay all such fees, charges, and expenses as by the agreement he has agreed, to pay: And I direct, with respect to the second action, that each party, plaintiff and defendants, do bear their own costs, and likewise, that, in the said second action, the said John Kearns do bear all the expenses incurred by him in respect of his witnesses, counsel, attorney, or otherwise, in attending before me as arbitrator during the first reference: and I do further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do pay the costs of the said first reference and of the said first award, except as aforesaid: And I do further direct, with respect to the said second reference, that each party do bear and pay his own costs: and that, as to this my second award, each party do bear and pay one half of the costs of the same: And, as to the damages mentioned in the said first award, I direct that the sum therein mentioned of 1000l. stand and remain as the amount of damages."

F. Russell, on a former day in this term, obtained a rule calling on Mr. Kearns to shew cause why the last-mentioned award, or so much of it as directs the Cordwainers' Company to apply for a licence to the [398] Thames Conservators, and to make the platform on getting their licence alone, should not be set aside,—on the ground that the arbitrator had no authority to make any such direction, and that the grant or licence of the conservators would not protect the company from all proceedings by other parties.

T. Jones and Honyman shewed cause. The only question here is, whether the licence of the Thames conservators for the erection of the jetty or landing-stage opposite the plaintiff's premises would protect the Cordwainers' Company against any action or claim which might be brought against them by the owners or occupiers of the adjoining premises: and this depends upon the nature and extent of the powers conferred upon the conservators by the Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii. The preamble to that act commences with a recital of a suit by the Crown against the mayor and corporation of London for determining their rights to the soil of the Thames, and an agreement between them for putting an end to that suit, by which the corporation withdrew their claim to the ownership of the soil, and the same was afterwards vested in the corporation, as conservators, upon certain trusts: and it concludes thus,—“and whereas it will be necessary that all the powers, authorities, rights, and privileges heretofore given or granted to, and which are now vested in, or which have been or may be exercised, used, or enjoyed by the mayor and aldermen of the city of London, or the mayor, aldermen, and commonalty of the city of London in common council assembled, or the mayor for the time being of the said city, with reference or in relation to the conservation of the river Thames, should be transferred to and vested in and exercised by the conservators appointed by or under the authority of this act.” The [399] 3rd section vests the powers to be exercised under the act in twelve conservators, viz. the Lord Mayor, two aldermen, four members of the common council, the deputy-master of the Trinity House, two persons appointed by the Admiralty, one person appointed by the Board of Trade, and one person appointed by the Trinity House. The 44th section authorizes the persons so appointed to make bye-laws for the regulation of the river. The 50th section vests all the estate, right, &c., of the Crown and of the corporation in the bed and soil of the river, in the conservators. The 52nd section enacts, that “from and after the commencement of this act, all the powers and authorities, rights, and privileges which are now vested in, or which have been or may be exercised by, Her most excellent Majesty, in right of Her Crown, and all the powers and authorities, rights, and privileges at any time heretofore given or granted to, or which are now vested in, or which have been or may be exercised by, the mayor and commonalty and citizens, or by the mayor and aldermen of the city of London, or by the common council, or by the mayor for the time being of the said city, by prescription, usage, charter, or act of parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river Thames, and of the several rivers, streams, and watercourses within the flow and reflow of the tides of the said river, within the limits aforesaid, and upon the banks, shores, and wharfs of the said river and the port of London, shall be and the same are hereby vested in the conservators by this act appointed, to be by them exercised in the same manner, and under and subject to the same restrictions as the same are now respectively legally exercised by Her Majesty, or by the mayor and commonalty and citizens, or by the said mayor and aldermen, or by the common council, or by [400] the said mayor, save only and except so far as the same may be modified by or be inconsistent with the provisions herein contained, and particularly that nothing herein contained shall prejudice or affect the free use and enjoyment and power of disposition by Her Majesty or any department of Her Majesty's government entitled thereto, of those parts of the bed, soil, and shores of the river Thames, and the embankments, incroachments, and enclosures thereupon, which are hereinbefore reserved and excepted from the operation of this act, or shall authorize the conservators in any manner to interfere therewith.” The 53rd section gives very large powers to the conservators with reference to erections on the banks of the river: it enacts that “it shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a licence to make any dock, basin, pier, jetty, wharf, quay or embankment, wall, or other work immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration

as is by this act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose." The 54th section provides "that it shall not be lawful for any person whomsoever to erect, build, or make any embankment or any erection, building, or work in or upon the bed or shore of the river Thames, or to drive any piles thereon or in the said river, without the permission of the conservators." [Cockburn, C. J. The act gives power to encroach on public rights, with the consent of the conservators. But, can the conservators by granting their licence interfere with any private right? Suppose, under the Metropolitan Building Act, 18 & 19 Vict. c. 122. the commissioners grant permission for the erection of a building which would cause an obstruction of an an-[401]-tient light,—would that be within the scope of their authority? The difficulty I feel is, whether the powers given to the conservators under this act would enable them thus to override private rights.] The 59th section, which authorizes the conservators to erect piers and landing places where they please, seems to shew that there are cases in which private rights may be interfered with, where the general convenience of the public requires it. The 87th, 92nd, 93rd, 94th, and 99th sections all shew how extensive are the powers vested in the conservators. The 179th section,—the saving clause,—applies to rights and claims of a strictly private nature, and not to the mere right of an individual as one of the public. [Willes, J., referred to *Rose v. Groves*, 5 M. & G. 613, 6 Scott, N. R. 645. There, the plaintiff declared that he carried on the business of a licensed victualler in a certain house abutting upon the river Thames, which was of right accessible from the river to persons navigating thereon in boats and other craft; that the defendants, with intent to hinder and prevent persons from coming from the river to the plaintiff's house for refreshments, wrongfully and maliciously placed certain beams and spars so that they might and did at certain states of the tide drift and float opposite to and against the plaintiff's house, and thereby obstruct the access thereto from the river; and that divers persons who would otherwise have come to the plaintiff's house for refreshments were thereby hindered and prevented from so doing; and it was held, on motion in arrest of judgment, that the declaration disclosed such a private and particular damage to the plaintiff as to entitle him to maintain an action for the obstruction.] In the late case of *The Queen v. Cubitt*, where the defendant was indicted for an obstruction of the navigation of the river by the erection of a landing-pier, a licence granted by [402] the conservators under this statute was held to justify its continuance. In *The King v. Pease*, 4 B. & Ad. 30, by an act, reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest, and the general traffic of the country, power was given to a company to make such railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than one hundred yards. By a subsequent act, the company, or persons authorized by them, were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage road: and upon an indictment against the company for a nuisance, it was held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) shewed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority. That case is a distinct authority to shew that it is competent to the legislature by such words as are here used to abridge or encroach upon the enjoyment by individuals of rights which they enjoy as members of the public. [Willes, J. That case has not met with universal approval: see the dictum of Pollock, C. B., in *Manley v. The St. Helen's Railway and Canal Company*, 2 Hurlst. & N. 840, 848, cited by Bramwell, [403] B., in *Vaughan v. The Taff Vale Railway Company*, 3 Hurlst. & N. 743, 749. "Though the legislature permits the company to do the various acts described in their statutes, they are to be considered as persons doing them for their own private advantage, and are therefore personally responsible if mischief arises from their not doing all they ought."] There, there was evidence of negligence.

M. Smith, Q. C., and F. Russell, contra. The 53rd section of the 20 & 21 Vict.

c. cxlvii., gives the conservators no greater power than the corporation committee had before. [Cockburn, C. J. As at present advised, I think the conservators have power by their licence to extinguish any public rights. The question is, how far that is to prevail against any private rights of individuals. But, before we come to that, we must inquire whether there are any private rights which would be affected by the licence of the conservators, or any rights except those the interference with which would be redressable by a proceeding on behalf of the public.] There is nothing in the act to empower the conservators, as against the public, to legalize a nuisance: *The King v. Lord Grosvenor*, 2 Stark. N. P. C. 511. The 53rd section, which is relied on by the plaintiff, is not an enabling, but a restrictive clause, and relates only to private rights and interests. The public clauses are the 57th and 59th. The former of these enacts that "it shall be lawful for the conservators from time to time, upon such terms, and upon the payment of a fair and reasonable consideration, &c., and under and subject to such rules, regulations, and restrictions as they shall think fit to impose, to license the erection by the owners or occupiers of lands adjoining the river, at the places where the piers or landing-places hereinafter mentioned are to be erected, at any convenient [404] places, of piers or landing-places of such form and construction as the conservators shall consider most advantageous to the public, and as causing the least obstruction to the navigation of the river Thames; and also to license the driving of piles, &c.; and also from time to time to cause any such piers or landing-places, piles, &c., to be removed and taken away," &c. And the 59th section provides that it shall be lawful for the conservators from time to time as they shall deem necessary for the convenience of the public, to erect at any convenient places piers or landing-places of such form and construction as they shall deem most advantageous to the public, and causing the least obstruction to the navigation of the river Thames; and also from time to time to alter and vary the form and construction of such piers or landing-places; and also from time to time to shut up or take away and remove any such piers or landing-places, &c. If the 53rd and 54th sections give the conservators all the powers contended for on the other side, the 57th and 59th were unnecessary. The cases of *Wilks v. The Hungerford Market Company*, 2 N. C. 281, 2 Scott, 446, and *Rose v. Groves*, 5 M. & G. 613, 6 Scott, N. R. 645, shew that any interference with a public highway or a public navigable river which occasions a private and particular damage to an individual, may be made the foundation of a claim for compensation in damages. [Cockburn, C. J. That is, assuming that the thing done is a public nuisance.] Any unauthorized obstruction of or interference with the full enjoyment of a public right, is a public nuisance.

COCKBURN, C. J. I am of opinion that this rule, which asks us to set aside a part of the award made in this case, must be discharged. It seems to me unnecessary to decide in this case whether the conserva-[405]-tors appointed under the statute 20 & 21 Vict. c. cxlvii. can, in the exercise of the powers with which the act invests them of licensing the erection of projections into the body of the river, interfere with private rights already vested in individuals, because at present it appears to me that no private right is interfered with. The only right the invasion of which the owners or occupiers of the adjoining premises could complain of would be, an interference with the public right operating to their private injury. The whole question, therefore, turns on whether there is any public right which in the present instance is interfered with. The erection which the conservators are in this case supposed to be about to authorize, is not one which is immediately brought into contact with or can directly interfere with the access to the premises of the adjoining owners. The whole interference which can be made matter of complaint is simply the commodious approach to the premises by means of the river. In that respect, all that is complained of is, the obstruction of the free navigation: that is not a private, but a public right. So long as that part of the river is free to the public, the owners of the adjoining premises would have a right to make use of it; and, if any unauthorized obstruction to the navigation operated a private and particular injury to them, then, according to *Rose v. Groves*, and other cases, they would have a right of action. But, if the public right can be and is taken away or diminished by a licence granted by a public body duly authorized by act of parliament, there can be no redress by action on account of such interference with or obstruction to an individual and private right. The principal being taken away, the private right, which is only accessory, falls with it. This brings us to the question whether the conservators appointed by the statute have

under the 53rd section power to [406] authorize the erection of buildings calculated to interfere with the free navigation of the river, and so to obstruct the right which the public have, and which the owners or occupiers of the adjoining premises have, as a portion of the public, to the free and unrestricted navigation. I entertain no doubt that such is the operation of that section. The corporation of London, acting as conservators of the river, and arrogating to themselves the ownership of the soil, had long been in the habit of granting licences to make incroachments on the bed of the stream. That right was questioned by the Crown; and the result of the litigation which thereupon ensued between the Crown and the corporation was, the passing of this act of parliament. I entertain no doubt whatever that it was the intention of the legislature to confer upon the new body of conservators created by the act powers which should be beyond the reach of question, of granting permission to make incroachments on the bed of the river, and even to some extent to interfere with the navigation; it being thought, no doubt, that, taking into consideration the great benefits which would result from the facilities thus afforded to commerce, such a course would upon the whole operate advantageously for the public. There is nothing restrictive in the 53rd section, save that the conservators are not to grant these licences for nothing, but are to receive a fair and reasonable consideration, whereby a fund may be raised for public purposes more immediately connected with the duties they are intrusted with. Beyond this I see no limit to the power conferred on this body,—reserving always the question, upon which I desire to be understood as expressing no opinion, whether the exercise of those powers is at variance or inconsistent with the maintenance of rights already acquired by individuals. Entertaining, as I do, no manner of [407] doubt that the conservators have under the statute power to authorize incroachments upon the public right of free navigation of the river, and assuming that they have done so, or will do so by the licence which they are about to grant in this case, and it appearing to me that the owners of the adjoining premises, who have no existing private right which can be affected by it, have no claim for redress except for a private and particular damage resulting from an interference with the public right which is taken away by the licence, there can be no ground for maintaining an action against the Cordwainers' Company for anything which they may do under it. I see no ground, therefore, for meddling with the award.

CROWDER, J. I also think this rule should be discharged, and that the arbitrator has done quite right in directing that the application for a licence to erect the platform or landing-place in question shall be made only to the conservators appointed by the statute. I do not find in the affidavits any suggestion of any right which can be shewn to belong to the owners of the adjoining premises, other than such rights as they have as part of the public. I agree with my Lord Chief Justice, that, if the granting of the licence would be an act within the scope of the powers vested in the conservators, the right to be affected by it being a public right only, the question must be considered only as it regards the effect of the provisions of the act, and the powers thereby conferred upon that body. The 53rd section is relied on as authorizing that which the company are by this award directed to call upon the conservators to do, viz. to licence the erection of a pier or landing-place extending into the body of the river. The language of that section is most general. Reading it alone, it is impossible to doubt that it does empower [408] the conservators to grant licences to make erections so as to interfere with the general right of the public to the free navigation of the river, subject only to such conditions and restrictions as they in their discretion may think fit to impose. Then it is argued that we must look at the preamble of the act, and consider the circumstances which led to its passing. Now, the preamble begins with reciting the suit by the Crown against the corporation touching the ownership of the river. It then recites an agreement between the Crown and the corporation for putting an end to the disputes between them. It is argued that the language of the enacting part of the statute is to be referred to and explained by the preamble and the several clauses of the agreement therein recited. But it appears to me, that, in construing the various provisions in this statute, the general rule must prevail which I find laid down by Campier, J., in the case of *Truman v. Lombard*, 4 M. & Selw. 238. "I have always," says that learned judge, "understood it as a standing rule in the construction of acts of parliament, that the enacting clause shall not be restrained by the preamble, if the enacting words are large enough to comprehend the case." The language of Lord Abinger, C. B., in *Waller v. Richardson*, 2 M. & W. 889, is to the

same effect:—"The general rule is, that the preamble may extend, but cannot restrain the effect of a particular clause." I see no reason why we should deviate from the general rule in this case. Looking at the preamble, and taking into consideration the reasons for which the act was passed, I should judge that it was intended to give the new conservators greater powers than were before vested in the body whom they were to supersede. And I am very much fortified in this conclusion by a reference to the provision contained in the 3rd section, which names the Lord Mayor of the city of London, [409] two aldermen and four members of the common council, the deputy-master of the Trinity House, two persons to be appointed by the Admiralty, one person appointed by the Board of Trade, and one person appointed by the Trinity House, to be conservators of the river Thames. The 52nd section shews that very large powers were intended to be conferred upon that body. The 53rd section enables them to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a licence to make any dock, basin, pier, jetty, wharf, quay, or embankment, wall, or other work immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose. The saving clause, s. 179, does not, I think, go to the extent which has been contended for on the part of the company. It enacts "that none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owners or occupiers of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made." This was evidently not intended to save any "rights of action," but refers to vested rights of property, and probably has a more particular application to s. 59, which authorizes the conservators to erect piers and landing-places, and to vary the public landing-places already erected or intended to be erected. In exercising their authorities, the conservators are not to interfere with any rights of [410] the owners of the soil. It seems to me that no right of that sort is at all interfered with or assailed by that which is proposed to be done here; and that the only persons whose consent or licence was necessary, are the persons to whom the company are by this award directed to apply.

WILLES, J. I am of the same opinion. The words of the 53rd section of the 20 & 21 Vict. c. cxlvii appear to me to be quite large enough to authorize the erection of a pier or landing-stage under the licence of the conservators such as is contemplated by this award. As to the saving-clause, s. 179, one may conceive a species of right existing concurrently with a public right which could not be interfered with. One can conceive a way first used as an occupation-way, and then turned into a public highway, and the public right afterwards extinguished, and so the private right alone remaining. Such a right would be within the saving-clause. The rights here intended to be saved are, such rights, &c. as may belong to the parties as owners and occupiers of the adjoining premises, not as individuals forming part of the public. The sum of these rights of individuals as part of the public put together makes the public right; and that right is taken away or abridged by the powers conferred by the act upon the Thames conservators.

BYLES, J., having been engaged as counsel in the cause, contented himself with generally expressing his concurrence.

Rule discharged, without costs.

[411] THE LONDON GAS-LIGHT COMPANY v. THE VESTRY OF THE PARISH OF CHELSEA. May 11th, 1859.

[S. C. 28 L. J. C. P. 275. See *Woolley v. North London Railway*, 1869, L. R. 4 C. P. 609; *Fenner v. London and South Eastern Railway*, 1872, L. R. 7 Q. B. 771.]

It is no objection to an order, under the 14 & 15 Vict. c. 99, s. 6, for the inspection of a document in the possession of a defendant, that its production will disclose his case, provided that it be satisfactorily shewn that it also supports the plaintiff's case.

This was an action to recover the price of gas supplied by the plaintiffs to the defendants.

The declaration stated, that, theretofore, by deed, made the 23rd of March, 1858, between the defendants of the first part and the plaintiffs of the second part, the plaintiffs, amongst other covenants of the plaintiffs as in the said deed mentioned, covenanted with the defendants that they the plaintiffs should and would at their own costs and charges, to the satisfaction of the defendants or their surveyor, for and during the term of three years, to be computed from the 1st of October, 1857, determinable as thereafter mentioned, well and sufficiently light or cause to be lighted with gas, in all and every the streets and other public places and passages in the said parish of Chelsea in which their mains were at the time of the making of the said deed, or might thereafter be laid (exclusive as thereinbefore mentioned), each and every night at sunset, and continue lighted till sunrise, such number of public lanterns, to be fixed in the manner therein mentioned, at and after the rate of 4l. 10s. for every lantern for a year, and so in proportion for any period less than a year, during which the said lanterns should be duly supplied and lighted with gas, such gas to be well and sufficiently purified so that the said gas should give a clear and white and brilliant light, agreeably to the true meaning of the said contract, and the light or flame to be in all respects such a light or flame as is known by the name of the large "bat's-wing burner," each burner consuming at the rate of five cubic feet of gas per hour at the least: And the defendants [412] thereby, as far as they lawfully could or might, covenanted and agreed with the plaintiffs, that, if the plaintiffs should and would paint and keep the columns and posts and service-pipes, bracket lanterns, iron lanterns, stop-cocks, bat's-wing burners, glass, and other apparatus therein mentioned, in good repair and condition, and well and effectually light the said lanterns with gas, and observe, perform, fulfil, and keep all and singular the covenants, clauses, and agreements therein contained, and which on their part ought to be observed, performed, fulfilled, and kept in all respects, and particularly according to the true meaning of the said presents, they the defendants should and would well and truly pay, or cause to be paid, out of the funds in their hands, or which they could or might raise or obtain by virtue of the powers and authorities vested in them, unto John Rigby Hinde, the then secretary, or unto any future secretary for the time being of the plaintiffs, or such other person as the plaintiffs might appoint, for and on their account, for every lantern lighted with gas of the plaintiffs, at and after the rate of 4l. 10s. for the year, and so in proportion for a less period than a year during which such lantern should be actually so lighted, painted, and repaired as thereinbefore mentioned, in manner following, that is to say, on the 1st of October, the 1st of January, the 1st of April, and the 1st of July in every year, or as soon after as conveniently might be, without any deduction or abatement whatsoever: Averment, that the said deed had been from the time of the making thereof hitherto, and still was, in full force and effect, and not determined; and that the said term of years thereby created had not been determined; and that the plaintiffs did, in pursuance of the said deed, supply and deliver to the defendants, who accepted the same, large quantities of gas during the year 1858, to wit, to the [413] value of 2296l. 0s. 6d.; and that the plaintiffs had performed all conditions precedent on their part to be performed according to and under the said deed, and that all things had been done and happened necessary to entitle them to payment from the defendants in the manner provided by the said deed for the said gas so supplied and delivered as aforesaid, and that all times had elapsed necessary to entitle the plaintiffs to such payment by the defendants as aforesaid, and to maintain the action: Breach, that the defendants had not paid the plaintiffs, or any person on their behalf, for the said gas supplied as aforesaid, or any part thereof, but had therein wholly failed and made default, contrary to the said deed.

The declaration also contained counts for gas sold and delivered, and for money due on accounts stated. Claim, 4000l.

The defendants pleaded,—first, to the first count, *non est factum*,—secondly, to the first count, that the plaintiffs did not during the said period light the said public lanterns, or cause the same to be and continue lighted, pursuant to the said deed, to the satisfaction of the defendants or their surveyor,—thirdly, to the first count, that the plaintiffs did not supply and deliver, nor did the defendants accept, as alleged,—fourthly, to the first count, that the plaintiffs did not during the said period so light the said public lanterns during each and every night, at sunset, and so continue the same lighted till sunrise, that the light or flame therein was such a light or flame as

is known by the name of the large bat's-wing burner, and consumed at the rate of five cubic feet of gas per hour at the least, within the true meaning of the said deed,—fifthly, to the residue of the declaration, payment of 1800l. into court.

Upon these pleas issue was joined on the 8th of April, 1859.

[414] On the 13th of April, the following order was made by Byles, J., at Chambers, on the application of the defendants:—"Upon hearing the attorneys or agents on both sides, I do order that the plaintiffs do produce to the defendants, and permit them to take copies of, the following documents mentioned in the affidavit of J. R. Hinde, except such parts as do not relate to the matters in question in this cause, viz. Weekly reports of the inspector, Daily pressure papers in the districts, Pressure register papers at the works at Vauxhall, District inspector's book, containing list of public lamps, District inspector's report book, District inspector's book of measurement of quantity of gas consumed in public lamps in Chelsea during the last two months of 1858, Mr. Warrington's reports of the quantity of illuminating power of the plaintiffs' gas, and Ledger containing defendants' account.—the defendants to pay cost of inspection and copies: and all further proceedings herein to be stayed till such inspection is granted and copies taken."

This order was made on production of an affidavit of the plaintiffs' secretary (Mr. Hinde) in obedience to an order under the 50th section of the Common Law Procedure Act, 1854, which affidavit set forth in a schedule the plaintiffs' documents, and stated that the plaintiffs did not, to the best of his belief, object to the production of such documents, except such parts of them as did not relate to the matters in question in this cause.

On the 13th of April, the plaintiffs served a summons for inspection and copies of the defendants' documents, with a copy of an affidavit in support, sworn by the plaintiffs' engineer, who deposed that "he was informed and believed that the defendants had, by their officers and others, made experiments and observations with regard to the lighting by the plaintiffs of the lamps in the defendants' parish under the contract [415] declared on, and that they had in their possession and power certain papers and writings shewing the results of the said experiments and observations, which would prove that the plaintiffs had performed their said contract both as to the quantity and quality of the gas supplied to the parish of Chelsea; and that the deponent was informed and believed that it would be material and necessary for the plaintiffs, in order to enable them to prepare for the trial of this cause, to inspect and take copies of or extracts from the said papers in the defendants' possession, shewing the results of the said experiments and observations."

This summons was opposed on the part of the defendants, on the ground that the title to discovery was not shewn, that the 50th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), had not been complied with, and that the matters of which discovery was thereby sought were evidence relating exclusively to the defendants' case, and that obedience to the order would disclose the matter in which the defendants' case, and their disproof of the case of the plaintiffs, was to be established. The learned judge, nevertheless, on the 14th of April, made the following order:—

"I do order that the plaintiffs by their attorneys and officers be at liberty forth with to inspect and take copies of or extracts from certain papers and documents in the defendants' possession, shewing the results of observations and experiments made by the defendants' officers and others on the lamps lighted by the plaintiffs, and of the quantity and quality of the gas supplied by the plaintiffs to the defendants from the month of June, 1858, to the month of December, 1858, both inclusive."

David Keane, on a former day in this term, obtained [416] a rule nisi to set aside the last-mentioned order. He referred to *Micklethwait v. Moor*, 3 Meriv. 292, and *Bligh v. Benson*, 7 Price, 205. [Byles, J., observed that the documents on both sides tended to shew the quantity and quality of the gas supplied and consumed.]

Bovill, Q. C., and Holland, now shewed cause. If the papers in question shew the quantity and quality of the gas supplied by the plaintiffs under the contract declared on, they must necessarily be material to their case. The 6th section of the 14 & 15 Vict. c. 99, enacts, that, "whenever any action or other legal proceeding shall be pending in any of the superior courts of common law, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to

inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same (a), or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge." There are several cases both at law and in equity clearly shewing that the order in question was fully warranted by the statute. *Hill v. Philp*, 7 Exch. 232, is very like this case. In an action against the keeper of a lunatic asylum licensed under the 8 & 9 Vict. c. 100, for improper treatment of the plaintiff whilst confined there as a lunatic, the defendant was [417] held not to be privileged from producing the books required by that statute to be kept: and therefore an order was made under the 14 & 15 Vict. c. 99, s. 6, for the plaintiff to inspect "The book of admissions, The book of entries, The medical visitation book, The case book, and The patients' book," so far as related to the plaintiff: and the court also ordered inspection of the defendant's licence, and of the order and medical certificates under which the plaintiff was confined, and also of all letters written by the plaintiff's wife and the commissioners in lunacy to the defendant, relating to the plaintiff. It was argued there that the documents an inspection of which was prayed were privileged on the ground of public policy, that they were of a private and confidential character, and not material for the plaintiff's case. But these arguments did not prevail. In *Hunt v. Hewitt*, 7 Exch. 236, which is a leading case upon this subject, it is laid down that the 14 & 15 Vict. c. 99, s. 6, has not given to courts of common law the power of compelling a discovery, but only of allowing an inspection of documents, subject to the following limitations,—first, there must be an action or other proceeding pending,—secondly, the documents must relate to such action or other proceeding,—and thirdly, the case must be one in which a discovery could be obtained in a court of equity: and that the right of a plaintiff in equity is limited to a discovery confined to a question in the cause, and to such material documents as relate to the proof of the plaintiff's case on the trial, and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. A further illustration of the rule is to be found in the case of *Riccard v. The Inclosure Commissioners for England and Wales*, 4 Ellis & B. 329. There, on a feigned issue directed under the statute 8 & 9 Vict. [418] c. 118, s. 56, to try whether the plaintiffs had such an interest in a manor as entitled them to object to the inclosure of certain lands lying within it, the substance of the defendant's case was, that, though the plaintiffs were lords of the manor, yet a former lord, L., to whom the plaintiffs were privy in estate, agreed, in 1800, not under seal, to take an allotment in severalty of 151 acres of the waste in lieu of his interest in the rest of the waste: that the agreement was acted upon, and the plaintiffs still enjoyed the allotment. A judge's order having been obtained by the defendant to inspect the conveyances by which L. acquired the manor before 1800, and the conveyance by L. to his son, the probate of the will of the son, under which the plaintiffs were executors, and also all leases and entries relating to the letting of the 151 acres alleged to have been allotted,—the court, upon a rule to rescind the order, held that each of the documents was relevant to the support of the defendant's case, and, being so, the defendant was entitled to inspect them, though they were also title deeds of the plaintiffs. [Willes, J. The case of *The Attorney General v. The Corporation of London*, 12 Beavan. 8, is in point upon that. The corporation of London, who held the office of conservators of the river Thames under the Crown, claimed the freehold of the bed and shores, and, in answer to an information, which insisted on the right of the Crown thereto, set up a prescriptive title, and refused to discover the charters, &c., under which they held, the particulars of their title, the mode in which they intended to make it out, or the evidence by which it was to be supported. They admitted the possession of documents relating (as they said) to their own right, and which formed material evidence for them, but they did not (as they said) tend to prove the right of the Crown: and they submitted they were not bound to [419] set forth a list thereof. But the court, on a consideration of the whole case, having

(a) The costs of the inspection of documents under this statute must be paid by the party seeking it; but the costs of the application are costs in the cause: *Hill v. Philp*, 7 Exch. 232.

regard to the nature of the title claimed to the bed or soil of the river, to the circumstances under which it was claimed, and to the fiduciary relation which subsisted between the Crown and the corporation in respect of the conservancy,—held that the defendants were bound to give the discovery required.] In *Colman v. Treiman*, 3 Hurlst. & N. 871, in an action for a breach of contract, in not accepting goods, to which the defendant pleaded fraud, a judge having made an order for the inspection of the correspondence between the plaintiffs and the consignors of the goods and the plaintiffs and their broker, after the contract and alleged breach,—it was held that the order was properly made. [Williams, J. In actions upon policies, the underwriters always get inspection of surveys.] It is every day's practice. The cases in equity clearly sustain the propriety of this order: see *Maden v. Peeters*, 7 Beavan, 489; *Kerr v. Gillespie*, 7 Beavan, 572; *Smith v. The Duke of Beaufort*, 1 Hare, 507. In *Flight v. Robinson*, 8 Beavan, 22, the Master of the Rolls says: "According to the general rule which has always prevailed in this court, every defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question." In *Goodall v. Little*, 20 Law Journ. Ch. 132, 133, Lord Cranworth, V. C., says: "The plaintiffs assert a title which the defendants deny. The defendants admit that they have in their possession documents relating to the [420] matters in the bill mentioned. Some of the matters in the bill mentioned are the facts from which the plaintiffs shew, or allege they shew, a title. The documents in question relate or, for aught that appears in the answer, may relate to those very facts. The defendants, it is true, say that the documents would not shew the facts to be as the plaintiffs allege them to be. But that is the very point in issue. The documents relate to the matters in dispute. What is the true result of them, is the matter to be decided. It may be true, as stated by the answer, that by the documents, that is, by them alone, the truth of the plaintiffs' case would not appear; but they may form material links in the chain of proof, and, at all events, as it is admitted they relate to the matters in dispute, the plaintiffs, unless there be some other objection, are entitled to see them, in order to form their own opinion whether they do or do not make out or help to make out their title." [Willes, J. In equity, the only inquiry is, whether the plaintiff has an interest in the document, and whether it is privileged. If the matter rested upon the defendant's affidavit, there would clearly be no privilege.] The judgment of Richards, C. B., in *Bligh v. Benson*, 7 Price, 205, has no application to this case: and *Micklethwait v. Moor*, 3 Meriv. 292, turned on the want of a sufficient admission.

David Keane, in support of the rule. It is positively sworn on the part of the defendants that the documents the production of which is directed by the order in question, are exclusively applicable to their case: that necessarily involves a negation that they have any application to the case of the plaintiffs: whereas, on the other side, there is a mere statement as to the deponent's information and belief that they will be material and necessary for the plaintiffs' case. The autho-[421]rity the most analogous to this is the case of *Micklethwait v. Moor*, 3 Meriv. 292. There, on a bill to set aside a partition on the ground of inequality, and for a new partition, stating a valuation and estimate, the gross result of which, without the particulars, was contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the defendant was unable to set forth in what particulars it was inaccurate, by reason of such omission,—a motion by the defendant for production of the valuation and papers, &c., relative thereto, was refused with costs. And Lord Eldon said: "The case cited, of *Pickering v. Rigby*, 18 Ves. 484, is very different from the present case. There, the bill was for an account of partnership dealings: the plaintiff and defendant were jointly entitled to the possession of the documents the production of which was the object of the motion: and I then stated that I thought I remembered an instance of an application by a defendant under such circumstances to stay proceedings for want of an answer until he had been assisted with the inspection sought, and that that sort of motion might do without a cross-bill. But this case goes very much further than any I have ever yet heard of; and, even if a cross-bill were filed (which is the usual course), I should not have been able to compel the production

of these documents." The valuation there, was very much in the nature of the experiments here. To entitle a party to inspection under this statute, it must be shewn that the case is one in which a discovery would be ordered in a court of equity. This is not such a case. If the results had not been set down on paper, the plaintiffs clearly could not have asked for the information. No instance can be shewn where a discovery has been ordered of experiments in relation to a patent. In what does that case differ from this? If the plaintiffs had proceeded, as they might have [422] done, under the 50th section (*a*) of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), the defendants would have had an opportunity of setting out the documents in their possession, with their objections to the production of each seriatim. [Willes, J. This is a contest between two public bodies. It is hardly a case in which to raise these small matters of practice.] If the court uphold this order, it will lead to results of the most inconvenient nature: for, no party will be safe where it is known that he has made experiments or calculations with a view to assist him in the prosecution of his claim or in establishing his defence.

WILLES, J. I am of opinion that this rule must be discharged: and I trust that the decision to which we find ourselves compelled to come will not lead to the inconveniences which Mr. Keane seems to apprehend. It may be that this case comes very near the dividing line at which the province of discovery ceases. To go beyond that line would be, improperly to permit [423] the one party to pry into the case or defence of the other. But it appears to me that the present case falls clearly within the line. Two points have been urged upon the argument of this rule, on the part of the defendants. First, it is said that certain requirements of the 17 & 18 Vict. c. 125 have not been complied with, and that the application is not before the court in such a form as to enable the court to come to a decision upon the main question. As to that, it appears to me that the course of proceedings at Chambers and upon the application for this rule, precludes the defendants from urging that objection. Mr. Keane moved the rule upon the substantial question whether or not the plaintiffs were entitled to the production of the documents they sought; and he did not then set up the point last relied on. I do not say that the objection, if taken, could have been urged successfully. It is enough to say that it was not urged. I will now proceed to consider the other ground submitted by Mr. Keane, viz. that the documents in question are of such a nature that a court of equity would not order a discovery. In order to determine that, we must look at the character of the documents. The action is brought by the London Gas-Light Company against the vestry of the parish of Chelsea to recover a large sum alleged to be due to the company for gas supplied to the parish. The defendants have paid into court a certain sum, denying their liability for anything further. I assume that the dispute is *bonâ fide* on the defendants' part, and that the plaintiffs also think they are in the right. The question is, whether the gas which has been supplied by the plaintiffs was in point of quality and quantity such as to entitle them to a larger sum than that which has been paid into court by the defendants. Proceedings have been taken, and the matter is pending in court. Upon application to my Brother Byles [424] at Chambers, the defendants, on the 13th of April, obtained an order requiring the plaintiffs to produce certain documents, viz. "Weekly reports of the inspector, Daily pressure papers in the district, Pressure register papers at the works at Vauxhall, District inspector's book, containing list of public lamps, District inspector's report book, District inspector's book of measurement of quantity of gas consumed in public lamps in Chelsea during the last two months of

(*a*) Which enacts, that, "upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, as in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named of such body corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds,) to the production of such as are in his or their possession or power; and, upon such affidavit being made, the court or judge may make such further order thereon as shall be just."

1858, Mr. Warrington's reports of the illuminating power of the plaintiffs' gas, and Ledger containing defendants' account." Under that order, the defendants were entitled to have from the plaintiffs an inspection of documents containing information which they had obtained from their officers as to the quantity and quality of the gas supplied by them under their contract with the defendants. That order having been obtained, and the required information having been given by them under it, the plaintiffs apply, and not, I think, unreasonably, for similar information at the hands of the defendants. The substance of the application is this,—the vestry by their officers have watched the lamps, and have ascertained by experiment or observation the quantity and quality of the gas supplied to them. The results of these experiments or observations are not mere proofs collected by the defendants' attorney for the purpose of establishing their defence to the action. It seems to me to be just as if a person who has received a quantity of goods were to weigh or measure them and write down the results of that process in his journal. I apprehend the seller of the goods would have such an interest in that entry as would entitle him to a discovery. I cannot see any difference between that case and this: the observations which apply to quantity will equally apply to quality. Without going through [425] the authorities in equity, it seems to me that this is clearly a case in which a discovery would be ordered. I need only refer to the affidavit of Mr. Jones, the company's engineer, which is the one which was acted on by my Brother Byles, to shew that this is so. The third and fourth paragraphs of that affidavit are as follows:—"I am informed and believe that the defendants have, by their officers and others, made experiments and observations with regard to the lighting by the plaintiffs of the lamps in the defendants' parish under the said contract, and that they have in their possession and power certain papers and writings shewing the result of the said experiments and observations, which will prove that the plaintiffs have performed their said contract, both as to the quantity and quality of the gas supplied to the parish of Chelsea;" and "I am informed and believe that it will be material and necessary for the plaintiffs, in order to enable them to prepare for the trial of this cause, to inspect and take copies of or extracts from the said papers in the defendants' possession shewing the result of the said experiments and observations." That appears to me to bring the matter within the case I put. Now, is there any answer to that affidavit? It is suggested that there is, in the third paragraph of the affidavit of Mr. Hobbs, the managing-clerk to the defendants' attorneys, in which he says,—"It was stated to Mr. Justice Byles by the counsel for the defendants, as the fact was and is, that the matters of which discovery is by the said order directed, are evidence relating exclusively to the defendants' case, and that obedience to the said order will disclose the manner in which the defendants' case and their disproof of the case of the plaintiffs is to be established." As to the second branch of that paragraph, it is immaterial, because it is not an objection to discovery that it discloses the defendants' case, if it [426] proves the plaintiffs'. The first part is all which is material. I assume that these documents are evidence for the defendants. But we must take that in conjunction with what is sworn on the other side, and not denied, viz. that the contents of the papers will prove that the plaintiffs have performed their said contract both as to the quantity and quality of the gas supplied to the parish. Taking the affidavits together, it may be that the mode of reconciling them may be, that the results of the experiments and observations may go to diminish the plaintiffs' claim. It is enough to say it may be so, and therefore I think no sufficient answer has been given to the application. I am not aware of any principle in the law of discovery which should prevent us from giving the plaintiffs the inspection they ask, and which they are in justice entitled to. A case was referred to, of *Bligh v. Benson*, 7 Price, 205, in which the court refused to give discovery of a book in the possession of the defendant's attorney. But there it did not appear that the book, if produced, would be evidence in favor of the plaintiff. The observations of the Lord Chief Baron shew plainly the principle upon which he proceeded. "This book," he says, "is part of the defendant's evidence; and the rule is clear, that you have no right to call upon your opponent in this way to expose his case to his adversary. It would be opening a wide door to perjury. Besides, you must shew in all cases of an application for production of papers, that they would be evidence making in your favor; and that must be shewn by admission in the defendant's answer." That, therefore, was evidently a fishing application. As to the case of *Micklethwait v. Moor*, 3 Meriv. 292, that falls within the same observation. There did not exist the additional circumstance of

interest there, viz. that the document would be evidence to support the defendant's case. These are documents [427] which would be evidence for the plaintiffs. For these reasons, I think the order of my Brother Byles was right, and that the rule must be discharged with costs.

BYLES, J. The matter has been so fully gone into by my Brother Willes that I do not think it necessary to add anything.

Rule discharged, with costs.

DRESSER v. NORMAN AND ANOTHER. April 21st, 1859.

The court has no power to grant a rule for a special jury before issue joined, even where, in consequence of the defendant's being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for a special jury a sufficient number of days before the trial.—The proviso at the end of the 44th rule of Hilary, 1853, applies to the six days' notice.

The declaration in this case was delivered on the 4th of April, and the defendants pleaded on the 20th, but the plaintiff had not replied. The defendants were under terms to take short notice of trial for the first London sitting in this term, the 27th. Upon an affidavit stating these facts, and that the defendants were advised that the cause was a fit and proper one to be tried by a special jury, but that, should the plaintiff give notice of trial for the 27th, the defendants would be prevented, by reason of the holidays which would intervene between the 21st and 27th of April, from applying for a special jury after issue joined,

Crompton Hutton moved for a rule for a special jury notwithstanding the non-joinder of issue. [Cockburn, C. J. I do not see how we can dispense with the general law, which precludes the application for a special jury before issue joined. Your better course probably will be to apply to the judge at nisi prius to postpone the cause under the special circumstances.] In *Sayer v. Dufaur*, 9 Q. B. 800, it was held that a defendant cannot, without special application to a judge, have a [428] rule for a special jury before issue joined, although, being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for a special jury a sufficient number of days before the trial. [Crowder, J. Is that any authority that it can be done with leave? Willes, J. The court had no power to award jury process before the cause was at issue: 6 G. 4, c. 50, s. 30. The Common Law Procedure Act, 1852, dispenses with jury process, but it has not altered the law in this respect.] The proviso in the rule 44 of Hilary Term, 1853, cures that. That rule is as follows:—“No rule for a special jury shall be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit, either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice has been given: and, in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day: provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.” [Willes, J. That proviso only applies to the six days' notice.] The 44th rule of Hilary, 1853, is a mere re-production of the rule of Hilary, 1 Viet. [Willes, J. It therefore introduces no new practice. The 6 G. 4, c. 50, s. 30, in terms enacts that there can be no jury until there is an issue joined.]

Per Curiam. The whole power and authority of the court in this respect is based upon the fact of there being an issue joined between the parties. The 39th section of the 6 G. 4, c. 50, enacts that the court or judge may order a special jury to be struck “in any case depending in court,” and that “every jury so struck shall be the jury returned for the trial of such issue.” We cannot help you.

Rule refused.

[429] BETWEEN HENRY DRESSER, Judgment-creditor, AND WILLIAM JOHNS, Judgment-debtor, THE MARITIME PASSENGERS' ASSURANCE COMPANY, Garnishees; AND BETWEEN JAMES CHILTON, Judgment-creditor, AND WILLIAM JOHNS, Judgment-debtor, THE MARITIME PASSENGERS' ASSURANCE COMPANY, Garnishees; AND IN RE JAMES CHILTON, Gentleman, one, &c. April, 30th, 1859.

[S. C. 28 L. J. C. P. 281; 5 Jur. N. S. 1262. Referred to, *Horsley v. Cox*, 1869, L. R. 4 Ch. 100.]

A mere verdict in an action of contract for unliquidated damages is not a "debt owing or accruing," so as to be attachable under the 61st section of the Common Law Procedure Act, 1854.—A. obtained a verdict against B. for 100l. on the 21st of February, but judgment was not signed until the 8th of March. On the 4th of March, C., who had an unsatisfied judgment against A., obtained an order nisi under the 61st section of the Common Law Procedure Act, 1854, to attach the 100l. in the hands of B., upon which an absolute order was made on the 11th:—Held, that the order was invalid, there being no debt "owing or accruing" when the order nisi was obtained.

In July, 1857, William Johns was arrested at the suit of Henry Dresser for an alleged claim of 100l. and upwards; upon which Johns paid into the hands of the sheriff 100l. in lieu of bail, and 20l. for costs. In the action in which that arrest took place (in the Common Pleas), Mr. Chilton acted as attorney for the defendant, and the cause was referred, and an award was ultimately made in favour of the plaintiff, Dresser, for 200l. and costs, which costs were afterwards taxed and allowed at 74l. 19s. 2d. Final judgment was signed in this action on the 1st of May, 1858; and Dresser afterwards obtained the 120l. out of court.

Whilst the action at the suit of Dresser against Johns was pending, Chilton, as attorney for Johns, brought an action against the Maritime Passengers' Assurance Company, to recover the sum of 100l., on a policy of insurance on certain effects belonging to [430] Johns, which had been lost at sea: but, in consequence of the plaintiff's absence at sea, that action was not carried down for trial until the sittings in London after last Hilary Term. The trial took place on the 21st of February, when a verdict was found for the plaintiff for 100l. The plaintiff's costs of this action were taxed at 60l. 2s., and on the 8th of March judgment was signed therein for 160l. 2s.

Johns, being indebted to Chilton for the costs incurred by him in the defence of the first-mentioned action, and also for the extra costs in the action against the Maritime Passengers' Assurance Company, and being desirous to secure to him the payment of what should be due to him, on the 25th of February executed a warrant of attorney in his favour for 500l., with a defeazance conditioned to avoid the same on payment of 250l. and costs.

Judgment was signed upon this warrant of attorney on the 26th of February; and on the 4th of March, 1859, Dresser obtained a judge's order nisi, under the 61st section (a)

(a) The 60th section enacts that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor should be orally examined as to any and what debts are owing to him before a master of the court or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

And the 61st enacts that "it shall be lawful for a judge, upon the ex parte application of such judgment-creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment-debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor shall be attached to answer the judgment-debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to shew cause why he should not pay

of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to attach the debt due to [431] Johns from the Maritime Passengers' Assurance Company. On the same day, Chilton obtained a similar order. Upon service of this last-mentioned order, Chilton was informed that the money had already been attached in the company's hands by Dresser. Chilton thereupon gave the company notice of his lien for costs upon the judgment so recovered against them by Johns; and on the 10th of March he obtained a second garnishee order to attach the debt, judgment having then been signed; and, at the return of the order for attachment obtained by Dresser, viz. on the 11th of March, Chilton appeared by counsel to oppose the payment over to him of the amount of the verdict, but the learned judge refused to hear him, on the ground that he was not a party to the order, and that the company were willing to pay the money to Dresser; and the following order was made:—

“In the matter of attachment of debt.

“Henry Dresser, Judgment-creditor, agst. William Johns, Judgment-debtor, The Maritime Passengers' Assurance Company, Garnishees.

“Upon hearing the attorneys or agents for the judgment-creditor and for the garnishees, and the order made herein on the 4th day of March, 1859, whereby it was ordered that all debts [432] owing (or accruing due) from the said garnishees to the said judgment-debtor be attached to answer a judgment recovered against the said judgment-debtor by the said judgment-creditor in the court of Common Pleas on the 10th day of March, 1858, for the sum of 274l. 19s., and upon which judgment the sum of 154l. 19s. 2d. remained due and unpaid, I do order that the said garnishees do forthwith pay the said judgment-creditor the debt of 100l. due from them to the said judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt, and that, in default thereof, execution may issue for the same.”

The 100l. was paid over to Dresser's attorneys on the 14th of March; and on the same day they were served with a summons at the instance of Chilton calling upon them to shew cause why the garnishee summons and order of the 4th and 11th of March respectively should not be set aside, or why the garnishee order of the 4th of March, at the instance of Chilton, should not have priority over and supersede the said order of the 11th of March at the instance of Dresser,—on the ground, amongst others, that Chilton, as the attorney for Johns, had a lien for his costs upon the moneys so attached.

This last-mentioned summons was attended before Williams, J., on the 17th of March, who, after reading the affidavits and hearing counsel, made an order that Dresser, the judgment-creditor, “do pay into court within three days 100l. received from the garnishees under the order of the 11th of March instant, made in the first-mentioned cause, that the whole matter be referred to the court, and that all costs shall abide the event.”

The money was accordingly paid into court on the 21st of March. On the 22nd of March, Chilton obtained an order upon the garnishees to pay him the 60l. 2s., [433] the amount of the taxed costs in the action of *Johns v. The Maritime Passengers' Assurance Company*; and on the second day of this term,

Pearce, on behalf of Chilton, obtained a rule calling upon Dresser to shew cause why the order of the 4th of March should not be rescinded, and why the order of the 22nd of March should not be varied by increasing the amount to be paid to Chilton, the judgment-creditor in the secondly mentioned matter, from the sum of 60l. 2s. to 160l. 2s.; and why the sum of 100l. paid into court pursuant to the order of the 17th of March should not be paid out to Chilton; and why Dresser should not pay to Chilton or his agent the costs of and occasioned by the several applications at Chambers and of this application to the court. He referred to *Jones v. Thompson*, 27 Law J., Q. B. 234, where it was held that a verdict in an action of contract for unliquidated damages, without judgment, is not a “debt owing or accruing,” and cannot be attached under the 61st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

J. Brown now shewed cause. The judgment in the action of *Johns v. The Maritime*

the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt.”

Passengers' Assurance Company was signed on the 8th of March, for 100l. and 60l. 2s. for costs. The garnishee order was made on the 11th. [Willes, J. An attorney's lien cannot be got rid of by a garnishee order.] Mr. Chilton does not insist upon his lien. He seeks, in virtue of the judgment signed on his warrant of attorney, to obtain the 100l. which has already been paid over to Dresser. As to the two orders of the 4th of March, that of Dresser is clearly entitled to priority. [Byles, J. At that time neither party was entitled to anything. There was then no debt.] It does not lie in Chilton's mouth to [434] say there was no debt: and the garnishees do not dispute the matter. [Crowder, J. Although the garnishees make no objection, can there be an order under the statute where upon the face of the matter it appears that there is no debt?] As between two judgment-creditors, it is submitted, the objection cannot arise. [Crowder, J. If there was no debt, there can be no valid order.] As to the order of the 10th of March, the rule does not bring the proper materials before the court. [Crowder, J. The whole matter was before my Brother Williams on the 17th of March, including the application of the 10th.] The order of the 10th was not mentioned on that occasion: and the plaintiff Dresser is no party to the order of the 22nd, which this rule seeks to vary. It is no straining of the language of the 61st section of the statute to say that a debt is accruing as soon as a verdict is recovered. [Crowder, J. In *Jones v. Thompson*, Wightman, J., says: "*Ex parte Charles*, 14 East, 197, and several other cases, decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed. Those cases were decided under the Bankrupt Acts. Now, the Common Law Procedure Act enables a judge, on its being made to appear that another person is indebted to the judgment-debtor, to order that all debts owing or accruing from such third person to the judgment-debtor shall be attached to answer the judgment-debt. Mr. Prentice draws a distinction, relying on the word 'accruing,' and says the amount of this verdict is a debt accruing to the defendant. But it appears to me that it is neither a debt owing nor accruing: the latter word can only be applied, in my opinion, to a debitum in presenti solvendum in futuro. There must be a debt perfected, in order to entitle a judgment-creditor to the benefit of this clause." And Crompton, J., says: [435] "I think the question to be the same as in a fiat or commission of bankrupt, and that there must be an actual debt. Now, in *Ex parte Charles*, it was decided that a verdict in an action for unliquidated damages did not constitute a debt so as to be the foundation of a commission of bankruptcy. It was argued that the Common Law Procedure Act makes a distinction, by using the word 'accruing': but, in my opinion, there must still be a debt which, though not due in point of payment, is yet an absolute debt." That is inconsistent with *Skelton v. Mott*, 5 Exch. 231, where it was held, that, under the 69th section of the Insolvent Act, 1 & 2 Vict. c. 110, the words "debts growing due," were debts ascertained and payable in futuro. [Willes, J. The question was very fully gone into in the case of *Sparks v. Younge*, 8 Irish Common Law Rep. 251, where Pigot, C. B., puts the same construction upon similar words in the 63rd and 64th sections of the Irish Common Law Procedure Act, 19 & 20 Vict. c. 102, as Wightman, J., and Crompton, J., adopted in *Jones v. Thompson*,—saying: "When the words 'accruing or owing,' are used, as they plainly are, to designate two classes of debts, they can receive each a distinct meaning only by taking one as denoting debts which are not yet payable, and the other as denoting those which are. The phrase 'debitum in presenti solvendum in futuro' is one well known and understood in our law. In a case of *Jones v. Thompson*, which was before the court of Queen's Bench in England so lately as last Easter Term, the court appear to assume that such a debt is liable to an attachment under the garnishee sections of the English Common Law Procedure Act, 17 & 18 Vict. c. 125." The debt was accruing from the time the verdict was pronounced, though not perfected until judgment was signed. [Willes, J. There is no existing debt until judgment.] If the [436] court should think that Mr. Chilton is entitled to the 100l., the plaintiff Dresser at all events is entitled to the costs of the proceedings at Chambers, where Chilton was equally in fault.

Pearce, in support of the rule, was desired to confine himself to the question of costs. He submitted that Chilton was entitled to all the costs occasioned by Dresser's resistance to his claim. [Byles, J. If you get the 100l., and pay no costs, I think you ought to be content. Crowder, J. Up to the 10th of March both parties were in the wrong.]

CROWDER, J. I am of opinion that this rule should be made absolute. It appears that on the 4th of March, orders were obtained both by Dresser and Chilton to attach in the hands of the Maritime Passengers' Assurance Company the money which was to become payable to Johns upon the verdict recovered by him in his action against the company. But at that time there was no debt "owing or accruing" from the company to Johns, judgment not having then been signed: both, therefore, were acting in mistake; for, there could be no proper application under the 61st section of the Common Law Procedure Act, 1854, until there was a debt, viz. the 8th of March, when the judgment was signed. On the 10th of March, Chilton obtained a second order. It has been argued by Mr. Brown that there was on the 4th of March, when Dresser's order nisi was obtained, a debt accruing due within the meaning of the statute, and therefore that the order made on the 11th was a valid order. *Jones v. Thompson*, however, is a direct decision, and, as we all think, a correct decision, that there was no debt owing or accruing until the final judgment was signed on the 8th. I myself have certainly acted upon that view on [437] several occasions at Chambers. And the Irish court of Exchequer, in *Sparks v. Young*, 8 Irish Common Law Rep. 251, put the same construction upon similar words in the Irish Common Law Procedure Act, 19 & 20 Vict. c. 102. There being, then, no debt until judgment was signed, the order of the 4th of March was clearly invalid. Then comes the order obtained by Chilton on the 10th, which was not discussed until the 17th, when my Brother Williams ordered that Dresser should pay into court the 100l. which he had received from the garnishees under the order of the 11th of March, and that the whole matter should be referred to the court, and the costs abide the event. We are of opinion that Mr. Chilton is, under his order of the 10th, entitled to the 100l. so directed to be paid into court, and also to the costs of the summons on which the order of the 17th was made, but not to the costs of this application.

Rule absolute accordingly.

CAZENOVE AND OTHERS, Assignees of John Thomson, a Bankrupt, v. THE BRITISH EQUITABLE ASSURANCE COMPANY. May 6th, 1859.

[S. C. 28 L. J. C. P. 259; 5 Jur. N. S. 1309: affirmed in Exchequer Chamber, 29 L. J. C. P. 160; 6 Jur. N. S. 826; 8 W. R. 243.]

One T. effected a policy on his own life, with a condition thereon indorsed, that, "in case any fraudulent or untrue statement was contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy should be void."—Among the documents referred to was one called a "personal statement," which contained, amongst others, the following questions:—"4. Whether had, since infancy, any and what other disease (than those enumerated in a preceding question) requiring confinement?" "8. How often has medical attendance been required?" "9. How long did such attendance continue?" "10. For what disease or diseases?" "11. For what period confined to the house or bed?" "12. How long is it since these circumstances occurred?" "13. Name and address of the medical attendant or attendants employed on occasion of such disease?"—The answers to these questions were as follows,—To the 4th, "No"; to the 8th, "Two years ago;" to the 9th, "About one week;" to the 10th, "Disordered stomach;" to the 11th, "A week;" to the 12th, "One year;" and to the 13th, "Dr. R., Rock Ferry."—It appeared that the attendance of Dr. R. was in December, 1855; that, in January, 1856, the assured had had a relapse, when he was attended by one Dr. C.; and that, in February, while at Birmingham, he had another severe illness, when his life was despaired of, and on which occasion he was attended by three other medical men:—Held, that the untruth of the above answers avoided the policy, notwithstanding the jury found that no material information had been withheld from the insurers, and it was conceded that there was no intentional fraud.

This was an action by the plaintiffs, assignees of John Thomson, a bankrupt, deceased, to recover the sum of 500l., for which the deceased had insured his life with the British Equitable Assurance Company.

[438] The declaration stated, that, in the life-time, and before the bankruptcy of

the said John Thomson, the said company, by deed under their common seal, dated the 5th of March, 1857, covenanted with him that they the said company, or their successors, if their corporate funds, property, and effects for the time being, including the amount of capital subscribed for and not paid up, if any, after satisfying all prior claims and charges thereon, should be sufficient for the purpose, and if the current premium should have been paid, and the other regulations indorsed thereon should have been observed by the person entitled to the benefit of that assurance, would within two calendar months next after satisfactory proof should have been made, according to the rules, regulations, and practice of the said company for the time being, of the death of the said John Thomson, pay unto his executors or administrators the full sum of 500*l.* sterling, and all such other sums, if any, as the said company by their directors might have ordered to be added to such amount, by way of bonus or otherwise, according to their practice for the time being: provided always that that policy was made subject to the conditions and regulations thereon indorsed: that the said John Thomson afterwards departed this life, and satisfactory proof of his death was, more than two months before the com-[439]-mencement of the action, made, according to the rules, regulations, and practice of the said company for the time being: that all current premiums on the said policy were paid, and all the conditions and regulations indorsed thereon were observed and performed: that, at the time of the said death, and thenceforth continually, the corporate funds, property, and effects of the said company for the time being, including the amount of capital subscribed for and not paid up, after satisfying all prior claims and charges thereon, were sufficient for the purpose in the said policy mentioned: and that the time had elapsed, and all things had taken place and been done necessary to entitle the plaintiffs, assignees as aforesaid, to have the said sum of 500*l.* paid to them as assignees as aforesaid: yet that the said company had made default, and had not paid the said sum of 500*l.*, or any part thereof, according to the said policy; and the said sum of 500*l.* still remained wholly, due and unpaid to the plaintiffs, assignees as aforesaid.

The defendants pleaded,—first, that one of the said conditions and regulations indorsed on the said policy was and is to the tenor following, that is to say, “4th. In case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void; but, in case of a mere accidental erroneous statement of the age of the assured, the said company, provided application shall be made within three months after discovery of the error, and proof shall have been given to the satisfaction of their directors that no fraud was intended, will waive such forfeiture on such terms as the said directors shall impose by an indorsement on this policy under the hand of their manager or of their [440] chairman:” and that, before and at the time of the making of the said policy, divers fraudulent statements were contained in two certain documents addressed to and deposited with the said company by the said John Thomson in relation to the said assurance so made as aforesaid, the said statements being other than a mere accidental erroneous statement of the age of the said John Thomson; whereby the said policy was and is void.

Secondly, that one of the said conditions and regulations indorsed on the said policy was and is to the tenor of that set forth in the said first plea; and that, before and at the time of the making of the said policy, divers untrue statements were contained in two certain documents addressed to and deposited with the said company by the said John Thomson in relation to the said insurance so made as aforesaid, the said statements being other than a mere accidental erroneous statement of the age of the said John Thomson: whereby the said policy was and is void. Issue thereon.

The cause was tried before Byles, J., at the last Spring Assizes at Liverpool, when the following facts appeared in evidence:—

On the 22nd of December, 1856, the deceased, Ralph Hardie Thomson, being desirous of insuring his life in the British Equitable Assurance Office, was required by them to answer certain matters which were contained in a printed form of proposal. The material ones were,—“7th. Have you ever, and when, been attended by a medical man?” “8th. Names and addresses of the usual medical attendant, and the last medical attendant.” The answers given were, to the 7th,—“About one year ago;” and to the 8th,—“Names: Mr. Craigie. Addresses: Birkenhead. Have known the party two years.” There was a further re-[441]-quirement, viz. “Date of last

professional attendance," the answer to which was not filled in. At the foot of the document was the following:—"I declare that the above particulars are true, and that I have withheld no material information. Ralph Hardie Thomson."

In addition to the form of proposal, the party was required to answer certain other questions which were contained in a document called the "personal statement," of which the following are the material parts:—

"PERSONAL STATEMENT.

"To be made to the medical officer of the British Equitable Assurance Company, and to be signed by the party whose life is proposed for assurance.

"N.B.—It is particularly requested that precise answers may be obtained to each inquiry.

" Questions.	Answers.
2. Whether had any and which of the following diseases, viz. rheumatism, gout, shortness of breath, asthma, palpitation of the heart, fainting, giddiness, headache, fits, epilepsy, consumption, spitting or other discharges of blood, scrofula, cancer, piles, stone, gravel, stricture, rupture, insanity, delirium tremens, or dropsy ? . . .	No.
4. Whether had, since infancy, any and what other diseases requiring confinement ? . . .	No.
5. Whether had tumour or swelling of any kind? State its nature and position . . .	No.
6. Whether had any and what accident requiring confinement ? . . .	Nose fracture at school.
7. If ever engaged in any and what unhealthy business or pursuit ? . . .	No.
8. How often has medical attendance been required ? . . .	Two years ago.
9. How long did such attendance continue ? . . .	About one week.
10. For what disease or diseases ? . . .	Disordered stomach.
11. For what period confined to the house or the bed ? . . .	A week.
[442] 12. How long is it since these circumstances occurred ? . . .	One year.
13. Name and address of the medical attendant or attendants employed on occasion of such disease ? . . .	Dr. Roper, Rock Ferry
16. Whether of strictly temperate or intemperate or free habits ? . . .	Temperate.

" General Questions.

Do you know of any and what other circumstances connected with your family, habits, constitution, health, or condition, which may tend to affect your life ? . . .	No.
Is there any other circumstance which the officers of the company ought to know ? . . .	No.

"I declare all the above answers to be correct and true.

"RALPH HARDIE THOMSON.
"January 6th, 1857."

Being satisfied with the above answers, the company, on the 6th of March, 1857, issued the policy declared on, subject to certain conditions indorsed thereon, one of which was as follows:—

"4. In case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void. But, in case of a mere accidental erroneous statement of the age of the assured, the said company, provided application shall be made within three months after discovery of the error, and proof shall have been given to the satisfaction of their directors that no fraud was intended, will waive such forfeiture, on such terms as the said directors shall impose, by an indorsement on this policy, under the hand of their manager or of their chairman."

The first plea, so far as related to the imputation of [443] fraud was abandoned; and the defendant's counsel relied solely upon the fact of the statements contained

in the answers to certain of the questions contained in the "proposal" and "personal statement" being untrue, as alleged in the second plea. The evidence upon the subject was as follows:—The assured was a man of dyspeptic habit. In the month of December, 1855, whilst residing at Birkenhead, he had a violent bilious attack, and was attended by one Dr. Roper. After a few days he got better, and went to Dublin. He returned thence to Birkenhead, where he had a second attack, and was again attended by Dr. Roper. Before his recovery, Dr. Roper becoming ill, the assured was attended by one Dr. Craigie, under whose care he remained from the 2nd till the 8th of January, 1856, when he was restored to his usual state of health, and so remained until the 5th of February, when, being in Birmingham, his complaint returned with such violence as to require between the 15th and 21st the constant attendance of three medical men, viz. Dr. Fletcher, Dr. Palmer, and an apothecary. Having recovered from this attack also, he returned to Birkenhead, where he remained without requiring any further medical attendance until December, 1857, when he was again under the care of Dr. Craigie for an inflammatory affection of the liver, which complaint caused his death in April, 1858.

Thomson became bankrupt in March, 1857, and the plaintiffs were appointed his assignees.

It was contended, on the part of the defendants, that the untrue answers given by Thomson to the questions contained in the proposal and personal statement, which formed the basis of the contract, avoided the policy: and that it was unnecessary to inquire whether the concealment of the names of the medical men who had attended him at Birmingham was fraudulent or accidental.

[444] For the plaintiffs it was insisted, that, there being no fraud, and the answers being substantially true, and the information uncommunicated immaterial, the plaintiffs were entitled to recover.

The learned judge, reserving the question as to the construction of the contract for the court, left it to the jury to say whether or not any material information had been withheld. They found in the negative, and accordingly returned a verdict for the plaintiffs for the sum insured.

Atherton, Q. C., on a former day in this term, in pursuance of the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants, on the ground that the untruth of the statements contained in the proposal and personal statement avoided the policy; or for a new trial, on the ground that the verdict was against the evidence. He referred to *Anderson v. Fitzgerald*, 4 House of Lords Cases, 484. The proviso in the policy there was, that, "if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void: and it was held, that, in an action against the company on the policy, they were entitled to succeed if the answers to the questions contained in the proposal were false; and that it was not essential to their case that the matters therein contained should be material as well as false.

Edward James, Q. C., and Henderson, shewed cause. No fraud is imputed; neither is there substantially any untrue statement. Thomson was seized with an illness in December, 1855, which was supposed to be then cured, but which returned in January and February, [445] 1846. This was all one illness, with intervals of alleviation. It was enough, therefore, to give the name of one medical man who attended him,—his usual medical attendant; and the omission to state that he was attended by more than one was not a suppression of any material information. From these attacks Thomson recovered completely. The proposal for insurance was made on the 22nd of December, 1856, the personal statement was made on the 6th of January, 1857, and the policy was effected on the 7th of March. Thomson continued to enjoy his usual health until April 1858, when he died of a disorder not mentioned in the policy, and one which was wholly unconnected with the disorders with which he had been afflicted before. It is said that the answers to the 7th and 8th questions in the proposal were untrue: but there clearly was no untruth in the first answer, nor any material concealment in the second answer: the assured had been attended by a medical man about a year before: and the name of such medical attendant was correctly given, Dr. Craigie being in fact the last usual medical attendant. [Cockburn, C. J. I do not understand Mr. Atherton to deny that Dr. Craigie was the usual medical attendant of Thomson, but merely that he was the last. The answer was

calculated to mislead, and to induce any one to suppose that Dr. Craigie was both the usual and the last medical attendant.] Then, has there been any untruth in the personal statement? Although, in answer to the fourth question, Thomson denies that he had had since infancy any other disease requiring confinement than those mentioned in the second question, yet his answers to the subsequent questions qualify that, and shew what is meant. [Crowder, J. The language of the fourth condition is very stringent. If there are any untrue statements, I do not see how you can get over it. The House of Lords, in *Anderson v. Fitzgerald*, [446] 4 House of Lords Cases, 484, say there is no distinction in this respect between materiality and immateriality. We cannot overrule that.] The language of the condition here is totally different from that contained in the contract there. There may be an omission here, but there clearly is no untruth: and the jury have found the omission to be immaterial. The medical attendant referred to in the 7th question is not the one accidentally called in when the usual medical attendant was unable from illness to attend, but the one who usually attended the party at his place of abode. The answer, therefore, was perfectly reconcileable with truth; and the bona fides of the transaction was not impeached. Then, as to the other branch of the rule, there is no pretence for saying that the evidence did not warrant the verdict. [Cockburn, C. J. We would hardly be disposed to disturb the verdict on that ground, as my Brother Byles reports to us that he is not dissatisfied with the conclusion the jury came to on the evidence.]

Atherton, Q. C., and Quain, in support of the rule. Upon the authority of *Anderson v. Fitzgerald*, 4 House of Lords Cases, 484, the defendants are clearly entitled to make this rule absolute. There, F. applied to an insurance-office to effect a policy on his life. He received a form of proposal, containing questions requiring to be answered. Among these were the following: "Did any of the party's relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions F. answered, "No." The answers were false. F. signed the proposal, and a declaration accompanying it, by which he agreed "that the particulars mentioned in the above proposal should form the basis of the contract." The policy mentioned [447] several things which were warranted by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that, "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this assurance," the policy shall be void, and the moneys paid shall be forfeited. In an action on the policy,—it was held, reversing the judgment of the courts of Exchequer and Exchequer Chamber in Ireland, that it was misdirection to leave it to the jury to say whether the answers to the two questions were material as well as false, and if not material, that the plaintiff was entitled to the verdict; for that, the representation being part of the contract its truth, not its materiality, was the question. Lord St. Leonards says, at p. 509,—"Whether the circumstances warranted were material or not, is entirely out of the question. It is simply sufficient, and ought to be sufficient, to avoid the policy, that any one thing warranted is not true; and therefore the word 'untrue' there is used in its general sense of an untruth in the abstract. It signifies not whether he did or did not know it to be untrue; it signifies not whether the circumstances were material or not; the contract is to be avoided." It is impossible to distinguish that case from the present. If a statement be at variance with the fact, it is untrue: and the court is not to be embarrassed with the consideration of honesty of purpose or otherwise. In *Duckett v. Williams*, 2 C. & M. 351, Lord Lyndhurst, C. B., says: "The point is, whether the facts stated were not truly stated within the meaning of the declaration and agreement. It was contended, on the part of the plaintiffs, that the words must mean 'truly' or [448] 'untrue' within the knowledge of the party making the statement; and that, if the party insuring ignorantly and innocently makes a misstatement, he is not to forfeit the premiums under the clause in question. We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue because the party making it is not apprised of its untruth; and, looking at the context, we think it clear that the parties did not mean to restrict the words in the manner contended for. Two consequences are to follow if the statement be untrue,—one, that the premiums are to be forfeited,—the other, that the assurance is to be void.

Now, if the statement were untrue within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and therefore must be so as to the first: for, it would be contrary to all the rules of construction to hold that it was material as to one consequence, and not as to the other." The distinction between fraud in fact and fraud in law is familiar: see *Parson v. Watson*, Cowp. 788, *Pollitt v. Walter*, 3 B. & Ad. 114, *Milne v. Marwood*, 15 C. B. 778, and that class of cases. Here the statements contained the answers to the questions in the proposal" and in the "personal statement" are avowedly the basis of the contract. What is more reasonable or likely than that the office should seek to know who was the usual and also who the last medical attendant of the party desirous of insuring? The answer to the 8th question in the "proposal" is clearly untrue: the question is put thus,—"Names and addresses of the usual medical attendant, and the last medical attendant?" The answer is, "Names, Mr. Craigie: addresses, Birkenhead. Have known the party two years." Now, it was not true to say that Dr. Craigie was the usual and [449] also the last medical attendant. [Cockburn, C. J. It is a true answer as to part, and an omission as to the rest.] Then, as to the "personal statement," the answer to the 4th question is clearly untrue. If it had stopped there, the case would have been free from a shade of doubt. The answer to the 13th question confirms the defendants' view. The party being required to give the "name and address of the medical attendant or attendants employed" on occasion of the disease mentioned in the answer to the 10th question, gives the name of "Dr. Roper, Rock Ferry, Cheshire." The names of Dr. Palmer, Dr. Fletcher, and the surgeon, who attended him at Birmingham in February, are not mentioned at all. In substance, the answers amount to this,—“I have never since infancy had any disease (other than those enumerated in the 3rd question) requiring confinement, except for about a week one year ago, when I was attended by Dr. Roper, of Rock Ferry.” That was an untrue statement, and one which effectually concealed from the office the fact of the much more serious illness which occurred at Birmingham, after the attendance of Dr. Roper had ceased.

COCKBURN, C. J. I am of opinion that this rule should be made absolute. The action is brought upon a policy of insurance which is made subject to a condition (the fourth), that, "in case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void." Now, one of the documents which formed the basis of the contract was that which is called the "personal statement:" and, amongst the questions therein contained, we find the following.—“No. 4. Whether had since infancy any and what [450] other disease requiring confinement?” To that the assured answers simply and emphatically, “No.” If that answer had stood alone, with nothing to qualify it, it is clear, beyond all controversy, upon the evidence which was given at the trial, that it was an untrue answer in point of fact. It remains, therefore, to be seen whether there is anything in the answers to the subsequent questions so to qualify that negation as to make it reconcileable with truth, and to except it out of the operation of the fourth condition. The 8th question is, “How often has medical attendance been required?” To which the answer is, “Two years ago.” Then comes the 9th question, “How long did such attendance continue?” Answer, “About one week.” The 10th question is, “For what disease or diseases?” Answer, “Disordered stomach: the eleventh, “For what period confined to the house or the bed?” answer, “A week” the twelfth, “How long is it since these circumstances occurred?” answer, “One year:” and the thirteenth, “Name and address of the medical attendant or attendants employed on occasion of such disease:” answer, “Dr. Roper, Rock Ferry.” It is contended on the part of the plaintiffs that the answers given to these latter questions so qualify the denial contained in the answer to the fourth question, as to make that denial consistent with the truth. I however think they do not. The only illness to which the assured refers in these answers is that which occurred in December, 1855, when he was attended by Dr. Roper. He makes no allusion whatever to the last and more serious illness which occurred at Birmingham, when he was attended by Dr. Fletcher and Dr. Palmer, and also by a surgeon. The effect of all the answers taken together amounts to this,—there is a positive denial of the assured's having since infancy had any disease (other than those mentioned in the [451] preceding question) requiring confinement, with an admission of his having had a year ago one disease, viz. a disordered stomach, which

continued for a week, and for which he was attended by Dr. Roper. That clearly is not true; for, within a month after, he had had a serious attack, which placed his life in imminent danger, and during the continuance of which he was attended by no less than three medical men. I will only add, that, this being the view which I take of the "personal statement," it becomes in my opinion unnecessary to consider the answers given to the questions contained in the "proposal."

CROWDER, J. I also think it unnecessary to consider the effect of the questions and answers contained in the proposal, because I feel myself compelled to come to the conclusion that there is falsehood in the answers to the questions in the personal statement. The answer to the fourth question is a positive negation of any disease requiring confinement since infancy, and the answers which are relied on as a qualification of that positive negation are a denial of any other illness than that for which the assured had been attended by Dr. Roper at Birkenhead in December, 1855: whereas, the more important illness was that which occurred at Birmingham, when the assured was attended by three medical men, and when his life was in great danger.

WILLES, J. I am of the same opinion. It appears to me, that, taking the answers all together they do amount to a denial of any illness coming within the description of the illness which occurred at Birmingham, when the life of the assured was in great danger. There was not a mere omission to disclose that illness, but a direct and positive denial that it ever took place. I therefore agree that this rule must be made absolute.

[452] BYLES, J. I am of the same opinion. I think those words in the fourth condition,—“in case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void,”—interpreted by the decision of the House of Lords in *Anderson v. Fitzgerald*, 4 House of Lords Cases, 484, clearly mean this, that, if any statement contained in either of the documents referred to be inconsistent or irreconcilable with the facts, whether it be material or immaterial, the policy is void. I forbear, in common with the rest of the court, from expressing any opinion as to the answers to the questions contained in the proposal. In his answer to the fourth question in the personal statement, the assured in effect says, “I never had since infancy any disease requiring confinement.” Clearly that is not an omission, but a positive negation of the illness at Birmingham. But, in his subsequent answers, the assured goes on to say,—“I was confined to the house or bed for a week about one year ago; and my medical attendant on that occasion was Dr. Roper.” He thus introduces one exception, viz. the illness at Birkenhead in December, 1855, leaving the general negation of the Birmingham illness still remaining. That statement is untrue; and upon this ground the defendants are entitled to a verdict on the plea relating to the untruth of the statement.

Rule absolute.

[453] CLARKE v. DICKSON. May 2nd, 1859.

[S. C. 28 L. J. C. P. 225; 5 Jur. N. S. 1029; 7 W. R. 443. Applied, *Edgington v. Fitzmaurice*, 1885, 29 Ch. D. 482.]

An action will lie against a director of a mining company for false and fraudulent representations contained in a prospectus issued with his sanction, although the language might be susceptible of a meaning which would make it not literally untrue: and it is not necessary that the representations should have been made directly by the defendant to the plaintiff; it is enough that they are contained in a document which is meant to be circulated amongst the class of persons who are likely to be deceived by it. Nor is it any defence to such an action, that the false representations contained in the prospectus were not the sole inducement to the plaintiff to buy shares in the concern.

This was an action for false representations in a prospectus of a mining company.

The first count of the declaration stated that the defendant was a promoter and director of a certain company or association of persons having a capital stock divided into shares, and professing to be constituted and managed upon the cost book principle,

and which was called "The Welsh Potosi Lead and Copper Mining Company," and which was formed for the purpose of working certain lead and copper mines situate in the county of Cardigan; and the defendant was interested in and desirous of having the shares of the said company subscribed for and taken, and the amount of such shares paid up; and thereupon the defendant, in order to induce and procure the plaintiff to subscribe for and take certain shares of and in the said company, and to pay up the amount thereof respectively, falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that he, the defendant, and the other directors of the said company, had, on behalf of the said company, given or appropriated, or agreed to give or appropriate, 5000 paid-up shares in the said company, and 5000*l.* in money, to the proprietor of the lands and property in and upon which the said mines were situated, in consideration of his making over to the said company all the right and interest to which he was entitled in the said mines, and the plant, buildings, and property thereon or therewith connected; whereas, in truth and in fact, as he the defendant well knew, he the defendant and the said other directors had, on behalf of the said company, given or appropriated, or agreed to give or appropriate, [454] a much smaller sum in money, and a much smaller number of shares, to such proprietor, in respect of the matters aforesaid, and the residue of the said 5000 shares and of the said 5000*l.* in money had been given and appropriated to the defendant and another promoter and director of the said company for their own use and benefit, and without any value or consideration whatsoever: And the defendant, for the purpose aforesaid, also falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that he the defendant and the other directors of the said company had on behalf of the said company made advantageous arrangements for the purchase of the lands and property in and upon which the said mines were situated, and had agreed that five sixths of the purchase-money should be received in paid-up shares of the said company, and the remainder in cash, and that the price so to be paid was the fair and proper price for the said lands and property, and that the said lands and property were of that value; whereas, in truth and in fact, as he the defendant well knew, the persons with whom such arrangements had been made, and from whom the said company were to purchase the said lands and property, were the defendant himself and one of the other directors of the said company, and no other person, and such purchase and all the arrangements made in reference thereto were wholly collusive, and were made and entered into for the private benefit of the defendant and the said other promoter and director, and the said arrangements were extremely disadvantageous to the company, and the price so agreed to be given far exceeded the fair price and true value of the said lands and property: And the defendant, for the purpose aforesaid, falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that the same lead and [455] copper mines to be so worked by the said company were the said lead and copper mines which had been described by one William Waller, in a book published by him in the year 1698, and which mines so described by the said William Waller were of very great extent, richness, and value; whereas, in truth and in fact, as he the defendant well knew, the said lead and copper mines to be worked by the said company were not the same as the said mines described by the said William Waller, and were situate at a considerable distance therefrom, and were of very inferior extent, richness, and value to those so described by the said William Waller: And the defendant, for the purposes aforesaid, and in order to induce the plaintiff to believe that the said company was in a thriving condition, and the shares thereof were in demand and of value, also falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that, out of the 5000 shares in the capital of the said company which it was proposed to issue in the first instance, a considerable portion had been already subscribed for and taken, and part of the purchase-money paid; whereas, in truth and in fact, as the defendant well knew, a very small portion only of the said 5000 shares had at that time been subscribed for, and no part of the purchase-money thereof had at that time been paid: Averment, that the plaintiff, believing and relying on the said representations, was induced to and did subscribe for and take from time to time certain shares in the said company, which shares were in fact of no worth or value whatsoever, and become and continue the holder thereof, and pay certain deposits, calls, and instalments of the purchase-money thereof.

The second count stated, that the defendant was such promoter and director as in the first count mentioned, and was interested and desirous of having the [456] shares of the said company subscribed for and taken, and the amount thereof paid up; and thereupon, after the making of the representations in the first count mentioned, and after the plaintiff had subscribed for and while he was the holder of certain shares in the said company, and before he had fully paid up the amount of the same, he the defendant, in order to induce the plaintiff to subscribe for and take certain other shares of and in the said company, and to pay up as well the amount of such other shares as the part remaining unpaid of the amount of the said first-mentioned shares, did, as a director of the said company, fraudulently prepare, present, and publish, and cause to be prepared, presented, and published, for, at, and to certain general meetings of the shareholders in the said company, certain false and fraudulent accounts, balance-sheets, reports, and statements, whereby it was made to appear to such general meetings that the said company, and the affairs and prospects thereof, were in a thriving and flourishing condition, and that dividends of 10 per cent. might and could properly and fairly be declared and paid to the shareholders of the said company from and out of the profits realized by the said company in and by the working of the said mines during the respective half-years immediately preceding such general meetings respectively, and sent and caused to be sent such accounts, balance-sheets, reports, and statements to the plaintiff, and fraudulently caused to be declared and paid to the plaintiffs and others dividends out of the funds and moneys of the said company in respect of their shares in the said company at and after the rate aforesaid; whereas, in truth and in fact, and as he the defendant well knew, the said company and the affairs and prospects thereof at the time of the preparing, presenting, and publishing of the said accounts, balance-sheets, [457] reports, and statements respectively, and the declaration of the said dividends respectively, were in a bad and unsatisfactory condition, and no such dividends ought to have been or could have been declared out of the profits of the said company during the said half-years respectively, and such dividends were not bona fide, and were as to all or some of the shareholders in the said company paid out of the capital moneys of the said company, or by paid-up shares, and not out of the revenue or profits of the said company: Averment, that the plaintiff, believing and relying on the said accounts, balance-sheets, reports, and statements, and believing the said dividends to be bona fide, and to have been really paid out of profits as aforesaid, was induced to and did subscribe for and take certain other shares of and in the said company, which shares were in fact of no worth or value whatsoever, and pay certain deposits, calls, and instalments of the purchase-money thereof, and also pay certain further calls and instalments by and upon the shares previously held by him: And, by reason of the premises above mentioned, he the plaintiff not only lost all the moneys which he paid upon all the above-mentioned shares, and never derived any benefit or advantage therefrom, but was also compelled, by reason of his being the holder of the said shares respectively, to pay certain large sums of money as a contributory, upon the winding-up of the said company, for the payment and discharge of the debts and liabilities thereof. Claim, 4000l.

The defendant pleaded,—first, not guilty,—secondly, to the first count, that the plaintiff was not induced to and did not subscribe for and take the said shares, and become the holder thereof, and pay as therein mentioned, believing and relying on the representations in that count mentioned,—thirdly, to the second count, that the plaintiff was not induced to and did not sub-[458] scribe for and take the said shares and pay as in that count is alleged, believing and relying as therein is alleged. Issue thereon.

The cause was tried before Crompton, J., at the last Summer Assizes for the county of Cardigan. The evidence was as follows:—The plaintiff was a surgeon and apothecary at Over Darwin; the defendant was a colonel in Her Majesty's service, and one of the directors of a mining company called the Welsh Potosi Lead and Copper Mining Company. The action was brought to recover compensation for certain alleged false and fraudulent representations contained in a prospectus issued by the directors, whereby the plaintiff was induced to purchase shares which turned out to be valueless and entailed upon him considerable liabilities as a contributory on the winding-up of the concern.

The prospectus, which was issued in September, 1853, was as follows:—

“The Welsh Potosi Lead and Copper Mining Company, Cardiganshire,

“On the Cost-Book system,

“which limits the liability of shareholders.

“Capital £100,000, in 20,000 shares of £5 each,

“Of which 2l. will be payable on or about the 17th of January, 1854, and no further call will be made until the expiration of three months from that date.

“*Directors.*

“E. Bates, Esq., Boundary Road, St. John's Wood.

“James Burt, Esq., Briar House, Stoke Newington.

“S. A. Dickson, Esq., Grafton Street, Berkeley Square.

“J. S. Orton, Esq., Upper Hamilton Terrace.

“T. W. Wilkinson, Esq., 26 Gresham Street, London.

“John Williams, Esq., Middleton Place.

[459] “Robert Campbell, Esq., Jermyn Street, St. James's.

“T. Gibbs, Esq., 36 Tavistock Place, Russell Square.

“With power to add to their number.”

[Then followed the names of the bankers, solicitors, stock-brokers, and auditors.]

“*Pursuer and Manager.*

“T. W. Wilkinson, Esq.

“*Offices, 26 Gresham Street, London.*

“This company is formed for the purpose of effectually working and developing the Esgair-hir and Esgair-fraith Lead and Copper Mines, commonly known as ‘The Welsh Potosi,’ situated midway between Aberystwith and Machynlleth, Cardiganshire, at a distance of nine miles from the shipping port of Aberdovey, where vessels of 300 tons burthen can load alongside; and to which there is a good road (the greater portion of which leading from the mines was made a few years back, at a cost of at least 1000l.), whereby the company will be enabled to convey the ores to the port at a moderate cost.

“The setts are very extensive, being about two miles long and one broad, comprising a territory of mineral ground between 1400 and 1500 acres in extent: and the lodes, which are champions, are of very large dimensions, equal in size and strength to any in the principality, and extend upwards of one mile in length.

“The property is held for a term of twenty-one years, under a lease granted by Pryse Loveden, Esq., at a royalty of 1-14th, with a covenant for renewal for a further term of twenty-one years at the same royalty.

“These mines are some of the oldest on record, and have been partially worked at various periods, but never properly developed to any depth, as will be seen by referring to the annexed plan of the property.

“Some idea may be formed of their value by a re-[460]ference to the annexed extracts and small plan taken from a work (in the British Museum) published in 1698, by W. Waller, Esq. (the then steward of these mines), wherein he asserts that ‘The Great Lead vein is 11 feet wide, and 7½ feet in pure ore, and which he had no doubt would increase to 11 feet in ore as it descends:’ and, after shewing the various workings and expenses of these mines, he goes on to state ‘that 40,000l. was refused for one moiety.’ He also asserts that ‘Sir Hugh Middleton was enabled out of the profits (viz. 2000l. per month) arising from the mines in Cardiganshire to project and carry out so great an undertaking as the New River from Ware to London,’ and that one Mr. Thomas Bushell, by his ingenuity also in working these mines, did amass so large a sum as to be able to clothe the whole of the King's army.’

“A few years since, houses or barracks for about two hundred miners, with counting-house, smith's shop, powder, fuel, and store-houses, and cottage for enginemen,

were erected upon the property at a very considerable outlay, and are in a good state of repair, and fit for immediate use.

"The machinery consists of a 40 feet water-wheel, 4 feet breast, working a line of 1½ inch iron rods 600 fathoms long, fitted with iron rollers or wheels fixed to oak bearers, and connected with the principal shafts, in one of which are 20 fathoms of 10-inch pumps, and also 10 fathoms somewhat smaller, reaching to the bottom of the mine; and in the other shaft are 24 fathoms of 10-inch pumps, also two double-horse whims for raising the ore, three pairs of powerful iron crushers, one fluted and two plain, connected with a 22 feet water-wheel, 3 feet breast, with jiggers, dressing-floors, and five large reservoirs, at a convenient distance for working the above machinery, and dressing the ores when raised: thus enabling the company at once to [461] carry on extensive mining operations. The cost of sinking the shafts, driving the levels, forming reservoirs, constructing roads, erecting buildings, and machinery, is estimated as having amounted to not less than 50,000*l.*, of which the present company will have the full and immediate benefit.

"The directors have visited and inspected the mines, and have had the same carefully examined and surveyed by engineers and practical miners of considerable experience, to whose reports they beg to refer; and therefore, both as directors and shareholders, have the greatest confidence in recommending this undertaking to the public as a most promising and profitable investment."

[Then followed a report made by Messrs. Johnson & Son of their assay of specimens taken from different parts of the mine.]

"The directors have the satisfaction to inform the public that they have made advantageous arrangements for the purchase of the whole of this valuable property, and have agreed that five-sixths of the purchase-money shall be received in paid-up shares of the company, and the remainder in cash: (see cost-book rules annexed).

"The directors have also come to the determination of establishing this company with so large a capital, from the peculiar nature of these mines. The large extent of mineral ground over which they have obtained the right of working, and the very small extent to which any of the lodes have hitherto been developed, have induced them to suppose that by the employment of a large capital a better opportunity may be afforded of more fully developing these valuable mines, and obtaining a large return to the shareholders.

"The directors propose, however, in the first instance, to issue 5000 shares only to the public: but, should further capital be found necessary for the de-[462]-velopment of the mines, the existing shareholders will have the preference in the issue of shares.

"A considerable portion of the capital has already been subscribed, and a part of the purchase-money paid. Active operations have been commenced at the mines; and it is expected that in a month or six weeks the engine shafts will have been pumped free from water, and a considerable quantity of ore raised.

"The directors do not consider it necessary to enter into any calculation of the probable profits which may arise from these mines. The present value of mines in the county of Cardigan is a sufficient evidence of the result which may be expected, and amply proved by an inspection of the share-list, shewing the present value of the shares in such mines as the Lisburne, 1*l.* 15*s.* per share paid,—present value 22*s.*; Cwymstwith, 60*l.* paid,—present value, 190*l.*; East Daren, 2*l.* paid,—present value, 105*l.*; and Goginan, 8*l.* paid,—present value, 20*l.*

"Further information may be obtained, specimens of the minerals inspected, and orders for leave to inspect the mines furnished, upon application to T. W. Wilkinson, Esq., the managing director, 26 Gresham Street, London."

The rule referred to was as follows:—"That the said 5000 paid up shares, together with 5000*l.* in money, shall be appropriated to the proprietor in consideration of his making over to the company all the right and interest to which he is entitled in 'The Welch Potosi Lead and Copper Mines,' together with all the valuable plant, machinery, buildings, implements, tramways, and other property and articles now in and upon the said mines."

It appeared that the mines in question had some years since been demised by Mr. Pryse Loveden to one Williamson, who, not finding the speculation successful, [463] in 1847 ceased to work them. Subsequently the working of the mines was

resumed by one Davies, under an arrangement with Williamson, Davies having obtained from Mr. Pryse Loveden a promise to grant a lease to him on the determination of Williamson's interest, in 1861. In the year 1853, one Wilkinson, who had inspected the mines, was desirous of forming a company for the purpose of working them. He accordingly purchased Williamson's interest under the lease, together with the plant, machinery, &c., for 1000*l.*, and Davies's contingent interest for 200*l.* more, and an allotment of a small number of shares in the proposed company. Wilkinson also obtained from Mr. Pryse Loveden the promise of a lease of the mines, machinery, &c., on the expiration of Williamson's term: for which, however, he was to pay no premium, but only a royalty. Whilst these arrangements were pending, Colonel Dickson became associated with Wilkinson in the scheme, and advanced the greater part of the money which was paid to Williamson and Davies for their interest in the mines: and Wilkinson and the defendant proceeded to form a company for the purpose of working them, of which company the defendant and Wilkinson were two of the directors, the latter being also purser. An arrangement was afterwards made between Wilkinson and Colonel Dickson and the other directors of the proposed company, that the interest which Wilkinson had thus acquired in the mines and the proposed lease from Mr. Pryse Loveden, should be purchased by the company for 5000*l.* in money and 5000 paid up shares. This arrangement was carried out, and, pursuant to a previous agreement between them, a moiety of the money and shares was handed over to the defendant. All this occurred before the issuing of the prospectus.

There never was any personal communication between the plaintiff and the defendant: but the former, having seen the prospectus, and relying upon the statements contained therein, and upon the assurances of his broker, Mr. Lofthouse (who, it appeared, had been employed by the directors to use his influence in promoting the success of the scheme), that the speculation was a promising one, bought a number of shares, which, upon the concern proving unsuccessful, became wholly worthless, and entailed upon him considerable liability. The plaintiff swore that he would not have bought the shares, but for the statements contained in the prospectus.

On the part of the defendant it was submitted that the action was not maintainable, inasmuch as there was no personal representation of any kind made by the defendant to the plaintiff; and that, assuming that the statements contained in the prospectus were untrue, and that the defendant was shewn to be an assenting party to its publication, the plaintiff could not recover unless those false statements were the sole inducement to the plaintiff's becoming the purchaser of shares. It was also insisted that the statements contained in the prospectus as to the purchase of the mines was perfectly consistent with truth.

The learned judge, in summing up the case to the jury, told them, that, if the prospectus was issued to the public with the sanction and assent of the defendant, and contained statements which were false to his knowledge, he was liable to the plaintiff, if, acting upon the faith of it, he sustained damage therefrom; that, if such false statements in the prospectus were some of the inducements which led the plaintiff to purchase shares in the adventure, the existence of other inducements, such as the broker's recommendation, would not interfere with the plaintiff's right to sue the defendant; that, to render the defendant liable, they [465] must be satisfied that he was guilty of moral fraud in the transaction, that the representations complained of were false to his knowledge, and that the plaintiff sustained damage therefrom; and that it was for them to say in what sense the word "proprietor" was used in the prospectus, and whether it was used in the sense imputed to it in the first count of the declaration.

The jury returned a verdict for the plaintiff, damages 1600*l.*

John Evans, Q. C., in Michaelmas Term last, in pursuance of leave reserved to him at the trial, obtained a rule calling upon the plaintiff to shew cause why the verdict should not be reduced by the sum of 500*l.*, being the price of the shares purchased by the plaintiff from Lofthouse: or for a new trial, on the ground that the verdict was against the weight of evidence, "and that the judge misdirected the jury in not telling them that the proof did not support the second supposed fraudulent representation in the declaration mentioned, because there was no evidence whatever that the defendant or any one else had alleged that the proprietors of the lands and property in and upon which the mines were situate had agreed that part of the purchase-money should be received in paid-up shares: and also that the judge should have directed the jury,

that, as between the plaintiff and defendant, there was no personal fraudulent representation made by the latter to the former, and therefore that in point of law the action was not maintainable."

H. Allen, F. Lloyd, and G. B. Hughes, now shewed cause. The plaintiff complains of false and fraudulent representations contained in the prospectus issued by the directors of this company (of whom the defendant was one), whereby he was induced to purchase shares [466] which turned out to be worthless. The jury by their verdict have found that those representations were false, and have affirmed the defendant's complicity in the fraud. It is said that there was no evidence of any personal representation made by the defendant to the plaintiff. But that is not necessary: it has been decided in numerous cases that a prospectus is an undertaking to all into whose hands it may come. Thus, in the recent case of *Scott v. Dixon*, 29 Law J., Exch. 62, n., which was an action against one of the directors of the Liverpool Borough Bank for false representations contained in a report published by the bank, Lord Campbell says: "Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company: and I have no doubt that the directors in the present case knew that this particular report would a few hours after its publication be in the hands of all the share-brokers in Liverpool, and that it would be acted on by those who had or wished to have dealings with the bank. But, moreover, we have here the positive evidence that it was to be bought by any person who wished to become a purchaser of shares, and it thus came into the hands of the plaintiffs, and the plaintiffs by the perusal of it were induced to buy shares in the bank. I have, therefore, no doubt whatever that the allegation in the declaration that that representation was made to the plaintiffs, is most completely established: and the damages given are no more than the damnification which they have suffered in consequence." *Bodford v. Bayshaw*, 29 Law J., Exch. 50, 4 Hurlst. & N. 538, is an authority to the same effect. There, the defendants and others forming the board of management of a joint stock company, for the purpose of getting the shares of the company inserted in the official list of the Stock-Exchange, through their [467] secretary, untruly represented that two thirds of the scrip had been paid upon. The shares being in consequence of that representation inserted in the official list, the plaintiff, knowing the requirements of the Stock-Exchange, on the faith that two thirds of the scrip had been paid upon, purchased shares in the company. The jury having found that the representation was made fraudulently, it was held that the defendant was liable to the damages sustained by the plaintiff, although the representation was not made to him directly. Pollock, C. B., lays down the rule thus,—“Generally speaking, a false and fraudulent statement must be made with a view to deceive the party who makes the complaint, or, at all events, to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended. There must always be evidence that the person charged with the false statement and the fraudulent conduct had in his contemplation the individual making the complaint, or, at all events, that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing.” Then, the allegations in the declaration are fully borne out by the statements in the prospectus respecting the property, and the persons from whom it was obtained. If the plaintiff was induced to buy the shares by the representations contained in the prospectus, the mere circumstance of other inducements also in some degree operating upon his mind, can make no difference.

John Evans, Q. C., Grove, Q. C., and Giffard, in support of the rule. The objection that there was no personal representation by the defendant to the plaintiff is undoubtedly removed by the cases of *Scott v. Dixon* and *Bodford v. Bayshaw*. The point as to the mis[468]-direction, however, still remains. The material fraud alleged is, that the defendant, in order to induce and procure the plaintiff to subscribe for and take shares, “falsely and fraudulently represented to the plaintiff that he the defendant and the other directors of the company had on behalf of the company given or appropriated 5000 paid-up shares in the company and 5000l. in money to the proprietor of the lands and property in and upon which the said mines were situated, in consideration of his making over to the company all the right and interest to which he was entitled in the said mines, and the plant, buildings and property thereon:” and that “the defendant and the other directors of the company had on behalf of the

company made advantageous arrangements for the purchase of the lands and property in and upon which the said mines were situated, and had agreed that five-sixths of the purchase-money should be received in paid-up shares of the said company, and the remainder in cash, and that the price so to be paid was the fair and proper price for the said lands and property." This is not a correct statement of the representation contained in the prospectus,—the word there used being "proprietor" only, not, as in the declaration, "proprietor of the lands and property in and upon which the said mines were situated." Now, Wilkinson was the proprietor of the interest in the mines and plant: therefore, the statement in the prospectus aptly pointed to him; and there was no misrepresentation,—or, at all events, none such as that charged in the declaration. The learned judge ought to have told the jury that there was no evidence of the misrepresentation as to the land. There was no falsehood at all, if Wilkinson is assumed to be the proprietor. [Byles, J. The plaintiff was induced to believe that the directors had acquired the property by purchase from the owner of the [469] fee, not from one of their own body. Cockburn, C. J. Is it likely that the plaintiff would have bought shares if he had known the real facts of the transaction?] The charge against the defendant here is, that he has wilfully made, or been party to the making by others, of a false and fraudulent representation, not that he concealed something which it was convenient that the plaintiff should know. Then, as to the evidence. [Cockburn, C. J. The learned judge who tried the cause intimates to us that he is not dissatisfied with the verdict.]

COCKBURN, C. J. I am of opinion that this rule must be discharged. Looking to the prospectus issued by the directors of this company, of whom Colonel Dickson was one, it seems to me to be impossible not to come to the conclusion that there was misrepresentation. The prospectus states that "the property is held for a term of twenty-one years under a lease granted by Pryse Loveden, Esq., at a royalty of one fourteenth, with a covenant for renewal." Then, in another part, it is stated, that "the directors have the satisfaction to inform the public that they have made advantageous arrangements for the purchase of the whole of this valuable property, and have agreed that five-sixths of the purchase-money shall be received in paid-up shares of the company, and the remainder in cash." The effect of that plainly is this,—it is a representation to the public, that, whereas the property in question was held under a lease, the directors had made arrangements for the purchase thereof from the lessee who at that time was entitled to the interest in the mine. Now, the lessee of Mr. Pryse Loveden was Mr. Williamson: and he had in point of fact made over his interest in the lease to Wilkinson, whom we find associated with the defendant at the time of the issuing of the pros-[470]-pectus. The sum paid by Wilkinson for Williamson's interest was 1000*l.*; and the price agreed to be paid by the directors, who were thus purchasing from two of their own body, was 5000*l.* in money and 5000 paid-up shares. This, therefore, was an important misrepresentation,—first, as to the party from whom the mine was purchased,—secondly, as to the amount of the consideration paid for it; and that it was one which was calculated to exercise a material influence upon the minds of persons who became shareholders is too plain to admit of doubt. That being so, the only question is, whether the declaration sufficiently states the ground of complaint. On the part of the defendant it is said that the fraud charged in the declaration is, that the directors represented that they had agreed to give and appropriate 5000 paid-up shares in the company and 5000*l.* in money to "the proprietor of the lands and property in and upon which the said mines were situated, in consideration of his making over to the company all the right and interest to which he was entitled in the said mines," &c.; whereas the prospectus contains no such representation,—the word there used being "proprietor" only, which, it is said, means proprietor or person having the interest in the mine, who was Wilkinson. Looking, however, at the whole declaration, it seems to me that the prospectus may fairly admit of the construction there put upon it: it means, the person who then had the interest in the mine, and who was capable of conveying that interest to the company. If so, the matter was properly left to the jury. At all events, it seems clear that this was mere matter of variance, which, if any application had been made to the judge to nonsuit, would have been amended, if thought necessary, by striking out the word "lands": and it is open to us to amend now. The substantial gravamen is, that the plaintiff was in-[471]-duced to take shares by the representation that the property had been purchased at the price mentioned from the person having the lease

of the mine and plant, when in truth the contract which the lessee had he had parted with to one of the directors for a very insignificant sum. It seems to me that there is no ground for saying that there was any misdirection in omitting to tell the jury that there was no evidence to support the plaintiff's case : and that there is no ground for finding fault with the verdict.

The rest of the court concurring,
Rule discharged.

CHIDELL AND OTHERS v. GALSWORTHY. April 19th, 1859.

A., in consideration of a debt due from him to B., granted and assigned to B., for securing that or any future debts, "all the fixtures and fittings, household furniture, stock in-trade, chattels, and effects in and about the premises of A., and which were more particularly mentioned in the schedule thereto, and all the right and interest of A. thereto : " and, for the more effectually securing the payment of the said debt and other moneys and interest, A. thereby authorized and empowered B., his executors, &c., to enter into and upon the said premises of A., whether acquired subsequently to the date of the deed, and not legally passing under it, or previously thereto, which before the satisfaction of that security should at any time be upon the said premises, in the name or names of A., his executors or administrators, or otherwise, to make and perfect any assignment, transfer, or delivery thereof to any agent or trustee for B., his executors, &c., or to a purchaser, or otherwise : " —Held, that, under this deed, A. was justified in seizing after-acquired property of B., upon premises built subsequently to the date of the instrument.

This was an interpleader issue to try whether certain goods seized by the sheriff of Surrey on the 1st and 9th of February, 1859, under a *fi. fa.* at the suit of Galsworthy, upon a judgment recovered by him against one John Wood, were at the time of the seizure the property of the plaintiffs.

The cause was tried before Wightman, J., at the last Assizes at Kingston, when it appeared that John Wood, the execution-debtor, being indebted to the [472] plaintiffs in the sum of 278*l.* for goods sold and delivered, executed to them the following bill of sale :—

"This indenture, made the 24th of September, 1859, between John Wood, of Heath End, near Farnham, in the county of Surrey, beer-retailer, of the one part, and John Chidell the elder, John Chidell the younger, and Edward Chidell, of Aldershot, grocers and provision-merchants, carrying on business under the style or firm of John Chidell & Sons, of the other part : Whereas, the said John Wood is indebted to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, in the sum of 278*l.*, and it has been agreed that the payment of the same, together with all other moneys which shall from time to time become due from the said John Wood to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, with interest thereon respectively, shall be secured in manner hereafter mentioned : Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the premises, the said John Wood doth hereby, for himself, his heirs, executors, and administrators, covenant with the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, and assigns, that he the said John Wood, his heirs, executors, or administrators, will immediately upon demand thereof in writing signed by or on behalf of the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors or administrators, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, being delivered to or left for him or them at his or their last known place of abode, or upon any premises where the said John Wood shall be carrying on business, pay or cause to be paid to the said John Chidell the elder, John Chidell the younger, and Edward [473] Chidell, or the survivor of them, his executors, administrators, or assigns, or their or his partner or partners (or other the person or persons for the time being constituting the said firm), the said sum of 278*l.* ; and also such other moneys as for the time being shall be owing from the said John Wood to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors or administrators, or their or his partner or partners, or other the person or persons for the time being constitut-

ing the said firm, on any account whatever, with interest at five per cent. per annum, such interest on the said sum of 278l. to be calculated from the day of the date of these presents, and on such other moneys from the time or respective times at which, according to the terms of any contract, the usual course of credit, or otherwise, the same shall become due: and that, in the mean time, and until such payment of the said 278l. and such other moneys as aforesaid, he the said John Wood, his executors and administrators, will pay unto the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors, administrators, or assigns, or their or his partner or partners, or other the person or persons for the time constituting the said firm, interest on the said sum of 278l. and such other moneys respectively, at the rate of 5l. per cent. per annum, by equal half-yearly payments: And this indenture further witnesseth, that, in further pursuance of the said agreements, and in consideration of the premises, the said John Wood doth hereby grant and assign unto the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, and assigns, all the fixtures and fittings, household furniture, stock-in-trade, chattels, and effects in and about the premises of the said John Wood situate respectively at [474] Heath End, near Farnham aforesaid, and Knapp Hill, near Woking, and which are more particularly mentioned in the schedule hereto; and all the right and interest of the said John Wood thereto. To hold, receive, and take the same unto the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, and assigns, as their own property and effects: and, for the more effectually securing the payment of the said sum of 278l. and such other moneys and interest aforesaid, he the said John Wood hereby authorizes and impowers the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, his executors, administrators, and assigns, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, to enter into and upon the said premises of the said John Wood, whether acquired subsequently to the date of these presents, and not legally passing under the assignment, or previously thereto, which before the satisfaction of this security shall at any time be upon the said premises, in the name or names of the said John Wood, his executors or administrators, or otherwise, to make and perfect any assignment, transfer, or delivery thereof to any agent or agents, trustee or trustees, for the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors, administrators, and assigns, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, or to a purchaser or purchasers, or otherwise: provided, that, in case the said John Wood, his executors or administrators, shall pay to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, the sum of 278l. and such other moneys and interest aforesaid at the times and in the manner hereinbefore [475] appointed for payment of the same respectively, then the grant and assignment hereinbefore mentioned shall be void: And it is hereby agreed and declared, that, if default shall be made in payment of the said sum of 278l., or such other moneys as aforesaid, or any part thereof, at the times and in manner hereinbefore provided, it shall be lawful for the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, his executors, administrators, and assigns, and their or his partner or partners, or other the person or persons for the time being constituting the said firm, to take possession of the said chattels and effects hereby assigned, or any of them, and to sell the same, and also such other chattels as aforesaid, or any of them respectively, by public auction or private contract, upon such conditions and generally in such manner as the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors, administrators, or assigns, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, shall think fit, with power to buy in the said chattels and effects or any of them at any sale or sales, and to resell the same, without being responsible for any loss occasioned thereby, and to give valid discharges for the purchase-moneys of any effects which may be sold. And, for the better enabling the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, and the executors or administrators of such survivor, and their or his partner or partners, and other the person or persons constituting the said firm, to obtain and keep possession of the said chattels and effects in case of such default as aforesaid, the said John Wood hereby irrevocably licences and impowers

the said John Chidell the elder, John Chidell the younger, and Edward [476] Chidell, and the survivor of them, and the executors and administrators of such survivor, and their or his partner or partners, and other the person or persons for the time being constituting the said firm, and their or any of their agents, to enter, and, if necessary, break into and upon the said premises in which the said chattels and effects shall be, to seize and remove or otherwise convert the said chattels and effects: And it is hereby agreed that the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, and the executors or administrators of such survivor, and their or his partner or partners, and other the person or persons for the time being constituting the said firm, shall stand possessed of the moneys or money arising from any sale or conversion of the said chattels and effects, in trust, in the first place, to pay and satisfy all costs and expenses of the said sale or sales and incidental to these presents, and then to pay and discharge all moneys and interest intended to be secured by these presents; and, subject thereto, in trust for the said John Wood, his executors, administrators, and assigns: Provided always, that, until default as aforesaid, the said John Wood, his executors, administrators, or assigns, may possess, use, and enjoy the said chattels and effects without any disturbance or interference by the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, or assigns. In witness whereof, the parties aforesaid have hereto set their hands and seals the day and year first above written.

“The schedule above referred to.

“Effects at Heath End. Bar,—6-pull engine, pipes, and taps, counter and fittings, shelves, and partitions, 6 dozen pots, 4 dozen glasses, table. Parlour,—mahogany table, 24 Windsor chairs. Coffee-room,—window [477] board, 3 tables, seats, scales and weights. Kitchen,—3 coppers and fittings, 5 coffee-boilers, table, kitchen-utensils. Tap-room,—2 tables and seats. Stable,—poney and cart, corn-bin, wheelbarrow, and ladder, and sundries. Club-room,—9 tables, 15 forms, stage. Bed-rooms,—6 bedsteads, bedding, 2 washhandstands, 11 cane-bottomed chairs, 1 table. Booth,—tables, bar seats, and fittings, stock of ale and porter. Effects at Knapp Hill,—wooden felt-covered hut, 18 bedsteads and bedding complete, all tables, forms, mugs, glasses, sundries, wooden partitions, &c.”

Default having been made by Wood, the plaintiffs entered under authority of the bill of sale, and seized the goods of Wood, as well after acquired as those in his possession at the date of the instrument, including goods in a portion of the premises which had not at that time been built.

On the part of the defendant it was submitted that nothing passed by the bill of sale except the goods mentioned in the schedule; and that the power to seize goods afterwards coming upon the premises was limited to substituted goods, and did not extend to all after-purchased property.

The learned judge directed a verdict to be entered for the plaintiffs, reserving the defendant leave to move.

W. Pearee, accordingly, now moved to enter a verdict for the defendant. The question is whether the goods not enumerated in the schedule to the bill of sale passed to the plaintiffs by that instrument. [Willes, J. They certainly did not pass by it; but the question is, whether the property did not vest in the plaintiffs by the seizure made under the authority of the bill of sale.] In *Lunn v. Thornton*, 1 C. B. 379, it was held that a grant of goods which are not in exist [478] ence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view after he has acquired the property therein. [Willes, J. The decision in *Lunn v. Thornton* is founded on the maxim “Nemo dat qui non habet.” But Tindal, C. J., suggests “whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff, as they should be acquired by him and brought on the premises, in satisfaction of the debt.” That was acted upon in *Comahee v. Eccles*, 10 Exch. 298, which was followed by *Hope v. Hayley*, 5 Ellis & B. 830. And all these cases were cited and adopted in the recent case of *Carr v. Allat* in the Exchequer, 27 Law J., Exch. 385, where it was held, that, when on the face of an assignment of personality it is plain that it was intended to operate as a continuing security, and to apply to property afterwards acquired, and substituted for that which was originally

assigned, it will, if the words are capable of such a construction, be so applied: and where in such a case the deed was found capable of such a construction, although rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed.] In the case last referred to, the deed contained an express power to take possession of all crops on after-taken land; and therefore Martin, B., says "it is immaterial whether they were on land in his occupation at the time of the deed or not." [Cockburn, C. J. Do not the words of this instrument import, "Go and seize and sell or deal with the property as your own?" The plaintiffs did seize. Does not that vest the property in them?]

[479] COCKBURN, C. J. Upon the authority of the cases referred to, I am of opinion that all the goods passed to the plaintiffs under and by virtue of the authority given to them by the deed. I therefore think there should be no rule.

CROWDER, J. The authorities are quite conclusive. It has been attempted to distinguish this case on the ground that the goods here seized were not substituted property, but after-acquired. I do not see that that makes any difference. The authority given by the instrument is precisely the same as to both. The subject has been under the consideration of all the courts; and nobody has ever suggested a distinction between substituted and after-acquired goods.

The rest of the court concurring,
Rule refused.

[480] NICHOLLS AND OTHERS *v.* ROSEWARNE. May 7th, 1859.

[S. C. 28 L. J. C. P. 273; 5 Jur. N. S. 1266; 7 W. R. 612.]

Quere, whether a mining company on the cost book principle is a "public company" within the meaning of the 1 & 2 Vict. c. 110, s. 14, so as to make shares therein liable to be charged with a judgment-debt?—An order under the statute having been made by a judge at Chambers,—the court confirmed it, on the ground that by setting it aside they would preclude the judgment-creditor from taking the opinion of a court of appeal.—Quere, whether one who has sold his shares in such a company, and whose vendee has accepted the transfer, but has not caused it to be registered, is a person having shares "standing in his name in his own right" within the statute?

On the 11th of February, 1859, an order was made by Willes, J., under the 14th section of the 1 & 2 Vict. c. 110 (*a*), charging Rosewarne's interest in ten shares in a certain company called the East Wheal Russell Mining Company of which Rosewarne was entered as proprietor, with a judgment recovered against him in this court at the suit of the plaintiffs. It appeared that the company was formed on the cost-book principle: that Rosewarne on the 28th of January sold the shares in question to one Hallett, who duly paid him the price, receiving from him the usual notice to the purser to enter Hallett's name in the cost-book as the proprietor of the shares in lieu of Rosewarne: and that Hallett accepted the transfer by signing the no-[481]-tice; but that he did not send it to the purser for registration until the 12th of February,

(*a*) Which enacts "that, if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment-creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment-creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment-debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

when the purser, having been previously served with the judge's order, declined to enter it, and consequently the shares still remained in the name of Rosewarne.

An application having afterwards been made to Williams, J., to rescind the order of Willes, J., on the ground that a cost-book mining company was not a "public company" within the statute, and that Rosewarne was not at the time of the order the beneficial owner of the shares in his own right, the learned judge declined to interfere, but directed that the application should be made to the court.

Collier, Q. C., accordingly applied for a rule to rescind the order of Willes, J.

Lush, Q. C., and Gibbons, shewed cause in the first instance. The objections to the order of Willes, J., are two,—first, that this is not a "public company" within the meaning of the 14th section of the 1 & 2 Vict. c. 110,—secondly, that, if it is, the shares were not at the time the order was made, standing in the defendant's name in his own right. The first point came under the consideration of Parke, B., and Alderson, B., in the year 1850, in a case of *Graham v. Connell*, 19 Law J., Exch. 361, respecting shares in the Union Bank of London, a bank carrying on business under a deed of settlement, and entitled to sue and to be sued by a public officer under the 7 & 8 Vict. c. 113, s. 47. Those two learned judges were not quite agreed as to whether or not the bank was a public company; but, the matter being doubtful, they declined to set aside the order. Application was then made to the court of Chancery,—see the case of *Macintyre v. Connell*, 1 Sim. N. S. 225,—and Lord Cranworth, V. C., made the order. In the [482] course of a very elaborate judgment, his Honor says: "The real difficulty which arises on this subject is, that the statute speaks of a public company, whether incorporated or not, as being something known to the law, that is, as if it were something that, when mentioned, a court could be able to say, *ex cathedra*, this is or is not a public company; there being, in truth, no such legal term known as a public company not incorporated. Then, the question is, there being no legal meaning to the term 'public company,' how are the courts to interpret that term? because it would be very improper to say that the legislature has used words that could have no meaning; and therefore we must find out as well as we can what meaning is to be attributed to the words. And that must be ascertained by discovering what the state of the law was in respect of companies at the time of the passing of the act of the 1 & 2 Vict.; because it must be with reference to the then state of the law that the question is to be determined, and not by the state of the law at any subsequent period; although, perhaps, what passed subsequently may enable us to interpret in some degree the language used by the legislature upon a prior occasion; but it cannot of itself give us the meaning. Now, it appears to me, having looked at the matter with some care, that there were only two classes of companies to which, by possibility, at that time the expression 'public company not incorporated' could apply. What was the state of the law at that time? In the first place, there was the statute of 7 G. 4, c. 46, for the better regulating co-partnerships of certain bankers in England. It is well known, that, prior to that act, nowhere within Her Majesty's dominions, at all events nowhere in England, could more than six persons associate together for the purpose of carrying on the banking business. The Bank of England were interested in sus-[483]-taining that privilege upon their part. They had advanced large sums of money to the government; and their remuneration, in part, was, that they were to have a monopoly in banking, except where there should not be more than six partners. But that monopoly was restricted, in the first instance, by the act to which I have alluded, the 7 G. 4, c. 46, which enabled partnerships consisting of more than six members to carry on the business of bankers, provided only they carried it on sixty-five miles or upwards from London, and provided they carried it on under the restrictions and in the manner provided by that act of parliament, which were that they should make regular returns of the names of all the partners to the stamp office. That list was to be amended from time to time when a transfer of the shares took place; and they were to return to the stamp-office the names of two or more persons to be called the public officers of the bank; and parties having claims on the bank were not to sue the bank as a partnership, according to the ordinary rule of common law, but were to sue the public officers instead; and those public officers were, for the purposes of the act, to represent the company. On the other hand, if the co partners had any claims against third parties, they were to sue, not in the ordinary mode in which partnerships, independent of that act, would sue, but by their public officers; and the effect of a

judgment against a public officer was, that you might take out execution under it against the partnership and every member of it. Now, that act was in force, at the time of the passing of the 1 & 2 Vict. c. 110. In the year 1833, the 3 & 4 W. 4, c. 98, was passed, and by it banking co-partnerships consisting of more than six members were permitted to carry on business in London or within sixty-five miles of it, on certain terms. Now, let us see whether there were [484] any other companies to which the language of the 1 & 2 Vict. c. 110 can be held to apply. There certainly was one other class of trading companies: because, by the act which was passed in 1837, viz. the 7 W. 4 & 1 Vict. c. 73, intituled 'An act for better enabling Her Majesty to confer certain powers and immunities on trading and other companies,' power was given to the Crown, not to incorporate partnerships, but to grant them privileges which by common law would not be granted, viz. to trade under liabilities to a certain degree restricted." His Lordship read the 2nd, 3rd, 4th, and 5th sections of the statute, and proceeded,—“And then, just in the same way as in the Bank Act of the 7 G. 4, a return is to be made to certain public officers of the names and addresses of the members, and the number of the shares they respectively hold; and that is to be renewed from time to time as changes take place. That, therefore, was a class of companies not incorporated, or which might come under the description of public companies not incorporated, which existed at the time of the passing of the 1 & 2 Vict. c. 110. Now, these two classes are, as far as I can discover, the only two classes of companies not incorporated to which the act of Victoria can by possibility refer. I mean banking companies existing under the 7 G. 4, c. 46, and the subsequent extension of that act by the act passed in 1833, the 3 & 4 W. 4, c. 98, and companies associated for trading or other purposes, having letters-patent granted by the Crown, but not incorporated. And it seems to me, if those were the only two classes, that either one or both of them must be the class or classes to which the act of Victoria refers. That the words 'public company not incorporated' would be applied properly to the last class, seems to me to admit of no doubt. The names of the members, and of the officers who are to sue and [485] be sued on behalf of the company, the objects of the society, and many other particulars relating to it, are to be inrolled, and thereby made public. Therefore it seems to me to be impossible to doubt that such a company would be a public company not incorporated within the meaning of the act of Victoria. Then, the question is whether there is any real distinction whatever between that which I assume must be taken to be a public company not incorporated within the meaning of the act of the 1 & 2 Vict. and a public company acting under the law that was then in force, viz. the 7 G. 4, c. 46, and the 3 & 4 W. 4, c. 98. I see no real distinction between the two. It is true that the banking company was not a banking company carrying on its operations under the provisions of a charter or letters-patent not incorporating them: but all the attributes of publicity appear to me to exist as well in the one case as in the other. The names of the members are all inrolled, with their addresses, and every transfer of interest is inrolled: and the company is to sue and be sued by public officers, just in the one case as in the other; and it seems to me, that, in the absence of a legal definition, I must treat the one case to be just the same as the other,—that that which was the attribute of publicity in a trading company quasi incorporated under the statute of the 7 W. 4 & 1 Vict. c. 73, was the attribute of publicity in the case of a banking partnership. In my opinion, the two cases are undistinguishable: and, the one being, as I assume it must be taken to be, within the meaning of the act of the 1 & 2 Vict., the other must be taken to be so likewise. It does not appear, that, in the case of banking companies, it is at all necessary that their capital should be divided into shares; although, with respect to companies quasi incorporated under the 7 W. 4 & 1 Vict., it is necessary that their capital should be divided [486] into shares, and should be transferable. But, in point of fact, the capital of the Union Bank of London is divided into shares. I do not, however, think I can hold the Union Bank of London to be a public company within the meaning of the 1 & 2 Vict. merely because its capital is divided into shares. In my opinion, it would have been a public company if its capital had not been so divided: because the attributes of publicity would exist, viz. the return of the names and places of abode of the members from time to time, and of the officers appointed to sue and be sued on behalf of the company. There was another ground that was relied upon as shewing that this was a public company, which I confess I do not pay much attention to. It was this, that the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110, defines

a joint-stock company to be a company the shares in which are transferable without the express consent of all the members; and it was said that this company is a joint-stock company according to that definition: and so I think it is: but I do not rely upon that: I advert to it merely to shew that the observation did not escape me." [Crowder, J. Was it brought to the attention of Lord Cranworth there, that there were such things as cost-book mines?] It does not appear from the report, which notices the argument very shortly. [Byles, J. It certainly was not necessary to the decision to confine it to the two cases mentioned. Willes, J. This might become a public company under the 19 & 20 Vict. c. 47, by registration.] The attributes of publicity which Lord Cranworth speaks of,—that the register of shareholders is prepared by the public officer, and that the public have ready access thereto to see who are partners,—do not exist here: the affairs of the company are kept as secret as those of any ordinary partnership. It is true there is in the cost-book a rule [487] authorizing the transfer of shares without the consent of the co-adventurers: but it is open to them at any time to rescind that rule. [Byles, J. In the 6 G. 1, c. 18, s. 18 (the Bubble Act), the word "public" seems to have been used with reference to the assignable quality of the shares without the assent of the co-adventurers: the act appears to have been levelled at companies as to which it was open to any of the public to take shares.] 2. Before the order was served, the defendant had parted with his shares. [Willes, J. The purser had no notice of the sale, and therefore the transfer of the shares was not completed at the time the order for charging them was served. The case of *Watts v. Porter*, 3 Ellis & B. 743, is against you on this point. There, A., an attorney employed by B. to invest money, lent it to C. on an agreement by which C., as a security, charged his interest in 5000l. Consols, standing in the names of trustees in trust for C. A. neglected to give notice to the trustees. A judgment-creditor of C., subsequently to this loan, obtained a charging order under the 1 & 2 Vict. c. 110, s. 14, notice of which was given to the trustees. C. took the benefit of the Insolvent Act. B. brought an action against A. for negligence: and, on the trial, the judge directed the jury, in estimating the damages, to consider, that, as no notice had been given to C.'s trustees of the charge in favor of B., the subsequent charge created by the judge's order had priority over it. On a rule for a new trial, it was held by Lord Campbell, Wightman, J., and Crompton, J., that the direction was correct, and that the judgment-creditor had the same rights as a subsequent incumbrancer without notice, and was therefore to be preferred in equity to A. But Erle, J., dissented, holding that the judgment-creditor had only those remedies which affected what at the time of the charging order remained the [488] property of the judgment debtor. It is true that that case has been the subject of comment in the Equity courts; and that Lord Cranworth and Lord Justice Turner in *Beavan v. The Earl of Oxford*, 6 De Gex, M'N. & G. 507, 524, 532, and Sir John Romilly, M. R., in *Kinderley v. Jervis*, 25 Law J., Chan. 538, incline to agree with the judgment of Erle, J.] In *Whitworth v. Gaugain*, 3 Hare, 416, it was held that an equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor and obtained actual possession of the lands by writ of elegit and attornment of the tenants. In *Fuller v. Earle*, 7 Exch. 796, the defendant, a registered owner of shares in a joint-stock company, deposited the certificate with E. as a security for money advanced. The defendant afterwards borrowed a further sum from an insurance-office, and executed to C., one of his sureties on that occasion, with the consent of E., who was the other surety, a transfer of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. The money not having been paid to the insurance-office, they claimed it from E. and C., when C. requested the insurance-office to transfer the shares into his name, which they refused to do, on the ground that they had been previously served with a judge's order nisi to charge the shares: and it was held that the shares were properly charged as shares standing in the defendant's name "in his own right," within the meaning of the 1 & 2 Vict. c. 110, s. 14. [Willes, J. That is quite right. A person coming in under a charging order would be in the position of one having an elegit, and desiring to pay off a mortgage.] In *Morris v. Manesty*, 7 Q. B. 674, it was held by the court [489] of Queen's Bench that a pension granted by the East India Company could not be charged under this statute. [Byles, J. You are asking us, in effect, to overrule the decision of the court of Queen's Bench in *Watts v. Porter*. Crowder, J. And in

a matter where there is no appeal. I must confess I am disposed to agree with Lord Cranworth: but I think we must leave you to your remedy in Equity.] The court of Equity will doubtless adhere to the opinions already expressed in *Beavan v. The Earl of Oxford* and *Kinderley v. Jervis*. To make this order absolute, will in effect be to take one man's money to pay another man's debt. [Willes, J. This is a mere proceeding *ad fundandum jurisdictionem*. Can we say that the creditor shall not have the opportunity of taking the opinion of a court of error?]

CROWDER, J. I am of opinion that the order of my Brother Willes must be confirmed. There are two grounds upon which it has been contended that the order is invalid,—first, that it is made for the purpose of charging shares in a company which is not a “public company” within the meaning of the statute,—secondly, that the order charges shares which are not standing in the name of the defendant in his own right. 1. This is the case of a mine worked on the cost-book principle, the shares in which may, if so arranged, be disposed of without the assent of the co-adventurers; and in this respect it certainly differs from an ordinary partnership. Still it is said that such an association is not a public company. The point is quite a new one, it never having been decided that this peculiar sort of association is either the one or the other. We have been much pressed with the discussions which arose in the case of the Union Bank of London, which first came before Parke, B., and Alderson, B., in the court [490] of Exchequer in *Graham v. Connell*, 19 Law J., Exch. 361, when those two learned judges expressed contrary opinions: the former thinking that the bank was a public company within the statute, the latter that it was not: but both expressly said the case was a very fit one for discussion, and they declined to set aside the order. The matter then came before the court of Chancery,—*Macintyre v. Connell*, 1 Sim. N. S. 225,—where the decision was that it was not a public company. In the course of a very elaborate judgment, Lord Cranworth gives a very strong intimation that in his opinion there are only two classes of unincorporated companies to which the 14th section of the 1 & 2 Vict. c. 110 could refer. The case, however, of a cost-book mine was not brought to his attention. On that point, therefore, I am not disposed to express any opinion. 2. As to the other point, it is said, that, assuming that this is a public company within the statute, the shares in question are not chargeable, because they had previously been disposed of by the judgment-debtor. It is true they have been sold, but the sale has not been completed, and the shares are still standing in the name of the person sought to be charged. This raises the very question which came before the court of Queen's Bench in *Watts v. Porter*, 3 Ellis & B. 743. That is a decision which has not been reversed. It has been the subject of comment in the court of Chancery: and Erle, J., differed from the other three judges. It is unnecessary to say which was right, though several of the equity judges have leaned to the opinion of the dissentient judge. But we cannot act upon that view, for that would deprive the party of the opportunity of appealing against our decision. I give no judgment upon the matter: but, in order that the party may not be concluded, I prefer making the rule absolute.

[491] WILLES, J. I am entirely of the same opinion, and for the same reasons. This is not a proceeding in which the rights of the parties can be finally determined. By refusing to set aside the order, we leave the matter open. If, on the other hand, we set the order aside, we should be finally deciding the matter so far as the particular creditor is concerned, by depriving him of the opportunity of raising the question so as to obtain the opinion of a court of appeal. The point cannot be said to be by any means clear. Another court might take a view different from ours: and possibly the House of Lords might not agree with us. We might, therefore, by our decision against the creditor, deprive him of the right to resort to the highest tribunal to correct our judgment. Consequently, I think the proper course for us to take is that which was taken by this court in the case of *Davies, Dem., Lowndes, Ten.* 7 M. & G. 762, 8 Scott, N. R. 539. The 3 & 4 W. 4, c. 27, by a section (s. 36) framed in general terms, enacted that no writ of right should be brought after a given day. The tenant in that case being dead, the demandant, in defiance of the above statute, sued out a new writ by journeys accounts. It was a writ which was clearly and obviously issued in violation of the act of parliament. So thought Lord Lyndhurst (see 7 Scott, N. R. 217), and so thought this court: but, inasmuch as it was possible that the court of ultimate appeal might entertain a different view of the matter, they concurred in declining to set the writ aside. Tindal, C. J., in giving judgment, stated his opinion

in these words,—"The Lord Chancellor, after expressing an opinion, in terms which it is impossible to misunderstand, that the writ of journeys accounts was not maintainable by law upon the ground of the first objection" (that writs of right having been abolished from and after the 31st of December, 1834, by the statute 3 & 4 W. 4, c. 27, no writ [492] of right could now be issued under any circumstances), "declined however to act upon that opinion by quashing or setting aside the writ, on the ground that the same objection might be raised upon the record in an ulterior stage of the proceedings, where it might become subject to the review of the ordinary tribunals of the law. The same objections have been raised before us upon this application to set aside the count and all the judicial process that has been issued in this court; and, after hearing a learned argument in support of and against such application, we have come to the same conclusion as that adopted by the Lord Chancellor, and for the same reason, viz. that, by analogy to the course of practice adopted in this and the other courts of Westminster Hall, we ought not, upon a summary application, from which there can be no appeal, to decide upon a question which involves the final determination of the rights of the parties, where the very same question may be raised on the record, and thereby not only the judgment of this court may be obtained, but, if thought necessary, the judgment of the court of ultimate appeal." The same rule of procedure was acted on by Lord Wensleydale and Alderson, B., in *Graham v. Connell*, upon the construction of this very section: and I think we ought to follow the same course, unless we are clearly satisfied that the question raised is frivolous, and that it would be merely vexatious to allow such an order to stand. Whether the application is frivolous or not depends upon two questions; the first of which is, whether the words "public company" in the 1 & 2 Vict. c. 110, s. 14, are used in the popular sense, or mean a company incorporated by act of parliament or by charter. It is impossible to say that that is not a question which is well worthy of consideration. And, as to the second point, fully appreciating as I do the learned argument of Mr. [493] Lush and Mr. Gibbons, as to what ought to have been the decision in *Watts v. Porter*, I think we are bound to defer to that case, though it is not impossible that the House of Lords might take a different view of it. Following the rule I have referred to, I think we cannot properly interfere to set aside this order, and that the rule for confirming it ought to be made absolute.

BYLES, J. I also am of opinion that the order of my Brother Willes must be confirmed. The words "public company" import, no doubt, some relation to the public: but the decisions leave it doubtful what that relation should be. It may mean a company the shares in which are open to all the public. It is enough, however, that there is a difference of opinion amongst judges; and therefore the proper course for us to take is, to leave the matter in such a position that the opinion of a court of error may be taken upon it. As to whether the judgment debtor was entitled of his own right to these shares, I offer no opinion. I cannot help saying there is great cogency in the arguments which have been urged by Mr. Lush and Mr. Gibbons; but still there is standing in the way a decision of the court of Queen's Bench in *Watts v. Porter*, 3 Ellis & B. 743, which has not been overruled. This, therefore, seems to me to be a stronger case than that of *Davies, Dem., Lowndes, Ten.* Our proper course will be to confirm the order, and thus give the party who seeks to question it the opportunity of taking the matter to a superior jurisdiction for a final decision.

Order confirmed, without costs.

[494] JOHN MALTASS v. SIDDLE. May 6th, 1859.

[S. C. 28 L. J. C. P. 257; 5 Jur. N. S. 1169; 7 W. R. 449.]

One who indorses a bill as surety is entitled to notice of its dishonor, although it be given for the purpose of raising funds for a company in which he (as well as the holder of it) is a shareholder.

This was an action against the defendant as acceptor of a bill of exchange for 240l. drawn by one William George Maltass at Smyrna, and payable to the plaintiff. The declaration also contained the money counts and a count upon an account stated.

The defendant pleaded, amongst other pleas, a set-off for money payable by the plaintiff to the defendant upon a bill of exchange for 500l., now overdue, drawn and accepted in parts beyond the seas, to wit, at Smyrna, on the 9th of March, 1853, by

M. Lafontaine and one William George Maltass, on behalf of and as agents of the Smyrna Steam Flour-Mill Company, who were the drawers and also the acceptors of the said bill, payable two years after date to the order of the plaintiff, although he had no effects then or afterwards in the hands of the said company, nor any reasonable grounds to suppose he would have such effects, or that they could or would ever pay the said bill, and which said bill was, as between the plaintiff and the drawers and acceptors thereof, wholly without value or consideration, as the plaintiff always knew; and which said bill was indorsed by the plaintiff to one Thomas Jackson, and indorsed by him to the said William George Maltass, and indorsed by William George Maltass to the defendant; and which said bill was, when due, not paid by the acceptors, whereof the plaintiff had notice. Issue.

The cause was tried before Willes, J., at the sittings in London after last Michaelmas Term. The only question was as to the right of the defendant to set off the 500l. bill mentioned in the plea. It appeared that both the plaintiff and the defendant had been holders [495] of scrip in a company or association at Smyrna, called the Smyrna Steam Flour-Mill Company; that, the company being in want of funds, William George Maltass, who was a shareholder and one of the managers of the company, in the early part of 1853 opened a negotiation with the defendant for an advance of 2500l. for the purposes of the company, to be secured by the joint bond of William George Maltass, the plaintiff, and one Thomas Jackson (who was also a shareholder). Subsequently, however, it was arranged, that, instead of a bond, five bills for 500l. each should be given, of which that sought to be set off was one,—being drawn, as alleged in the plea, upon and accepted by the company, and indorsed by the plaintiff to the defendant. The company stopped payment in July, 1853. The bill became due on the 12th of March, 1855; but notice of its dishonor was not given to the plaintiff until the 12th of May. The plaintiff swore, that, when he indorsed the bill, he had every reason to believe that it would be duly paid by the company, and that it was understood that it was to be held as a mere security, and not to be put in circulation.

The learned judge ruled, that, under the circumstances, the plaintiff was entitled to notice of dishonor; and he thereupon directed a verdict to be entered for the amount of the bill declared on and interest,—reserving leave to the defendant to move to enter a verdict for him, if the court (who were to be at liberty to draw inferences) should think the plaintiff was not entitled to notice: the plea to be amended if necessary.

Shee, Serjt., in Hilary Term, accordingly obtained a rule nisi, on the ground that the bill (in the plea mentioned) was drawn and accepted for the accommodation and for the purposes of the plaintiff as well as for those of the drawers and acceptors, and that the plain-[496]-tiff had no recourse against any one else, on its non-payment, and consequently was not damaged by the want of a notice of dishonor.

Huddleston, Q. C., and Bushby, now shewed cause. The simple question is, whether the plaintiff was entitled to a notice of dishonor of the 500l. bill the subject of the set-off. It is clear, upon the facts, that John Maltass, the plaintiff, was a surety only for the payment of the amount of the 500l. bill by the company; and, if so, he was entitled to notice of dishonor. The case of *Bickerdike v. Bollman*, 1 T. R. 405, only decides that one who has no reason to expect that the bill will be paid by the acceptor, and can sustain no prejudice by the want of notice, is not entitled to receive a notice of dishonor. In the notes to that case, in 2 Smith's Leading Cases, 46, it is said: "*Claridge v. Dalton*, 4 M. & Selw. 226, is another strong exemplification of this doctrine. There, the drawer of a bill had no effects in the hands of the drawee, but had supplied him with goods upon a credit, which would not, however, expire till long after the bill would have become due. He was held not to be entitled to notice of its dishonor. 'The case of *Bickerdike v. Bollman*,' said Bayley, J., 'has established, and, I am disposed to think, rightly, that a party who cannot be prejudiced by want of notice, shall not be entitled to require it.'" That would be the case where the drawer knows he has no effects in the hands of the acceptor, and has no chance of having any before the maturity of the bill. "But even," continues the learned author, "in the very cases in which *Bickerdike v. Bollman* has been acted upon, it has been declared that the rule established in that case must not be extended. In *Claridge v. Dalton*, Le Blanc, J., went so far as to regret that any such decision had ever taken [497] place: and see the judgment delivered by Parke, B., in *Carter v.*

Flower, 16 Law J., Exch. 201. Accordingly, it has been settled that the drawer is entitled to notice, though he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee: *Rucker v. Hiller*, 3 Campb. 217, 16 East, 43. So, it was laid down by Lord Eldon, in a case of bankruptcy, — *Ex parte Heath*, 2 Ves. & B. 240, 2 Rose, 141, — that, 'if a bill were accepted for the accommodation of the drawer, and there were nothing but that between them, notice would not be necessary, the drawer being, as between him and the acceptor, first liable: but, if the bills were drawn for the accommodation of the acceptor, the transaction being for his benefit, there must be notice without effects: and if, in the result of various dealings, the surplus of accommodation is on his side, he is, with regard to the drawer, in the situation of an acceptor having effects, and the failure to give notice may be equally detrimental.' And this rule thus laid down by Lord Eldon extends to cases where the drawer has reason to expect that some third party will provide for the payment of the bill: thus, in *Cory v. Scott*, 3 B. & Ald. 619, where the bill was drawn and accepted for the accommodation of the first indorsee, the drawer was held to be entitled to notice: and the same point was decided in *Norton v. Pickering*, 8 B. & C. 610, 3 M. & R. 23." If the plaintiff had received notice of dishonor, he might have had recourse against the property of the company. [Cockburn, C. J. It is enough for you to shew that John Maltass was not the person primarily liable to provide funds for the bill. We will hear what is to be said on the other side.]

Thrupp (with whom was Shee, Serjt.), in support of the rule. The evidence shews that the plaintiff was [498] primarily liable on the bill in question, and therefore not entitled to notice. He was a shareholder, and substantially interested in the advance made to the company for repayment in part of which the bill was given. [Cockburn, C. J. The defendant's own evidence shews that he treated the plaintiff as a surety only.] The true test is, not whether or not the party is primarily liable, but whether he has any remedy over against any other person. In *Cory v. Scott*, Abbott, C. J., says: "It has been held (alluding to *Bickerdike v. Bollman*) that the drawer of a bill who has no effects in the hands of the acceptor, and who has no right upon any other ground to expect that the bill will be paid, is not entitled to notice of its dishonor; and that for this reason, because the facts shew that he must have known that the bill when presented would not be paid. That decision, which substituted knowledge for notice, I have always regretted, because it introduced nice distinctions into the law, instead of adhering to a plain and intelligible rule. This case, however, is very different. The ground for the former decision was, that, if notice had been given, there would still have been no person to be found upon whom the party to whom notice was omitted to be given might call for the money: but here, at least one, and perhaps two persons are in that situation." So, Bayley, J., says: "One test is this, — suppose the drawer to pay the bill, has he any remedy over against a third person? In the case of *Bickerdike v. Bollman*, he had none." The same doctrine is laid down by Parke, B., in delivering the judgment of the court of Exchequer in *Carter v. Flower*, 16 M. & W. 743. Here, the plaintiff had no remedy over, and therefore could not be damaged by the want of notice. [Willes, J. Might he not have had recourse to William George Maltass or to Fontaine? It is submitted he could not: he was equally [499] interested with them in the concern. No notice of dishonor is necessary where the bill is drawn by several persons upon one of themselves. The reason for this is thus given in Byles on Bills, 7th edit. 260, — "Since the acceptor is likewise a drawer, notice of dishonor is superfluous, as the dishonor must be known to one of them, and the knowledge of one is the knowledge of all," — citing *Porthouse v. Parker*, 1 Campb. 82(a). [Cockburn, C. J. There would be a remedy here against the funds of the company.] In *De Berdt v. Atkinson*, 2 H. Bl. 336, A. drew a promissory note payable to B. or order, which B. indorsed, having given no value for it, and knowing that A. was insolvent. In an action by the indorsee against B., it was held that it was not necessary to prove that the note was presented for payment to A. immediately when it became due, or that notice was given to B. of A.'s refusal to pay it. Eyre, C. J., there says, — "As to notice, and the application for payment to the defendant, what did it signify to him when the application

(a) But the learned author adds in a note, — "It may be doubtful how far this rule would hold in the case of a joint-stock company."

was made? It could make no difference to him whether it were made on one day or another; he meant to guarantee the payment of the note, and there was no possibility of any loss happening to him from the want of notice. In this instance, therefore, the general rule fails in its application." And Buller, J., says: "The general rule has been long settled, but it is only applicable to fair transactions, where the bill or note has been given for value in the ordinary course of trade." That case has never been overruled: and it is said to have been followed in the American courts. [Byles, J. Maule, J., in *Sands v. Clarke*, 8 C. B. 751, 760, says that *De Berdt v. Atkinson* has been dissented from, if not [500] distinctly overruled,—referring to the remarks of Chambre, J., in *Leach v. Hewitt*, 4 Taunt. 731, and to the cases of *Brown v. Maffey*, 15 East, 216, and *Cory v. Scott*, 3 B. & Ald. 619. Cockburn, C. J. It appears, that, when the bills were drawn, there was reason for expecting that they would be paid by the company.] That is hardly consistent with the plaintiff's statement that the bills were not to be put in circulation.

COCKBURN, C. J. I am of opinion that this rule should be discharged. The defendant, Siddle, seeks, by way of defence to an action brought against him as the acceptor of a bill of exchange, to set off another bill for 500l. drawn by the administrators of a company called the Smyrna Steam Flour-Mill Company upon themselves, and accepted payable to the order of the plaintiff, John Maltass, and indorsed by John Maltass to one Jackson, by Jackson to one William George Maltass, and by William George Maltass to the defendant. The plaintiff's answer to that set-off is, that the defendant has no right to set-off that bill for 500l., because, upon its being dishonored at maturity, no notice of that fact was given to him. The defendant insists, that, under the circumstances, the plaintiff was not entitled to notice, because he was a shareholder in the company, by whom and for whose use it was accepted, and he was so mixed up with the transaction that the bill was in point of fact an accommodation bill for his benefit. Now, if the evidence had established that the bill was solely matter of accommodation, and for his benefit, then, upon the principle referred to in the course of the argument, it seems, that, inasmuch as the plaintiff could not have been prejudiced by the absence of a notice of dishonor, he could not have resisted the defendant's claim of set-off. It seems to me, however, that the facts altogether fail to establish the proposi-[501]-tion contended for on the part of the defendant. It appears that the company being in want of funds, it was proposed that these should be supplied to a certain extent by certain persons of whom the defendant was one. Not being satisfied with the mere liability of the company, the persons making the advance required the guarantee of John Maltass, the plaintiff. A bond was at first proposed: but ultimately, instead of a bond, it was arranged that bills should be given, one of which was the bill sought to be set-off. It is clear, that, in this transaction, the defendant was dealing with John Maltass in his individual capacity, and not as a member of the company. It follows, then, that, upon the dishonor of the bill, John Maltass, not being primarily liable, was entitled to notice of dishonor, and that, for want of such notice, the bill cannot be made the subject of a set-off against him.

CROWDER, J. I am of the same opinion. The defendant could not establish his set-off unless he could shew a right to sue John Maltass upon the bill without having given him a notice of dishonor. It seems to me to be clear, upon the facts, that John Maltass was entitled to notice. The advance was made upon the five bills for 500l. each, instead of upon the security at first proposed, viz. a bond in which John Maltass and Thomas Jackson were to join as sureties. John Maltass was not a party for whose accommodation the bills were drawn, though he was a holder of scrip in the company. As between themselves, Siddle seems to have dealt with John Maltass in his individual capacity. The latter, therefore, is in the ordinary situation of one not primarily liable on the bill, and consequently was entitled to notice.

The rest of the court concurring,
Rule discharged.

[502] COOPER, WHO HAS SURVIVED TRUSCOTT, v. LAW. May 5th, 1859.

[S. C. 28 L. J. C. P. 282; 5 Jur. N. S. 1263.]

The vestry-clerk of a parish, upon his appointment (by the vestry) to the office, was told that it would be part of his duty to collect the church-rate and poor-rate, and

to apply them as his predecessor had done. In pursuance of these instructions, and in accordance with a practice which had prevailed in the parish for fifty or sixty years, the vestry-clerk applied a portion of the money arising from a church-rate made in the plaintiffs' year of office as churchwarden to the payment of certain parochial charges not legally payable out of the church-rate:—Held, that, inasmuch as one of the churchwardens was aware of the manner in which the money was about to be disposed of,—he having previously filled the office of overseer, and also of auditor of the parish accounts,—and did not object, the two were precluded from suing the vestry-clerk for this misapplication of the rate.—Held, also, that (one of the plaintiffs being a vestry-man) the parish books were admissible in evidence to shew the usage of the parish as to the appropriation of the rates.

The first count of the declaration stated that the plaintiffs, being churchwardens of the parish of Allhallows the Less, in the city of London, at the request of the defendant, retained him, then being the vestry-clerk of the said parish, and the attorney and legal adviser of the plaintiffs as such churchwardens, to collect a certain church-rate therein mentioned, and to lay out and expend for them the said rate in payment of the costs and charges of the necessary repairs and expenses of the church; and alleged for breach that the defendant wrongfully, and without the consent of the plaintiffs, laid out and expended a certain balance of the said rate in and about charges and expenses not lawfully chargeable to church-rate, &c.

There was a count for money received for the use of the plaintiffs, and for money found due upon accounts stated.

The defendant pleaded (amongst other pleas), to the first count,—first, a denial of the alleged retainer,—fourthly, that he laid out and expended the said balance of the rate, and did all that was in that count complained of, by the plaintiffs' leave; and, to the residue of the declaration, never indebted, and payment. Issue.

The cause was tried before Cockburn, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—The plaintiffs Cooper and Truscott were churchwardens of the parish of Allhallows the Less, in the city of London, for the years 1856-1857. The defendant was the [503] vestry-clerk of the parish, having been appointed to that office at a meeting of the vestry in October, 1848. In December, 1856, a vestry meeting was held, at which it was resolved that a church-rate should be made of 1s. 1d. in the pound; the proceeds of this rate, amounting to 277l. 8s. 10d., were received by the defendant; and this action was brought against him to recover a balance of 150l. which it was alleged that the defendant as vestry-clerk had improperly applied in making certain payments not legally chargeable to the church-rate.

It appeared, that, at the time the defendant was appointed vestry-clerk, he was told that he was to collect the poor-rate and church-rate, and to apply them as his predecessor had done: and the parish books were produced, shewing that for the last fifty or sixty years it had been the practice to make the payments now objected to out of the church-rate (some ever since 1793), though properly and legally chargeable on the poor-rate.

Truscott died shortly after the commencement of the action.

On the part of the surviving plaintiff (Cooper) it was submitted that these books were not admissible,—at all events, not those kept before his time. The Lord Chief Justice, however, overruled the objection, holding that the books were admissible for the purpose of shewing that the plaintiff Cooper, who had access to them, and therefore must be presumed to be aware of their contents, knew of and sanctioned the defendant's appropriation of the rate.

Truscott, being in bad health at the time he became churchwarden, had never performed any of the duties of the office: and Cooper had been told by the defendant when he accepted the office of churchwarden that he would have nothing to do; all the duty of the office being in fact performed by himself. Cooper had been [504] a member of the vestry since 1850; he had also filled the offices of overseer and auditor of the parish accounts, in which latter capacity he necessarily became aware of the manner in which the payments in question had been usually made.

On the part of the defendant, it was submitted that there was no evidence of his employment by the churchwardens; and that, if there was, it was upon the understanding that he was to make the payments in the accustomed manner.

His Lordship left it to the jury to say whether, assuming the payments in question to have been improperly made out of the church-rate, the plaintiff Cooper knowing or having the means of knowing the practice which had so long prevailed, and not objecting, must not be taken to have acquiesced in and consented to that course being continued.

The jury found that Cooper knew of and acquiesced by his conduct in the payments: and his Lordship thereupon directed a verdict to be entered for the defendant, reserving leave to Cooper to move to enter the verdict for him, for such sum as the court should direct, if they should be of opinion that he was entitled to recover.

Collier, Q. C., in Hilary Term last, accordingly obtained a rule nisi, on the ground that there was no sufficient evidence of the acquiescence of Cooper in the misappropriation of the sums complained of, and that, even if there had been any such acquiescence, it would not bind the plaintiffs in the action: and also on the ground of the improper reception of evidence.

Montague Smith, Q. C., and Maude, now shewed cause. The case is disposed of by the finding of the jury. The churchwardens seem to have delegated their [505] duties to the vestry; and the vestry appointed the vestry-clerk, with instructions to do the very thing now complained of. There was no retainer of the defendants by the plaintiffs; and, if there was, it was clearly upon the tacit understanding that he was to go on in the old way, and apply the proceeds of the church-rate as he and his predecessor in the office of vestry-clerk had always done. Cooper had himself audited the accounts of previous years, containing these very items. [Cockburn, C. J. Cooper knew that it was the invariable usage to make these payments out of the church-rate, and he took no objection to it, nor intimated any desire that the same course should not be pursued during his year of office. I thought that was abundant evidence that he acquiesced in and sanctioned the particular course of proceeding. And the jury thought so too.]

Collier, Q. C., Prideaux, and Garth, were called upon to support the rule. There was sufficient evidence of a retainer of the defendant by the churchwardens: and that *prima facie* would be a retainer to collect the church-rate and to apply it according to law. [Cockburn, C. J. According to the directions of his employers.] Churchwardens are by the 7 & 8 Vict. c. 101, s. 32, subject to a penalty for wilfully authorizing or making an illegal or fraudulent payment from the church-rate. There was no evidence that the plaintiffs either directly or indirectly authorized the misappropriation of the money. It was the defendant's duty to inform the churchwardens that the application he was about to make of a portion of the rate was a violation of the law. [Cockburn, C. J. Cooper knew that the defendant was about to apply the money as he had always done. Can it be said that it was not done with his acquiescence?] Mere knowledge surely was not [506] enough to charge the churchwardens with an illegal act. [Cockburn, C. J. They had the power to prevent it, but forbore to exercise that power. Cooper was as much bound to know the law as the defendant was.] Assuming that Law had by tacit acquiescence the authority of Cooper for what he did, that would not prevent the two churchwardens from maintaining this action. It is not pretended that Truscott knew anything of what was done. Churchwardens are a corporation for the benefit of the parish: and, if one of them release a debt due to the parish, it will not bar the suit of his companion: *Starkey v. Barton*, Cro. Jac. 234, Yelv. 173. In Dr. Prideaux's *Directions to Churchwardens*, edit. 1835, p. 130, it is laid down, that, "if any one break the church windows, cut down the seats in the church, demolish any part of the walls either of the church or churchyard, or any other way damnieth the church in such particulars as are not of the goods of the church, but are either parts or appurtenances of the freehold; in this case the churchwardens cannot sue in their own names for reparations to be made for these damages, but must bring the action in the name of the minister, to whom the freehold belongs. But, if the damage be done to any of the utensils or goods of the church, in this case the churchwardens are to bring the action in their own names, because the property of all such utensils and goods is in them as a corporation, for the use and benefit of the parish: but in the doing hereof they are to observe two things: the first is, that, being a corporation, they act jointly together; for, neither of them alone is that corporation, but both together, and, consequently, what one doth without the other hath no force in law. For, should one of them alone commence the action in his own name, without joining the name of the other with it,

or, when it is rightly commenced [507] in the name of both, should either of them give a discharge from the action, or from the costs or damages which are recovered upon it, all that is so done is void and null in law, and so it will be in everything else wherein either of them shall take upon him to act alone in his office without the other, except only in presentments." [Willes, J. The plaintiffs are not suing here as churchwardens.] They are suing in respect of rights which they allege they had before they ceased to fill the office of churchwardens. Then, as to the evidence. The parish books were not admissible, unless they were shewn to have come to the possession or control of the plaintiffs. [Cockburn, C. J. The plaintiff Cooper had access to them. He was a parishioner and a vestryman.] He was not a parishioner at the time Law was appointed vestry-clerk. [Byles, J. He was a vestryman at the time of the trial, consequently the books came out of his custody. How, then, can you say that they were not admissible?]

COCKBURN, C. J. I am of opinion that this rule should be discharged. It seems to me to be unnecessary to decide the question first submitted to us on the part of the defendant, viz. as to whether or not he could be considered as the agent of the plaintiffs at all. It is true that he was not appointed vestry-clerk (in which capacity the church-rate was received by him) by the plaintiffs, but by the vestry. I cannot help thinking, that, having collected the rate, if the churchwardens had demanded the money, the defendant would have been bound to hand it over to them; and a question, perhaps a nice one, might have arisen, whether he was not to be considered as their officer or agent. But it seems to me to be quite clear that the payments made by the defendant must be taken to have been payments made on behalf and with the sanction and approbation [508] of the plaintiffs. It seems clear, that, according to the practice of a long series of years, the churchwardens did not take upon themselves the discharge of the duties of their office, but left them to be performed by the vestry-clerk appointed by the vestry; and that for very many years payments which in strictness were not proper to be made out of the church rate, had been made out of that fund. The churchwardens having delegated their duties to the vestry, payments made by the direction of the vestry must be taken to have been made by the direction and under the authority of the churchwardens themselves. But, independently of that, it appears to me that the finding of the jury was well warranted by the facts. The plaintiff Cooper, at all events, knew of and acquiesced in, and so sanctioned, the payments in question being made out of the church-rate. He had been for several years a member of the vestry, and for a still longer period he had been a parishioner. He had filled the office of auditor of these very accounts. He had served the office of overseer, and knew what parochial charges were paid out of the poor-rate, and what out of the church-rate. Payments similar to these had all along been made and carried to the same account. Looking to these facts, and to the further fact of his having free access to the parish books, I think it is impossible to doubt that he knew of these payments and did not prevent their being made. If a person knows that an agent of his is about to apply moneys to a particular use, and chooses to lie by and suffer the payment to be made, I think it may fairly be said *dum tacet loquitur*, and that it has the same effect in law as in justice and honesty it should have. These circumstances seem to me plainly to shew that the finding is right and the defendant entitled to judgment. It has been urged that the knowledge and acquiescence of one churchwarden cannot affect the [509] right of the two to sue. The answer to that was given in the course of the argument, viz. that this is not an action brought to enforce the plaintiffs' rights as churchwardens, but is brought by them in their private capacity, simply because in their public capacity they have no authority to delegate their functions to anybody. As to the reception of evidence, I think the reason suggested by my Brother Byles for receiving the evidence is in itself sufficient, viz. that Cooper, being a member of the vestry, had access to the parish books, and may therefore be taken to have had knowledge of their contents. In addition to that, I think the evidence was receivable as shewing the practice which had prevailed in this parish. The defendant having been appointed vestry-clerk, and being told that he would find his duties in the books of his predecessors, and there being no direct appointment of the defendant by the churchwardens, it must be taken that he was employed by them on the terms upon which he was appointed by the vestry. And, when he is told that he will find his instructions in the books, and those are adopted as the basis of his employment, it seems

to me that the books must be admissible to shew what the instructions were, and what were the terms on which he acted. Upon the whole, I am of opinion that justice and equity and fairness equally concur in requiring that our judgment should be in favor of the defendant.

CROWDER, J. I am of the same opinion. Upon the evidence, it seems to me to be exceedingly doubtful whether there is any contract express or implied to render the defendant answerable to the plaintiffs in this action. The only part of the evidence from which any implication can arise, is, that, when Law asked Cooper to be churchwarden, he told him he would have [510] no trouble, as he (Law) transacted all the business. It seems to me, however, to be very doubtful, particularly when it appears that the defendant was distinctly appointed by the vestry, and to do the very thing he did, viz. to collect and dispose of the church rate as had been done for many years. Acting as vestry-clerk by appointment of the vestry, and receiving his instructions from the vestry, it seems to me to be exceedingly doubtful whether there was any evidence that the defendant was employed by the plaintiffs. But it is unnecessary for us to decide that: for, assuming that he was employed by them, it seems to me that the fourth plea was established, viz. that the payments were authorized by them. Now, what was the evidence to establish that? There was no language expressly used to that effect: but there was very strong evidence to shew that Cooper was well aware of the manner in which the church-rates of former years had been dealt with by order of the vestry, viz. that payments had been improperly made out of that fund. Being aware of that, and knowing how the payments would be made, we must assume that he acquiesced in them. Then it is said that the evidence shewed acquiescence on the part of Cooper only, and not on that of Truscott; and it is said that the latter was necessary also. The ground for that contention is, that there is this peculiarity in the character of churchwardens, viz. that they are a quasi corporation. The answer to that is, that the plaintiffs are not suing as churchwardens. The defendant has been guilty of no breach of duty towards them as churchwardens. The only way it can be put is, that there was a contract by which the defendant was employed as agent of two persons who are churchwardens: but that would not render the defendant responsible as for the breach of a public duty. It only reduces it to the ordinary case of two persons [511] employing a third, and one of them giving him permission or authority to do an act, which would prevent the other from bringing an action. As to the alleged misreception of evidence,—I am glad to find that my learned Brothers are of opinion that the books were properly received, though I must own that I entertain some doubt. The books kept whilst Cooper was a vestryman would clearly be evidence. But, whether those kept before that period would be so, is a matter upon which I do not feel altogether satisfied. Upon the whole, however, I agree with my Lord in thinking that the rule should be discharged.

WILLES, J. I am of the same opinion. Assuming that there was evidence of an employment of the defendant by the plaintiffs, I think that employment is shewn to have been upon terms one of which was that the payments in question should be made as they were made. There was evidence of a course of business for a long series of years: and I think the jury were justified in inferring from that an intention that that course of business should be continued. Assuming that there was an authority from one of the two churchwardens, is there any difference between that and the case of one of two trustees releasing a debt, and one afterwards bringing an action for it? In *Starkey v. Barton*, Yelv. 172, Cro. Jac. 234, it is said by the court, “13 H. 7, 10, is, that, if churchwardens release or give the goods of the church, it is nothing worth; for, the law gives them power to receive a thing for the advantage of the church, but not for the disadvantage.” Therefore, if this were an action by the plaintiffs as churchwardens, I am not satisfied that there is not a good answer to it. But there is another answer, viz. that this is a contract with the plaintiffs individually, the right of action in respect of which [512] would pass to the executors of the survivor. In either view, therefore, I think there is nothing in that point. Then, as to the admissibility in evidence of the parish books,—I think it would be clipping the evidence very close to say that you cannot shew the history of the transaction, which, as it seems to me, these books were. It appeared from them that there was a long course of dealing with reference to payments out of the church-rate; and that Cooper had access to those books. If he was ignorant of the facts disclosed by those books,

he might, when called, have negatived his knowledge of their contents. He did not do so.

BYLES, J. I also think this rule should be discharged. I think it necessary only to say a word as to the disqualification of one of several plaintiffs to sue. I apprehend, that, if one of several plaintiffs is disqualified, his disqualification vitiates the right of his co-plaintiffs to sue, 1 H. 4, 15 a.; *Peruvallock's case*, 5 Co. Rep. 100 b. And further I find that this question arose before the court of Queen's Bench in *Jones v. Yates*, 9 B. & C. 532, 538, 4 M. & R. 613, 621, where Lord Tenterden says: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that, where one of two persons who have a joint right of action dies, the right then vests in the survivor; so that, in this case (if it be held that Sykes and Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act, by alleging his own misconduct." And still more recently has this rule been recognized in *Wallace* [513] v. *Kelsall*, 7 M. & W. 264. There, to an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part-payment in cash and a set-off of a debt due from that one to the defendant: and it was held that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement. Parke, B., there said: "In the case referred to of *Jones v. Yates*, the principle of the decision is, that, if one of the plaintiffs is barred, he cannot recover by joining other plaintiffs in an action to undo his own act." And there is no greater hardship in this than there is in holding a release by one of several plaintiffs a bar to an action by all. For these reasons, it appears to me, that, when it is made out that one cannot sue without committing a fraud, no other person can join him in an action for the same cause. Upon the other grounds, I entirely agree with the opinions expressed by my Lord and my Brother Willes,—not participating in the doubt entertained by my Brother Crowder as to the admissibility of the parish books.

Rule discharged.

[514] HUNTLEY v. WARD. May 11th, 1859.

[S. C. 6 Jur. N. S. 18. Referred to, *M'Quire v. Western Morning News Company*, [1903] 2 K. B. 112.]

The plaintiff's attorney having at his desire written to the defendant demanding payment of an alleged debt, the latter sent a letter to the attorney containing gross imputations upon the plaintiff's character, wholly unconnected with the demand made upon him:—Held, not a privileged communication, although the jury found that the letter was written *bonâ fide*, and negatived malice in fact.

This was an action for a libel contained in a letter addressed by the defendant to the plaintiff's attorney.

The cause was tried before Williams, J., at the second sitting at Westminster in this term. The facts were shortly these:—The defendant being indebted to the plaintiff in the sum of 6l. 10s., the latter caused his attorney to write him a letter threatening to take proceedings against him to recover it. To this the defendant sent an answer addressed to the attorney, containing very gross aspersions on the character of the plaintiff.

On the part of the defendant, it was submitted, upon the authority of *Toogood v. Spying*, 1 C. M. & R. 181, 4 Tyrwh. 582, and *Harrison v. Bush*, 5 Ellis & B. 344, that, assuming the letter to contain libellous matter, the occasion upon which it was written rendered it a privileged communication.

The learned judge thought otherwise, and he left it to the jury to say whether or not the defendant was actuated by motives of malice in writing as he did.

The jury expressed an opinion that the letter was written *bonâ fide* and without any malice in fact; and they returned a verdict for the plaintiff, damages one farthing.

The learned judge certified, under the 3 & 4 Viet. c. 24, s. 2, that the grievance

for which this action was brought was wilful and malicious; but he reserved to the defendant leave to move to enter a verdict for him, if the court should be of opinion that the occasion of the writing rendered the communication privileged.

Cole now moved accordingly. The simple question [515] is whether the letter was not written upon an occasion which fairly brings it within the class of privileged communications. It was addressed to a person who had been employed by the plaintiff to put the law in motion to enforce a demand which the defendant believed to be unjust. In *Togood v. Spyring*, Parke, B., thus lays down the rule,—“In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.” Now, this letter was written by the defendant with reference to the conduct of his own affairs, and in a matter in which his interest was concerned. “In such cases,” says the learned Baron, “the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society: and the law has not restricted the right to make them within any narrow limits.” [Willes, J. If you have any case where such a communication as this has been held to be privileged, I should like to see it.] In *Harrison v. Bush*, 5 Ellis & B. 344, the defendant was an elector and an inhabitant of the borough of Frome; and, after the election was over, he and several other inhabitants of the borough prepared, signed, and transmitted to the Home Secretary a memorial complaining of the conduct of the plaintiff as a magistrate during the election, imputing to him that he had made speeches directly in-[516]-iting to a breach of the peace; that, after reading the riot act, he had sent a man into the streets armed with a bludgeon, and ordered him to strike any person he might meet, indiscriminately; and that he had himself violently struck and kicked several men and women. The memorial alleged that the plaintiff ought not to be allowed to remain in the commission of the peace, and concluded thus,—“Your memorialists, therefore, earnestly pray that your lordship will cause such an inquiry to be made into the conduct of the said Dr. H. (the plaintiff) as your Lordship may think fit; and that, on the allegations contained in the memorial being duly substantiated and verified, your Lordship will feel it to be your duty to recommend to Her Majesty that the said Dr. H. be removed from the commission of the peace.” The jury having found that the defendant acted *bonâ fide*,—it was held that the defendant was entitled to the verdict on not guilty, notwithstanding that the memorial was addressed to a person who had no power to entertain the matter. All the authorities upon the subject of privileged communications are referred to and discussed in an elaborate opinion by Lord Campbell. [Willes, J. That is put upon the ground that the memorialist had both an interest and a duty in the subject-matter of the communication.] *Cooke v. Wildes*, 5 Ellis & B. 328, was not a case of public duty. The onus of shewing malice lay on the plaintiff.

WILLES, J.(a)¹. I am of opinion that there ought to be no rule in this case. Mr. Cole has not complained of the direction of my Brother Williams upon the question whether the letter was libellous or not: nor could [517] he properly have complained of that direction, because whether libel or no libel is equally in civil and criminal proceedings a question for the jury: yet the judge cannot properly withhold from the jury his opinion. The construction of writings in most cases belongs to the court: this is an exception to the general rule; and I quite agree in the propriety of the exception. Every lawyer is well aware, that, although the Libel Act, 32 G. 3, c. 60, applied more particularly to criminal cases, yet there is no distinction in this respect between the law in criminal cases and that in civil (a)²; and that the opinion of the dissentient judge (Willes, J.) in the case of *The King v. The Dean of St Asaph*, 3 T. R. 428, n., is the proper exposition of the law. Then, the jury here have found the letter

(a)¹ The Lord Chief Justice was absent on account of indisposition; and Crowder, J., was presiding at the Central Criminal Court

(a)² See per Littledale, J., in *Bayliss v. Lawrence*, 11 Ad. & E. 925.

to be libellous in the sense of imputing to the plaintiff matter tending to injure his reputation, and to expose him to hatred, contempt, and disgrace. Generally speaking, a writing is libellous if it has that effect. There are, however, certain excepted cases, where a communication is privileged, though *prima facie* libellous. But these are cases where the matter is written in the assertion of some legal or moral duty, or in self-defence, and the thing is done honestly and without sinister motive, and in the *bonâ fide* belief in the truth of the statement at the time of making it. In such cases, no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged, because the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of a private injury. Therefore, upon principles of public policy, such communications are protected. The question is whether the letter in the present case falls within that category. It appears to me that the principle does not [518] apply. There was no legal or moral duty to be discharged by writing a letter to the plaintiff's attorney heaping abuse upon his client. It was not written either in assertion of or defence against any claim; and therefore does not fall either within the principle or within any of the decided cases. As to the authorities which have been cited, —one of course at once assents to the doctrine, that, if the communication would be privileged provided the statement were made honestly and *bonâ fide*, there must be some evidence of sinister motive or untruth to turn the scale, and to take the case out of the privileged class. If that were not so, the privilege would be all but useless. But, to entitle him to the benefit of the rule, it is necessary that the defendant should make out that the circumstances of the publication were such as to bring the case within it. I think in this case the defendant has failed to do that, and therefore there is no ground for disturbing the verdict.

BYLES, J. I am of the same opinion. The libel complained of was contained in a letter written by the defendant to the plaintiff's attorney in answer to a letter addressed to him by the latter demanding payment of a debt alleged to be due to the plaintiff. The letter, however, is not confined to the history of the supposed ground of action, but contains general and gross abuse of the plaintiff, and imputations upon his character. Words of general abuse, if in writing, are actionable, because they tend to bring the party libelled into public hatred and contempt (*a*). There clearly was no legal or moral duty here to justify the defendant in the course he took.

Rule refused.

[519] COOPER v. LLOYD. May 12th, 1859.

The adultery of a wife living apart from her husband destroys her implied agency to bind him by her contracts for necessaries. —And, in such a case, the wife herself is an admissible witness to prove the adultery. —A cause was tried on the last day but two of Easter Term. The court refused to allow a motion for a new trial to be suspended until the first day of Trinity Term, on the ground that the attorney had not had time since the trial to prepare himself with affidavits of surprise.

This was an action to recover the price of necessaries supplied by the plaintiff to the wife of the defendant. The cause was originally commenced in the Lambeth county-court, but was removed thence to this court by *certiorari*.

At the trial before Williams, J., at the second sitting at Guildhall in this term, the defence set up was that the wife had been guilty of adultery, and was living apart from her husband: and to prove this the wife herself was called, and she, after some hesitation, admitted the fact.

To rebut this, the plaintiff called witnesses to prove, that, after the alleged adultery, the defendant had several times visited the wife at the house where she was residing, which was not the place where the goods had been supplied.

On the part of the defendant it was shewn that these visits had reference to a treaty which was pending between him and his wife for a deed of separation, which was ultimately agreed upon and executed.

The learned judge told the jury, that, if the wife had been guilty of adultery, and there had been no subsequent pardon or condonation, the husband would not be liable

(a) See 2 Selwyn's *Nisi Prius*, 12th edit. 1049, et seq.

upon the implied obligation which the law imposes upon him to support his wife when living apart from him either in consequence of his misconduct or by his consent; for, that the implied authority of a wife who is not living with her husband as a part of his family, to charge him for necessaries, is put an end to by the effect of her adultery, unless there has been a subsequent condonation on his part: and he left it to them to say whether they were satisfied that [520] adultery had been committed, and that there had been no condonation, telling them, that, if they were of that opinion, they must find for the defendant.

The jury accordingly returned a verdict for the defendant.

Patchett now moved for a new trial, on the grounds of misdirection, the improper reception of evidence, and that the verdict was against evidence. Before proceeding with his motion, he prayed to be allowed to reserve it until the first day of the next term, on the ground that, the trial having so recently taken place,—viz. on the 10th instant,—he was unprepared with affidavits of surprize, which he otherwise would have had. [Williams, J. The rule of court (a) precludes us from allowing that: you must move upon the materials you have.] The liability of a husband in respect of goods supplied to his wife arises from her implied agency: *Reid v. Teakle*, 13 C. B. 627. In the notes to *Manby v. Scott* (1 Lev. 4, 1 Siderf. 109, 1 Keble, 69, 80, 87, 206, 337, 361, 383, 429, 441, 482, 1 Mod. 124, 1 Ventr. 24, 42, 2 Ventr. 155), in 2 Smith's Leading Cases, 385, it is said: "The principle affirmed in *Manby v. Scott*, and followed up by the later authorities, is to be found so far back as Fitzherbert,— 'A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or [521] servant to buy and sell for him; and so for the contract of his wife, if he giveth authority to his wife, otherwise not.' F. N. B. 120 G. The principle thus laid down by Fitzherbert, and acted on by the majority of the judges in *Manby v. Scott*, viz. that a wife's power, where it exists, to bind her husband, is as his agent, by virtue of an express or an implied authority derived from him, has never since been shaken. Consequently, wherever it is sought to charge a husband on his wife's contract made during the coverture, the only question is,—as where it is sought to charge him with the contract of any other agent,—had the wife in the one case, or the agent in the other, authority, either express or implied, to make such a contract!" The learned judge, therefore, should have left the question of agency to the jury; and, notwithstanding the adultery (assuming it to have been proved), there was abundant evidence to establish an implied agency, inasmuch as the husband was shewn to have been visiting at the house where the wife lived, and so giving his sanction to the supply of the goods. Thus, in *Norton v. Favan*, 1 Bos. & P. 226, where the defendant, knowing his wife to have committed adultery, allowed her to remain under the marital roof, with children bearing his name, his liability was held to continue, though he himself had separated from her. [Willes, J. There, she remained the apparent mistress of his establishment. That was, as Buller, J., observed, an anomalous case. The cases on this subject are divisible into two classes,— "1. Where the contract made by the wife was made while living with her husband. 2. Where the contract made by the wife was made while living away from her husband. The principle which governs cases ranging themselves under the former class is, that, during cohabitation, there is a presumption arising from the very circumstances of the cohabitation, [522] of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate." There, the husband is bound by acts done by his wife within the ordinary scope of her agency. *Norton v. Favan* falls within that class. "The next class of cases is that in which the wife, at the time of making the contract, is living apart from the husband. We have just seen, that, during the cohabitation, the presumption is, until the contrary be shewn, that she has authority to contract for necessaries. But, in the class of cases we are now considering, the presumption is the other way; and it is on the creditor to shew that she is living apart from the husband under such circumstances as give her an

(a) Hilary Term, 1853, which provides, that, "no motion for a new trial, or to enter a verdict or nonsuit, motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term, or after the expiration of the first four days of the ensuing term when the cause is tried out of term, unless entered in a list of postponed motions by leave of the court."

implied authority to bind him. And this is just; for, when a tradesman sees two persons living together as man and wife, he naturally infers that there is that degree of confidence and affection subsisting between them, which would induce the one not to contract without authority, and the other to confer such authority for necessary purposes. But, when a tradesman finds a woman living alone, the presumption is quite the other way; and he must naturally suppose that she is either a feme sole, or, if he knew her to be married, that she is not on such terms of confidence and affection with her husband as could induce him to entrust her with authority to bind him by her contracts." 2 Smith's Leading Cases, 286, 288. In the first class of cases, it is immaterial whether the woman be his wife or not. The present is a totally different case. Where the separation is caused by the wife's misconduct, she carries with her no implied authority to bind her husband.] Then, the wife's evidence was not admissible to prove the adultery. [Willes, J. Did you object to the question?] No. [Byles, J. Why do you say her evidence was inadmissible?] Because her answer would criminate her. In [523] Taylor on Evidence, § 695, 3rd edit. vol. i, p. 626, it is said: "The admissions of a wife cannot be received in evidence for her husband in any suit between him and a stranger, unless, perhaps, in the single event of their constituting part of the *res gestæ*. An instance of their admissibility on this ground is afforded by the case of *Walton v. Green*, 1 C. & P. 621, where, in an action of assumpsit for goods supplied to a wife who had been turned out of doors by her husband, the defendant, evidence was admitted, in support of a defence which relied on her previous adultery, that she had confessed her guilt to a third party; as it appeared to have been partly in consequence of this confession that she had been put away by her husband. This case is here noticed more out of respect for the eminent judge [Abbott, C. J.] who decided it than because it appears to rest upon any sound principle of law. The question was, not whether the husband had reason to suspect his wife's fidelity, but whether she had in fact committed adultery; and, to allow her admissions to establish that fact, and thus screen her husband from the claims of a stranger, would seem to be directly opposed to the rule of law which rejects hearsay evidence." [Byles, J. The admissions of the wife rest upon a totally different principle (a).] The effect is the same.

WILLES, J. (b). With regard to the matters of law relied upon in support of this motion, we are prepared at once to dispose of the rule. With regard, however, to that part of the motion which prays for a new trial on the ground that the verdict is against evidence, we will speak to my Brother Williams. The fact of this being [524] the last day of the term, and of only one day having intervened between the trial and the motion, ought not, I think, to induce us to depart from the rule of court (Hilary, 1853, r. 50), which requires that all applications to set aside verdicts shall be made within four days after the trial, in term. We should be overwhelmed with applications to postpone motions if we were to permit this rule to be relaxed. That disposes of the matter so far as regards a new trial on the ground of surprise, the learned counsel not being furnished with the necessary affidavit. The next ground upon which the motion rests is an alleged misdirection; and that arises thus, --This being an action against a husband for necessaries supplied to his wife, and it appearing that at the time of the supply she was living apart from him, my Brother Williams told the jury, that, if the wife had been guilty of adultery, and there had been no subsequent condonation the husband would not be liable upon the implied obligation which the law imposes upon him to support his wife when living apart from him either in consequence of his misconduct or by his consent; for, that the implied authority of a wife who is not living with her husband as a part of his family, to charge him for necessaries, is put an end to by the effect of her adultery. That seems to have been the substance of the direction; and it appears to me that it is perfectly good law. Mr Patchett contends that it was not sufficiently shewn here that the wife was living apart from her husband, and that there was evidence of authority which should have been submitted to the jury, apart from the conjugal relation. But I think he wholly failed to shew any evidence of such authority. All that appeared, was, that the husband had visited his wife, but not at the place where the goods were

(a) See Taylor on Evidence, 3rd edit. p. 628, § 698.

(b) Cockburn, C. J., was absent on account of indisposition, and Crowder J., was presiding at the Central Criminal Court.

supplied. This was a circumstance from which, if unexplained, the jury might [525] have inferred condonation. These visits, therefore, must have been thought by them not to have been visits for the purpose of restoring the wife to the society and confidence of her husband, but to have been made altogether alio intuitu. It would be a gross abuse and perversion of justice, when the law lays down that which is a substantial and honest position, that the implied authority of the wife to bind her husband by her contracts is put an end to by her adultery, for us upon slight circumstances pointing equally to one conclusion as to the other, to hold that the jury have come to a wrong one. It appears to me that this disposes of the plaintiff's first proposition: there was proof of adultery, and no condonation. For this there is abundant authority: see, amongst others, the cases of *Gorier v. Hancock*, 6 T. R. 603, and *The King v. Flintan*, 1 B. & Ad. 227, and the expressions of the judges in *Atkins v. Pearce*, ante, vol. ii, p. 763.

Then, assuming that the direction of the learned judge was right, it is said there was no such evidence of adultery on the part of the wife as ought to have been left to the jury. That rested upon her own confession of her guilt. It is undoubtedly true that such a confession may be the result of collusion between the husband and wife for the purpose of defeating the plaintiff's claim. That consideration has been allowed to weigh in some of the cases. Thus, in divorce cases, the confession of the wife has always been held an insufficient ground of judgment. But I am not aware that that principle has ever been introduced into the common law courts. The statute (14 & 15 Vict. c. 99) which permits a wife to give evidence for or against her husband has no such exception, though it has in respect of criminal proceedings: s. 3. And, if there were any force in the objection, it goes rather to the value than the admissibility of the evidence. With regard [526] to the privilege suggested, that is the personal privilege of the witness: it gives no right to the plaintiff,—more especially where no objection was made at the time.

As to the remaining question, viz. whether the verdict was against the evidence, we will consult my Brother Williams, and communicate the result to the officer of the court.

BYLES, J., concurred.

The rule was afterwards refused.

MASON v. HADDAN. May 12th, 1859.

[Followed, *Randell v. Thompson*, 1876, 1 Q. B. D. 248.]

Quere, whether the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), applies to an agreement to refer existing matters in difference to arbitration, or is limited to contracts containing stipulations for the reference of future differences?—By a memorandum it was agreed that all matters in difference in relation to the W. Railway, between A. and B., and between A. and the W. Railway Company, and also between C. and B., and between C. and the W. Railway Company, whether retrospective or prospective, present or future, should be referred to an arbitrator. This memorandum was signed by B. for himself, and also as agent for the company. A formal deed of reference was afterwards prepared and executed by B., but by none of the other parties:—Held, that, assuming the agreement to be within the 11th section of the Common Law Procedure Act, 1854, at all events it was not one which the court ought in its discretion to enforce by staying the proceedings in an action brought by B. against A. in respect of a matter in difference included within it.—That office-copies of affidavits upon which a rule is moved have not been taken, is not an objection which this court will entertain after the argument has been allowed to commence.

On the 10th of July, 1856, the following agreement was made and signed by the defendant and also by the plaintiff for himself and for the railway company therein mentioned, whose solicitor he then was:—

“Memorandum, 10th July, 1856. It hath this day been agreed that all matters in difference relative to the Westminster Terminus Railway and the Clapham [527] and Norwood Railway, between John Coope Haddan and Nathaniel Mason, and John

Coope Haddan and the Westminster Terminus Railway Company, and also between Price Pritchard Baly and the said Nathaniel Mason, and the said Price Pritchard Baly and the same company, whether retrospective or prospective, present or future, shall be referred to T. Webster, Esq., as the arbitrator mutually agreed on between the parties in difference, with full powers in relation thereto, and particularly as to mutual releases, such releases to include, if required, all contingent payments and benefits: the necessary arbitration-bond or agreement or bonds or agreements to be settled by Mr. Webster, or a conveyancer appointed by him, as counsel for and on behalf of all parties, and to be duly signed and executed by the parties in difference.

“NATHANIEL MASON, for self.

“N. MASON, for the WESTMINSTER TERMINUS RAILWAY COMPANY.

“I undertake to have the seal of the company affixed hereto forthwith.

“N. MASON.

Shortly after the execution of the agreement Haddan was informed by Mason that the company's seal had been affixed thereto. Mr. Webster being a shareholder in the company, one Baxter was subsequently appointed arbitrator in lieu of him. A formal agreement of reference was afterwards prepared by a conveyancer (Mr. Bullar), and executed by Mason, but neither by Haddan nor by the company.

After many ineffectual attempts by Haddan to get the company to execute the deed of reference, and a long correspondence between the solicitors for the respective parties, the present action was brought by Mason to recover the sum of 610*l.* 1*s.* 6*d.* alleged to be [528] due to him from the defendant upon the following items of account:—

“John Coope Haddan to Nathaniel Mason.

		£	s.	d.
“1855.				
March 1.	To your loan	100	0	0
April 3.	To paid London and County Bank interest on deposit for the Clapham and Norwood Junction Railway	172	7	0
	To paid Messrs. Wilkinson & Stevens for costs of securities	42	0	0
May 4.	To paid ditto balance of costs	28	0	0
14.	To your loan	100	0	0
25.	Ditto, for counsel's fees	67	14	6
June 23.	To paid Messrs. Marchant & Pead by your order.	100	0	0
		<u>£610</u>	<u>1</u>	<u>6”</u>

Summonses were afterwards taken out before Williams, J., at Chambers, when that learned judge suggested that the reference should proceed as between Mason and Haddan alone, but he ultimately referred the parties to the court.

Upon an affidavit of these facts, and also stating that Haddan was and always had been willing and desirous to proceed to a reference of the matters in difference which had been referred in the manner thereinbefore stated, whether generally or (in the event of the company refusing to concur) such of them as were between the plaintiff and himself alone,

David Keane, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why all further proceedings in this cause should not be stayed, the action having been brought in respect of matters previously agreed by the parties to be referred to arbitration, and why he should not pay the costs of the [529] action and of the application. The affidavits upon which the rule was obtained further stated “that the plaintiff's claim in this action for moneys alleged to have been advanced by him to the defendant or on his account in the year 1855, was part of the matters in difference between the plaintiff and himself which were comprised in the agreements for reference thereinbefore set forth and referred to respectively, as the moneys of which such claim consisted were advanced (if and so far as they were so at all) with special reference to or in aid of his (the defendant's) promoting the Clapham and

Norwood Junction bill then before parliament and in which the plaintiff was interested, on security of the large claims the defendant then had and still had on the plaintiff and the said Westminster Terminus Railway Company respectively, and of the defendant's interest in the Clapham and Norwood Railway project, as the promoter thereof; and further that Mason had ceased to be solicitor for the company, and that the deponent believed that one object of the change of solicitors was in collusion with the plaintiff, for the purpose of defeating or delaying the arbitration which he and the company had agreed on with the defendant."

Matthews now shewed cause (a) upon an affidavit by Mr. Mason, in which he deposed, amongst other things, as follows,—that he executed the agreement of reference [530]—ence prepared by Mr. Bullar, as mentioned in the affidavit of the defendant, as an escrow, and he would not have executed the same except upon the understanding that the company would join in and proceed with the reference according to the terms of the said agreement: that he ceased to be solicitor for the company on the 12th of April, 1858, when Messrs. Terrell & Chamberlain were appointed to be such solicitors, of which fact he informed the defendant's attorney on the following day; that, under the advice of Messrs. Terrell & Chamberlain, the company had hitherto refused to proceed on the reference; that the change of attorneys was not in any respect collusive or intended to delay or defeat the proposed arbitration; that the deponent ceased to be the solicitor of the company, not for the purpose of preventing the arbitration, but in consequence of certain proceedings in Chancery to which the company and himself were parties; that Messrs. Terrell & Chamberlain, in advising the company, acted wholly independently of the deponent, and without any reference to any supposed interests of his in preventing the said arbitration; and that he had no power to compel the directors or the company to proceed with the reference, but was advised and believed that the defendant could have compelled them to do so if he had thought proper.

This motion is founded upon the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then-existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against [531] the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which [such] action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require." A memorandum like this is not within that section. It does not apply to an agreement of reference entered into subsequently to the differences arising. In *Bluthe v. Lafone*, 5 Jurist, N. S. 364, Lord Campbell says: "I have no doubt that s. 11 of the Common Law Procedure Act, 1854, contemplates the case of an agreement, whether under seal or not, in which there is a stipulation, that, if differences should arise, they should be referred to arbitration, and that, if an action at law should be brought, instead of settling the matter by arbitration, the court might stay the proceedings in the action. There were some strange decisions in law, that the jurisdiction of the courts was not ousted by a private

(a) After the argument had proceeded some little way, Keane interposed, and objected that office-copies of the affidavits on which the rule was obtained had not been taken. Willes, J. The objection comes too late. Keane. In the Queen's Bench and Exchequer, the objection is permitted to be taken at any time: it is for the protection of the Treasury. Willes, J. The practice is otherwise in this court. You are at least five minutes too late.

agreement to refer, and persons were not allowed to choose their own tribunal for the settlement of their disputes. To remedy that, s. 11 was enacted: it does not apply to a subsequent [532] agreement of parties to refer, where there is no such stipulation in the original deed or instrument." [Byles, J. The words of the section are, "any then-existing or future differences."] Crompton, J., in the case above referred to, says: "Sect. 11 of the Common Law Procedure Act, 1854, was intended to remedy the case in which parties entered into a deed or instrument containing a clause agreeing that there should be no action, but a private settlement of differences by arbitration; there was a doubt whether as to future differences such an agreement would be enforced (a)¹. It was intended by s. 11 to give the court power in such a case to stay the proceedings in an action." The statute clearly was intended to apply, not to cases where differences had already arisen, but to differences which might in future arise upon the construction of the contract. [Byles, J. I am not prepared to accede to that: it would be giving a very narrow construction to the language of a very useful section, which is very large and comprehensive.] An agreement to refer existing differences is a submission, not a contract with a collateral agreement to refer. At all events, this is clearly not a case in which the court would feel inclined to exercise the discretion given to them by the latter branch of the clause. The plaintiff only entered into the agreement to refer, upon the faith of all the other parties concurring in it.

Keane, in support of the rule, submitted, that, having signed the agreement to refer, the plaintiff ought not now to be permitted, in defiance of his contract, to bring an action for that which was confessedly one of the matters in difference intended to be embraced by the proposed reference; that there could be no reason [533] why the court should not exercise the jurisdiction given to them by the statute, to prevent injustice being done; and that it was manifest from the affidavits that the plaintiff was colluding with the railway company, and had ceased to be their solicitor merely for the purpose of evading the engagement he had entered into.

WILLES, J.(a)². I am of opinion that this rule should be discharged. It is a rule founded upon the 11th section of the Common Law Procedure Act, 1854, calling on the plaintiff to shew cause why all further proceedings in this cause should not be stayed, on the ground that he and the defendant were parties to an instrument in writing by which it had been agreed that the cause of action should be referred to arbitration, and that this action had been brought in violation of that agreement. Now, in order to entitle him to make this rule absolute, he must make out, first, that there is such an agreement, and, in the second place, he must satisfy the court that "no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement." As to the first point, it is perhaps unnecessary to express any decided opinion; but, as at present advised, the court would not be disposed to abstain from holding that the memorandum in question would be within the statute, notwithstanding the court of Queen's Bench is suggested to have expressed a different opinion in *Blythe v. Lefone*. I will say no more upon that case than that I am hardly satisfied that the court really did lay down such a matter. There is, however, another objection connected with the first point here, upon which, if necessary, we might pronounce against the rule: that is, that no such deed or instrument in [534] writing has been made or executed as the statute contemplates. It can hardly be contended that a mere executory memorandum such as that first drawn up here is a deed or instrument within the 11th section: and, as to the more formal document afterwards prepared by Mr. Bullar, that was not executed by the defendant himself, nor was it executed by the company which was intended to be a party to the reference. I feel great difficulty in interposing under that section in favor of a person who comes merely alleging that he is ready and willing to execute and to carry into effect the proposed reference. We could hardly make the rule absolute upon the defendant's mere undertaking that he will execute the deed or that he will proceed with the reference. It seems to me that the section points to a completed instrument already binding between the parties. It may be possible that the non-execution by the company might not be open to the objection I have suggested;

(a)¹ See *Tattersall v. Groote*, 2 Bos. & P. 131.

(a)² Cockburn, C. J., was absent on account of indisposition, and Crowder, J., was presiding at the Central Criminal Court.

but, at all events, it is a matter which comes within the second consideration to which I have referred, because it affords a sufficient reason for not referring to arbitration. It is clear that the inducement for the plaintiff's entering into the agreement to refer, was, that there should be a final settlement of the matters in difference, not only between Mason and Haddan, but also between Haddan and the Westminster Terminus Railway Company, and between Baly and Mason, and between Baly and the company. If the proceedings in this action were stayed upon the notion that there is to be an arbitration between Mason and Hadden only, the intention of the submitting parties would not be carried out. Upon the whole, therefore, it appears to me that this is not a case in which the court ought to be called upon to interfere under the 11th section, even if it clearly had jurisdiction in respect of the character of the instrument and the matter [535] to which it relates. As to the costs,—looking at the affidavits, I think Mr. Mason has sufficiently answered the affidavit of the defendant, so far as to satisfy the court that the change of solicitors was not made for the purpose suggested, and that the directors are not so far in his power or under his influence as to enable him to compel the company to execute the deed. Still I think there is enough upon the affidavits to shew that there exists such a degree of connection between Mason and the company, that I am not disposed to discharge the rule with costs.

BYLES, J. I am of the same opinion. The old rule of law was, that an agreement to refer was no bar to an action at common law. That rule was productive of great hardship and inconvenience; and accordingly the 11th section of the 17 & 18 Vict. c. 125, was directed to remedy the evil. That section is conceived in the widest terms: and, in the absence of any express decision the other way, it is our duty to give it the full construction which is due to a remedial statute,—to suppress the mischief and to advance the remedy. Subject to the observations on *Blythe v. Lefone*, I conceive the present case comes within the first branch of the 11th section; but, to enable us to act upon that, it is necessary that we should be satisfied that no sufficient reason exists why the matters cannot or ought not to be referred,—that is, why the arbitration between Haddan and Mason, and Haddan and the company, and the other parties, should not be carried out. The onus of satisfying the court of that lay upon the defendant. I for one am not satisfied. Mason has not the full consideration to which it is entitled. I therefore think the rule must be discharged, but without costs.

Rule discharged accordingly.

[536] NOTMAN AND ANOTHER v. THE ANCHOR ASSURANCE COMPANY.

May 12th, 1859.

Quære, whether a special case can be amended after judgment, and writ of error brought, without consent?

On the 23rd of June, 1853, the plaintiffs (in Glasgow) effected a policy for 2000l. upon the life of one Michael Finlayson Stirling, one of the conditions of the insurance being that the policy should be void if Stirling should go beyond the limits of Europe without leave of the directors. Stirling contemplating a return to Belize, Honduras, where he had been some years residing, the following indorsement was made upon the policy:—"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed."

The (original) premiums were regularly paid each half-year down to the 22nd of December, 1857.

The extra premium for one year's foreign residence was paid on the 23rd of June, 1853, but Stirling did not in fact proceed to Belize until the 9th of June, 1856. No further premium for foreign residence was ever paid.

Upon a case stated by judge's order under the Common Law Procedure Act, 1852, in which the question presented to the court was, whether the permission to go and reside "for one year" at Belize meant a year's residence unconditionally and at any

time, or was intended to be a year commencing within a reasonable [537] time, it was erroneously stated as a fact that the assured arrived at Belize "about the middle or latter end of August, 1856," and died there on the 13th of August, 1857.

This court having given judgment for the plaintiffs,—holding that the permission to reside "for one year" at Belize was not limited to any particular year, and consequently that the plaintiffs were entitled to recover the sum assured (a)¹,—the defendants brought error.

It being afterwards discovered that the defendants had been misled by the information which they had received from the plaintiffs, and that, in point of fact, Stirling arrived at Belize on the 29th of July, 1856, and consequently did not die within the year for which the extra premium had been paid,

Bovill, Q. C., in Michaelmas Term last, obtained a rule calling upon the plaintiffs to shew cause why the special case should not be amended in this respect, or why, if the fact were not admitted, an issue should not be directed to ascertain it.

J. Wilde, Q. C., now shewed cause. He admitted that the party assured arrived at Belize on the 29th of July, 1856, and not "about the middle or latter end of August," as stated in the case, and that the decision of this court was based upon the supposition of his having died within a year after his arrival. But he urged that it was an unusual thing to amend a special case after judgment. *Res judicata pro veritate accipitur*. [Byles, J. The case was argued on both sides upon the assumption of a certain fact being true, which has since turned out not to be so. Does it not resolve [538] itself into a question of costs? Willes, J., referred to *Marriott v. Hampton*, 7 T. R. 269, 2 Esp. N. P. C. 546, and *Hamlet v. Richardson*, 2 M. & Scott, 811, 9 Bingh. 644.] Down to this moment the plaintiffs have been perfectly in the right. [Willes, J. I think as the price of the amendment, which seems to be consented to, the plaintiffs should have all the costs thereby occasioned,—so as to be a full indemnity.]

Bovill, in support of the rule, submitted that the costs should abide the event.

WILLES, J. (a)². The court feel relieved by the consent of the plaintiffs to the proposed amendment; but counsel must take care that that consent does not involve consequences beyond the mere amendment of the case. All costs should be paid by the defendants from the time the mistake occurred, and they should be full indemnifying costs. This application, and the order of the court made thereon by consent, must not be drawn into a precedent. The Common Law Procedure Acts undoubtedly contain very large powers of amendment (b): but we must construe them according [539] to the general rules which regulate the procedure of the courts; for it is expedient that there should be an end of litigation, seeing that litigants are mortal.

BYLES, J. It must be distinctly understood that what is done is done by consent, and is not to form a precedent for any future similar application.

Rule accordingly.

(a)¹ Vide ante, vol. iv., p. 476.

(a)² Cockburn, C. J., was absent on account of indisposition, and Crowder, J., was presiding at the Central Criminal Court.

(b) In *Hills v. Hunt*, 15 C. B. 30, Jervis, C. J., upon an application to amend a special case, said,—"The points are presented for our opinion by consent of the parties. They are bound by what they have consented to."

That case, however, occurred just before the passing of the 17 & 18 Vict. c. 125, the 96th section of which enacts that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for."

OLDFIELD v. PRICE. May 12th, 1859.

Upon a reference to arbitrators or an umpire to ascertain the amount due for fire-damage upon a policy of assurance,—the court will not interfere to set aside or to send back the award, on a mere suggestion that the umpire has adopted an erroneous principle of valuation.—An order for enlarging the time for making an award as to matters in difference, was intitled in a cause in the Queen's Bench which was at an end:—Held, that the title was mere surplusage, and did not invalidate the order.

The following agreement of reference was entered into on the 22nd of September, 1858, between the plaintiff, Alexander Oldfield, and the defendant, Thomas Price, as secretary of the General Life and Fire Assurance Company.

“Whereas, by a policy of assurance dated the 18th of March, 1856, the said Alexander Oldfield effected an insurance with the British Empire Mutual Fire Assurance Company against loss or damage by fire on the property therein described (not exceeding the sum therein specified on each article as the value thereof), [540] viz. on household goods, wearing-apparel, linen, plate, printed books, wine and liquors in private use, 200l. ; on pictures, prints, and drawings (not more than 10l. on any one picture or print), musical and mathematical instruments, jewels, watches, and trinkets in private use, china, glass, earthenware, and looking-glasses, 50l., in a dwelling-house situate No. 17 Devonshire Street, Queen's Square, Bloomsbury ; on stock and utensils in trade and fittings in workshop in rear, 700l. ; on goods in trust therein and in house, 400l.,—upon and subject to the several conditions, restrictions, and stipulations therein mentioned and thereon indorsed : And whereas, the business of the said British Empire Mutual Fire Assurance Society has since the date of the said policy been amalgamated with that of the said General Life and Fire Assurance Company, who have undertaken the responsibility of the said British Empire Mutual Fire Assurance Society (if any) upon the said policy ; and the said Thomas Price is the person in whose name the said General Life and Fire Assurance Company sues and is sued : And whereas, on or about the 2nd of February, 1855, a fire happened on the premises No. 17 Devonshire Street aforesaid, and the said Alexander Oldfield has made a claim for loss in respect of the articles so insured as aforesaid, amounting in the whole to 994l. 9s. 7d. : And whereas, the said General Life and Fire Assurance Company dispute their liability to pay the amount so claimed under the said policy as aforesaid, upon various grounds : And whereas an action has been brought by the said Alexander Oldfield in the court of Queen's Bench at Westminster against the said Thomas Price as the public officer of the said General Life and Fire Assurance Company for the recovery of the said sum of 994l. 9s. 7d. under the said policy, and the defendant pleaded thereto, and, among other things, alleged as a [541] third plea that the plaintiff had not complied with a condition indorsed on the said policy which required him to deliver to the said British Empire Mutual Fire Assurance Society a certain certificate therein mentioned or described, before any loss under the said policy should be made good : And whereas, in order to prevent further litigation, and for the purpose of settling all disputes between the said parties, it has been agreed that the said Thomas Price, on behalf of the said General Life and Fire Assurance Company, should pay to the said Alexander Oldfield the sum of 100l. in part payment, or in satisfaction (as the case might be) of any moneys which the said Thomas Price or the said General Life and Fire Assurance Company might be declared liable to pay to the said Alexander Oldfield by the award hereinafter mentioned (such payment to be without prejudice to the position or rights of the said General Life and Fire Assurance Company), and that such agreement for reference should be entered into as hereinafter contained : And whereas, the said sum of 100l. hath accordingly, in part-performance of the said agreement, been paid to the said Alexander Oldfield before the execution hereof, as he doth hereby admit and declare : Now, this agreement witnesseth, that, in further performance of the agreement, and in consideration of the premises and of the several agreements on the part of the said parties hereto hereinafter contained, it is hereby mutually and reciprocally agreed by and between the said Alexander Oldfield and the said Thomas Price for and on behalf of the said General Life and Fire Assurance Company in manner following, that is to say, that the amount of the loss alleged to have been sustained by the said Alexander Oldfield in respect of all and every or any of the goods, articles, and things (whether the property of the said Alexander Oldfield, or held in trust by

him,) insured, [542] or alleged or claimed to be insured, by or under the said recited policy, and all questions, disputes, and differences whatsoever between the said parties hereto in relation to the amount of the loss so alleged to have been sustained by the said Alexander Oldfield in respect of such goods, articles, and things, by reason of the said fire, shall be and the same are hereby referred to the award, order, arbitrament, final end, and determination of Mr. Thomas Young, of, &c., as the arbitrator for and on behalf of the said Alexander Oldfield, and Mr. Adolphus John Lewis, of, &c., as the arbitrator for and on behalf of the said Thomas Price, or, in case of any difference between the said arbitrators, then to the award, order, arbitrament, final end, and determination of their umpire, to be chosen by them before entering upon the matters hereby referred to them; so as the said Thomas Young and Adolphus John Lewis or their umpire shall make and publish their or his award in writing of and concerning the matters referred to them or him, ready to be delivered to the said parties hereto, or to either of them, on or before the 1st day of November next, or on or before any other day to which the said Thomas Young and Adolphus John Lewis or their said umpire shall extend the time of making their or his award: And it is hereby agreed that the said Thomas Young and Adolphus John Lewis or their said umpire shall in their or his award separate and distinguish between the several classes, divisions, or descriptions of goods, articles, and things, in the same manner as the same are separated or distinguished in the said policy, and shall apportion and fix the amount of loss, if any, which has been sustained or incurred in respect of each such class, division, or description: And, further, that the said Thomas Young and Adolphus John Lewis and their said umpire shall be at liberty, either with or [543] without any other person or persons, to inspect the premises No 17 Devonshire Street aforesaid, and also all and every or any of the goods, articles, and things as are not destroyed, included in, or claimed to be insured by, the said policy, wheresoever the same may now be, and also all and every or any of the books of account and other books, papers, and documents of or belonging to the said Alexander Oldfield, or which he can obtain, and which the said Thomas Young and Adolphus John Lewis or their said umpire may deem it necessary or expedient to inspect, and to take copies thereof or extracts therefrom respectively; and also to examine the said Alexander Oldfield or any other person or persons, upon oath or otherwise; and to do all other things which the said Thomas Young and Adolphus John Lewis or their said umpire may deem necessary to enable them or him to make their or his award of and concerning the moneys hereby referred to them and him: And this agreement further witnesseth, that, in further pursuance of the said agreement, and for the considerations and purposes aforesaid, it is hereby further agreed between and by the said Alexander Oldfield and Thomas Price, that, so soon as the award of the said Thomas Young and Adolphus John Lewis or their said umpire of and concerning the matters so referred to them and him as aforesaid shall have been made and published as and in manner and form aforesaid, the liability of the said Thomas Price as the public officer of the said General Life and Fire Assurance Company, or of the said company, under the conditions of the said policy, to pay all or any of the amounts or items of loss which shall have been so fixed and determined in and by the said award of the said Thomas Young and Adolphus John Lewis or their said umpire, or any part of such respective amounts or items, and all questions, disputes, and dif-[544]ferences in relation to such liability, shall be referred to the award, order, arbitrament, final end, and determination of A. C., Esq., so as the said A. C. shall make and publish his award in writing, ready to be delivered to the said parties hereto, or either of them, on or before the expiration of one month from and after the said award of the said Thomas Young and Adolphus John Lewis or their said umpire shall have been made and published, or on or before any other day to which the said A. C. shall extend the time for making his award: And it is hereby agreed that the said A. C. shall be at liberty to call for and inspect all or any of the books, papers, or other documents of or belonging to the said Alexander Oldfield, or of the said British Empire Mutual Fire Assurance Society, or the said General Life and Fire Assurance Company, or either of them, and also to examine the said parties hereto and any other person or persons, upon oath or otherwise, and to do or cause to be done all other things which he the said A. C. may deem necessary or expedient to enable him to decide or determine all or any of the matters hereby referred to him, unless the parties hereto shall agree upon a written case or statement of facts to be laid before the said A. C.; and, in the event of such case or statement being so agreed

upon, the said A. C. shall make his award on the statement contained in such case: Provided always that the said Thomas Price shall be at liberty before the said A. C. to avail himself of all or any legal grounds of defence which he might raise or avail himself of under the pleas which have been pleaded in the action hereinbefore mentioned, or otherwise, except that the said Thomas Price shall not dispute that the liability (if any) under the said policy has devolved upon the said General Life and Fire Assurance Company in the same manner as if the name of that company had been in-[545]-serted therein instead of the said British Empire Mutual Fire Assurance Society, and except also that the said Thomas Price and the said General Assurance Company shall not be at liberty to avail themselves, upon such reference, as a matter of defence of the third plea in the said action, which alleges that the condition indorsed on the said policy as to a certificate of two householders was not delivered to the said company previously to the commencement of the said action: Provided also that neither of the said parties hereto shall attend before the said Thomas Young and Adolphus John Lewis, or their said umpire, by counsel, but only by his attorney: but the said parties shall be at liberty to attend by counsel or special pleader before the said A. C.; and also, that, in case either of the said parties hereto shall neglect to attend before the said Thomas Young and Adolphus John Lewis or their said umpire, or the said A. C., respectively, to proceed in the matters referred to them or him respectively, after seven days notice of an appointment for that purpose served upon such party, or left at his usual place of abode or business, then it shall be lawful for the said Thomas Young and Adolphus John Lewis or their said umpire, or the said A. C., respectively, to proceed ex parte, and all acts so done shall be as valid and effectual as if the said parties hereto had duly attended in pursuance of such notice; and, further, that the costs and expenses of the reference hereby made to the said Thomas Young and Adolphus John Lewis and their umpire, and of their or his award, and incidental thereto, respectively, shall be in the discretion of the said Thomas Young and Adolphus John Lewis or their said umpire; and that the costs and expenses of the reference made to the said A. C., and of his award, and incidental thereto, respectively, shall be in the discretion of the said A. C.; and, in case all or any portion [546] of the costs and expenses of either of the said references shall be adjudged to be paid by the said Alexander Oldfield to the said Thomas Price, then the said Thomas Price shall be at liberty to deduct and retain the amount thereof from and out of the sum, if any, which he the said Thomas Price or the said General Fire and Life Assurance Company may be adjudged liable to pay under the terms and conditions of the said policy, or for or in respect of the costs and expenses of either of the said references hereby made; and also that the death of the said Alexander Oldfield shall not determine or put an end to these presents, but the same shall continue in full force for or against his representatives, in the event of his so dying; and also that the said parties hereto shall and will on their respective parts in all things stand to, obey, abide by, perform, fulfil, and keep the award, arbitrament, final end, and determination of the said Thomas Young and Adolphus John Lewis or their said umpire, and A. C., respectively, so to be made as aforesaid, and shall not continue the said action hereinbefore mentioned, or bring or prosecute, or cause to be brought or prosecuted, any writ of error, or any other action or suit at law or in equity against the said Thomas Young and Adolphus John Lewis, or their said umpire, or the said A. C., or either of them, or against any of the said parties hereto, or of concerning the matters aforesaid; and that, if either of the said parties hereto shall by affected delay or otherwise prevent, impede, or delay the said arbitrators or either of them from making an award, he or they shall and will pay to the other or others of the said parties hereto, such costs as the said arbitrator so delayed shall think reasonable: And, lastly, that these presents, or the submission hereby made, shall be made a rule of Her Majesty's court of Common Pleas at Westminster, pursuant to the statute [547] in such case made and provided; and that, in case any application shall be made by either party to the said court on the subject of the said reference, or the awards, or either of them, the said court shall have full power to refer back to the said Thomas Young and Adolphus John Lewis, or their said umpire, or the said A. C., respectively, the whole or any part of the matters in difference referred to them respectively, upon such terms as the said court shall think fit: And, lastly, the said Thomas Price, as such secretary as aforesaid, doth hereby agree with the said Alexander Oldfield, his executors, administrators, and assigns, that he the said Thomas Price, his executors or adminis-

trators, shall and will within ten days after notice of the amount, if any, which he or the said company shall by the award of the said A. C. be declared liable to pay, shall be served on him, or left for him at the office of the said General Life and Fire Assurance Company, pay unto D. D., of &c. (which payment he the said Alexander Oldfield doth hereby direct and request accordingly), out of the amount, if any, which he the said Thomas Price or the said company shall be so declared liable to pay as aforesaid (after deducting thereout the sum of 100l. so paid to the said Alexander Oldfield as hereinbefore mentioned, and also all costs and expenses, if any, which shall have been awarded to be paid by the said Alexander Oldfield to the said Thomas Price,) the sum of 309l. 3s., and interest thereon, or so much thereof as the amount so payable by the said Thomas Price shall be sufficient to pay, and pay the balance (if any) to the said Alexander Oldfield, his executors, administrators, or assigns: Provided lastly, and it is hereby expressly agreed and declared that the payment of the said sum of 100l. as hereinbefore mentioned shall not in any wise prejudice or affect the position or rights of the said General Life and Fire [548] Assurance Company in relation to the matters or questions in dispute, or otherwise howsoever; and that such payment shall not, nor shall anything herein contained, in any way prejudice or affect any of the rights or defences of the said Thomas Price or the said General Life and Fire Assurance Company, or the said British Empire Assurance Society, upon or in relation to any other action or claim which may be brought or preferred against them or either of them in the name or names of the said Alexander Oldfield, his executors or administrators, or otherwise, by him or them, or any other person or persons claiming through or under him or them. In witness," &c.

The arbitrators not agreeing, the matter came before the umpire. Part of the plaintiff's claim was in respect of certain valuable tools which had been destroyed in the fire. As to these, the umpire took the valuation of one Price, who valued them at the price they would have fetched at a forced sale, and, without hearing any other evidence, he said he would be bound by that valuation.

The award was not made within the time limited by the agreement; but the time had been enlarged by an order of Hill, J. This order, however, was intituled in the cause in the Queen's Bench.

Joyce now moved to set aside or send back the award, on the grounds that it had been made after the expiration of the prescribed time, and without any due enlargement, and also that the umpire had been guilty of misconduct. As to the first, he submitted that the order of Hill, J., being wrongly intituled, was a mere nullity: and, as to the second, that, in adopting the valuation of Price, the umpire proceeded so erroneously as to establish a case of misconduct against him, for that, inasmuch as the plaintiff was entitled [549] to a full indemnity, the tools destroyed should have been valued at the sum it would have cost him to replace them.

WILLES, J.(a). I am of opinion that there should be no rule in this case. One objection to this award is, that the umpire has adopted an erroneous principle of valuation as to certain tools, he having valued them at the price they would have fetched at a forced sale, instead of at the price the plaintiff would have to pay for replacing them. If that be an error, it is either an error of fact as to the value of the articles, or an error of law as to the principle upon which the damages ought to be assessed. In either case, the court cannot interfere. The parties have chosen their own tribunal, which is to judge as well of the law as of the fact: and they are bound by the result, unless they can shew misconduct. Now, misconduct in the ordinary sense is not imputed to the umpire: and mistake or misconduct in law is not enough to entitle the court to interfere (b). Then, as to the time. The award was sufficiently early, unless the order of my Brother Hill was a void order. The precise form of the order is not brought before us: it is merely recited in the award. But it appears that it did substantially enlarge the time for making the award in respect of the matters referred to by the agreement. It further appears that it was intituled in a cause in the Queen's Bench which is at an end. Does that affect the validity of the order? In my opinion it certainly does not. The title of the

(a) Cockburn, C. J., was absent on account of indisposition, and Crowder, J., was presiding at the Central Criminal Court.

(b) See Russell on Arbitration, 2nd edit. 302, 306, 646, 649. And see *Hodgkinson v. Fernie*, ante, vol. iii., p. 189.

cause is mere surplusage. The order is a [550] perfectly valid order with reference to the matters in difference.

BYLES, J. I am of the same opinion. The first objection resolves itself into an objection upon the merits. If the umpire adopted a wrong principle of valuation, that was a mistake in point of law. We have no power to send back an award to the arbitrator or umpire except for a cause for which the award might be set aside. The persons selected by the parties are judges of the law as well as of the fact. As to the other point, I will only observe that nothing has been brought before us to shew that the order of my Brother Hill is not a perfectly valid order.

Rule refused.

THE GENERAL STEAM-NAVIGATION COMPANY v. ROLT. Feb. 1st, 1858.

[S. C. 6 Jur. N. S. 801; 8 W. R. 223. Referred to, *Watts v. Shuttleworth*, 1861, 7 H. & N. 355.]

A material variation of the terms of the contract with the principal discharges the surety—A. contracted with B. to build for him a ship for a given sum, to be paid by instalments as the work reached certain stages; and C. became surety for the due performance of the contract on the part of B., the builder. A. allowed B. to anticipate the greater portion of the last two instalments; and B., becoming bankrupt before the ship was finished, A. was compelled to expend a larger sum of money than the unpaid portion of the purchase-money in completing her.—In an action by A. against C. (the surety) to recover the excess and also a stipulated sum by way of damages for the delay in the completion of the ship, C. pleaded that the prepayments were made to B. without the knowledge or consent of C., and that, by making such payments without his consent, A. materially and prejudicially altered his position as surety. To this A. replied that the advances so made by him to B. were made with the knowledge, authority, and consent of C., and at his request, or for his use and benefit, and on his account:—Held, that the plea afforded a *prima facie* answer to the action, and that the onus lay upon A. to prove that the advances were made with the knowledge and assent and at the request of the surety.

This was an action brought by the General Steam-Navigation Company against the defendant as surety for the due performance of an agreement by one Mare.

The first count of the declaration stated, that, by a certain deed or articles of agreement, dated the 26th [551] of April, 1855, made between Charles John Mare of the first part, the defendant of the second part, and the plaintiffs of the third part,—after reciting that the said Charles John Mare had agreed to build for the plaintiffs an iron paddle-wheel steam-ship or vessel of the dimensions thereafter mentioned, and to launch and deliver the same to the plaintiffs at the time and for the price or sum thereafter expressed, and that the defendant had agreed to become the surety for the due performance of the said agreement by and on the part of the said Charles John Mare, and to execute the said agreement as such surety in manner thereafter mentioned,—it was witnessed, that, in pursuance of the said agreement, and in consideration of the covenants thereafter contained by and on the part of the plaintiffs, he the said Charles John Mare did thereby covenant with the plaintiffs that he the said Charles John Mare should and would, at his own proper costs and charges, in the best and most substantial and workman-like manner, construct and build for the plaintiffs an iron paddle-wheel steam-ship or vessel, of best Staffordshire iron, or iron of equal quality, and the decks and such other parts thereof as were to be constructed of wood of good sound and well-seasoned timber and plank, and the whole of the materials of every kind to be used by the said Charles John Mare in the construction of such ship or vessel to be the best of their respective kinds; and the said ship or vessel and fittings up to be built and constructed conformably to and of the description and dimensions and in the manner particularly mentioned and set forth in the specification thereunder written or thereunto annexed, and the drawing or plan prepared and signed by or on behalf of the said parties thereto of the first part and third part; and that the said Charles John Mare should and would complete the said vessel, including the fit-[552]-tings, and all carpenters' and joiners' and painters' work, and in every respect fit for sea, and launch and deliver her safe afloat into the charge

of some person or persons appointed to receive her in the river Thames by or on behalf of the plaintiffs on or before the 13th of September then next ensuing; and, in case the said vessel should not be so finished, launched, and delivered fit for sea on the said 13th of September then next ensuing, the said Charles John Mare did thereby agree to pay to the plaintiffs as and for liquidated damages to be incurred by such default the sum of 10l. per day for every subsequent day until the said vessel should be so finished, launched, and delivered as aforesaid: And it was declared and agreed by and between the said parties thereto of the first and third parts, that the said company should and might deduct and retain to themselves, their successors and assigns, all and every such sum and sums of money as should or might become payable for or in respect of such liquidated damages aforesaid, from and out of any consideration or other moneys or instalments of moneys as should or might from time to time become due or payable by them to the said Charles John Mare, his executors, administrators, or assigns, under or by virtue of the covenants in that behalf on the part of the said company thereafter contained: And for the due and punctual performance of the covenants thereinbefore contained on the part of the said Charles John Mare, he the defendant did by the said deed or articles, in pursuance of the thereinbefore recited agreement on his part, bind and oblige himself to and with the plaintiffs, in the penal sum of 20,000l.: Averment, that the plaintiffs have always been ready and willing to do, perform, and observe, and have done, performed, and observed all things on their part, and all things have happened and exist to entitle them to a performance [553] of the said covenants of the said Charles John Mare and the defendant respectively, and to maintain this action: nevertheless the said Charles John Mare did not nor would complete the said vessel, including the fitting and all carpenters' and joiners' and painters' work, and in every respect fit for sea, and launch and deliver the same safe afloat or otherwise into the charge of the plaintiffs, or any person or persons appointed to receive the same in the river Thames by or on behalf of the plaintiffs, or in any other manner, on or before the said 13th of September, 1855, but had wholly neglected so to do, and the said vessel was not so finished, launched, and delivered according to the said covenant, and the said Charles John Mare made default and default was made in that behalf for and during divers, to wit, seventy days after that day; whereby the plaintiffs became and were entitled to be paid, and the said Charles John Mare became and was liable to pay them, a large sum of money, to wit, 700l., being at and after the rate of 10l. for each and every of those days, and neither the said Charles John Mare nor the defendant hath paid the same, nor hath the defendant paid the plaintiffs the said 20,000l.: That the said Charles John Mare became and was declared a bankrupt without having completed or finished the said vessel as aforesaid, and the plaintiffs, in order to obtain the construction, completion, and delivery thereof, were forced and obliged to pay large sums of money to the assignees of the estate and effects of the said Charles John Mare under his said bankruptcy, for work done and materials provided by them in the construction and completion of the said vessel, and which sums, together with divers sums amounting, to wit, to 2000l. on account of the moneys to be paid to him for work to be done [554] and materials provided by him under the said deed, greatly exceeded the sum of money for which the said vessel was by the said deed to be built, constructed, completed, and delivered to the plaintiffs according to the said deed; and a large sum of money over and above the moneys to be paid by the plaintiffs under and by virtue of the said deed for the price of the building, constructing, and completing of the said vessel, had thereby become and was lost to the plaintiffs.

To this count the defendant pleaded, *inter alia*, as follows:—

First,—to the first count, that the said deed in that count mentioned is not his deed.

Secondly,—to so much of the said first count as alleges that the said Charles John Mare did not nor would complete the said vessel, including the fitting and all carpenters' and joiners' and painters' work, and in every respect fit for sea, and launch and deliver the same safe afloat or otherwise into the charge of the plaintiffs, or any person or persons appointed to receive the same in the river Thames by or on behalf of the plaintiffs, or in any other manner, on or before the day and year in that behalf in the declaration mentioned,—the defendant denies the same allegation and every part thereof.

Thirdly,—to so much of the first count as alleges that the said vessel was not finished, launched, and delivered according to the said covenant, that the said Charles John Mare made default, and that default was made in that behalf, for and during the said time in that behalf in the declaration mentioned,—the defendant denies the same allegation and every part thereof.

Fourthly,—to the first count, that, in and by the said deed in the declaration mentioned, the plaintiffs covenanted and agreed that they would well and truly pay or cause to be paid to the said Charles John [555] Mare the sum of 14,120*l.* as the purchase or consideration-money for the said vessel and fittings, by four even and equal instalments or payments, at the times and in the manner following, that is to say, one equal fourth part thereof when the surveyor employed to superintend the works should certify that the whole of the premises, including the stem and stern-post of the said vessel, should be up and complete,—one other equal fourth part thereof when the said vessel should be plated up and all the beams and stringers in,—one other equal fourth part thereof when the vessel should be launched,—and the remaining equal fourth part thereof when the said vessel should be completely finished and delivered, and should have proved upon trial to fulfil all the terms and conditions of the said deed and the specification thereunder written: that the said covenants so made by the plaintiffs as in this plea aforesaid are the same covenants which are mentioned in the said deed and in the declaration respectively under or by virtue of which the consideration or other moneys or instalments of moneys therein mentioned were to become or might become due and payable from the plaintiffs to the said Charles John Mare, his executors, administrators, or assigns, as therein mentioned; that, after the said first two instalments of the said sum of 14,120*l.* had been paid to the said Charles John Mare by the plaintiffs under the said covenant in that behalf, but long before the said vessel had been launched, and before the third of the said instalments had become due to the said Charles John Mare from the plaintiffs according to the true intent and meaning of the said deed in that behalf, and before the accruing of any of the said alleged causes of action in the declaration mentioned, the plaintiffs, without the knowledge or consent of the defendant, and contrary to the true intent and meaning of their [556] said covenant in that behalf, paid and advanced to the said Charles John Mare nearly the whole of the said third instalment: that, afterwards, and long before the said ship had been completely finished and delivered, and before the last of the said instalments of the said sum of 14,120*l.* had become due or payable to the said Charles John Mare from the plaintiffs according to the true intent and meaning of the said deed in that behalf, and before the accruing of any of the said alleged causes of action in the declaration mentioned, the plaintiffs, without the knowledge or consent of the defendant, paid and advanced to the said Charles John Mare a large portion of the said last-mentioned instalment: that each of the said advances so made to the said Charles John Mare of the said third and last instalments respectively as aforesaid amounted to a large sum, to wit, to the amount of the said debts and penalties due from the said Charles John Mare to the plaintiffs as in the declaration mentioned, and of all damages sustained by the plaintiffs by reason of the breaches of covenant by the said Charles John Mare in the declaration alleged; and that, by making the said payments and advances without the consent of the defendant, the plaintiffs materially and prejudicially altered his the defendant's position as surety for the said Charles John Mare as aforesaid, and the defendant was and is by reason of the premises discharged and exonerated from liability as such surety.

Fifthly,—to the first count, upon equitable grounds, that, in and by the said deed in the declaration mentioned, the plaintiffs covenanted and agreed that they would well and truly pay or cause to be paid to the said Charles John Mare the sum of 14,120*l.* as the purchase or consideration-money for the said vessel and fittings by four even and equal instalments or payments, at the times and in the manner following, [557] that is to say, one equal fourth part thereof when the surveyor employed to superintend the works should certify that the whole of the premises, including the stem and stern-post of the said vessel, should be up and complete,—one other equal fourth part thereof when the said vessel should be plated up, and all the beams and stringers in,—one other equal fourth part thereof when the said vessel should be launched,—and the remaining fourth part thereof when the said vessel should be completely finished and delivered, and should have proved upon trial to fulfil all the terms and conditions of the said deed and the specification thereunder written: that

the said covenants so made by the plaintiffs as in this plea aforesaid are the same covenants which are mentioned in the said deed and in the declaration respectively under or by virtue of which the consideration or other moneys or instalments of money therein mentioned were to become or might become due and payable from the plaintiffs to the said Charles John Mare, his executors, administrators, or assigns, as therein mentioned: that, after the said first two instalments of the said sum of 14,120*l.* had been paid to the said Charles John Mare by the plaintiffs under the said covenant in that behalf, but long before the said ship had been launched, and before the third of the said instalments had become due or payable to the said Charles John Mare from the plaintiffs according to the true intent and meaning of the said deed, and before the accruing of any of the said causes of action in the declaration mentioned, the plaintiffs, by arrangement between them and the said Charles John Mare, without the knowledge and consent of the defendant, and contrary to the true intent and meaning of their said covenant in that behalf, paid to the said Charles John Mare divers money by way of anticipation and in advance [558] and discharge of nearly the whole of the said third instalment: that, afterwards, and after the said first three instalments of the said sum of 14,120*l.* had been paid to the said Charles John Mare by the plaintiffs under the said last-mentioned covenant, but before the said vessel had been completely finished and delivered, and before the last of the said instalments had become due or payable to the said Charles John Mare according to the true intent and meaning of the said deed in that behalf, and before the accruing of any of the said alleged causes of action in the declaration mentioned, the plaintiffs, by arrangement between them and the said Charles John Mare, and without the knowledge or consent of the defendant, paid to the said Charles John Mare divers moneys by way of anticipation and in advance and discharge of a large portion, to wit, 3000*l.*, of the said last-mentioned instalment: that the said moneys so paid to the said Charles John Mare by way of anticipation of each of the said third and last instalments as aforesaid amount to a large sum, to wit, the amount of the debts and penalties due from the said Charles John Mare to the plaintiffs as in the declaration mentioned, and of all damages sustained by the plaintiffs by reason of the breaches of contract by the said Charles John Mare as in the declaration alleged: that, by making such payments as in that plea aforesaid, the plaintiffs deprived themselves, without the consent of the defendant, of the security which they had for the payment of the said last-mentioned sum under and by virtue of the said deed; and that the defendant's position as surety was much altered and prejudiced thereby, to wit, to the whole amount of the plaintiffs' claim in respect of this action: that, afterwards, and long before the said vessel was completely finished and delivered, the said Charles John Mare became and was duly and according to law adjudged a [559] bankrupt on the 25th of September, 1855, and that his estate has not paid and is not capable of paying his debts in full, and that he the defendant had no notice of the causes of action alleged against him in the declaration until the 6th of March, 1856; and that he (the defendant) hath been much aggrieved by reason of the premises, and he ought to be and is thereby exonerated and discharged from liability to the plaintiffs.

The plaintiffs took issue upon all the pleas.

Second replication, upon equitable grounds, to the fourth plea,—that the last of the said advances so made by the plaintiffs to the said Charles John Mare as in that plea mentioned, was made with the knowledge, authority, and consent of the defendant, and at the request, or for the use and benefit, and on account of the defendant, and was of a large amount, to wit, 2000*l.*, and, before and at the time of the making of the said advance, the defendant had notice and knowledge of the plaintiffs' having made the said previous advances to the said Charles John Mare as in that plea mentioned; and the defendant did not at any time before or after the said alleged breaches of the said deed by the said Charles John Mare, or any or either of them, disavow or disavow the said deed, or his liability under the same or to perform the defendant's covenants therein, or otherwise avoid the said deed, but acquiesced in and recognized the same as a valid deed, and that he continued liable for the performance of his covenant therein; and, at the time of his so authorizing and consenting to and requesting the said last of the said advances to be made by the plaintiffs as aforesaid, the defendant, by virtue thereof, affirmed the said deed and his said covenant, and waived and abandoned any release or discharge to him of the same by reason of the said advances so before then made by the plaintiffs as in the said fourth plea alleged.

[560] Third replication, upon equitable grounds, to the fifth plea,—that the last of the said payments so made by the plaintiffs to the said Charles John Mare by way of anticipation and in advance and discharge of a portion of the said last of the said instalments as in that plea mentioned, was made with the knowledge, authority, and consent of the defendant, and at the request or for the use and benefit and on account of the defendant, and was of a large amount, to wit, 2000l. : and, before and at the time of the making of the said payment, the defendant had notice and knowledge of the plaintiffs' having made the said previous payments and advances to the said Charles John Mare as in that plea mentioned, and the defendant did not at any time before or after the said alleged breaches of the said deed by the said Charles John Mare, or any or either of them, disaffirm or disallow the said deed, or his liability under the same, or to perform the defendant's covenants therein, or otherwise avoid the said deed, but acquiesced in and recognized the same as a valid deed, and that he continued liable for the performance of his covenant therein ; and, at the time of his so authorizing and consenting to and requesting the said last of the said advances to be made by the plaintiffs as aforesaid, the defendant, by virtue thereof, affirmed the said deed and his said covenant, and waived and abandoned any release or discharge to him of the same by reason of the said advances so before then made by the plaintiffs as in the said fifth plea alleged.

The defendant rejoined to the last two replications, and also took issue thereon.

The cause was tried at the sittings in London after Trinity Term, 1857, before Willes, J., and a special jury, when the following evidence was given on the part of the plaintiffs :—

[561] An agreement under seal was put in, dated the 26th of April, 1855, between Charles John Mare, of the first part, the defendant of the second part, and the plaintiffs of the third part. This was the agreement upon which the action was brought ; and the terms of it corresponded in substance with such portions of it as are mentioned in the declaration and in the fourth and fifth pleas.

It was also proved (by admissions entered into between the parties for the purposes of the trial), that Mare was adjudged a bankrupt on the 25th of September, 1855 ; that Charles Lee was appointed the official assignee, and that the defendant, Mark Hunter, and Samuel Turner, were duly appointed creditors' assignees, under the bankruptcy : that the steam-ship the subject of the agreement was launched on the 12th of September, 1855, and that she was not finished and fitted for sea by Mare on or before the 13th of September, 1855 ; that the plaintiffs paid to Mare the following sums on account of the moneys payable or to become payable under the agreement, at the dates following, viz.

On the 28th of April, 1855, 3500l.,—on the 24th of May, 3500l.,—on the 5th of July, 3500l.,—on the 11th of August, 1000l.,—on the 13th of September, 2000l. : and that these sums were paid by cheques on the plaintiffs' bankers, Messrs. Spooner, Attwood, & Co.

It was also arranged, by consent, that, in the event of the plaintiffs being entitled to a verdict, the amount of damages should be settled by an arbitrator.

Mr. Benjamin Attwood was then called, and stated in effect as follows :—“ I am one of the directors of the General Steam Navigation Company. Mr. Mare applied to me in July, 1855, for payment of the third instalment under the deed of the 26th of April, 1855. I do not remember the precise day on which he applied, [562] but I had several communications with him upon the subject : and the instalment was subsequently paid on the 5th of July, 1855. I saw the vessel from time to time myself while she was in course of building ; and, on the 5th of July, she was in a launchable condition, and might have been launched any day. Mr. Mare carried on his business in Orchard Yard, Blackwall, but communications were frequently made to him at Mr. Rolt's (the defendant's) office, in Clement's Lane. Mr. Mare is Mr. Rolt's son-in-law : and Mr. Rolt has been connected in business with Mr. Mare, in the way of advancing him sums of money to carry on his business.”

On cross-examination, Mr. Attwood said,—“ Lloyds' surveyors were employed by our company to superintend the work done upon the ship. I know that before the first instalment was paid the surveyor certified, either verbally or in writing, that the frames were completed ; and on the 24th of May, when the second sum of 3500l. was paid, the vessel was plated up. The 3500l. which under the contract was payable when the vessel should be launched, was paid on the 5th of July. The vessel was

not in fact launched till the 12th of September following. The vessel was not completed and delivered till the 22nd of November. Of the last instalment of 3500l., 1000l. was paid on the 11th of August, and 2000l. on the 13th of September, 1855. At the time when the vessel was completed and delivered, there was only 620l. of the contract money unpaid. Our claim in this action is 1629l., including penalties. I saw the progress of the work going on before the 5th of July: and, if I had said I would not pay the instalment in July, Mr. Mare had power to enforce it when he put the ship into the water. I say on the 5th of July the ship was ready for launching. When I say that the ship was ready for launching, I [563] should explain that the time when a ship shall be launched depends entirely upon the will and pleasure of the builder: some who can afford it keep the vessel on the stocks much longer than others; and some vessels are launched as speedily as possible, because that is generally the time when by the terms of the contract an instalment of the purchase-money becomes due. When the 2000l. was paid on the 13th of September, a great deal more work had been done to the ship than was necessary for launching the vessel. A ship may be launched in various conditions. The 'Dolphin' was capable of being launched in July; but it was thought better not to launch her. I had no communication during these transactions with Mr. Rolt personally, nor till after Mr. Mare's bankruptcy."

On re-examination, Mr. Attwood said,—"Mr. Rolt was one of the assignees under the bankruptcy; and they finished the vessel according to the contract, except that the same was finished very much behind the time. This was an arrangement between the company and the assignees. I received this letter from the defendant, as assignee of Mr. Mare's estate, on or about the 14th of February, 1856,—'Dear Sir,—Will you ask the board to give Mr. Lee (meaning the official assignee) a cheque this week for 1000l. on account of the "Dolphin." I am sure they will not consider it intrusive under the existing circumstances of the estate.' I saw Mr. Rolt two or three times while the assignees were finishing the vessel. On one of those occasions, I said to him, 'I am surprised you do not get on faster with the ship, because you know you are now liable to penalties.' Mr. Rolt in reply said, 'I will set about it directly I get the money; I will put more men on, and get on as fast as possible.' Mr. Rolt did not during that time make any complaint to me of the pre-payments. The last payment of 2000l., on the 13th of [564] September, was paid to Messrs. Spooner & Co. by Mr. Mare's order, and placed there to Mr. Rolt's credit. I do not recollect anything else that passed between myself and Mr. Rolt. The payment of the 1000l. and 2000l. did not delay the finishing of the vessel: on the contrary, they greatly expedited it: they certainly did not contribute to that head of damage, at all events."

By leave of the judge, the witness was further examined by the defendant's counsel, and said,—"This was not the only ship Mr. Mare was engaged in building. Unfortunately, he was over head and ears in work: and I do not suppose that all the money we advanced from time to time was bestowed specially upon our ship. I do not myself know that the 2000l. went to Mr. Rolt. I heard it from Messrs. Spooner."

Mr. Philip Twells, one of the partners in the banking-house of Spooner, Attwood, & Co. was called. He deposed in substance as follows:—"In the year 1855, and up to the date of Mr. Mare's bankruptcy, we acted as his bankers. In the month of August in that year, three cheques of the defendant's were paid in to Mr. Mare's credit, one for 5000l., and one for 2000l., on the 7th of August, and another for 1000l., on the 8th. We held all these three cheques at the same time; and, upon their being presented at Prescotts', who were the defendant's bankers, they were dishonoured. At this date, Mr. Mare's account was overdrawn. We then made application to the defendant for payment of these cheques; and we also applied to Mr. Payne, his clerk. Soon after this, the defendant paid us 2000l. in bank notes; and we thereupon gave up to him the cheque for 2000l.; and then we were holders of dishonoured cheques for 6000l.,—one of 5000l., and another of 1000l. Shortly after this payment, viz. on the 16th of August, an attachment upon Mr. Mare's account was lodged at our bank; in consequence of which, another account [565] was opened the same day, in the defendant's name; and he stated to us as the reason for opening this account, that there were at that time several acceptances of Mr. Mare's outstanding, which were made payable at our bank, and, in order that funds might be provided to meet these acceptances, and as we could not pay them out of any funds belonging to Mr. Mare, an account should be opened in the defendant's name; and he authorized

us to pay any of the said acceptances, or any cheques drawn upon us by Mr. Mare, out of the moneys standing to the credit of that account. The defendant paid in various sums from time to time to the credit of that account, and we applied them exclusively to the payment of Mr. Mare's acceptances and cheques. On the 27th of August, the two dishonored cheques for 5000l. and 1000l. still remained in our hands unpaid. On that day, the defendant made us a further payment of 500l. on account of the dishonored cheques; upon which we gave up to him the cheque for 5000l., and he gave us a fresh cheque for 4500l. on his bankers, Messrs. Prescott & Co. We continued frequently to press him upon the subject of these cheques, and saw both him and his solicitor several times about them. I believe it was mentioned on one of these occasions (I think by the solicitor) about money which Mr. Mare had to receive from the General Steam Navigation Company. We also saw Mr. Payne, the defendant's clerk; and he generally assured us that he was doing every thing he could to put the matter right without unnecessary delay. He further stated that large sums of money were coming due to Mr. Mare shortly, and, amongst others, he mentioned a sum of 2000l. which Mr. Mare was to receive from the plaintiffs, which should be paid to us. I know a person named Payne, who was clerk to Mr. Rolt, and who generally communicated between Mr. [566] Rolt and us. My impression is, that he was the person who paid in these cheques, but I cannot say I recollect the particular transaction. Mr. Mare's account was frequently overdrawn. I should state, generally, it was to an amount perhaps varying from 5000l. to 25,000l."

[A note was here shewn to the witness, who was told to look at it, but not to read it aloud: he then proceeded.]

"This is a note which I received from the defendant's attorney about this time, with reference to a proposition which was afterwards made by the defendant himself, that the sum of 2000l. which I have just mentioned should be paid to us."

[Willes, J., here asked the plaintiffs' counsel whether the note was to be read or not: and stated that there was no reason why the plaintiffs should not put it in and read it as evidence, if they pleased. Byles, Serjt., however, on the part of the plaintiffs, stated that he did not want the note read; that it was a note saying that Mr. Rolt would make a proposition; and that he was asking the witness whether it recalled to his mind that Mr. Rolt did make a proposition. The witness then proceeded.]

"The proposition which the defendant made shortly after I received this note, was, that a sum of 2000l. would be payable by the General Steam Navigation Company as soon as a new vessel was launched; and that, as soon as that money was paid, it should be handed over to us in part satisfaction of the dishonored cheques. Between that time and the 13th of September, the amount due to us from the defendant on these cheques was reduced to 3486l. 13s. 4d. He paid us 500l. on the 31st of August, when we gave up to him the cheque for 4500l., and he gave us a fresh cheque for 4000l., and, on the 4th of September, he [567] paid us a further sum of 513l. 6s. 8d. We then gave up to him his cheque for 4000l., and he gave us a fresh cheque for 3486l. 13s. 4d. On that day, the 13th day of September, a cheque of the plaintiffs' for 2000l., in favor of Messrs. C. J. Mare & Co., was paid into our bank to the defendant's credit; and on that occasion we returned the defendant his cheque for 3486l. 13s. 4d., and he gave us a new one for 1486l. 13s. 4d. That left his balance, 1486l. 13s. 4d., which was afterwards paid by various payments."

On cross-examination Mr. Twells stated as follows:—"I know that very large advances were made from time to time, and very frequently, by Mr. Rolt to Mr. Mare; and this transaction of which I have just spoken was one of many of the like description. When Mr. Mare required an advance or advances of money, the defendant would give him his cheque or cheques upon his own bankers (as in this instance for 7000l., or 8000l.); and these cheques remained in our hands in expectation of payments being made by Mare. We in the meanwhile advanced to Mr. Mare whatever he required, upon the faith and to the amount of the defendant's cheques; and they were paid in and received by us in discharge of the amount due upon the defendant's cheques. These sums were frequently drafts and cheques payable to Mr. Mare; and sometimes we received from Mr. Payne bank-notes to a large amount: and, as from time to time sufficient sums were paid in to cover the amount of the cheques, such cheques were always given up. I think the cheques were always returned, to the best of my recollection, to Mr. Rolt's clerk, Payne, and generally on his bringing us money. In

the transaction in question, Mr. Rolt, the defendant, gave cheques altogether to the amount of 8000l. Shortly before or on the 8th of August, we made advances to Mr. Mare to the extent [568] of 8000l. Mr. Mare did not make payments to us to that amount: and we then presented the cheques, and they were not paid."

On re-examination, Mr. Twells said,—“The only communication that I recollect upon the subject of the 2000l. was, that we sent a letter to the defendant requesting that the transaction (with reference to the dishonored cheques) might be closed. It was sent to the defendant's office in Clement's Lane; and I received in answer a letter from Mr. Mare, in the following terms,—‘In Mr. Rolt's absence, I opened your letter. The G. S. N. Co.'s ship will be launched on Thursday, when the 2000l. order will be payable.’ The defendant and others had mentioned to me that 2000l. was likely to become due from the General Steam Navigation Company, and that it should be paid to the account of the defendant's unpaid cheques. The account of Mr. Rolt's unpaid cheques was not the account he opened for Mr. Mare. I think Mr. Mare's letter was written from the office of the Dover Mail-Packet Company, with which Mr. Mare was connected, and from which he sometimes dated his letters. I am not aware that the defendant Mr. Rolt knew anything of it. The letter to which that is an answer was directed to Clement's Lane. Whenever we had any communication to make to Mr. Mare, we used to send it to Clement's Lane. I think Mr. Mare had not an office with his name up in Lombard Street; I feel sure he had not; I think we must have known it if he had. Mr. Payne, the defendant's clerk, constantly interfered and took part in business that related to Mr. Mare: indeed, I should think that he must have brought to us on Mr. Mare's account, within the last three or four years, cheques to the amount of several hundred thousand pounds of the defendant's.”

It was submitted on the part of the defendant, that, [569] upon the evidence as it stood, the fourth and fifth pleas were proved, the three instalments of 3500l. on the 5th of July, 1000l. on the 11th of August, and 2000l. on 13th of September, having been paid prematurely; and there being no evidence that the defendant had consented to any of these pre-payments: and, further, that the onus of proving the defendant's consent to these pre-payments lay on the plaintiffs.

The learned judge said:—“My present impression is, that the pleas are made out. I do not think that any creditor has a right to pay away the security which is in his hands, to the prejudice of the surety; and here the moneys which the General Steam Navigation Company had in their hands for the purpose of paying to Mr. Mare when the instalments had been earned, were a security to them that the work would be properly performed before the payments were made: and I think they parted with the money without the consent of Mr. Rolt. I think there is no assent either as to the 3500l. or as to the 1000l.; and I think it is for the plaintiffs to prove it. I think the company, in parting with the moneys without the assent of Mr. Rolt, parted with securities which the surety had a right to so long as the creditor had elected to treat or retain those as securities. And, secondly, until the work was done which earned the respective instalments, I think that they had no right to anticipate the payment, so far as the surety was concerned; because, so far as they had those moneys in their hands, they had them to look to, instead of looking to the surety. I put it on the principle that the plaintiffs had no right to part with the securities which the creditors, and consequently the surety, would have a right to look to. The question is, —and it is a question raised on the plea as to the pre-payments, —whether that is an answer to the whole of the [570] creditors' claims, or only an answer to the extent of the loss sustained by the surety in consequence of the securities being thus given up. I have doubt about that. My impression at present is rather in favor of holding with the plaintiffs: but I do not see what the damages should be; therefore I cannot make a substantive ruling upon that, and, consequently, I think the better thing to do, for the purpose of to-day, is to rule according to the tendency of my opinion, —to rule for the defendant, giving the plaintiffs leave to move to enter a verdict for them, if the court shall think my law is wrong, either as to the pleas being an answer to the action, or any answer as to the 1000l.” Ultimately his lordship directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter a verdict for the amount of damages to be ascertained by an arbitrator.

Byles, Serjt., in Michaelmas Term, 1857, accordingly obtained a rule nisi to enter a verdict for the plaintiffs, or for a new trial, or to enter judgment for the plaintiffs non obstante veredicto, —on the grounds that the acts of the plaintiffs occasioned no

injury or prejudice to the defendant,—that the defendant was a party to the acts of the plaintiffs,—that the defendant was cognizant of and consented to them,—that the defendant ratified them and took the benefit of them,—that the burthen of shewing that he had no notice of them lay on the defendant,—that the pre-payment of the 1000l. on the 11th of August, 1855, could be no bar to the whole action,—that it was the defendant's duty to have made inquiry,—and that the defendant was neither at law nor in equity released from his contract.

Sir Fitzroy Kelly, J. Wilde, Q. C., and Garth, shewed cause. The plaintiffs seek to recover from the defendant, as surety, the damages they have, as they allege, sustained by the failure of Mare, the principal, to complete his contract. The sum agreed to be paid by the plaintiffs for the "Dolphin" was 14,120l., by four instalments, which were to be payable as the work progressed. The first two instalments of 3500l. each were duly and properly paid at the times stipulated for. The third instalment of 3500l. was payable when the ship should be launched: it was, however, paid on the 5th of July, whereas the ship was not launched until the 12th of September. On the 11th of August a further payment of 1000l. was made on account of the fourth instalment,—still before the ship was launched; and on the 13th of September a further sum of 2000l. was paid: thus leaving only 620l. unpaid at the date of Mare's bankruptcy, the 25th of September. The ship was not actually completed and delivered until the 22nd of December, which was seventy days after the day limited by the contract. The cost of completing her expended by the plaintiffs after Mare's bankruptcy amounted to 1629l. Deducting, therefore, 620l. which remained unpaid of the stipulated price, the plaintiffs now claim from the surety 1009l., and also 700l. for the seventy days' delay, at 10l. per day. The answer which the defendant sets up against this claim is, that he engaged to guarantee the due completion of the ship by the 13th of September, the plaintiff paying the purchase-money in four instalments as the work reached certain stages of completion: and that, if the plaintiffs had not deviated from their contract by prematurely paying those instalments, they would have had ample funds in hand at the time of Mare's bankruptcy to complete the ship. Whether the surety was damaged or not by the course adopted by the plaintiffs is quite immaterial. The question is, was the contract broken? Has the situation of the surety been altered? [572] The plaintiffs have parted with that which by the terms of the contract was to have remained in their hands for the benefit of the surety as well as of themselves. The nearest case to this is that of *Culbert v. The London Dock Company*, 2 Keen, 638. There, one Streather, a builder, contracted to perform certain works for the London Dock Company, and it was agreed that three fourths of the work, as finished, should be paid for every two months, and the remaining one fourth upon the completion of the whole work: and it was held that the sureties for the due performance of their contract were released from their liability, by reason of payments exceeding three fourths of the work done, having, without their consent, been made to the contractor before the completion of the whole work. Lord Langdale, M. R., in giving judgment, said: "The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that, by the advances made to him he was enabled to do more than he otherwise could have done: and that, to assist him, was to assist his sureties; and it was only for the purposes of affording that assistance that the company did more than they were obliged to do. The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety; and the answer has [573] always been, that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him: and, bearing in mind that the surety, if he pays the debt, ought to have all the securities possessed by the creditor, the question always is whether what has been done lessens that security. In this case the company were to pay for three fourths of the work done every two months; the remaining one fourth was to remain unpaid till the whole was completed: and the effect of this stipulation was,

at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not: and thus it materially tended to protect the sureties. What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith: but it also took away that particular sort of pressure which by the contract was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors having in their hands one fourth of the value of the work done, became creditors to a large amount without any security: and, under the circumstances, I think their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship" (a). This is just like the case of a party to a bill or note who is discharged by the absence of a notice of dishonor. No inquiry can take place as to whether or not he is damaged by the want of notice. He is absolutely discharged. *Hitcher v. Hall*, 5 B. & C. 269, 8 D. & R. 22, is also an authority to shew, that, to charge a surety, it must be shewn that there has been a literal performance of the contract [574] with the principal. The surety, said Bayley, J., there, "had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference: the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party." Littledale, J., did not agree in the judgment in that case, but he did not deny the general principle, that, if by the act of the creditor any alteration is made in the position of the surety, the latter is discharged. The rule is the same in equity as at law: see *White & Tudor's Leading Cases*, 2nd ed. 827, et seq., notes to *Rees v. Berrington*, 2 Ves. jun. 540; and see *Newton v. Chorlton*, 10 Hare, 646; *Bonar v. Macdonald*, 3 House of Lords Cases, 226, 238. There is no pretence, upon the evidence, for saying that Mr. Rolt assented to the instalments being anticipated. No doubt he was aware of the payment of the 2000l. on the 13th of September; but there is nothing to shew that he was aware that it was part of the fourth instalment. And, as to the 1000l. paid on the 11th of August, it was not shewn that that got into the hands of Spooner & Co. [Willes, J. It was not pretended that Mr. Rolt knew anything about the payment of the 1000l.] In *Samuell v. Howarth*, 3 Meriv. 272, A. guaranteed the payment of any goods to be supplied by B. to C. between the 2nd of April, 1814, and the 2nd of April, 1815; and it was held, that, although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and C. having accepted bills for the amount of the goods delivered, which B. permitted him to renew [575] when payable, without any communication to A. on the subject of such renewal, A. was discharged from his guarantee by virtue of the rule that a creditor giving time to the principal debtor without the consent of the surety, releases the surety; and that although it was proved that the renewal was given only in consequence of C.'s inability to pay, and that no injury could accrue to A., the surety being himself the fit judge of what is or is not for his own benefit. [Cockburn, C. J. It may not be necessary, in order to discharge the surety, that he should be actually prejudiced, that the result should have been produced: but he must be put into a worse position. Now, as to the 3500l. paid on the 5th of July, I do not see how Mr. Rolt could have been put into a worse position. The ship was then capable of being launched: but she was not actually launched, because the keeping her in the yard would rather accelerate her arrival at the next stage, and so promote the ultimate completion of the contract by the stipulated day.] That is by no means certain: there is considerable expense and risk incurred in the launching. [Cockburn, C. J. The case of *Samuell v. Howarth*, proceeds upon the assumption that the position of the surety was prejudiced: the creditor had no right to prolong the duration of his responsibility.]

Knowles, Q. C., W. A. Collins, and Welsby, in support of the rule. The allegation in the fourth plea, that the pre-payments were made to Mare by the plaintiffs without the knowledge and consent of the defendant, and that, by making the said payments and advances without the consent of the defendant, the plaintiffs materially and

(a) Cited in *Strong v. Forster* 17 C. B. 211. And see *Warre v. Calvert*, 7 Ad. & E. 143, 2 N. & P. 126

prejudicially altered his position as surety for Mare,—is a material allegation, and one which it was incumbent on the defendant to prove. [576] [Cockburn, C. J. Is it not enough for the surety to say, “You have varied the terms of the contract?” The only question is upon whom lay the onus of proof.] In *Mayhew v. Crickett*, 2 Swanst. 185, it was held that a creditor whose debt is secured by a warrant of attorney, having received promissory notes from the debtor and two sureties, and afterwards entered up judgment and taken the goods of the debtor, and, without the knowledge of the sureties, withdrawn the execution, has discharged the sureties; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability. “I always understood,” said Lord Eldon, “that, if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle which prevails both in courts of law and in courts of equity. On the other hand, if the surety afterwards makes a promise to pay, he cannot object to that as a promise without consideration: the promise is valid, not as the constitution of a new, but the revival of an old debt. So, when a bankrupt is discharged by his certificate, he cannot for that reason impeach a subsequent promise to pay a former debt, as a promise without consideration.” That case has never been impugned in any court either of law or equity. In *Smith v. Winter*, 4 M. & W. 454, A. indorsed to S. & Co., as a security for advances made to him by them, certain promissory notes made by B. While the notes were running, A. stopped payment, and a deed was executed by him and several of his creditors, and among them by S. & Co., whereby his affairs were placed in the hands of inspectors, and the creditors parties to the deed agreed on certain terms not to call for or compel payment of the debts due from him for the period of three years. After the execution of this deed by A. and S. & Co., and before the notes became due, B. [577] signed a written consent to the creditors’ signing the deed and giving time to A. without prejudice to their claims on her, B. It was held that her liability on the notes to S. & Co. was thereby revived: and Lord Abinger said,—“We must take the law to be, according to the case of *Mayhew v. Crickett*, that, if the defendant, at any time before the bills became due, gave her consent to the forbearance, she remains liable.” [Crowder, J. You will observe that the allegation in the plea is negative. Cockburn, C. J. Is it not an answer for the defendant to say that the contract for the breach of which by his principal he is sought to be charged, is not the contract he entered into? Does it not lie upon the plaintiff to reply that the surety knew of and assented to the altered state of circumstances?] A suggestion of that sort was thrown out by counsel in *Smith v. Winter*. “The plea,” it was said, “alleges that the plaintiffs forbore and gave time to Innes without the defendant’s consent. They did so, by the deed: if the subsequent consent cures it, that should have been replied.” But Parke, B., said,—“Must we not reasonably construe your plea so as to make it a good plea, i.e. as alleging that time was given without the defendant’s consent at any time? otherwise it is bad, according to the authority of Lord Eldon.” [Willes, J. The plea there stated that time was given without the assent of the defendant. The replication took express issue on that. Now, it is a rule of pleading, that, where a plea contains a negative allegation which need not have been made, if the other side take issue on it, that makes it material and necessary to be proved. All that is discussed in *Lush v. Russell*, 5 Exch. 203, 7 D. & L. 228 (a). The argument is not inconsistent with *Lush v. Russell*. Here, the plaintiffs do take issue on the plea. [Williams, J. [578] That amounts to no more than putting the defendant to proof of all the material allegations in the plea.] The doctrine of the discharge of the surety by indulgence being given to the principal, is to be judged of upon equitable principles. If a good defence in equity, it is a good answer at law. The contract of the surety is absolute: his discharge is an equitable doctrine. [Cockburn, C. J. The surety guarantee the due performance of the contract, subject to certain conditions. If the conditions are varied, so as to make the contract more onerous to the surety, must it not be assumed that it is done without the assent of the surety, until the contrary is shewn?] The defence suggested is, “You have varied the contract without my consent.” Who is to prove that, but the party who asserts it? [Cockburn, C. J. Is not the absence of consent to be presumed from the fact of the contract having been made more burthen-some?] The plaintiffs had simply to prove the defendant’s contract, and the breach.

Then comes the defence. If the position of the surety has by the act of the creditor been altered so that he might be prejudiced, whether he has been actually damaged or not, he is discharged. It is enough that the contract has been varied, and that the surety may be damaged: see the judgment of Richards, C. B., in *Bowmaker v. Moore*, 7 Price, 223, 231, Daniel, 264, 270 (a). The rule is thus laid down in Story's *Equitable Jurisprudence*, 6th edit. 363, § 323,—“On the whole, the doctrine may be generally stated, that, [579] wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. § 324. The case of principal and surety, as a striking illustration of this doctrine, may be briefly referred to. The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract. Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety. If any stipulations, therefore, are made between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract. And, on the other hand, if any stipulations for additional security or other advantages are obtained between the creditor and the debtor, the surety is entitled to the fullest benefit of them. § 325. Indeed, the proposition may be stated in a more general form,—that, if a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him, if not at law, at all events in equity. § 326. It is upon this ground, that, if a creditor, without any communication with [580] the surety, and assent on his part, should afterwards enter into any new contract with the principal, inconsistent with the former contract, or should stipulate, in a binding manner, upon a sufficient consideration, for further delay and postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety.” So, in *Bell v. Banks*, 3 Scott, N. R. 497, 503, 3 M. & G. 258, Tindal, C. J., says: “No doubt, the general rule is that the surety is discharged by any arrangement between the creditor and the principal, by which the situation of the surety is altered. The general class of cases exemplifying this principle, are those where without the knowledge or assent of the surety time has been given to the principal debtor by some contract that is binding upon the creditor. There, the surety was held to be discharged, on the ground that such secret arrangements amount to a legal fraud: the surety relying upon the contract by which the principal is to be called upon for payment on a given day, his situation is altered, inasmuch as he is prevented from having adverse recourse to the principal.” *The Bank of Ireland v. Beresford*, 6 Dow. 233, is to the same effect. In order to displace this defence, it is necessary to shew that the surety knew of the advance made to the principal. If the circumstances of the case were such as to make it his duty to make inquiry, and he abstains from making it, he is in equity affected with the knowledge he would have had or might have had if he had made inquiry. [Crowder, J. This part of your argument fails, unless you shew that Mr. Rolt had either actual or constructive notice of the pre-payment of the third instalment.] Exactly so. In *Goring v. Edmunds*, 6 Bingh. 94, 3 M. & P. 259, Gaselee, J., says: “I think a surety has a duty upon him to go and inquire as to the state of the transaction.” And in *Wright v. Simpson*, 6 Ves. 714, Lord Eldon says: “The surety is a [581] guarantee; and it is his business to see whether the principal pays, and not that of the creditor.” In *The Mayor of Berwick v. Murray*, 3 Jurist, N. S. 1, the treasurer of a municipal corporation, for whom A., B., and C. were sureties by bond to the extent

(a) “The real and only question in the case is, whether the surety was in point of fact placed in a different situation by what had taken place on the arrangement between the principal and the obligee, and whether by such change of situation he might have been prejudiced, not whether he did in fact actually sustain any injury in consequence.” 7 Price, 231.

of 2000l., kept a banking-account in his own name, which was shewn to have been in continuation of an account kept as treasurer, and several sums of money paid in to that account were shewn to have been corporation money. He drew from his account a sum of 2300l., and placed it at interest, upon a deposit-note, in another bank, in the name of his daughter. Being indebted to the corporation in a sum greater than that amount, he was required to account, but refused; and, the corporation having informed the sureties of the debt, and his refusal to account, A., one of the sureties, went to him and demanded an indemnity, when he gave him the deposit-note for 2300l., stating at the same time that he had sufficient means to meet any demand of the corporation against him. Upon a bill by the corporation for the purpose of recovering the 2300l., it was held that it was to be considered as part of the corporation moneys, although A. by his answer stated that at the time the deposit receipt was delivered to him he believed that it was the proper money of the treasurer. In giving judgment, Lord Cranworth, C., said: "When, by way of indemnity, he (A.) was offered a deposit-note, —a deposit-note made a month previously by Daniel Murray in the name of his daughter, a young woman of twenty-three years of age,—it is impossible that suspicion should not have been excited. He was bound to ask why such a deposit was made, not in his own name, but in that of his daughter. It is not alleged that he was ever led to suppose the daughter had any beneficial interest in the money. For what purpose, then, was her name used? In fact, her name was evidently [582] used as a means of disguising the truth. Perhaps inquiry would not have brought out the truth: but it does not lie in the mouth of William Murray to say this. He made no inquiry, although the circumstances were such as ought to have induced him to do so. He knew that the corporation alleged great misconduct and default against David Murray. If he had applied to the daughter, he would probably have learnt from her that she knew nothing of the deposit till she was called on by her father to indorse the deposit-note, that it was made without any previous communication with her, and that she was never possessed of any such sum as 2300l. It is impossible to permit a man who received by way of security from a defaulting agent a deposit of money which had been withdrawn from the funds of his principal, to insist, in circumstances like these, on his ignorance of the truth. I am clearly of opinion that William Murray must be treated as a person who had notice of the truth." So, here, the slightest inquiry of Mare would have made Mr. Rolt acquainted with all the facts. As he chose to make no inquiry, "he must be treated as a person who had notice of the truth." The same principle is enunciated in *Owen v. Homan*, 4 House of Lords Cases, 997. And the doctrine of constructive notice from the absence of inquiry is further considered in *Hewitt v. Loosemore*, 9 Hare, 449. There was nothing to shew that Mr. Rolt did or could sustain any prejudice from the circumstance of the 2000l. having been paid in advance: it did not appear that the work went on with less vigour. [Cockburn, C. J. What evidence is there that Mr. Rolt knew that the prior payments had been made in anticipation?] The whole surrounding circumstances shew that he must or ought to have known it. All might have been made clear if Mr. Rolt had been called, as he ought to have been. [Williams, J. I [583] must confess I do not see any evidence annexing the prepayment to the final instalment.]

COCKBURN, C. J. As there is not perfect unanimity amongst us, we will take a little time to consider.

J. Wilde. We are content to take our stand upon the ruling of the learned judge, that there was no evidence to go to the jury.

Cur. adv. vult.

COCKBURN, C. J., now said:—Upon the whole, we are of opinion that there must be a new trial in this case. Leave was reserved to the plaintiffs to move to set aside the verdict entered on the assumption of certain facts, and, amongst others, that there was no evidence to go to the jury of knowledge on the part of the defendant that the payment of the 2000l. was a pre-payment made in anticipation of the period at which, according to the contract for the due performance of which he was surety, it was to become payable. My Brother Willes was of opinion at the trial that there was no evidence to go to the jury of that fact. Upon a full discussion of the case, and after consideration,—although my learned Brother still adheres to that opinion,—the rest of the court (a) are of opinion that there was some evidence to go to the jury. We,

(a) Cockburn, C. J., Williams, J., and Crowder, J.

however, think it better not to enter into the merits of the case, lest it should in any way prejudice the future trial. It is enough to say that the majority of the court think that there was some evidence which ought to have been submitted to the jury, in support of the plaintiffs' replication. We are all agreed that the burthen of proof was upon the plaintiffs. The rule must therefore be made absolute for a new trial.

[584] WILLIAMS, J. I may add that a great many arguments were used for the purpose of shewing that the allegation in the plea, —that the pre-payments were made to Mare without the knowledge or consent of Rolt, and that, by making such payments without his consent, the plaintiffs materially and prejudicially altered Rolt's position as surety,—was material, and must be proved. But we are of opinion that the burthen of proof was upon the plaintiffs.

WILLES, J. All I think it necessary to say, is that my Lord has accurately stated the view which I entertain.

Rule absolute accordingly.

June 18, 1858. Decision affirmed on appeal.

The defendant appealed against this decision; and the case was argued in the Exchequer Chamber on the 18th of June, 1858, before Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B., and Hill, J., by the Attorney General (Sir F. Kelly, with whom were James Wilde, Q. C., and Garth), for the appellant, and Knowles, Q. C. (with whom were Welsby and W. A. Collins), for the respondents.

The points urged on the part of the appellant (the defendant) were, that the rule of Michaelmas Term, 1857, ought to have been discharged for the following reasons,—1. That the fourth and fifth pleas were proved by the plaintiffs' own evidence at the trial, and that there was no evidence to go to the jury in support of the plaintiffs' replications to those pleas.—2. That the onus of proving the defendant's knowledge of and consent to the pre-payments of 3500*l.*, 1000*l.*, and 2000*l.*, respectively, lay upon the plaintiffs, and that [585] the defendant's case was complete, upon proof of those pre-payments.—3. That it was not shewn at the trial that the defendant knew anything of the pre-payments, but, on the contrary, the evidence adduced by the plaintiffs shewed him to have been in ignorance of them.—4. That the verdict for the defendant ought to stand, and that there was no ground either for entering the verdict for the plaintiff or for granting a new trial.—5. That the said pleas, and the facts proved in support of them, afford a clear defence to the action both in law and equity: see *Colbert v. The London Dock Company*, 2 Keen, 638.

The plaintiffs' points were as follows:—1. That the defendant's fourth and fifth pleas were not proved at the trial, and therefore the verdict on the issues joined on the replication to those pleas ought to be entered for the plaintiffs.—2. That, if the fourth and fifth pleas were proved, the replications thereto were also proved in substance, and therefore the issues joined thereon ought to be entered for the plaintiffs.—3. That, assuming that it was necessary, in order for the plaintiffs to succeed on the above issues, that they should give evidence to prove that the defendant knew of and consented to the pre-payments made by the plaintiffs to Mare, evidence of such knowledge and consent was given by the plaintiffs at the trial, which evidence ought to have been left to the jury: and that therefore the learned judge at the trial was wrong in directing a verdict for the defendant on the above issues, and the court of Common Pleas were right in ordering a new trial. And the plaintiffs will rely on the grounds set forth in the rule obtained by them in the court of Common Pleas.

WIGHTMAN, J. We are of opinion upon the whole [586] case that the conclusion come to by the court below was right. What may be the result of a new trial, we do not pretend to say: but, as we think there was some evidence which ought to have been submitted to the jury, the cause must go down again. We will not prejudice the case by offering any opinion upon the weight of the evidence.

Judgment affirmed.

The cause was tried again at the sittings after Hilary Term, 1859, before Cockburn, C. J., and a special jury. The following admissions were made by the attorneys for the respective parties:

"1. That the defendant signed the agreement mentioned in the pleadings:

"2. That Charles John Mare also signed such agreement, and that he was adjudicated a bankrupt on the 25th of September, 1855 :

"3. That Charles Lee was appointed official assignee, and Peter Rolt (the defendant), Mark Hunter, and Samuel Turner, all three being creditors, were chosen and appointed creditors' assignees under the bankruptcy :

"4. That the steam-ship, the subject of the said agreement, was launched on the 12th of September, 1855, and was not finished and fitted for sea by Charles John Mare on or before the 13th of September, 1855.

"5. That the plaintiffs paid to or on account of Charles John Mare the following sums on account of the moneys payable, or to become payable, under the said agreement, at the dates following : On the 28th of April, 1855, 3500l.,—on the 24th of May, 3500l.,—on the 5th of July, 3500l.,—on the 11th of August, 1000l.,—on the 13th of September, 2000l.

[587] "6. That such sums were paid by cheques on the plaintiffs' bankers, Spooner, Attwood, & Co."

The following evidence was given on the part of the plaintiffs :—

Mr. Attwood, one of the directors of the General Steam Navigation Company, gave substantially the same evidence as he gave on the former trial. As to the 2000l. paid on the 13th of September, he stated that it was paid into Spooner & Co.'s to the credit of Mr. Rolt, on Mare's order.

Mr. Twells, a partner in the house of Spooner, Attwood, & Co., also gave evidence as to the pecuniary transactions between Mare and Mr. Rolt, substantially as upon the former occasion.

The defendant was then called. On his examination in chief, he stated in substance as follows : Mr. Mare is my son-in-law. Previously to his bankruptcy, he carried on a very extensive business as a ship-builder at Blackwall. My office is in Clement's Lane, Lombard Street. Mr. Mare used to avail himself to some extent of the services of my clerk, with my consent. I had nothing to do with his ship-building business, or any interest in it. In 1855, I was in the habit of assisting Mr. Mare to a very considerable extent, by lending him my cheques. With the exception of Mr. Mare making use of the services of my clerk at my office, I had no knowledge of the details of his business as a ship-builders. His communications with my clerk were generally carried on without my knowledge. He required the services of my clerk for his convenience. At the time I am speaking of, Mr. Mare had an office of his own in Lombard Street. When he came to my counting-house and saw my clerk, he saw him in his place, and generally not in my presence, but in another room. I recollect becoming surety for Mr. Mare under the agreement now in question. I had become surety [588] for him in respect of other ships in like manner, on account of the same company. The first time I heard of the company having made advances to Mr. Mare before the time stipulated for in the contract, was when I received the letter which has been read, of the 21st of February, 1856 (a). Before I received that letter, I

(a) This letter and Mr. Rolt's answer were read in the cross-examination of Mr. Attwood. The letter, which was addressed to Mr. Rolt by Mr. Pratt, the secretary of the company, was as follows :—

"Dear Sir, —Mr. Lee is pressing for payment of the bill sent in by the assignees of Messrs. C. J. Mare & Co., and the directors propose to pay him a sum on account on Saturday next. The account is now under revision, as you suggested : but the directors have desired me to state that whether deductions may be made, with the instalments already paid to Messrs. Mare & Co., will exceed the sum agreed to be paid for the vessel by the terms of the contract : which overpayment, with a further outlay by this company for sundry stores supplied to the vessel, the directors will have to claim from you."

To this letter, Mr. Rolt replied as follows :—

"22 February, 1856.

"Dear Sir, —In reply to your letter of the 21st instant, I request you will be kind enough to furnish me with the terms of the contract between Mr. Mare and the General Steam Navigation Company, the mode of payment for the ship, and the amounts and the dates when the various instalments were paid to Mr. Mare."

certainly had not any knowledge that the company had made pre-payments. Mr. Mare had not told me at any time anything about the sums he was receiving from the company, with the exception of the 2000l., nor ever asked my assent to the money being paid out of its proper time. Neither Mr. Mare nor anybody else ever told me that that 2000l. was a pre-payment, a payment made out of order and before the company were bound by the contract to pay it.

On cross-examination, Mr. Rolt said:—I knew what [589] I was doing when I signed the agreement: I knew I was undertaking a responsibility as surety for my son-in-law. I knew the payments were to be made at certain stipulated times until the vessel was finished. I kept my engagements in mind. I was under very heavy advances for Mr. Mare during the whole of the year 1855. He sometimes told me when his money was coming in: and, when he got money from me, I asked him when I should get it back. The cheques I gave (the 5000l., 2000l., and 1000l.) were to be held as collateral security for the re-payment of advances to Mr. Mare. Spooner, Attwood, & Co. took those cheques as collateral security until the advances were re paid. When Mare got the payment from the General Steam Navigation Company (meaning the 2000l.), he paid it in to the bankers' in liberation of my cheques. Mr. Mare and I never talked at all about the sources from which he got the money which he paid in liberation of my cheques. I cannot say whether it was ever mentioned. Mr. Payne was my cashier, and managed that department. Until the 2000l. was paid, I never knew anything of it. I took no trouble in the matter. I certainly did not keep it in mind that Mr. Mare would have to receive money under that agreement. I did not consider Mr. Mare's means of receiving money. I had done my part in signing the agreement. I had no motive to inquire about the money. I knew the 2000l. was to come from the company. I never discussed the matter with Mare as to where the money was coming from. When I talked about the 2000l., Mare told me it was the launching instalment upon the ship. He told me I should have the 2000l. he was going to receive from the company when the ship was launched. I knew perfectly well by the agreement that 2000l. was not the whole instalment becoming due. The reason I did not ask him some further question, and [590] say there must be more than 2000l., or why I did not get the 3500l., was, because he could not spare any more of it to me, and I had only to pay 2000l. I knew he ought to receive 3500l. He said he could not spare me more than 2000l. I recollect in October meeting Mr. Attwood in the street, and his saying something about the penalties I was incurring. He made some remarks on the subject of penalties. We were a very few moments together. Unquestionably, I did not then know that Mr. Mare had been paid nearly the whole of the contract money, and that only a few hundred pounds remained in the hands of the company. I supposed the last instalment was in the hands of the company. The fourth instalment was not due until the ship had been completed and tried at sea.

On re-examination, he said: Whatever I learned from Mr. Mare about the sums he expected to receive from any body, he did not at any time call my attention to the circumstance that he expected to receive or had received from the General Steam Navigation Company any sum by way of advance. I never heard from Mr. Mare or from any one else that he had received or expected to receive any payment by way of advance.

Joseph Payne, Mr. Rolt's clerk, was called. He stated that he was in the habit of executing orders from time to time for Mr. Mare, and received a separate salary from him, but that he had no knowledge of the particulars of the contract in question. On cross examination, he stated that he did not know that the 2000l. was part of the last instalment: and, upon a receipt being put into his hands, containing these words,—"13 September, 1855. Received of the General Steam Navigation Company 2000l. on account of the last instalment due for the new steam ship," he admitted it to be in his handwriting, but stated [591] that he knew nothing about it, but merely wrote what Mare dictated.

Mr. Mare was also called, and he corroborated the evidence of Mr. Rolt as to his not having communicated to him the fact of the third and last instalments having been anticipated.

His lordship, having summed up the case to the jury, handed them a paper with the following questions:—

"First, Did the defendant know that the payment of the 3500l. on the 5th of

July was a payment made on account of the third instalment, before the vessel had been launched?

"Secondly,—Was the defendant prejudiced by that payment?

"Thirdly,—Did the defendant know that the payment of 1000*l.* on the 11th of August was a payment made on account of the fourth instalment, before the completion of the vessel?

"Fourthly,—Did the defendant know that the payment of 2000*l.* on the 13th of September was a payment made on account of the fourth instalment, before the completion of the vessel?"

To these questions the jury answered,—to the first, "We all agree that he did not know,"—to the second, "We are all agreed that he was not prejudiced by that payment,"—to the third, "We are all agreed that he did not know,"—to the fourth, "We are all agreed that the defendant did not know."

The Lord Chief Justice thereupon directed that a verdict should be entered for the defendant, with leave to the plaintiffs to move to enter a verdict for them, upon any grounds, legal or equitable, not inconsistent with this finding of the jury.

Knowles, Q. C. (with whom were Welsby and W. A. Collins), in Easter Term, 1859, accordingly moved for [592] a rule to shew cause why a verdict should not be entered for the plaintiffs, pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against the evidence. 1. The defendant was not, under the circumstances, prejudiced by the prepayments made to Mare: the jury so found. [Cockburn, C. J. They found that he did not know of them, and was not prejudiced. I thought the verdict right.] 2. It was the defendant's duty, under the circumstances, to have made inquiry whether the payments made to Mare were made in conformity with the contract: and, not having done so, he must be taken in equity to have had notice that such payments were not made in conformity to the contract. It must be borne in mind that the pleadings are equitable. The circumstances proved on the part of the plaintiffs, and admitted by the defendant himself, amount to constructive notice. There was enough to make it the defendant's duty to inquire: and, having neglected to do so, he is, in equity at least, fixed with the knowledge he would have acquired if he had made inquiry. With regard to the 2000*l.* paid on the 13th of September, the defendant knew that the contract had then been broken by Mare, the 12th being the day stipulated for the completion and delivery of the vessel. There are numerous authorities to shew, that, in equity, means of knowledge will be taken to be knowledge, where the circumstances impose upon the party any obligation to make inquiry, and that duty is neglected. Thus, in *Kennedy v. Green*, 3 Mylne & K. 699, it was held, that where one solicitor is employed in a mortgage transaction, he is to be considered as solicitor both for mortgagee and mortgagor, and notice to such solicitor is notice to the mortgagee: and, where the solicitor was himself the author of a fraud which affected the title, and the fraud was committed under circum-[593]-stances, apparent upon the face of the deed fraudulently obtained which ought to have excited the suspicion of a professional man, and have led to inquiry, it was held by the Master of the Rolls,—first, that the mortgagee was as fully affected with notice of the actual fraud, as if the fraud had been committed by a third person, and the knowledge of it acquired by the solicitor,—secondly, that the circumstances under which the fraud was committed were sufficient to fix the mortgagee with constructive notice, and that, if, in any mortgage or other transaction, a party does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation with respect to constructive notice, as he would have been if he had employed a solicitor. This decision was affirmed, on appeal, on the second ground, Lord Brougham, C., being of opinion that the mortgagee was not fixed with actual notice of the fraud, which, though known of course to his solicitor, who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal. In pronouncing judgment, his Lordship says,—“The doctrine of constructive notice depends upon two considerations,—first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds knowledge to exist, because it is highly improbable it should not,—and, next, that policy and the safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge. In such a case, it would be most iniquitous and most dangerous, and give

shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to [594] both, whether it be so in fact or not. Under one or other of these heads, perhaps under both, comes the other principle, which is quite undeniable, that, whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation." The same doctrine is laid down in *Hewitt v. Loosmore*, 9 Hare, 149, where it was held that a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud or gross or wilful negligence on his part; and the court will not impute fraud or gross or wilful negligence to the legal mortgagee, if he has bonâ fide inquired for the deeds and a reasonable excuse has been given for not delivering them to him; but the court will impute fraud or gross or wilful negligence to the mortgagee, if he omits all inquiry as to the deeds. *The Mayor of Berwick v. Murray*, 3 Jurist, N. S. (cited ante, p. 581), is a distinct authority to the same effect. [Cockburn, C. J. I do not quite see what there was here to court inquiry. Why is the surety to assume that the company will prejudice themselves as well as him by making anticipatory payments?] It is submitted that the circumstances were so fraught with suspicion as to make it incumbent on the surety to ascertain the real facts. *Owen v. Homan*, 4 House of Lords Cases, 997, is also a strong authority in favor of the view now presented. [Willes, J. That was a very peculiar case.]

COCKBURN, C. J. I am of opinion that there should be no rule in this case. As regards the question which arises upon the plea, independently of the equitable ground which Mr. Knowles has last taken, it is clear [595] that the plaintiffs have made a payment on account of the fourth instalment of the contract price before the completion of that portion of the work which was to entitle Mr. Mare to receive the money, and thereby prejudiced the position of the surety, who loses, by that anticipatory payment to the principal, the strong inducement which otherwise would have operated on his mind to induce him to finish the work in due time. Mr. Knowles, however, contends that the ground of defence taken in that respect by the surety is removed by the circumstance of the money which was thus paid by way of anticipation having found its way into the pocket of the surety. But I think that argument fails, because, though true it is the money found its way into the pocket of Mr. Rolt, yet it so found its way there because Mare was Mr. Rolt's debtor, and the money was paid to him on that account. It is quite immaterial, therefore, that Mr. Rolt in point of fact received the money so advanced. His position as surety was equally prejudiced by the alteration of the contract for the performance of which he consented to be bound. Then, as to the other ground presented by Mr. Knowles, arising out of the equitable defence, that the surety is not to avail himself of that defence, if he could by inquiry have ascertained that the money had been prematurely or improperly paid, and neglected to make such inquiry. The answer to that is simply this,—that the payment is admitted to have been made wrongfully; that is, that it was a payment whereby the surety has been unduly and improperly prejudiced. But then it is said that the payment was made with the knowledge and assent of the surety. Was there any assent? It is conceded that actual assent there was none: but, says the learned counsel for the plaintiffs, there was constructive consent, and that in this way,—Mr. Rolt, he says, knew that the money was [596] paid, and, if he had made inquiry, he would have ascertained that the payment was by way of anticipation of what was to form the fourth instalment of the purchase-money. That, as it appears to me,—adopting the doctrine of constructive assent to the fullest extent,—turns upon whether the circumstances were such as to convey to the mind of Mr. Rolt the existence of such a state of things as to make it incumbent on him to make inquiry. I do not gather from the evidence that they were. Mr. Rolt was told that a payment was about to be made on account of the third or launching instalment. If it had been on account of that instalment, it would have been a perfectly legitimate payment. Mr. Knowles says that Mr. Rolt must have been aware that by this time the work should have reached its fourth stage, and consequently that the fourth instalment should have been payable; and that that was enough to put him upon his guard, and to induce him to make inquiry. That argument, however, assumes that it was present to Mr. Rolt's mind that the 13th of September, the day on which the 2000*l.* was paid, was after the day stipulated for the completion of the vessel, when the fourth and last instalment

would become payable. I think it would be straining Mr. Rolt's evidence too far to hold it to amount to an admission or acknowledgment such as is suggested. On the contrary, the whole tenor of it seems to me to shew, that, although aware of the general scope and character of the contract, the precise circumstances of the case as they then existed were by no means present to his mind. I therefore do not see anything which called upon him to make the inquiry which it is said he ought to have made: for, although by the evidence he appears to have assented to the receipt of this 2000l. by Mare, and the money immediately finds its way to him, he assented in the belief that it was a [597] portion of the third instalment which had before that time become due. To constitute an answer to the equitable defence set up by the surety, it was incumbent on the plaintiffs to shew that his assent was given with knowledge, or the means of knowledge such as he was bound to avail himself of, that the payment was an anticipatory one. For these reasons, it seems to me that the verdict was right, and that there is no ground for this motion.

CROWDER, J. I also am of opinion that this verdict ought not to be disturbed. The first ground taken by Mr. Knowles is, that the position of Mr. Rolt, the surety, was not in fact prejudiced by what occurred in respect of the mode of paying the instalments, because he says, that, although payments prematurely made might be prejudicial to the surety, there could be no prejudice here, inasmuch as 2000l. of the money found its way into Mr. Rolt's pocket. It seems to me, however, that the fact of the money so received by Mare having been handed over to Mr. Rolt in part-payment of a debt due from him to Mr. Rolt, did not in the slightest degree vary the question before the jury, viz. whether Mr. Rolt was prejudiced in his position as surety by the time of payment of the instalments under the contract being anticipated. It is obvious that a pre-payment must prejudice the surety in a case like this, inasmuch as it deprives him of the benefit of that which would be an inducement to the principal to perform the contract in due time. I see nothing in the fact of the money having ultimately come to the hands of the surety, to alter his position in that respect. Then, it is further contended, that, though the jury have found that the money was received by Mr. Rolt, knowing where it came from, but that he did not know that it was a pre-payment, believing it to be part of [598] the instalment which was to become due upon the launching of the vessel,—yet, looking at this matter as a court of equity would view it, he must be taken to have known that it was a pre-payment, because the circumstances were such as should have led him to inquire, and, if he had inquired, he would have ascertained that it was so. Looking at the facts, I find, that, at the time the 2000l. was paid, the launch of the vessel, which was to entitle Mare to receive the third instalment, had not taken place; and the jury have found that Mr. Rolt was led to believe, and did believe, that the money was paid on account of the launching instalment. I see nothing in that which made it incumbent on Mr. Rolt to make any further inquiry. I do not find anything in the evidence to lead me to the conclusion, that, when he received the 2000l., Mr. Rolt had present to his mind that the 13th of September was the day stipulated for the completion and delivery of the vessel: all that he stated on cross-examination was, that, when he entered into the agreement, he knew what the terms of the contract were: beyond that, nothing appears from his cross-examination to shew that he had any knowledge or recollection on the subject. Several cases were cited,—among them that of *The Mayor of Berwick v. Murray*, 3 Jurist, N. S. 1,—for the purpose of shewing, that, though a surety may have no actual knowledge of the course of dealing with his principal, yet, if the circumstances are such as ought reasonably to have led him to make inquiry, and he abstains from doing so, that shall be deemed equivalent to knowledge. The facts of that case seems to me to differ in every particular from the present. There, Murray, the defendant, who was a surety, had taken from his principal property which on the face of it appeared to be the property of another. I do not see how that can have any application [599] to the case now before the court. As far as I can judge from the evidence, and looking at the finding of the jury, I feel bound to say that Mr. Rolt did not know that the 2000l. which was paid on the 13th of September was any other than a payment on account of the third instalment; though, perhaps, if he had inquired, he might have ascertained that it was a payment on account and in anticipation of the fourth and last instalment. I therefore think there should be no rule.

WILLES, J. I am of the same opinion. As to the first point, Mr. Knowles says, that, as the 2000l. was paid to Mr. Rolt or to his account, he sustained no prejudice

from its being an anticipatory payment. But I must confess I do not see how the receipt of the money from Mare, or by means of Mare's order, in satisfaction of a debt due to him from Mare, can establish that proposition. A case of *Samuell v. Howarth*, 3 Meriv. 278, was cited on the former argument (ante, p. 574), which is a decision of Lord Eldon's very much in point. His Lordship there says: "A creditor has no right, —it is against the faith of his contract,—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." It is clear, therefore, there must be an assent by the surety to the creditor's dealing with the principal debtor otherwise than in the manner pointed out by the contract: and it is no answer to say that it is for the advantage of the surety, or that he has sustained no prejudice. Here, there was an unauthorized payment of 2000l. to Mare; and, as this payment was made without Rolt's assent, that, according to *Samuell v. Howarth*, was such a prejudice to him as surety as to discharge him. Then, assuming that to be so, Mr. Knowles contends that there was here evidence of assent on the [600] part of Mr. Rolt, inasmuch as he knew of the payment, and must under the circumstances have known that it was a pre-payment. The jury, however, have found that Mr. Rolt was not aware that the payment of the 2000l. was a pre-payment. He believed it to be part of the third or launching instalment, which had then become due. But then Mr. Knowles contends that the surrounding circumstances were such that they ought to have put Mr. Rolt upon inquiry; and, if he had inquired, he would have found that the launching instalment had been all paid more than two months before, and, as he abstained from inquiry, he must in equity be presumed to have knowledge of, and consequently to have assented to, that unauthorized payment. But no authority has been cited which goes that length: and the doctrine of constructive assent is not one which ought to be admitted, certainly not one which a court of law ought to extend. No case has been cited to shew that any such duty to inquire is imposed on a surety. The case of *Owen v. Homan*, 4 House of Lords Cases, 997, says that such a duty is, under suspicious circumstances, imposed upon the creditor, but it does not say that that is so as to a surety. In the case of *The Mayor of Berwick v. Murray*, the question really was whether a person obtaining, for no consideration, property from one who was not the true owner, nor even the apparent owner, and under circumstances calculated to engender a suspicion that he was dealing with property which was not his own, could retain it as against the true owner. It was a totally different case from this in all its circumstances. It can have no application to the case of a person *bonâ fide* receiving money which he has no reason to believe has been unduly obtained. I think there was no duty imposed upon Mr. Rolt to make inquiry, and that there was nothing to excite his suspicion or to put [601] him upon his guard. The only circumstance which could at all be relied on is, the fact that the payment which was called the launching instalment was made at a time when there was reasonable ground for supposing that the vessel was finished, and therefore that the only payment which remained to be made was the fourth or final instalment. But that seems to me to assume that all the payments had been regularly made at the stipulated periods, and, if so, the launching instalment must have been due a long time before. Upon the whole, therefore, I think there should be no rule.

BYLES, J., having been counsel for the plaintiffs upon the former trial, took no part in this decision.

Rule refused.

Affirmance of judgment.

Feb. 3, 1860.—The plaintiffs appealed against this decision; and the case came on for argument in the Exchequer Chamber on the 3rd of February, 1860, before Lord Chief Baron Pollock, Wightman, J., Channell, B., Hill, J., and Blackburn, J. The first points for argument were as follows:—

For the plaintiffs,—That, under the circumstances stated in the case, there is nothing to shew that the defendant was or could be prejudiced in his capacity of surety by any of the advances made by the plaintiffs to Mare, and therefore he was not thereby discharged from his liability as such surety: That the defendant must be taken in equity to have had notice and knowledge of such advances, and of the circumstances under which and of the purposes for which they were made, and to have assented thereto, and therefore he was not by such advances, or any of them, discharged

from his [602] liability as such surety: That, upon the facts stated in the case, it was the duty of the defendant to make inquiry for what purposes and under what circumstances the said advances were made by the plaintiffs to Mare, and that, the defendant not having made any such inquiry, it must be taken as against him that he knew for what purposes and under what circumstances the same were made, and assented thereto: And that, upon the facts stated in the case, and notwithstanding the findings of the jury, the defendant was not discharged from his liability as surety.

For the defendant, — 1. That the court of Common Pleas were right in refusing to grant the rule, and that the verdict ought to stand for the defendant. — 2. That all the material allegations in the fourth and fifth pleas were proved at the trial and affirmed by the jury, and that the special replications to those pleas respectively were not proved, and were negated by the finding of the jury. — 3. That it is immaterial to the validity of the defence whether the defendant was or was not in fact prejudiced by the pre-payments. — 4. That the defendant was in fact prejudiced by the pre-payment of the two sums respectively of 1000*l.* and 2000*l.* — 5. That the points upon which the rule was moved in the court of Common Pleas have no foundation in law or equity, and that they are not raised by or open to the plaintiffs upon the pleadings.

Welsby (with whom were Knowles, Q. C., and W. A. Collins), for the appellants (the plaintiffs). Having urged, as was urged below, that there was nothing to shew that the defendant, as surety, had sustained or could sustain any prejudice or damage from the circumstance of advances having been made to Mare before the stipulated times for payment of the instalments, he proceeded to contend, that, upon the facts [603] stated in the case, there was enough to shew that the defendant had, according to the doctrine of equity applicable to contracts of suretyship, constructive knowledge of those payments. [Pollock, C. B. Can we infer knowledge from the facts stated, when the jury have not found it? Hill, J. Constructive knowledge or notice is matter of legal inference from certain facts. Until those facts are found, we cannot say whether there was or was not constructive notice.] The facts are found in the special case. [Wightman, J. No. All you have is, the evidence and the finding of the jury.] The jury have found that Mr. Rolt did not know of the pre-payments. That was the only question of fact expressly left to them. They must be taken to have found that on the undisputed facts of the case as proved in evidence. [Hill, J. If you contend that there was constructive notice, you ought to have had that found, or the facts found from which constructive notice follows as a conclusion of law from the evidence.] A court of equity would draw the inference from the pleadings. [Hill, J. In equity the judge performs the functions of a jury also.] This being a motion in effect calling upon this court to enter a verdict for the plaintiffs because certain facts were proved in evidence which amount in equity to constructive notice, undoubtedly those facts should have been found by the jury. [Pollock, C. B. Constructive notice is notice. The jury found that Mr. Rolt had no notice. You are only entitled to move upon any ground, legal or equitable, which is not inconsistent with the finding of the jury.] This is not inconsistent with the finding of the jury. The difficulty is, that the jury have not said anything about it one way or the other; nor have the facts been left to them *eo intuitu*. [Blackburn, J. Nor have they been admitted by agreement of counsel at the trial.] If we had contended for actual know-[604]-ledge, we should have submitted that question to the jury, if there was any evidence of it: or, if the Lord Chief Justice had ruled that there was no evidence of it, we might have moved on the ground of misdirection. But, by the course the cause took at the trial, we were deprived of the opportunity of so doing.

Sir Fitzroy Kelly (with whom were Wilde, Q. C., and Garth), *contra*, was not called upon.

POLLOCK, C. B. I believe we are all of opinion that there is no occasion to trouble the learned counsel in answer to this application: but that, considering this as a rule to enter a verdict for the plaintiffs, against which cause is to be shewn in the first instance, we are all of opinion that the rule ought not to be granted. Speaking in this respect only for myself, I would make this remark, that this case appears to me to illustrate what I have sometimes doubted, *viz.* whether the power of reserving these points has dispensed altogether with the propriety of tendering a bill of exceptions. This is only my own view; but I think the point which Mr. Welsby meant to raise was properly either the subject of a bill of exceptions or of a motion for a new trial, — not that which was reserved by the learned judge, — on the ground of misdirection.

Neither of these courses has been adopted. I believe we are all of opinion that this rule ought not to be granted, and upon this ground, that it is for the purpose of entering a verdict for the plaintiffs. It is the duty of the counsel who moves that the verdict should be so entered, to shew that the plaintiffs are entitled to it. Now, certainly, *prima facie*, the withdrawal of a fund which is a security for the thing in respect of the not doing of which he is now called upon to pay damages, is a prejudice to the [605] surety. He is not in the same situation with regard to his principal in which he ought to be placed: he is deprived of the security of the fund out of which the company might in the first instance have indemnified themselves. With regard to the point that there was constructive notice, that has very properly been abandoned by Mr. Welsby. It is clearly not tenable: *Prima facie*, the surety was prejudiced by the existing state of things. Whether there could have been any proof to shew, that, notwithstanding the appearance of prejudice, in reality none was or could be sustained, it is not at all necessary to inquire. It is, however, exceedingly difficult to conceive any state of things in which it must not to a considerable extent be a prejudice to a surety to have a fund withdrawn which would be in reality the security to the company with whom he is contracting, and to the surety who guarantees. Upon these grounds, we are all of opinion that the rule cannot be granted, and that the judgment of the court of Common Pleas must be affirmed.

Judgment affirmed.

End of Easter Term.

[606] IN THE EXCHEQUER CHAMBER.

EASTER VACATION, 22 VICTORIA.

WHEELER v. GRAY. 1859.

[S. C. 28 L. J. C. P. 200; 5 Jur. N. S. 916; 7 W. R. 325. See *Williams v. Golding*, 1865, L. R. 1 C. P. 78.]

A landlord is justified, under the 83rd section of the Metropolitan Building Act, 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85, such tenant not being an "owner" within the interpretation clause, s. 3: and it is no objection that he has neglected to give the notice to the district-surveyor, required by s. 38.

This was an action of trespass for breaking and entering certain premises in the occupation of the plaintiff, in Gray's place, King's Road.

The defendant pleaded not guilty "by statute," the statute referred to in the margin of the plea being the Metropolitan Building Act, 18 & 19 Vict. c. 122, ss. 3, 82, 83, 85, and 108; and also leave and licence.

At the trial before Cockburn, C. J., at the sittings at Westminster after Michaelmas Term, 1857, a verdict was found for the plaintiff, subject to leave reserved to the defendant to move to enter a nonsuit. A rule was obtained accordingly, which in Trinity Term last was made absolute, the court of Common Pleas holding that a landlord is justified, under the 83rd section of the Metropolitan Building Act, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85,—such tenant not being an "owner" within the interpretation clause, s. 3, and that it is no objection that he has neglected to give the notice to the district surveyor, required by s. 38. Vide *ante*, vol. iv., p. 584.

Against this decision the plaintiff appealed: and the case was argued in the Exchequer Chamber on the 7th of February last, before Crompton J., Bramwell, B., and Hill, J.

[607] Gibbons was heard on behalf of the plaintiff. The arguments urged were substantially the same as those urged in the court below.

T. Chitty, *contra*, was not called upon.

CROMPTON, J. I am of opinion that the court of Common Pleas decided rightly

in this case. They did not determine it upon any question whether notice of action was necessary or not; and, in the view we take, it is unnecessary for us to consider it. No answer has been given to the question which I put in the course of the argument, why the 83rd section of the Metropolitan Building Act does not sufficiently justify this alleged trespass. It was, indeed, urged that there ought to be an exception implied where the "building owner" and the "adjoining owner" are the same person; but I do not see that. I do not see why, if all the party-structure which requires repair belongs to one owner, the section cannot apply. The 83rd section gives a protection to the building owner against the tenant of the adjoining owner in doing the requisite works. There is, in my opinion, no reason why it should not also protect him against his own tenant. The 86th section governs this case, unless the giving some notice to the tenant is necessary as a condition precedent. The provisions of the 85th section have been relied on by the plaintiff. That section provides that "no building owner shall, except with the consent of the adjoining owner, or in cases where any party-structure is dangerous, in which case the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party-structure, unless he has given at least three months' previous notice to the adjoining owner, by delivering the same to him personally, or by sending it by post in a [608] registered letter addressed to such owner at his last known place of abode; and that the notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced." The reasoning of the court of Common Pleas is very cogent, that the building owner need not give any such notice to himself. The tenant is excluded by the interpretation clause, s. 3, from being considered an "owner," and therefore no such notice need be given to him. He is not protected in any case; for, the adjoining owner might consent to the building owner doing the repairs immediately. Such consent was in fact given in this case. It was further urged that the defendant cannot rely on the statute, because no notice had been given to the district-surveyor of the intended work, under s. 38. The judgment of the court of Common Pleas on this point is satisfactory to me, holding as they do that the giving of notice to the district-surveyor is not a condition precedent to the defendant's being entitled to the protection of the act. If the notice is not given, there is only a liability to penalties under s. 41. I therefore think the defendant was justified in what he did, though he had not given either notice.

BRAMWELL, B. I also abstain from giving any opinion upon the question whether a notice of action was necessary. On the other point, I agree with my Brother Crompton that the defendant is entitled to judgment. It has been contended that ss. 82 and 83 of the act only apply to cases in which the building and adjoining owners are different persons, and not to cases where they are the same person. That argument is not, in my opinion, well-founded. The statute does not say that one person may not fill both characters. The term "party-wall" is in s. 3 defined to mean [609] "every wall used or built in order to be used as a separation of any building from any other building, with a view to the same being occupied by different persons." So that a "party-wall," may belong in all its parts to one person. The term "party structure" includes "party-walls," &c., "and other structures separating buildings, &c." "which belong to different owners, or which are approached by distinct staircases or separate entrances from without." So that a party-structure may belong to the same owner. Section 82, it is true, seems rather to suppose that there would be two owners; but it may have a sensible application when there is one owner only, viz. when there is an owner who occupies one building himself, and who has let the building on the other side of the party-wall to a tenant from year to year. It is said that he might get rid of his tenant by giving him notice to quit, and that he might then do the repairs; but it may be a very long time before he could legally determine the tenancy in that way. The case of the present defendant may be within the mischief the statute intended to remedy. Further, it was pressed upon us, that, had there been another person as adjoining owner, three months' notice must have been given to him before anything could have been done, and that he could have given notice of it to his tenant. But there is no obligation upon the adjoining owner to give any such notice to his tenant; and also, the adjoining owner may, if he pleases, give his consent that the works shall be commenced immediately. As far as ss. 83 and 85 are concerned, the tenant from year to year is left out of the protection of the statute. I do not think that we ought

to put an implied qualification upon the act of parliament, without some necessity. The right to pull down and repair any party-structure is applicable, in my opinion, to a case where one person is the owner [610] of the two adjoining premises. We have no right to cut down the operation of the statute to a case where there are two owners only. There is no strong ground of reason or convenience to warrant us in so doing. On the contrary, reason and convenience seem to point the other way.

WATSON, B. I am of the same opinion. If we were to adopt the construction contended for, it would be taking out of the act of parliament all cases where the owner of two adjoining premises occupied one of them himself and let the other to a tenant from year to year.

HILL, J. It is admitted that this is a party-wall; and it is found as a fact that it was out of repair, and that the defendant repaired it. There is nothing to shew that anything was done beyond what was necessary for doing the repairs. No negligence or improper delay was shewn, or any violation of the Metropolitan Building Act. The defendant is not, I think, a trespasser, for want of giving notice to the district-surveyor: nor is he so, in my opinion, for want of the notice required to be given to the adjoining owner. The attention of the legislature was directed to the interests of the adjoining owner and building owner. The only provision in favor of the tenant is, that the person who has to do the repairs is to do them in such a manner and at such a time as not to cause unnecessary inconvenience to the adjoining owner: s. 85, clause 3. Where there is an adjoining owner, he might waive the necessity of the three months' notice, and give his consent to the repairs being done at once. If he does so, his tenant would have no action of case or trespass against the building owner, if the repairs are done properly. Here the adjoining owner and build-[611]-ing owner is the same person, viz. the defendant. He could not be required to give notice to himself. Trespass, therefore, will not lie: but an action, I think, might nevertheless have been maintained, had there been any negligence or improper delay.

Judgment affirmed.

ROBERTS v. BRETT. May 16th, 1859.

[Affirmed in House of Lords, 6 C. B. N. S. 611; 11 H. L. C. 337;
11 E. R. 1363 (with note).]

By an indenture of the 15th of May, 1855, the plaintiff covenanted that he would forthwith, at his own expense, procure a suitable vessel, and stow on board a certain telegraphic cable then at Morden's Wharf, and would rig, fit out, &c., the said ship, and would have her fully equipped at the Nore, ready for sea, on or before the 15th of July then next, and proceed forthwith to Cape T., and there lay down the cable &c. And the defendant covenanted to pay the defendant 5000l. by certain instalments, viz. 1000l. on or before the expiration of seven days after the arrival of the vessel alongside Morden's Wharf, 2000l. on or before the expiration of twenty-one days after the vessel should have arrived alongside Morden's Wharf, and 2000l. when and so soon as the ship should put to sea from the Nore: "And it was thereby agreed and declared, that, for the true performance of the covenants by the plaintiff (and the defendant respectively) thereinbefore contained, &c., the plaintiff (and the defendant) should, within ten days from the execution of these presents, give and execute to the defendant (or the plaintiff), &c., a bond in the penal sum of 5000l.:" Held, that the giving of the bond by the plaintiff to the defendant was a condition precedent to his right to sue the defendant for a breach of his contract in refusing to allow the plaintiff to stow the cable on board a suitable vessel.

Error from the court of Common Pleas: see 17 C. B. 534, and 18 C. B. 561. Since the argument of the demurrer, the declaration was amended by striking out the second breach, and adding the words in italics at p. 618.

The declaration stated, that, by a certain indenture made between the plaintiff of the one part, and the defendant of the other part, and bearing date the 15th of May, 1855, he the plaintiff, for the considerations therein mentioned, for himself, his heirs, executors, and administrators, covenanted with the defendant, his executors and

administrators, in manner following, that is to say, that he the plaintiff should and would forthwith, at his own expense, procure the "Cornwall" frigate, or some other suitable ship or vessel, and [612] should and would (unless prevented by fire, tempest, or the Queen's enemies) stow or cause to be stowed on board the said ship or vessel the submarine telegraphic cable which was 150 miles in length or thereabouts, and was then at Morden's Wharf, East Greenwich, in the county of Kent, and in the said indenture afterwards called for the sake of distinction "The African and Sardinian Cable;" and also should and would, at the like expense, unless prevented as aforesaid, rig, complete, fit out, provide, and provision the said ship or vessel with all proper and sufficient masts, rigging, ropes, spars, cables, anchors, ship-chandlery, and other stores and provisions; and also should and would, at the like expense, obtain and provide and pay competent and sufficient officers and crew for the purpose of navigating the said ship or vessel, and workmen and others to assist in laying down the said cable; and also should and would, at the like expense (unless prevented as aforesaid), provide and place on board the said ship or vessel, to the satisfaction of the defendant, his executors and administrators, proper and sufficient breaks and rollers in order that the said cable might be properly paid out, and should and would to the extent of 600l. pay the expense of insuring the said cable to the amount of £0,000l.; and should and would, at the like expense (unless prevented as aforesaid), if so required by the defendant, his executors or administrators, place on board from the said Morden's Wharf any further quantity of submarine telegraphic cable, not exceeding in weight forty tons, which the defendant, his executors and administrators, should require; and should and would (unless prevented as aforesaid) do and perform all the several acts thereafter covenanted to be performed by him the plaintiff, and have the said ship fully equipped in all respects, and ready for sea, at the Nore, on or before the 15th of July then next; and [613] further that he the plaintiff should and would, as soon as the said ship or vessel should be ready for sea at the Nore as aforesaid, unless prevented as aforesaid, cause the same to proceed with the said cable or cables on board, as the case might be, to Cape Tabague, on the northern coast of Africa; and should and would, at such expense as aforesaid (unless prevented as aforesaid), with all convenient dispatch, proceed to pay out and lay down the said African and Sardinian Cable from the said Cape Tabague, or as near thereto as might be practicable, to the Cape Spartivento, in the island of Sardinia, or as near thereto as might be practicable; and should and would, at his own expense, provide all steam tugs and other vessels necessary for laying down the said cable as last aforesaid; and also should and would (unless prevented as aforesaid), according to the directions in writing of the defendant, his executors or administrators, either discharge the other cable thereinbefore mentioned either at Cape Spartivento or Cape Tabague, as the defendant, his executors or administrators, should by writing under his or their hand or hands direct, and, if no such direction should be given, then at the said Cape Tabague; and should and would with all convenient speed after the said African and Sardinian Cable should have been laid down (unless prevented as aforesaid), lay down the said other cable from and to such places and in such direction as the defendant, his executors or administrators, should by writing under his or their hands direct or require, and for such a sum of money as should be agreed upon between the plaintiff and defendant, his executors or administrators, before the said ship or vessel should sail from the Nore; and should and would, at the like expense, provide all steam-tugs and other vessels necessary for so doing; And it was in and by the said in-[614]-denture provided always, that, if the plaintiff should (unless prevented as aforesaid) make default in having the said ship, with the said cable or cables on board, as the case might be, at the Nore, fully equipped and ready for sea on or before the said 15th of July then next, the defendant, his heirs, executors, or administrators, should be at liberty to retain from any moneys payable by him or them under the covenants for that purpose thereafter contained, as and for liquidated damages in respect of such default, the sum of 200l. per week, and after that rate for any period less than a week during which such default should continue; but the power of the defendant, his executors or administrators, to demand and enforce payment of the said sum by way of liquidated damages, and to deduct and retain the same as aforesaid, should be without prejudice to the right of the defendant, his executors or administrators, to exercise any other powers or remedies which the defendant, his executors or administrators, should possess or be entitled to, either at law or in equity, by virtue of those presents or the bond thereafter referred to for

enforcing the completion of the works thereinbefore covenanted to be done, or for indemnifying and compensating himself or themselves for the damage or injury occasioned to him or them by reason of such default: And, by the said indenture, for the consideration therein mentioned, the defendant did further, for himself, his heirs, executors, and administrators, covenant with the plaintiff, his executors and administrators, in manner following, that is to say, that he the defendant, his heirs, executors, and administrators, should and would, subject to such rights of deduction therefrom as thereinbefore mentioned, pay the plaintiff, his executors and administrators, the sum of 5000*l.* sterling by the instalments and at the times next [615] thereafter mentioned, that is to say, the sum of 1000*l.*, part thereof, on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, the sum of 2000*l.*, further part thereof, on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of 2000*l.*, the remainder thereof, when and so soon as the said ship should put to sea from the Nore,—one half of such last-mentioned sum to be paid in cash, and the other half thereof by the defendant, his executors or administrators, accepting a bill of exchange at three months' date, to be drawn upon him or them by the plaintiff, his executors or administrators; and, further, that he the defendant should and would, on or before the expiration of twenty-one days from the time when the said Sardinian and African Cable should have been so laid down as aforesaid, deliver or cause to be delivered to the plaintiff, his executors or administrators, or his or their nominee or nominees, five hundred paid-up shares in the Mediterranean Submarine Electric Telegraph Company, of 10*l.* each; and, further, that he the defendant, his executors or administrators, if he or they should require the plaintiff to lay down the said other cable as aforesaid, should and would pay to the plaintiff, his executors or administrators, the sum which might be so agreed upon as aforesaid for his so doing, on or before the expiration of twenty-one days from the time of the said last-mentioned cable having been so laid down: And it was thereby agreed and declared, that, for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days from the execution of these presents, give and execute to the defendant, his [616] executors and administrators, a bond on the penal sum of 5000*l.*, and, for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5000*l.*: And it was in and by the said indenture provided always and thereby expressly agreed and declared that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff, his heirs, executors, and administrators, and of the defendant, his heirs, executors, or administrators, under or by virtue of these presents: Averment, that, after the making of the said indenture, and whilst the same was in full force and effect, he the plaintiff did forthwith, at his own expense, procure a suitable ship or vessel, within the terms and meaning of the said contract in that behalf, and did, at his like expense, rig, complete, fit out, provide, and provision the said ship or vessel with all proper and sufficient masts, rigging, ropes, spars, cables, anchors, shipchandlery, and other stores and provisions, and was also ready and willing, at his like expense, to obtain and provide and pay competent and sufficient officers and crew for the purpose of navigating the said ship or vessel, and workmen and others to assist in laying down the said cable; and did, at his like expense, provide proper breaks and rollers in order that the said cable might be properly paid out; and was always ready and willing to place the same on board the said ship to the reasonable satisfaction of the defendant in that behalf; and was always ready and willing, to the said extent of 600*l.*, to pay the expense of insuring the said cable to the amount of 60,000*l.*; and was always ready and willing, at his [617] like expense, if so required by the defendant, his executors or administrators, to place on board from the said Morden's Wharf any further quantity of submarine telegraphic cable, not exceeding in weight forty tons, which the defendant, his executors and administrators, should require; and was also always ready and willing to do and perform all the several acts thereinbefore covenanted to be performed by him the plaintiff, and to have the said ship fully equipped in all respects and ready

for sea at the Nore on or before the said 15th of July then next; and that he the plaintiff was always ready and willing to receive the said African and Sardinian cable, and to cause the same to be stowed on board the said ship, upon the terms of the said contract, and to proceed with the same and the said other cable to Cape Tabague aforesaid, and with all convenient dispatch to proceed to pay out and lay down the same according to the terms of the said contract, and in other respects fully to perform and carry out the same on his part and behalf, and was also ready and willing, according to the terms of the said contract, to bring the said ship alongside the said Morden's Wharf for the purposes in the said contract mentioned; but, before the time arrived for so doing according to the terms of the said contract, the defendant refused to perform the said contract on his part, and dispensed with the said vessel being brought alongside the said wharf: and that he the plaintiff has performed and fulfilled all conditions precedent on his part to be performed and fulfilled, and everything has taken place and happened to entitle the plaintiff to a performance by the defendant of the said indenture and all the said conditions, covenants, and stipulations therein contained on his the defendant's part to be performed and fulfilled, of all which several premises the defendant always had full knowledge and notice, and was from time to time [618] requested by the plaintiff to stow on board the said ship the said cables on the terms and for the purposes aforesaid, and also to inspect the said breaks and rollers so provided by the plaintiff as aforesaid: for the doing and accomplishing of all which several matters and things a reasonable time had elapsed before the commencement of this suit: Yet the defendant did not nor would stow or allow to be stowed on board the said ship the said African and Sardinian Cable, and the said other cable, or either of them, or any part thereof, but wholly refused so to do, and therein made default, and wholly and absolutely refused to perform the said contract on his part; and, by reason of the premises, the plaintiff lost the benefit of the payment and shares that he would otherwise have obtained, and the profits and advantages that would have accrued to him, if the contract had been performed by the defendant: and that the defendant caused the said African and Sardinian Cable to be stowed on board a certain ship or vessel other than the plaintiff's, and thereby broke his said contract with the plaintiff, and thereby discharged, prevented, and hindered the plaintiff from fully and completely performing the same on his part and behalf: *And the plaintiff further says and assigns for breach of the said contract between the plaintiff and the defendant, that the defendant did not within ten days from the execution of the said indenture, or at any time, give and execute to the plaintiff, nor did he within the said period of ten days, or at any time, procure two responsible persons, or any responsible person or persons, as sureties or surety on his behalf, to give and execute, nor did the defendant and two responsible persons, nor did two responsible persons, or any responsible persons or person, as sureties or surety on behalf of the defendant, then or at any time give or execute to the plaintiff a bond or [619] bonds in the penal sum of 5000*l.* for the due performance by the defendant of the other covenants on his part to be performed in the said indenture contained, as by his said covenant in that behalf he agreed to do: and the defendant therein wholly failed and made default: And the plaintiff says, that, for the purpose of the said contract, he chartered the said ship, and, by reason of the several premises, he incurred large expenses and liabilities in respect of such ship, and incidental to the chartering of the same, and also by reason of the premises incurred other large expenses in procuring the said ship and also other ships or vessels, and in having the same surveyed and insured and otherwise fitted for the said purposes, and he also by reason of the premises incurred other large expenses in equipping, provisioning, preparing, and otherwise fitting out the same, and in brokerage, and in procuring and providing the said breaks and rollers and otherwise, and in insuring the said African and Sardinian Cable: and thereby and by reason of the premises the plaintiff hath incurred all the aforesaid expenses to no use and the said ship and the said breaks and rollers still respectively remain in the hands of the plaintiff useless and unprofitable to him: and thereby also, and by reason of the premises, the plaintiff was hindered and prevented from commencing and carrying out his said contract, and by reason also of the premises he was wholly unable to perform or commence the performance of the same, and by reason also of the premises the plaintiff hath lost and been deprived of all the profits that he would have gained from carrying out and completing the said contract, and he has also thereby lost favorable opportunities of bringing home profitable cargoes in the said ship after completing his said undertaking; and thereby and by*

reason of the premises the plaintiff hath been and is otherwise greatly damnified : Claim, 10,000l.

[620] First plea,—except as to so much of the declaration as relates to the not giving, executing, or procuring a bond or bonds,—that the plaintiff did not at his own expense procure a suitable ship or vessel within the terms and meaning of the said contract in that behalf, and place the same alongside the said Morden's Wharf ready to take on board the said African and Sardinian Cable, as alleged.

Second plea,—except as aforesaid,—that the plaintiff did not at his like expense rig, complete, fit out, provide, and provision the said ship or vessel, as alleged.

Third plea,—except as aforesaid,—that the plaintiff was not ready and willing, at his like expense, to obtain and provide and pay such officers and crew for the purpose of navigating the said ship or vessel, and such workmen and others to assist in laying down the said cable, as alleged.

Fourth plea,—except as aforesaid,—that the plaintiff did not within ten days from the day of the execution of the said indenture (such ten days expiring before the said 15th of July, 1855, and before the time when the plaintiff placed the said ship so provided by him alongside the said Morden's Wharf), or at any time, give and execute, nor did he within such ten days, or at any time, procure two responsible persons or any responsible person as sureties or surety on his behalf, to give and execute, nor did two responsible persons, nor did any responsible person, as such sureties or surety for the plaintiff, then, or at any time, give and execute to the defendant, his executors and administrators, a bond or bonds in the penal sum of 5000l. for the due performance by the plaintiff of the other covenants by the plaintiff in the said indenture contained, and for securing any penalties which he the plaintiff might incur under the said indenture, according to the meaning and effect of the said indenture.

[621] Fifth plea,—as to the breach of covenant by the defendant so excepted as aforesaid, the defendant brought into court the sum of one shilling, and said that the same was sufficient to answer the claim of the plaintiff in respect of the said breach.

The plaintiff joined issue on the second, third, and fifth pleas, and demurred to the fourth plea, the ground of demurrer stated in the margin being “that the matter therein set forth does not amount to a condition precedent to the plaintiff's right to recover in this action.”

The court below gave judgment upon this demurrer in Trinity Term, 1856, for the defendant, see 18 C. B. 561. The issues of fact were tried before Cockburn, C. J., at the sittings in London after Trinity Term, 1858, when the jury returned a verdict for the plaintiff, with 2300l. damages.

The case now came on for argument in the Exchequer Chamber, before Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B., and Channell, B.

Bovill, Q. C. (with whom was Beasley), for the plaintiff. The question, upon the record as altered, is, whether the fact of the plaintiff not having given the bond, as stipulated by the agreement, affords an answer to the action; or, in other words, whether the giving of a bond was a condition precedent. The substance of the agreement is, that the plaintiff should forthwith, at his own expense, procure a suitable vessel and stow on board thereof the cable in question, and rig, provision, and man the ship, and have her ready for sea at the Nore on or before a given day, and proceed with the cable on board to the northern coast of Africa, and lay down the cable from Cape Tabague to Cape Spartivento. Then, the defendant covenants to pay the plaintiff 5000l. by certain instalments—1000l. [622] seven days after the arrival of the vessel at Morden's Wharf; 2000l. on or before the expiration of twenty-one days after the vessel should have arrived alongside Morden's Wharf; and the remaining 2000l. as soon as the ship should put to sea from the Nore; and also to give the plaintiff 500 paid up shares in a certain company. Then there is a stipulation that, within ten days from the execution of the agreement, each party should give the other a bond for the due performance of the covenants on his part. A material part of the agreement, therefore, was to be performed before the arrival of the time at which the bonds were to be given: the plaintiff was to obtain the vessel forthwith, and to put himself to great expense to bring her alongside Morden's Wharf; and he was to be entitled to receive 1000l. within seven days after the arrival of the ship at Morden's Wharf. The payment of the money was not to be the consideration for the giving of the bond, but for doing the service before mentioned. The clause as to the giving of

the bonds is totally distinct and independent of the covenants to be performed on the one side and on the other. Suppose the defendant had sued the plaintiff for not having the vessel forthwith at Morden's Wharf, would it have been any answer for the plaintiff to have said,—“ You have broken your covenant, by omitting to give me a bond ! ” The not giving the bond was a substantive cause of action. Besides, it was a necessary part of the performance of all conditions precedent, as alleged generally, that the plaintiff was ready and willing and offered to give his bond, and requested the defendant to do the like : *Bentley v. Davies*, 9 Exch. 666. The defendant does not plead that the plaintiff was not ready and willing to give, but simply that he has not given his bond. [Martin, B. The simple question is, whether the giving the bond was or was not a condi-[623]tion precedent : that is upon the declaration. *Graves v. Legg*, 9 Exch. 709, is very much like this case. There, by a written agreement, the plaintiff contracted to sell to the defendant from 300 to 350 bales of white washed Dunskey fleece wool, laid down at certain ports in England, “ deliverable at Odessa during August then next, to be shipped with all dispatch, warranted fair average quality ; but, should they prove otherwise, to be taken with a fair allowance, to be assessed by Messrs. H. and R., subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped, &c. In an action for the breach of this contract, by not accepting the wools, the defendant pleaded that the wools were bought, with the knowledge of both parties, for the purpose of re-selling in the course of the defendant's business ; that wool is an article of fluctuating value, and not saleable until the names of the vessels in which it was shipped should have been declared according to the contract ; and that the plaintiff had neglected to declare the names of the vessels in which the wools were shipped, until after an unreasonable time after they had been shipped : and it was held, that the provision in the contract, that the names of the vessels in which the wools were shipped should be declared as soon as they had been shipped, was a condition precedent to the defendants' obligation to accept and pay for them ; and that, consequently, the plea was good. Crompton, J. The clear overriding intention of the parties, as Jervis, C. J., observed in the court below, was, that the bonds should be given as a security for the performance of everything on either side. The real object of the defendant was, to have the plaintiff's bond before he trusted him with this valuable property. He bargains for a security against every breach of covenant by the plaintiff. Neither [624] party was bound, as I read the contract, to do anything until the bonds were given.] If one party refuses to perform the contract on his part, or disables himself from performing it, there is an end of all conditions precedent : *Lowlock v. Franklin*, 18 Q. B. 371 ; *Hochster v. De la Tour*, 2 Ellis & B. 678. Lord Campbell in that case says,—“ The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured ” That principle was acted upon in *Cort v. The Ambergate Railway Company*, 17 Q. B. 127, and also in the Odessa cases,— see *Reid v. Hoskins*, 4 Ellis & B. 979, 5 Ellis & B. 729 ; *Avery v. Bowden*, 5 Ellis & B. 714 ; *Esposito v. Bowden*, 7 Ellis & B. 763 ; *Barrick v. Buba*, ante, vol. ii., p. 563. [Martin, B., referred to *Crookwell v. Fletcher*, 1 Hurlst. & N. 893.] Then, the stipulation as to the giving of the bond formed only part of the consideration for the plaintiff's promise to perform the covenants on his part. One of the earliest cases upon this subject is that of *Boone v. Eyre*, 1 H. Bl. 273 (a). That was an action of covenant on a deed whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500l. and an annuity of 160l. per annum for his life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was, the non-payment of the annuity. The defendant pleaded that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and [625] so had not a good title to convey ; to which there was a general demurrer. And Lord Mansfield said : “ The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But, when they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy

on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." So, here, if this plea be allowed, a delay in the giving of the bond for a single day would defeat the plaintiff's action, and deprive him of the benefit of all his outlay. In *Constable v. Oloberie*, Palmer, 397, a stipulation in a charterparty that the ship "should sail with the next wind" on a voyage to Cadiz, was held not to be a condition precedent. The like was held in *Bornmann v. Tooke*, 1 Campb. 377, where Lord Ellenborough says: "To hold that any short delay in setting sail, or trifling departure from the direct course of the voyage would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going inter apices facti." And in *Davidson v. Gwynne*, 12 East, 381, a stipulation that the ship should sail "with the first convoy" did not amount to a condition precedent. Lord Ellenborough there said: "It is useless to go over the same subject again, which has been so often discussed of late. The sailing with the first convoy is not a condition precedent: the object of the contract was, the performance of the voyage; and here it has been performed. The principle laid down in *Boone v. Eyre*, has been recognized in all the subsequent cases, that, unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, [626] but as a distinct covenant, for the breach of which the party injured may be compensated in damages. It is useless to repeat all the cases, because we had the subject so fully before us very lately in *Ritchie v. Atkinson*, 10 East, 295, and in the other cases mentioned." In *Stavers v. Curling*, 3 Scott, 740, 754, 3 N. C. 355, 368, Tindal, C. J., in delivering the judgment of the court, says: "The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case: to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie v. Atkinson*, 10 East, 295, to be this,—'that, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.'" *Kingdom v. Cor*, 2 C. B. 661, *Judson v. Bowden*, 1 Exch. 162, *Dicker v. Jackson*, 6 C. B. 103, and *Manby v. Crenonini*, 6 Exch. 808, are all authorities to the same effect. In all these cases, it is for the party who alleges the covenant to amount to a condition precedent to shew that the non-performance defeats the whole object and intention of the contract: *Freeman v. Taylor*, 8 Bingham, 124, 1 M. & Scott, 182; *Clipsham v. Verha*, 5 Q. B. 265. So, in *Tarrabochia v. Huckle*, 1 Hurlst. & N. 183, it was held, that the stipulations in a charterparty, that the vessel, being tight, staunch, and strong, shall sail with all [627] convenient speed, are not conditions precedent to the charterer's obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated. The court can hardly assume that the giving of the bond by the plaintiff was a material part of the consideration, when neither party has chosen to call for the performance of the stipulation, and the defendant has assumed one shilling to be a sufficient compensation for that breach on his part. In the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 b., it is said: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance: for, it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. This seems to be the ground of the judgment in this case of *Pordage v. Cole*, the money being appointed to be paid on a fixed day, which might happen before the lands were, or could be, conveyed." The same doctrine is laid down in *Matlock v. Kinglake*, 10 Ad. & E. 50, 2 P. & D. 343. There, by articles under seal, A. agreed to sell and B. to purchase certain premises: B. therein covenanted to pay, on or before a fixed day, as the consideration of such sale and purchase, a certain sum, with interest to the time of the completion of the purchase, A. allowing thereout the same rate of interest for so much of the money as might be paid in the meanwhile: and B. agreed to pay for the conveyance and the stamp. It was held that the conveyance was not

a condition precedent to, or concurrent with, the payment, and that A. might therefore sue for the purchase-money and interest, without previously tendering a conveyance. Littledale, J., there [628] says: "A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase-money, without averring performance of the condition." And Patteson, J., says: "*Montage v. Cole* is directly in point. We must overrule it if we decide in favor of the defendant. There is no express provision that the conveyance shall be executed before payment, nor any reasonable intendment that it was to be necessarily precedent to or concurrent with it." *Wilks v. Smith*, 10 M. & W. 355, is to the same effect.

Montague Smith, Q. C. (with whom was H. Lloyd), contra, was not called upon.

MARTIN, B. My Brother Erle, before he left the court, intimated an opinion that the judgment of the court below ought to be affirmed: and I believe we are all of the same opinion. One point urged by Mr. Bovill before us, and which was not urged in the court below, was, that the allegation that the defendant refused to perform the said contract on his part, shewed a complete breach. It seems to me, however, to be perfectly clear that those words do not constitute any breach at all, and never were so intended. That depends upon the construction of the language used, and nothing else. The declaration begins with stating, that, by an indenture of the 15th of May, 1855, the plaintiff, for the considerations therein mentioned, covenanted that he would forthwith, at his own expense, procure the Cornwall frigate, or some other suitable vessel, and stow or caused to be stowed on board a certain telegraphic cable then at Morden's Wharf, and would rig, fit out, and provision and man the said ship, &c., and would have her fully equipped at the Nore, ready for sea, on or before the 15th of July then [629] next, and proceed therewith to Cape Tabague, and there lay down the cable, &c. It then stated the defendant's covenants for payment of 5000l. by certain instalments, viz. 1000l. on or before the expiration of seven days after the arrival of the vessel alongside Morden's Wharf, 2000l. on or before the expiration of twenty-one days after the vessel should have arrived alongside Morden's Wharf, and 2000l. when and so soon as the ship should put to sea from the Nore. Then comes this allegation,—“And it was thereby agreed and declared, that, for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days from the execution of these presents, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5000l.; and, for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should within ten days from the execution of these presents give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5000l.” There is, therefore, an express statement that the bonds are to be given for the due performance of “the covenants,”—that is, all the covenants,—by the respective parties. The declaration then goes on to aver that the plaintiff did forthwith at his own expense procure a suitable ship, and rig, fit out, provision, and man her, and was always ready and willing to do and perform all the several acts thereinbefore covenanted to be performed by him, and to have the ship fully equipped in all respects and ready for sea at the Nore on or before the 15th of July then next, and was always ready and willing to receive the cable and cause it to be stowed on board the said ship upon the terms of the contract, [630] and to proceed with the same to Cape Tabague, &c., and in other respects fully to perform and carry out the same on his part, and was also ready and willing, according to the terms of the contract, to bring the said ship alongside Morden's Wharf for the purposes in the contract mentioned. Then comes that which Mr. Bovill contends constitutes a breach,—“but, before the time arrived for so doing, according to the terms of the said contract, the defendant refused to perform the said contract on his part, and dispensed with the vessel's being brought alongside the said wharf.” Then follows a general averment of performance by the plaintiff, an allegation that the defendant did not stow or allow to be stowed on board the said ship the said African and Sardinian Cable, but wholly refused so to do, and wholly and absolutely refused to perform the said contract on his part, and caused it to be stowed on board another vessel, and thereby broke his contract with the plaintiff, and discharged and prevented the plaintiff from fully and completely performing the same on his part. It seems to me to be perfectly clear that this statement of the defendant's refusal to perform the contract on his part is only introduced as ancillary to the

alleged dispensation from bringing the plaintiff's vessel alongside the wharf. It never was intended as a breach, but was merely to shew the nature of the alleged dispensation. The declaration then goes on to state that the defendant did not within ten days from the execution of the indenture, or at any time, give and execute a bond with sureties, as by his covenant he agreed to do. It is to my mind as plain as language can be that the breach is the refusal to stow the cable. If that be not a good breach, the declaration is bad. The question is, whether a plea that the plaintiff did not within ten days from the day of the execution of the indenture, or at any time, give a bond with two [631] sureties, as provided by the contract, is a good plea. It seems to me that the judgments of Jervis, C. J., and Cresswell, J., in the court below, upon that point, are as clear as can be. The judgment of Cresswell, J., in particular, is quite conclusive. "I am," he says, "of opinion that the giving of the bond was a condition precedent to the plaintiff's right to enforce his remedy for the non-payment of the 5000*l.* at the times stipulated. The essence of the contract is, that the parties shall mutually have remedies for the breach by either of any of the covenants therein. It is true the word 'forthwith' occurs at the beginning of the instrument. But when once you arrive at the conclusion that the giving of the bond is a condition precedent, that gives a meaning to the word 'forthwith.' As soon as the bonds are given, the plaintiff may be compelled to go on; but not until then. It is evidently used in a very vague sense: it is applied to all the things that are to be done by the plaintiff; and they certainly cannot all be done immediately. I feel no difficulty in holding it to have been the plain intention of the parties that each should have the security of the bond of the other for the performance of all the covenants." That is clearly the good sense of the thing. If the giving of the bond were not a condition precedent, it would be difficult to say what the damages for a breach should be. It evidently was intended, that, before anything should be done, each party should hand to the other a bond, as a mutual security for the performance of the covenants.

CROMPTON, J. I am of the same opinion. I entirely agree with my Brother Martin as to what is the breach. It is much to be lamented that parties should frame their averments so loosely. But, for the reasons given by the court below, which are entirely satisfactory to [632] my mind, I think the giving of the bond by the plaintiff was clearly a condition precedent. This does not come within any of the instances given in the cases cited. *Boone v. Eyre*, 1 H. Blac. 273, n., and all those cases, stand upon a totally different footing. Those were all cases of partial failure of consideration, which might well be compensated in damages. Here, the defendant could not be compensated in damages for the omission to give a bond. The object of the stipulation for mutual bonds was, that each party should have security for the performance of the covenants by the other. The giving of the bond was clearly a condition precedent, and to be done before either had any right to call upon the other to do anything. I do not think the word "forthwith" was used by the parties in the sense contended for by the plaintiff. The answer to that is given by Jervis, C. J., in the court below. He says,—“It may be, as my Brother Byles suggests, that the seven days provided for the payment of the 1000*l.* may elapse before the expiration of ten days from the execution of the agreement. But it does not follow that the plaintiff would be bound immediately to set about the preparation of the vessel. He might, I apprehend, wait until the expiration of the ten days, and then say 'Give me the bond.' That makes the whole thing perfectly consistent; whereas, the contrary construction deprives him of security, which is very different from having a remedy.” It seems to me that the intention is as plainly expressed as could be. Practically, it was not supposed that anything would be done within the seven days: but the bond was to be given as a security that anything that was done should not be thrown away. It seems to me to be absurd to say that the failure to give a bond was a matter which might be compensated in damages. It was clearly a condition precedent in the strongest sense, and not a [633] concurrent act. The only doubt that has arisen in my mind was created by the averment in the declaration that the plaintiff was ready and willing to perform all the acts covenanted by him to be performed. But, looking at that averment, two answers arise. The averment of readiness and willingness amounts to this, that the plaintiff is ready and willing to carry out the contract, when the contract has become binding upon him by the performance of all conditions precedent on the part of the defendant. Another answer is, that I do not think the general averment

of readiness and willingness is sufficient in the case of a condition precedent. It is, where the acts to be done on both sides are concurrent. But readiness and willingness, and notice, will not do, where the party is not bound to do the act until the performance of some other act by the other party. The defendant had a right to say to the plaintiff, "Give me the bond before you call upon me to do anything on my part." We cannot construe the averment of readiness and willingness to give the bond, as an averment of the performance of that which beyond all doubt is a condition precedent.

BRAMWELL, B. I also am very clearly of opinion that the giving of the bond by the plaintiff in this case was a condition precedent to the plaintiff's right to sue the defendant for a breach of any of the covenants on his part. Wherever the obvious good sense of the thing makes the performance of an act a condition precedent, it ought to be so construed. When a man says, "I require you to give me security for the performance of your part of the contract," when is it reasonable to hold that the security is to be given,—before or after the other party has performed his part? It seems to me to be obviously the good sense of the thing to hold this to be a condition precedent to the [634] defendant's being in any way liable on the contract. I entirely agree with Jervis, C. J., that we are to ascertain the intention of the parties. The rules laid down in the notes to *Portage v. Cole* are very excellent guides, but not arbitrary tests. It is said that the giving of the bond here was not to be a condition precedent, because that was not to be done until ten days after the execution of the agreement, whereas 1000l. of the stipulated 5000l. was to be paid within seven days of the arrival of the ship alongside Morden's Wharf, which was to take place forthwith on the execution of the agreement. If it had appeared that the seven days must elapse before the expiration of the ten days, there would have been more weight in the argument, though even then I should have been inclined to hold the giving of the bond to be a condition precedent. *Boone v. Eyre* in reality has nothing to do with this case. That case was decided upon principles of good sense. It may be that the plaintiff may be a loser by not having given a bond. Mr. Bovill has urged before us a point which was not made in the court below, viz. that a man may break his covenant before the time for its performance has arrived: and for this he relies upon *Hochster v. De la Tour*, 2 Ellis & B. 678. I say nothing about that case, except that there is high authority for saying that the judgment may be supported on the ground that by the defendant's renunciation of the contract the relation of master and servant was destroyed. I agree that the breach commences with the word "yet." The only real question is that which was argued in the court below.

WATSON, B. I also am of opinion that the judgment of the court of Common Pleas was right. The whole question is, whether the giving of a bond by the plaintiff was a condition precedent to his right to sue the defendant for a breach of the contract on his part. I [635] am clearly of opinion that it was. It lies at the root of the contract. Two parties contract to carry out an expensive undertaking: the one is to procure a ship, and the other to have a telegraphic cable ready to be put on board. The agreement contains several provisions as to what shall be done by each party: and then they provide, that, "for the due performance of the covenants thereinbefore contained," each shall give the other a bond, with two sureties, for 5000l. The court below were clearly right in holding the giving of the bond to be a condition precedent. The only doubt that ever crossed my mind, arose from the form of the allegations. But, when looked at, I think the matter is very simple. The real breach alleged is, the defendant's failure to stow the cable on board the vessel provided by the plaintiff: the subsequent allegation of the refusal to perform the contract on his part, is merely introductory to the plaintiff's excuse for not having the vessel at Morden's Wharf in performance of the contract on his part. The giving of the bond being a condition precedent, it was absolutely necessary for the plaintiff to aver performance or a tender: readiness and willingness is not sufficient, as in the case of concurrent acts. *Hochster v. De la Tour*, which has been relied on by Mr. Bovill, has nothing whatever to do with the present case. The declaration there was upon an agreement to employ the plaintiff as a courier, from a day subsequent to the date of the writ,—averring that the plaintiff, from the time of the agreement till the refusal by the defendant after mentioned, was ready and willing to perform his part of the contract; and alleging for breach, that, before the day for the commencement of the employment, the defendant refused to perform the agreement, and discharged

the plaintiff from performing it, and wrongfully wholly put an end to the agreement. Upon [636] motion in arrest of judgment, it was held, that a party to an executory agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract; and that an action will lie for such breach before the time for the fulfilment of the agreement: that it sufficiently appeared on the face of the declaration that there was on the part of the defendant, not only an intention to break the contract, of which intention he might repent, but a renunciation communicated to the plaintiff, on which the plaintiff was entitled to act; and consequently that the plaintiff was entitled to judgment. The principle on which that proceeded is well reconciled by the argument of Mr. Mellish in *Avery v. Bowden*, 5 Ellis & B. 722. The case, however, is wholly inapplicable here. The real and sole question here is, whether the giving the bond was a condition precedent. I am clearly of opinion that it was.

CHANNELL, B. I also am clearly of opinion that the judgment of the court below was right, and must be affirmed. The breach is, that which follows the word "yet." No breach is laid in the earlier part of the declaration. The sole question is, whether the fourth plea is a good answer to that breach. It unquestionably is, if the giving of the bond was a condition precedent. I think it was. It is very probable that the parties contemplated that some part of the agreement would be performed by the plaintiff before the lapse of the ten days. But, I am of opinion that that was to be done at the plaintiff's own peril and risk. But there was no obligation on the defendant to do anything until the bond was given.

Judgment affirmed.

End of Easter Vacation.

[637] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN TRINITY TERM, IN THE TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges who sat in banc in this term, were,—Cockburn, C. J., Williams, J., Willes, J., and Byles, J.

MEMORANDA.

On Friday, the 24th of July, the Right Hon. John Lord Campbell, late Lord Chief Justice of England, was sworn in at Lincoln's Inn, before the Master of the Rolls and the Vice-Chancellor of England, as Lord High Chancellor, in the room of Lord Chelmsford, resigned.

His Lordship, assisted by the Lords Justices Knight Bruce and Turner, then proceeded to hear causes.

[638] The Right Hon. Sir Alexander James Edmund Cockburn, Knt., late Lord Chief Justice of Her Majesty's court of Common Pleas, was on the same day sworn in before the Lord Chancellor as Lord Chief Justice of England, in the room of Lord Campbell, promoted to the office of Lord High Chancellor.

The Hon. Sir William Earle, one of the Judges of Her Majesty's court of Queen's Bench, was at the same time sworn in before the Lord High Chancellor as Lord Chief Justice of the court of Common Pleas, in the room of Sir Alexander James Edmund Cockburn, promoted to the office of Lord Chief Justice of England.

On the 22nd day of June, Sir Richard Bethell, Knt., was appointed Her Majesty's Attorney-General, upon the resignation of Sir Fitzroy Kelly, Knt.

On the same day, Sir Henry Singer Keating, Knt., was appointed Her Majesty's Solicitor-General, upon the resignation of Sir Hugh McCalmont Cairns, Knt.

On the 27th day of July, Colin Blackburn, of the Inner Temple, Esq., was appointed one of the Judges of Her Majesty's court of Queen's Bench, in the room of Sir William Erle, promoted to the office of Lord Chief Justice of the court of Common Pleas. He shortly afterwards received the honor of knighthood.

[639] IN THE MATTER OF THE COMPLAINT OF WILLIAM GARTON AND MOSES STONE AGAINST THE BRISTOL AND EXETER RAILWAY COMPANY. June 13th, 1859.

[S. C. 28 L. J. C. P. 306; 5 Jur. N. S. 1313. Considered, *Palmer v. London and South Western Railway*, 1866, L. R. 1 C. P. 588. See *West v. London and North Western Railway*, 1870, L. R. 5 C. P. 629. Applied, *In re Palmer and London, Brighton and South Coast Railway*, 1871, L. R. 6 C. P. 204. Applied, *Parkinson v. Great Western Railway*, 1871, L. R. 6 C. P. 562. Referred to, *Liverpool Corn Trade Association v. London and North Western Railway*, [1891] 1 Q. B. 132. See *Phipps v. London and North Western Railway*, [1892] 2 Q. B. 246.]

A railway company has no right to impose a charge for the conveyance of goods to or from their station, where the customer does not require such service to be performed by them.—The B. & E. Railway Company closed their goods station at B. at 5 15 P.M. against all persons except their agent W., who had a receiving-house about a mile distant from the station, and from whom the company received goods up to 8 P.M. For the conveyance of goods from the receiving-house to the station, W. charged 1s. 8d. per ton on all goods above 3 cwt., and 3d. for each package below that weight:—Held, upon the complaint of a rival carrier, that the refusal to receive goods sent by him to the station after 5.15, unless sent through the receiving-house of W., was imposing upon him an undue prejudice, within the 17 & 18 Vict. c. 31, s. 2,—although it was sworn on the part of the company that the goods so brought to the station by W. came there properly classified, weighed, and prepared for loading.—The general rate of charge for the carriage of goods from Bristol to Bridgewater and vice versa was 6s. 8d. per ton for first-class, 8s. 4d. per ton for second-class, 12s. 6d. per ton for third-class, and 16s. 8d. per ton for fourth-class goods. The company had special contracts with certain grocers and ironmongers at Bridgewater, under which they agreed to carry all their grocery and ironmongery goods at a uniform rate of 6s. per ton, including delivery:—Held, an undue preference,—it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, or to meet competition from another railway or any other mode of carriage.

Collier, Q. C., in Easter Term last, obtained a rule on behalf of Messrs. Garton & Stone, common carriers, calling upon the Bristol and Exeter Railway Company to shew cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the said company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and delivering for themselves or other persons of goods and parcels, or in their charges for the same, over the complainants, in the carrying of such goods and parcels for the complainants; and enjoining the said company not to subject the said complainants to any undue or unreasonable prejudice or disadvantage in the charges made to them for carrying such goods and parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such goods and parcels as aforesaid, or in reference to the time of taking in and receiving such goods and parcels—with costs.

The affidavits upon which the rule was obtained [640] stated in substance as follows,—That the complainants were common carriers carrying on business at Bristol, and were in the habit of collecting goods from their customers who required them to be sent between Bristol and Exeter, Exeter and Crediton, Durston and Yeovil, and Highbridge and Glastonbury, and intermediate places: That the Bristol and Exeter Railway Company were proprietors of a railway from Bristol to Exeter, and branch railways from Exeter to Crediton, from Durston to Yeovil, and from Highbridge to Glastonbury: That the said Bristol and Exeter Railway Company, in addition to the management of their said lines of railway, and the traffic thereupon, also carry on the business of common carriers by collecting goods from their customers, and carting them to their several stations upon their said railway from which such goods are consigned, then carrying them on their said railway to the station nearest to the place to which the same goods are consigned, and finally carting them from such last-mentioned station to the residence or place of business of the consignee: That the complainants in their business of common carriers collect goods from their customers in Bristol, and deliver

such goods to the company at their station in Bristol, to be carried by them to the several stations on their said lines of railway to which they are severally consigned, and then carting them from such last-mentioned several stations, and delivering them to the several consignees, and it is essential to the carrying on of their said business that goods so delivered by them to the said railway company at their said station in Bristol should be received by them at their said station in Bristol at as late an hour in the day as goods delivered at the said station by the said company or their agents, or any other persons: That the said company close their said station at Bristol to the complainants every day at a [641] quarter after five o'clock in the evening, and refuse to receive for transmission on their said lines of railway all goods brought by the complainants to their said Bristol station at a later hour than a quarter after five o'clock in the evening; and the said company have so closed their said station, and refused to receive goods brought by the complainants as aforesaid after the hour aforesaid for a period of four years and upwards, and still continue, and, it was believed, intended to continue so to do: That the complainants had from time to time during the said period of four years and upwards been informed by the servants of the said company that the only goods received by the company at their said station in Bristol at a later hour than a quarter after five o'clock in the evening, were such goods as were brought to such station by one Wall, the agent of the said company, and that goods so brought to the said station by Wall as aforesaid were received up to an hour much later than a quarter after five o'clock in the evening, and transmitted by the trains of the said company leaving Bristol on the same day they were so received; and the deponent believed that during the whole period of four years and upwards the company have always received goods brought to their station at Bristol by themselves and their said agent Wall up to a very much later hour in the day than a quarter after five o'clock in the evening, and that the company still continue and intend to continue so to do: That the deponent had been largely employed in the business of a carrier by railway for fourteen years past, and was well acquainted with the proper mode of assorting and packing goods for transmission by railway, and that the goods from time to time sent by the complainants to the said station were so sent in a manner and form as convenient in every respect to the company and their servants, and the same might be and were assorted, [642] packed, and transmitted in every way as ready, easily, and expeditiously, and inexpensively to the company, as goods sent to the station by the company, or Wall their agent, or any other person: That, on the 31st of January last, at a quarter to seven o'clock in the evening, the deponent tendered at the company's station at Bristol a truss of drapery goods for transmission to Exeter, but the cart in which the same was brought to the station was refused admission within the station by the servant of the company, whereupon the deponent went to the offices of the company, at the station, and requested of the clerk there that the said truss might be received and transmitted, and he then produced to the clerk the particulars and weights of the said truss, in writing, but he refused to receive the same, saying it was too late; and that the deponent thereupon went to the superintendent of the station, and made the same request, and produced the same particulars and weights, and he also refused to receive the said truss; and that, whilst in conversation with the superintendent, a van belonging to Wall entered the station, to which fact the deponent called the attention of the superintendent, who said "I am aware of it, but he is our agent, and we make a rule not to receive goods from any one but him after a quarter past five o'clock in the evening," and the said truss was not received or transmitted; that the deponent then went to the platform of the station and saw Wall's van unloaded, and the goods therefrom, which were of the same nature as the truss of drapery tendered by the deponent, were received by the servants of the company, and in the deponent's presence by such servants packed into the railway trucks, many of the articles being then weighed by the company's servants; and that, on the same occasion, when leaving the station, the deponent saw another van belonging to Wall, containing general [643] merchandize of the same nature as the said truss of drapery, admitted into the said station; and that, on the same 31st of January, the deponent sent another truss of drapery to the receiving-office of Wall in Bristol, situate about one mile from the company's said station, at a quarter after seven o'clock in the evening, consigned to one Roberts at the railway-station at Exeter, and the same truss was then received at such receiving-office, and the deponent had since been informed by the consignee that such truss was sent by the company by a train which

left the said station in Bristol in the night of the said 31st of January : That again, on 2nd of February last, at half past five o'clock in the evening, the complainants tendered at the company's station at Bristol aforesaid, a case of caps for transmission to Bridgewater, and at the time of the arrival at the station of the cart containing such case, a van belonging to Wall containing goods of a like nature to the said case arrived at the same station, and Wall's van was admitted into the station, and the cart containing the said case was excluded by the servants of the company : that the complainants notwithstanding tendered the said case, with the particulars and weight thereof, to the clerk employed by the company to authorize the receipt of goods, who refused to receive the same, whereupon the deponent went on to the platform of the station and saw the company's servants take the goods from the van belonging to Wall, weigh some of them, and place them in the railway truck of the company ; and the deponent afterwards, about a quarter past seven o'clock in the evening of the same day, sent the said case to the receiving office of Wall, consigned to one Babbage at the station at Bridgewater, and the same case was then received at such receiving-house, and the deponent had since been informed and believed that the said case was sent by [644] the company by a train which left the station at Bristol in the night of the said 2nd of February. Several other instances were then given of goods of the complainants being rejected, and goods received by the company at a later hour from Wall, and forwarded to their destination on the same day : and the affidavit proceeded to state that all goods brought by all or any of the public to the receiving-office of Wall were received there up to the hour of eight o'clock in the evening of every day, and were forwarded by the company to the several stations on their said railway nearest to the several places to which they were severally consigned, on the same day on which such goods were so received : That all goods delivered to and received at the said receiving-office of Wall were charged 1s. 8d. per ton on all goods above 3 cwt. in weight, and 3d. for each consignment under 3 cwt. in weight, for delivery from the receiving-office to the station at Bristol, in addition to the company's usual rates of charge for carriage upon their said several lines of railway : That Wall, besides receiving goods at his said receiving-house as aforesaid, collected goods from the residences or places of business in Bristol of the customers of the company requiring such goods to be carried on their said lines of railway, and delivered the same to the said station in Bristol : and that the deponent had on several occasions and constantly seen the vans of Wall leaving the said residences or places of business of the said customers of the company loaded with the goods of such customers after a quarter past five o'clock in the evening ; and that the deponent had seen the same vans of Wall afterwards passing through the streets of Bristol on the way and near to the station : and that such goods were afterwards received into the station at a much later hour than a quarter past five o'clock in the evening, without having been first received at or delivered [645] to the said receiving-office : That all goods so collected as last aforesaid by Wall were charged with the like sum of 1s. 8d. per ton in quantities above 3 cwt. in weight, and 3d. for each consignment under 3 cwt. in weight, for collection and delivery from the residences or places of business of the said customers of the company to the station at Bristol, in addition to the company's usual rates of charge for carriage upon their said several lines of railway : That the business of the complainants consisted in collecting goods from their customers in Bristol, carting such goods to the station at Bristol, carrying them on the railway, and delivering them to the several consignees ; and they derived a profit from the said collection and cartage to the station : but that, if the goods were delivered to the receiving-office of Wall, the complainants charged their customers, or the consignees of the goods, the same sums which the railway company charged the complainants, with a loss to complainants of the said sums of 1s. 8d. per ton on all goods above 3 cwt. in weight, and 3d. for each consignment under 3 cwt. in weight, for delivering the said goods from the said receiving-office to the station, though they were ready and willing and desirous to do and perform the services for which the said last-mentioned sums were charged : That the company, through their said agent (Wall), also collected and delivered goods as aforesaid, and competed with the complainants in their said business of collection and delivery ; and that the deponent believed that the company so refused to receive goods at their said station at Bristol from all persons except their agent Wall at a later hour than a quarter after five o'clock in the evening, for the purpose of compelling persons desirous of having their goods conveyed on their lines of railway, to employ the said

company and their agent Wall to collect and deliver such goods, and thus [646] to secure this business, and the profit upon it, to the said company, and to exclude the complainants from competing with them in that department of business: That the company's rates from Bristol to Bridgewater and from Bridgewater to Bristol, for goods sent by their ordinary goods trains, were,—6s. 8d. per ton for first-class goods, 8s. 4d. per ton for second-class goods, 12s. 6d. per ton for third-class goods, and 16s. 8d. per ton for fourth-class goods, which said several rates of charge were for the carriage of goods from station to station only: That, on goods consigned by the complainants from Bristol to Bridgewater and from Bridgewater to Bristol, they had paid, and still continued to pay the company their said respective rates last above mentioned, and, on all goods arriving at Bridgewater, the complainants, on the arrival of such goods carted them at their own expense from the station at Bridgewater to the residences or places of business of their customers in Bridgewater: That the deponent had been informed, and believed, that the company had been in the habit of carrying, and still continued to carry, goods of all and every the aforesaid classes, and of like kinds to those sent by the complainants to and from [certain persons named], all of Bridgewater, charging them respectively for the carriage of goods required to be sent by the company's ordinary goods trains from the station at Bristol to the several and respective residences or places of business of the several and respective persons in Bridgewater, or from the several and respective residences or places of business of the several and respective persons in Bridgewater to the said station at Bristol, an uniform rate of 6s. per ton for all classes of goods, including the charge for collection or delivery at Bridgewater, and all separate parcels of different kinds of goods being charged for on the aggregate weight of the whole carried from week to week. The affidavits then [647] set out a correspondence between the attorney for the complainants and the secretary of the company on the subject of the alleged inequality of charges.

Butt, Q. C., Kinglake, Serjt., and M. Smith, Q. C., now shewed cause, upon affidavits, not denying the matters alleged in the affidavits filed by the complainants, but professing to explain the course of dealing adopted by the company for their own convenience, and stating, amongst other things, that the goods carried at the lower rates of charge for the grocers and ironmongers at Bridgewater, were carried under special contracts, which special contracts were limited to grocery and ironmongery by reason of their being sent in large quantities, and that those persons would be charged for other goods the same as was charged to the complainants and the rest of the public.

As to the charge for collection and delivery being included in the charge for carriage on the railway,—it is proposed to ask the court to re-consider the two cases of *Barnedale v. The Great Western Railway Company* (*Reading case*), ante, vol. v., p. 336, and *Garton v. The Great Western Railway Company*, ante, vol. v., p. 669. [Cockburn, C. J. Those cases were decided on full consideration.] It will be borne in mind that there is no appeal. [Williams, J. It is perfectly competent to the company to make an extra charge for receiving goods at their receiving-houses: but the question is whether they may impose an additional burthen on those who do not require them to convey their goods for them to the station.] If the court considers the question settled by the cases referred to, it would be idle further to argue this point.

The next ground of complaint is, that the company close their goods station at a quarter past five o'clock in the evening, after which time they refuse to receive [648] goods from the complainants, though they receive them as late as eight from Wall,—the explanation of that is, that a considerable time is necessary to classify, weigh, enter, and pack the goods before starting the train, and that these duties are performed for the company by Wall in respect of all goods brought by him to the station. [Cockburn, C. J. No doubt, the company are entitled to a reasonable time. But, if it is sufficient to take a parcel to Wall's receiving house an hour before the time of starting the train, why should it not be sufficient to take it to the station at the same time?] If the parcel is brought to the station, it would have to be weighed and entered. [Cockburn, C. J. The place of business of the company is the station. What right have they to say to any one, you shall take your goods somewhere else?] The public do not complain that the time of closing the station is unreasonable. [Cockburn, C. J. A rival carrier complains, that, by this arrangement, those who bring parcels to him after a quarter past five cannot have them conveyed by that night's train. It is enough for the complainants to say that the company are giving an

advantage to A. which they withhold from them.] The case of *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77, shews that the collection of goods by means of receiving-houses is the ordinary mode of conducting railway business.

Then, as to the alleged inequality of charge for the carriage of goods between Bristol and Bridgewater,—it appears from the affidavits, that the company had entered into special contracts with certain grocers and ironmongers at Bridgewater, to carry for them their grocery and ironmongery at the rate of 6s. per ton, irrespective of class, in consideration of their sending all their goods of those descriptions by the railway, and abstaining from availing themselves of water-carriage: [649] and that, if any other description of goods were sent by or to those persons, they would be charged the ordinary rates of carriage. In *Nicholson v. The Great Western Railway Company*, ante, vol. v., p. 366, this court held that it is competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that, in entering into such agreements, the company have only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them be adequate, and the company are willing to afford the same facilities to all others upon the same terms: nor is the 2nd section of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train-loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. The special agreements here are as free from objection as the special agreement in that case: and it makes no difference that the exact quantity of goods required to be sent cannot be ascertained and defined. [Willes, J. Do your affidavits shew that the Bridgewater people have any other mode of carrying their goods than the defendants' railway?] They do. [Cockburn, C. J. Do they state, that, but for the special agreements, they would send their goods by water-carriage or otherwise than by the defendant's railway?] Not in terms: but that may fairly be inferred from the affidavits. Nobody in the grocery or ironmongery trade complains: but only the applicants, who are rival [650] carriers. [Williams, J. These special agreements would not press upon any other description of tradesmen. If the grocer or the ironmonger employed the complainants to carry, would they be charged the lesser rate?] The affidavits so state. [Cockburn, C. J. No instance is given. Probably no one ever tried so hazardous an experiment.] The complainants have no right to come and complain until they have made the experiment, and failed. [Williams, J. Do your affidavits negative an intention on the part of the company to favor these individuals?] No fraud or intention to favor one class of persons at the expense of another, is suggested.

Collier, Q. C., and Karslake, in support of the rule. As to the first point, assuming that the court will abide by their decisions in *Barendale v. The Great Western Railway Company* (*Reading case*), ante, vol. v., p. 336, and *Garton v. The Great Western Railway Company*, ante, vol. v., p. 699, it is unnecessary to say anything upon it. As to the second point, the complaint is, that, whereas the station at Bristol is closed against the complainants at a quarter past five o'clock in the evening, Wall, the favored agent of the company, is allowed to have access thereto for the purpose of delivering his goods until eight o'clock. This is sworn to by the complainants, and is unanswered. Then, as to the special agreements,—all the complainants could know was, that the parties referred to were preferred before them. The case of *Nicholson v. The Great Western Railway Company*, ante, vol. v., p. 366, is clearly distinguishable: the special agreements there were so manifestly for the advantage of the company that the court could not fail to see that it was reasonable that they should enter into them. [Byles, J. There, the company got a fair equivalent, in full train-loads and regular times, for the advantage they [651] afforded to the Ruabon Coal Company. I do not see that the defendants here do get an equivalent.] The case of *Barendale v. The Great Western Railway Company* (*Bristol case*), ante, vol. v., p. 309, though not precisely in point, still throws some light upon the subject. There, the company made a special agreement with one Somerville to give him certain advantages, in consideration of his employing them to carry all his paper by their lines: and yet that was held to be a case of undue preference. [Willes, J. We there held that it was undue and unreason-

able to charge more or less for the same service, according as the customer of the railway thought proper or not to bind himself to employ the company in totally distinct transactions.]

COCKBURN, C. J. I am of opinion that this rule should be made absolute. With regard to the first point urged on the part of the complainants, the case appears to me to fall within the principle of *Barendale v. The Great Western Railway Company* (Reading case), ante, vol. v., p. 336, and *Garton v. The Great Western Railway Company*, ante, vol. v., p. 669. It has not been successfully distinguished from those cases, and we are satisfied to abide by what was there decided: and upon that point the complainants are entitled to have the rule made absolute. With respect to the second ground of complaint, viz. that the goods-station is closed against the complainants and the public generally at a quarter past five o'clock in the evening, but is kept open until eight o'clock in favor of the company's agent, Wall,—I also think the rule must be made absolute. It seems to be admitted on the part of the defendants that the charges made by Wall, upon payment of which charges alone goods are conveyed to and received at their station after the hour at which the station is closed to the complainants and the rest [652] of the public, includes a charge for cartage to the station. So far, therefore, as that is concerned, the case falls within the principle of the decisions to which I have already referred. That principle is, that a railway company has no right to impose a charge for the conveyance of goods to or from the station, where the customer does not require such service to be performed by the company. Here, the defendants say to the plaintiffs,—“You shall not have the same facility for forwarding your traffic on the railway as we afford to our agent Wall, unless you consent to pay a certain charge for the conveyance of your goods to the station.” Without entering any further into the merits of that part of the case, it is plain to my mind that it falls within the principle of those mentioned, and upon which we have held the first objection to be well founded. The third objection is founded upon the special contracts entered into between the company and certain individuals, under which those persons have a preference over the complainants in the carriage of heavy packages of grocery and ironmongery between Bristol and Bridgewater. It is not, as it seems to me, necessary to decide upon the present occasion how far a railway company may for their own advantage enter into special contracts of this sort. Nor is it necessary to say whether, with a view to meet competition by another railway company or by another mode of carriage, the company may not say to persons having large quantities of heavy goods to send, “If you will engage to send a given quantity, or to send all the goods you have to send, by our line, we will give you such an advantage.” If that be done bona fide, with a view to overcome opposition, and the public in general are offered the same advantages under like conditions, it is unnecessary to say whether that might not be allowable; though I wish to guard myself against deciding [653] that upon the present occasion. The facts brought before us upon these affidavits fail to make out any adequate motive for this arrangement. It is suggested that there is certain water-carriage which might enter into competition with the railway between Bristol and Bridgewater. But it is not shewn that it actually does compete with it. We are not told what is the rate of charge for such water-carriage as compared with the carriage by the railway. A *prima facie* case is made out on the part of the complainants: it is shewn that they have not the same facilities afforded them for the conveyance of their goods as are conceded to certain favored individuals. That called on the company for an explanation. None has been given: and, in the absence of all explanation as to the grounds of this preference, we cannot come to any other conclusion than that the arrangement is made with a view to induce parties to engage with the company as carriers directly, to the exclusion of a rival carrier. I therefore think the rule must be made absolute.

WILLIAMS, J. I am of the same opinion. As to the first point, it is enough to say that the case is governed by those of *Barendale v. The Great Western Railway Company* and *Garton v. The Great Western Railway Company*, from which it is impossible to distinguish it. As to the second point, it appears to me upon the whole that an undue preference has been shewn to have been given to Wall by the company in their mode of dealing with him. No doubt, it is perfectly competent to a railway company to prescribe a certain time after which they will decline to receive goods to be forwarded by a given train. So, I do not see why they may not if they please extend the time, for a reasonable compensation for the extra trouble, to be paid by those who

bring their goods late. Nor do I think,—[654] though upon that I desire not to be understood as giving any decided opinion,—that it would make any substantial difference whether the company received such extra composition themselves or allowed some other person to receive it. But, looking at the affidavits as to the mode in which the business is conducted by Wall, the agent of the company,—the mode and the time of his receiving goods, and the remuneration he has for it,—I think it is impossible to say that this course of dealing can be brought within those principles. I am clearly of opinion that a case of undue preference has been made out in this respect, and that as to the second ground of complaint also the rule must be made absolute. As to the third ground of complaint, I must confess I have felt more difficulty: but, upon the whole, I think the applicants have made out a *prima facie* case of undue and unreasonable preference, by shewing that more is charged to them than is charged to other persons for the conveyance of the same descriptions of goods under the same circumstances and by the same trains. The question is whether the company have given any answer to that *prima facie* case. If it had appeared that a lower rate had been charged to certain individuals for the purpose of meeting competition by a canal or another railway, or in consideration of their sending large quantities of goods, though the same advantages were not publicly and generally held out, it may be that the company would be warranted in so doing,—though upon that it is not necessary for me to offer any opinion. If such had been the history of the reduced charge, or if, with a view to meet such competition, the company were to say to certain persons, “We will carry for you at a reduced rate, provided you will undertake to send your goods exclusively by our railway and not to resort to water-carriage, or any [655] other mode of conveyance,” the matter might have been well deserving of full consideration. But no such point is raised upon the affidavits, though it must have been in the minds of the persons who made the affidavits on the part of the company. The silence of the company as to any apprehension of water-carriage competition, and the absence of any answer to the case made out on the affidavits filed on behalf of the complainants, satisfies my mind that the object of the company in giving the preference charged, was, to shut out the complainants from competing with them as carriers.

WILLES, J. I am of the same opinion upon all the points. I will only add, in consequence of the mention which has been made of the case of *Nicholson v. The Great Western Railway Company*, that it is a mistake to suppose that the court there intended to decide that a *prima facie* case of preference is sufficiently answered by stating a difference which may or may not be material in the circumstances between the carriage for the person complaining and that for the person alleged to have been preferred, without shewing that such difference practically affects the fair charge for carriage, to an extent proportionate to the difference of charge actually made by the company to their several customers. It was in that case sworn on the part of the company, and not answered by the complainants, that, having regard to the circumstances there specially set forth, and appearing to the court to be material, the rates charged to the complainants were in every respect fair and reasonable as compared with the rates charged, under the special circumstances, to the company alleged to have been preferred.

BYLES, J. I also think the rule should be made absolute upon all three branches. With respect to the [656] first two grounds, I can only repeat what has already been said by my Lord and my two learned Brothers, that the right of the applicants to succeed upon those two points follows as a necessary consequence from the decisions of this court in *Barvendale v. The Great Western Railway Company* and *Garton v. The Great Western Railway Company*. The principle laid down in those two cases is, that a man shall not be forced to pay for a service which he has no desire to have performed for him, and the performance of which operates injuriously to him by giving others an undue preference over him. As to the third branch of the case, viz. that a lower charge is made by the company to persons residing at Bridgewater for the carriage of goods, than is made to the complainants, no satisfactory reason seems to me to have been given for that reduction. It is not shewn that it is rendered necessary for the purpose of meeting and of overcoming competition. As to the case of *Nicholson v. The Great Western Railway Company*, ante, vol. v., p. 366,—that was merely deciding distinctly a point which was thrown out in *Ransome v. The Eastern Counties Railway Company*, ante, vol. i., p. 437, and *Orlade v. The North Eastern Railway Company*, ante, vol. i., p. 454, viz., that a smaller per-centage of profit on a larger amount of traffic might be a full compensation to the company for a larger per-centage of profit

upon a smaller amount of traffic. It does not appear that that is the case here. There is nothing in the affidavits to shew that these Bridgewater grocers and iron-mongers send any large amount of goods by the defendants' line. The inequality of charge cannot be without a reason: and I am at a loss to see any other possible reason than a desire on the part of the defendants to displace the complainants as carriers, so that they themselves may become the sole carriers on their line of railway.

Rule absolute.

[657] BAINES AND ANOTHER v. WOODFALL. June 11th, 1859.

[S. C. 28 L. J. C. P. 338; 6 Jur. N. S. 19.]

A ship was insured by a time policy from the 30th of July, 1857, to the 29th of July, 1858. Having safely arrived in port on the 12th of April, 1858, her owner on the 15th wrote to the insurance-broker who acted for the insurers, as follows:—"The 'J. B.' having arrived here, we will thank you to render us a credit-note for unexpired time, say, from the 12th instant to the date of the expiration of her policy." On the following day, the broker sent a clerk with a memorandum as follows:—"Please hand bearer stamped policy per 'J. B.' to put forward returns for cancelling." The policy was sent accordingly, and on the 21st the broker's clerk indorsed thereon, "Cancelled this policy from the 12th of April, 1858, and returned the assured 1l. 17s. 10d., per cash, for three months unexpired time,"—the usage of underwriters at the port being to take into consideration unbroken months only in computing the returns.—The vessel was destroyed by fire (one of the perils insured against) in the dock on the 22nd of April. Later on the same day, but before they had received the credit-note for the return premium, or had any intimation from the broker that the policy had been cancelled, the assured wrote as follows,—"Not having received any reply to our note of the 15th instant, requesting you to send us a credit-note for unexpired time on policy on ship 'J. B.', we hereby withdraw our said note and the request therein contained." To this the broker replied,—"We beg to say, that, in accordance with your request of the 15th instant, we cancelled the policy per 'J. B.' in usual course, and we cannot therefore recognize any withdrawal on your part:"—Held, that there had been a sufficient acceptance by the broker of the proposal of the assured to cancel the policy, notwithstanding the parties had misunderstood each other as to the mode of calculating the returns.

This was an action upon a policy of insurance, for a total loss.

The first count of the declaration was upon a policy subscribed by the defendant, upon a ship called the "James Baines," lost or not lost, from the 30th of July, 1857, to the 29th of July, 1858, averring a loss of the ship by fire (which was one of the perils insured against) after the 30th of July, 1857, and before the 29th of July, 1858.

The declaration also contained a count for money had and received, and a count upon accounts stated.

The defendant pleaded,—first, to the first count, that, during the said risk, and before the happening of the loss in the first count mentioned, the said ship arrived at Liverpool safe in all respects, and was then and there in dock moored in safety more than twenty-four hours; that the plaintiffs then proposed to the defendant that the said policy should be cancelled, and the risk and liability of the defendant thereunder should be then terminated and put an end to, and that the defendant should make a return to the plaintiffs of premium paid to the defendant by the plaintiffs on the [658] said policy, for the unexpired time covered by the said policy; that he the defendant acceded to the said proposal, and applied to the plaintiffs for the policy, in order that the same might be so cancelled as aforesaid, and the plaintiffs handed the same to him for that purpose, and the said policy was cancelled, and the risk and liability of the defendant thereon and thereunder was terminated and put an end to, and the defendant was then ready and willing to make the said return of premium to the plaintiffs, and always since and still was and is ready so to do; that the premises aforesaid accrued before the said loss in the said first count mentioned; and that the said policy and liability of the defendant thereunder was terminated and put an end to before the said loss.

To the second and third counts the defendant pleaded, except as to 2l. 16s. 9d., never indebted, and, as to that sum, payment into court. Issue.

The cause was tried before Byles, J., at the last Spring Assizes at Liverpool, when the following facts appeared in evidence:—The “James Baines” having arrived in Liverpool on the 12th of April, 1858, the plaintiffs being desirous of cancelling the policy, and getting a return of premium for the unexpired portion of the year for which she was insured (the policy containing no provision for a return of premium), wrote to the defendant as follows:—

“Liverpool, 15th April, 1858.

“Dear Sir,—The ‘James Baines’ having arrived here, we will thank you to render us a credit-note for unexpired time,—say, from the 12th instant to the date of the expiration of the policy.

“FOR JAMES BAINES & Co.,

“J. GREAVES.

“W. H. Woodfall, Esq., Liverpool.”

[659] No answer appeared to have been returned to this letter; but, on the 16th of April, a messenger was sent by the defendant to the office of the plaintiffs with a document which was not produced (it having been lost), but which was proved to have been in the following terms:—

“From Woodfall, Willis, & Co.

“Liverpool, 16th April, 1858.

“Please hand bearer stamped policies per ‘James Baines’ and ‘David M‘Iver,’ (a) to put forward returns for cancelling.

“To Messrs. James Baines & Co.”

The policies were accordingly handed over to the defendant’s clerk: but, the defendant having divided the risk with another insurance broker, it was necessary to obtain his assent also to the cancellation; and consequently the act of cancellation was not actually performed until the 20th of April; on which day the defendant’s clerk made the following indorsement upon the James Baines’s policy,—“Cancelled this policy,—from the 12th of April, 1858, and returned the assured 1l. 17s. 10d. per cash, for three months unexpired time.”

On the morning of the 22nd of April the “James Baines” caught fire, and was totally destroyed. In the course of the same day, but before the credit-note for the amount of the return premium had been sent to the plaintiffs, they addressed the following letter to the defendant:—

“Liverpool, 22nd April, 1858.

“Sir,—Not having received any reply to our note of the 15th instant, requesting you to send us a credit-note for unexpired time on policy on ship ‘James Baines,’ we hereby withdraw our said note and the request therein contained.

“W. H. Woodfall, Esq.

“JAMES BAINES & Co.”

[660] To this letter the defendant’s firm replied as follows:—

“Messrs. James Baines & Co.

“Liverpool, 22nd April, 1858.

“Gentlemen,—In reply to your note of this morning, we beg to say, that, in accordance with your request of the 15th instant, we cancelled the policy per ‘James Baines’ in the usual course; and we cannot therefore recognize any withdrawal on your part.

“WOODFALL, WILLIS, & Co.”

On the part of the defendant, evidence was given of a usage amongst insurance-brokers at Liverpool, that, where a return of premium is made in respect of an unexpired time-policy, the unbroken months only are taken into account, no notice being taken of a fraction of a month. And the credit-note which was sent to the plaintiffs was framed upon that principle; and the payment into court was the amount of premium for the months of May, June, and July.

The learned judge was of opinion that the usage was sufficiently proved: and a

(a) Another vessel insured by the defendant for the plaintiffs at the same time as the “James Baines.”

verdict was by his direction found for the defendant,—leave being reserved to the plaintiffs to enter a verdict for them for 132l. 8s. 4d.; the court to be at liberty to draw inferences of fact.

Edward James, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiffs on the first count, for 132l. 8s. 4d., “upon the ground that on the evidence it appeared that the parties never were agreed upon the terms on which the contract of insurance should be put an end to;” or to enter a verdict for the plaintiffs on the second count, for the amount of the premium from the 12th to the 30th of April, in case the court should be of opinion that the policy was cancelled on the terms that the premium [661] should be returned from the 12th of April. He submitted that it was competent to the plaintiffs to retract their proposal at any time before it had in terms been accepted by the defendant,—*Routledge v. Grant*, 4 Bingh. 653, 1 M. & P. 717, 3 Car. & P. 267; that the usage proved was applicable only to the case of a policy containing a stipulation for a return of premiums, which this policy did not; and that it was not competent to apply a usage to a written instrument which is inconsistent with it.

J. Wilde, Q. C., and Milward, shewed cause. The question is, whether, at the time the fire took place, the proposal of the 15th of April had been carried out so as to be binding and to make the policy cease to be in force. The facts upon which that question depends are extremely short. The plaintiffs are the owners of the “James Baines”: the defendant is an insurance-broker at Liverpool, whose business it is to take risks and generally to manage the insurances for those underwriters by whom he is employed. The “James Baines,” which had been insured by the defendant for twelve months, from the 30th of July, 1857, to the 29th of July, 1858, having arrived in safety at Liverpool on the 12th of April, 1858, the plaintiffs, being desirous of getting the policy cancelled, and a return of premium for the unexpired time, wrote to the defendant, as follows,—“The ‘James Baines’ having arrived here, we will thank you to render us a credit-note for unexpired time, say, from the 12th instant to the date of the expiration of her policy.” No precise answer seems to have been returned to this letter; but, on the following day, a clerk of the defendant was sent to the plaintiffs’ counting-house with the following memorandum,—“Please hand bearer stamped policy per ‘James Baines,’ to put forward returns for can-[662]-celling.” On the 21st,—the policy having then found its way to the defendant’s office,—a clerk of the defendant made the following indorsement on the back of it,—“Cancelled this policy from the 12th of April, 1858, and returned the assured 11. 17s. 10. per cash, for three months unexpired time.” The credit-note for the return premium was not sent to the plaintiffs until the 22nd. The “James Baines” was destroyed by fire on that day; and the plaintiffs then (but before they received the credit-note) wrote to the defendant withdrawing their proposal of the 15th. To this, the defendant replied,—“In reply to your note of this morning, we beg to say, that, in accordance with your request of the 15th instant, we cancelled the policy per ‘James Baines’ in the usual course; and we cannot therefore recognize any withdrawal on your part.” The point taken on the part of the plaintiffs is this:—In their proposal of the 15th of April, the plaintiffs ask for a return of premium “from the 12th instant to the date of the expiration of the policy;” and the credit-note which was afterwards sent was for the three unbroken months from the 1st of May to the end of July. The answer to that is, that, by the usage of the underwriters of Liverpool, which was abundantly proved, unbroken months only are allowed for in calculating returns of premium on time policies. [Cockburn, C. J. Your argument is, that it is the same as if the defendant had answered simply, “I accept your proposal!”] Precisely so. Taking the letter with the evidence of the usage, and the fact that the underwriters were not bound to make any return upon this policy, the case is perfectly clear. [Willes, J. The defendant cancelled the policy before the loss happened: he must pay what he was bound to pay. To constitute an agreement, no doubt there must be a consensus or aggregatio mentium. But that is satisfied either by a mutual consent [673] in words, or it may be gathered from the acts and conduct of the parties. Here, both parties agreed to a contract, though there was some misunderstanding as to the terms. The proposal being received, the defendant immediately set about carrying it into effect.

Edward James, Q. C., Blackburn, and Mellish, in support of the rule. The question is whether there was a mutual agreement to cancel the policy before the happening of the loss. No doubt there was a proposal on the plaintiffs’ part to cancel the policy on

having a return of premium from the 12th of April. Now, unless there has been an *aggregatio mentium ad idem*, there is no cancellation. The plaintiffs could not be bound by their offer unless it was accepted in terms, and its acceptance communicated to them. The memorandum of the 16th of April clearly was not an acceptance; it was a mere intimation that the defendant was ready to take the preliminary step. [Cockburn, C. J. It is difficult to say that it was not substantially an acceptance of the plaintiffs' offer. The defendant says, in effect,—“Send me the policy, and I will ascertain what return of premium you are entitled to, and put it forward for cancellation.”] The parties were never agreed as to the terms upon which the policy was to be cancelled. The defendant assumed that the cancellation was to be upon the terms of a return of premium for the three unbroken months; whereas, the plaintiffs' offer involved a return of premium from the 12th of April. [Williams, J. If a man accepts a proposal, is he not bound although he may have misunderstood its terms? Cockburn, C. J. The acceptance is by an act done.] In *Wilkinson v. Johnston*, 3 B. & C. 428, 5 D. & R. 403, certain bills of exchange purporting to have, amongst others, the indorsement of H. & Co., bankers of Manchester, were presented for pay-[674]-ment in London, at a house where the acceptance appointed them to be paid. Payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., and asked him to take up the bills for their honor. He did so, and struck out the indorsements subsequent to those of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning, it was discovered that the bills were not genuine, and that the names of the drawer, acceptor, and H. & Co. were forgeries. The plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonor could be sent the same day to the indorsers. It was held that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against the prior indorsers; and that the rights of the parties were not altered by the erasure of the indorsements, that having been done by mistake, and being capable of explanation by evidence. And in *Norelli v. Rossi*, 2 B. & Ad. 757, the defendant, in discharge of a debt to the plaintiff, indorsed bills to him, which had been drawn and indorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here. The plaintiff indorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them “cancelled by mistake;” the bills were not however paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling: they would otherwise have honored them. A re-acceptance was obtained from [675] the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them, regularly protested, to the defendant, who applied to the prior indorsers for payment, but they refused. The defendant, who resided abroad, cited the drawers, the intermediate indorsers, and the plaintiff, before the Tribunal of Commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted him by the holders, with whom the plaintiff was identified, and consequently that the other parties to the bills were discharged. It was held that the French courts had mistaken the law of England as to the effect of the cancellation; and therefore that the defendant was still liable at the plaintiff's suit for the debt in respect of which the bills were given, notwithstanding the decree. Here, the broker (the defendant) had no authority from the underwriters to act for them otherwise than according to the usage: he had, therefore, no authority to make such a bargain as that proposed by the plaintiff's letter of the 15th of April. [Cockburn, C. J. Is the defendant in a position to deny his cancellation, by alleging his own want of authority to do that which he professed to do?]

COCKBURN, C. J. I am of opinion that the rule in this case must be made absolute so far as regards the return of the premium from the 12th of April to the 1st of May, so that there will be a verdict for the [676] plaintiffs for that sum, 10s. 7d., beyond

the money paid into court. As to the larger question which has been argued before us, our decision must be in favor of the defendant. After the discussion which has taken place, the true view of the case seems to me to be this, that the letter from the plaintiffs originally proposing the cancellation of the policy on the condition of a return of the premium for the unexpired time, must be looked at solely with reference to its terms, irrespective of any usage or practice at Liverpool upon the subject: I read this as an express stipulation, and one upon which the usage cannot attach; and I am strongly fortified in this view by the circumstance that the letter dates from the 15th of April, whereas the time from which it is proposed that the premium shall be returned is, the 12th of April, the day on which the vessel arrived at Liverpool. If the letter had been written with reference to the custom or usage, it would have been sufficient for the writers to have dated the letter, instead of referring to the 12th of April as the time from which they wished to have a return of premium. Taking that to be the true construction of the plaintiffs' proposal, let us see what was done afterwards, to ascertain whether there was a consent or concurrence of the two minds. The proposition of the plaintiffs must be taken to be this,—“If you, the defendant, will return us the premium from the 12th of April to the 29th of July, we will give you up the policy to be cancelled.” To this an answer is returned desiring that the policy may be sent in order that the amount to be returned may be ascertained, with a view to its cancellation. I cannot help thinking that that is an acceptance of the terms contained in the plaintiffs' proposal, because the defendant had no right to ask for the policy unless he was prepared to carry out the terms proposed by the plaintiffs. Looking at the [677] evidence, it may be assumed that the defendant, in giving this assent, understood the terms of the plaintiffs' proposal in a sense somewhat different from that intended by them. It may, therefore, as was suggested by Mr. Wilde, be likened to the case of a written contract in which a term is introduced that was intended to be used in one sense by the one party and in another sense by the other. Neither party can avail himself of this misunderstanding of the terms to get rid of the contract; but the court must construe it. I think that principle applies here. There is in terms an acceptance by the defendant of the plaintiffs' proposal, from which it was not competent to the former to recede. The only question, therefore, is, what is the true construction of the plaintiffs' letter of the 15th of April. Upon that I have already intimated my opinion. The policy was sent to the defendant to be cancelled; and it was cancelled. Upon these grounds, I think the rule should be discharged, except as I before mentioned.

WILLIAMS, J. I am of the same opinion. As to the main point, the facts, as I understand them, are these,—The plaintiffs, on the 15th of April send a letter to the defendant proposing a return of premium for the unexpired time for which their vessel was insured, “from the 12th instant to the date of the expiration of the policy.” If that proposal is accepted, that becomes a complete bargain between the parties. It therefore simply comes to the question whether the memorandum of the 16th of April was an acceptance of that proposal. I think it was. The terms are,—“Please hand bearer stamped policy, to put forward returns for cancelling.” The proper construction of that, as it seems to me, is,—“I do accept your proposal, therefore send me the policy for cancellation.”

[678] WILLES, J. I am of the same opinion. I think the cancellation of the policy took place by the assent of both parties, although the terms of the proposal were not understood between them.

BYLES, J. I am of the same opinion. The memorandum of the 16th of April was a clear acceptance of the plaintiffs' proposal of the 15th. It amounts to this,—“Give me the policy, and I will forward the returns,”—the returns which the parties were discussing. For what purpose was the policy to be sent, but for that of its being cancelled? If, therefore, it had turned merely on the question whether there had been an acceptance of the proposal contained in the plaintiffs' letter of the 15th of April, I should have held that there clearly had been. But then I observe that there are acts done. The policy is handed over by the plaintiffs to the defendant; and it is received by the defendant, and a calculation of the return made, though upon a wrong footing. Be it, therefore, a question of law or of fact, it is clear that the defendant is entitled to retain the verdict upon the first count.

Rule accordingly.

[679] SHADWELL v. SHADWELL AND ANOTHER. 1858.

In an action against executors upon an agreement under which the plaintiff claimed certain arrears of an annuity alleged to be due to him from the testator, the defendants pleaded, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof.—The court refused to grant the plaintiff a rule to inspect a supposed letter upon which the plea was founded,—upon a mere affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made, the inspection being sought, not in order to support the plaintiff's own case, but in order to see whether and by what means a defence could be made out against him.

This was an action upon an agreement under which the plaintiff sought to recover from the defendants, executors of one Charles Shadwell, deceased, certain arrears of an annuity.

The declaration stated that the testator, in his lifetime, in consideration that the plaintiff would marry one E. N., agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter addressed by the testator to the plaintiff, which writing was and is in the words, letters, and figures following, that is to say, "11th August, 1838. Gray's Inn. My dear L.,—I am glad to hear of your intended marriage with E. N.: and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 150l. yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require. Your ever affectionate uncle, C. Shadwell:" Averment, that the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of 150l. each respectively, and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said E. N., and in the lifetime of the said testator; and that the plaintiff's [680] annual income derived from his profession of a Chancery barrister never amounted to six hundred guineas, which he was always ready and willing to admit and state to the said testator; and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, 12l. of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue was still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the same five sums were still in arrear and unpaid. Claim, 1000l.

The defendants pleaded,—first, that the testator did not agree with or promise the plaintiff in manner and form as in the declaration alleged.

Secondly, that the time for the payments of the yearly sums, or either of them, had not elapsed as alleged.

Thirdly, that, before the accruing of the supposed causes of action in the declaration mentioned, or any part thereof, by the own admission of the plaintiff before then made to the testator, the annual income of the plaintiff derived from his profession of a Chancery barrister amounted to six hundred guineas.

Fourthly, that, before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the same marriage had been and was, without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said E. N., of which the testator before and at the time of making the supposed agreement and promise also had notice, and the same marriage was after the making of the supposed agreement and promise duly had and solemnized as in the declaration mentioned, at the request of the plaintiff, and [681] without the request of the testator; and that, save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifthly, to part of the claim of the plaintiff, to wit, to so much thereof as accrued due in and after the year 1855, that, although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue to practise and carry on the profession of such Chancery barrister as aforesaid, and should not abandon the same, yet that, after the making of the said agreement and promise, and before the accruing of the supposed causes of action by that plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily and without the leave or licence of the testator, relinquished and gave up and abandoned the practice of the said profession of a Chancery barrister which before and at the time of the making of the said supposed agreement and promise he had so carried on as aforesaid, and although the plaintiff could and might during the time in that plea and in the declaration mentioned, have continued to practise and carry on that profession as aforesaid, yet the plaintiff after such abandonment thereof never was ready and willing to practise the same as aforesaid, but practised only as a revising-barrister, that is to say, as a barrister appointed yearly to revise the lists of voters for the year, for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Sixthly, that, after the making of the said supposed agreement and promise in the declaration mentioned, [682] and before the accruing of the causes of action in the declaration mentioned, or any part thereof, it was agreed by and between the testator and the plaintiff that the same supposed agreement and promise should be, and the same accordingly were, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof.

Macauley, Q. C., in Hilary Term last, obtained a rule calling upon the defendants to shew cause why the plaintiff should not be at liberty to inspect a certain letter written by him to the testator. The motion was founded upon an affidavit of the plaintiff stating that he had written a letter to the testator relating to the annuity, the words of which he could not recollect, and also stating his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the sixth plea, but positively denying that any such agreement was ever made. The application was originally made to Williams, J., at Chambers; but that learned judge referred the plaintiff to the court.

H. Bullar shewed cause, upon an affidavit denying that any such documents existed as that mentioned in the plaintiff's affidavit. When this case was before the learned judge at Chambers, the plaintiff's right to the inspection prayed was not suggested to be based upon the statute 14 & 15 Viet. c. 99, s. 6; and probably the course taken here will be the same, viz. by a contention on his part that the application may be granted by virtue of the common-law power of the court. The principle upon which this rests is well stated in the notes to *Jones v. Harridge*, 1 Wms. Saund. 9 d., n. (i),—"Where one part only of an instrument is executed, and it is lodged in the hands of one party for the use of both, the court will compel the [683] production of it for the use of the other party;" and *Blakey v. Porter*, 1 Taunt. 386, *King v. King*, 4 Taunt. 666, *Blogg v. Kent*, 5 Bingh. 614, 4 M. & P. 433, and other cases are cited. This the courts have invariably acted upon. In all the cases, the existence of the agreement is admitted. So strictly have the courts adhered to this principle, that, in *Street v. Brown*, 6 Taunt. 302, 1 Marsh. 610, where two parts of an indenture of charterparty were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody was lost at sea with the ship, the court would not compel the charterer, being sued thereon, to grant inspection and a copy of the other part, for the purpose of the plaintiff's declaring with certainty. In *Hodgson v. Warden*, 1 D. & L. 286, a debtor assigned his property by deed to trustees for the benefit of his creditors, who by the same deed released him from their claims. The debtor being afterwards sued by one of the creditors, and the deed being necessary for his defence, a rule was made absolute, requiring a purchaser of the property, to whom the trustees had delivered the deed, to produce it. The purchaser having declined to do so, the court refused to grant an attachment, Parke, B. saying, "The court has no power to interfere unless the party holds the deed as a trustee." In *Goodliff v. Fuller*, 14 M. & W. 4, in an action for breach of promise of marriage, the court refused a rule for the defendant to inspect letters written by the plaintiff to

him, which he alleged contained a release of his promise, and which, after the breaking off of the connexion, the defendant had returned to her upon an understanding that all the letters of both should be mutually returned, which she had not complied with on her part. Parke, B., there said: "This is not a case where the instrument is held by one of the parties as a trustee for the other, [684] in which case the court generally allows the instrument to be inspected. There is no foundation at all for this application." And Alderson, B., said: "The matter of this application is the subject of a bill in equity, and for us to grant it would be nothing short of allowing a bill of discovery. The defendant should have applied for a postponement of the trial until he could file a bill in equity. In *Bonsfield v. Godfrey*, 5 Bingh. 418, 2 M. & P. 771, the document of which inspection was demanded was that on which the action was brought. I may observe that there is another case in the books which occasions a great deal of trouble at Chambers: it is perpetually cited there as an authority for applications like the present; and I am sorry it is not corrected." The case there alluded to is said by the reporters to be *Bury v. Alexander*, Tidd's Pr. 592, where Lord Mansfield is stated to have ruled, that, "whenever the defendant would be entitled to a discovery, he should have it here, without going into equity." [Willes, J. An application such as that in *Goodliff v. Fuller*, would be successful since the statute. The case of *Channock v. Lunley*, 5 Scott, 438, is the best illustration of the principle upon which this practice rests. There, in an action for money had and received, the court allowed the defendant after he had pleaded to inspect and take a copy of an agreement upon which the plaintiff's claim was founded. It was there said in argument,—"The defendant has already pleaded; and there is no case to be found where an inspection has been granted for the mere purpose of enabling the defendant to ascertain upon what evidence the action is to be supported. The agreement is not the basis of the action: and it is not sworn, in terms, either that the inspection is necessary to the defence, or that the agreement is one in which the parties have an equal interest." But Tindal, C. J., said: [685] "This case clearly comes within the spirit, though not within the strict letter of the rule. Had the action been founded upon the special agreement, the defendant's right to inspect the agreement could not have been questioned. Although in form this is an action for money had and received, inasmuch as the rights of the parties will be controlled by the agreement, it is in effect the same as if it were brought upon the agreement."] This is a fishing application. In *Pritchett v. Smart*, 7 C. B. 625, Williams, J., observes: "It is difficult to say how the court acquired the equitable jurisdiction which they exercise in compelling the production of documents. According to a case in 1 Wms. Saund. p. 98, 9th edit. n. (i), this jurisdiction is as old as the time of Charles the Second. It is clear, however, that we ought not to interfere in a case in which a court of equity would decline to entertain a bill of discovery." The principles which will guide the court in granting inspection under the 14 & 15 Vict. c. 99, s. 6, are well stated in *Hunt v. Hewitt*, 7 Exch. 236; and there it is stated to be a material part of the affidavit in support of the application, to shew that the action is well founded. Here, the action is clearly unfounded: the plaintiff is relying upon a mere voluntary promise, without any consideration. There is no relation of trustee and cestui que trust here.

Macauley, Q. C., in support of the rule. Upon principle and upon authority, it is submitted, this rule should be made absolute. It is true, that, to entitle a party at common law to inspection of a document in the hands of his opponent, he must in some sense hold it as a trustee. But the true criterion is this, the document must be one in which both parties to the suit have a common interest. The sixth plea here sets up an agreement to rescind the contract upon which [686] the plaintiff founds his claim in the action. The plaintiff alleges that the agreement so set up is based upon a letter of which he has no copy and the contents of which have escaped his recollection. [Cockburn, C. J. Would you have had any cause of complaint if the defendants had destroyed the letter?] No. [Cockburn, C. J. Is not that conclusive to shew that there is no relation of trustee and cestui que trust between the parties?] It is apprehended not. In *Doe d. Child v. Roe*, 1 Ellis & B. 279, which was an action of ejectment for a house, the tenant in possession took out a summons to inspect two leases. No affidavits were used before the judge; but it was stated, for the tenant, that he was in possession as a lawful occupant of the house, and that the lessors of the plaintiff, who were owners of the reversions expectant on two leases comprising a considerable district of which the premises were part, sought to recover on the ground

that they had a right of entry for breaches of covenants alleged to be contained in the leases which the tenant sought to inspect. The attorney for the lessors of the plaintiff, without either denying or in terms admitting the statement, argued that the judge had no authority to make an order to inspect. The judge made the order, on the assumption that the statement, not being disputed, was admitted to be true in fact. On a motion for a rule to set aside this order, it was held that the order was properly made in exercise of the common-law powers of the court; the tenant appearing, by the tacit admissions before the judge, to have an interest in the deeds which he sought to inspect. Lord Campbell there says: "If there be power to make such an order, is it not perfectly fair, that, if the tenant has no counterpart of the deeds, he should be permitted to inspect these deeds, and ascertain what the covenants are, so as to learn whether he ought to defend the eject-[687]-ment or submit to it? I give no opinion as to whether this order is authorized by the stat. 14 & 15 Vict. c. 99. It is authorized by common law." And, at the end of the judgment, his Lordship added: "This common-law jurisdiction of the court is likely in future to be of much greater practical importance than formerly. In a large number of cases to which it would have applied, the necessity for its exercise was superseded by profert. Now that, by stat. 15 & 16 Vict. c. 76, s. 55, the legislature has abolished profert, without providing any substitute, it becomes highly important to lay down the rule, that, where an action is brought on an instrument, the court has power to order an inspection of it." [Crowder, J. In that case, the tenant came in under a person who was party to the instrument of which inspection was sought.] In a case which occurred before Bramwell, B., at Chambers, the other day, that learned judge ruled in strict pursuance of the decision in *Charnock v. Lunley*. In *Bluck v. Gompertz*, 7 Exch. 67, it was distinctly held that the court has power, independently of the 14 & 15 Vict. c. 99, to compel the plaintiff to produce for the defendant's inspection a document upon which the action is brought, where the defendant is a party to the document, and has no copy of it. Alderson, B., there says: In *Inman v. Hodgson*, 1 Y. & J. 28, Alexander, C. B., said, "It would be a very formidable proposition to lay down, that every party might look into documents in the possession of his adversary, without shewing that he was interested therein. That implies that a party may inspect a document in which he is interested; and in the present case the defendant is himself a party to the instrument which he is desirous of inspecting." Here, the document sought to be inspected is, if anything, the agreement against which the plaintiff has to defend himself. He is, therefore, clearly in-[688]-terested in it. [Cockburn, C. J. There is no doubt of your right to inspect a letter which is set out in the declaration: but you insist upon your right to inspect a letter upon which the defence alleged in one of the pleas is founded.] A certain property always remains in the writer of a letter,—for instance, to an extent sufficient to found a jurisdiction in the court of Chancery to restrain the publication of it: *Gee v. Pritchard*, 2 Swanst. 402. [Cockburn, C. J. Do you found your right to inspection on that sort of property?] No. It shews the sort of trusteeship which is spoken of in these cases, which does not mean the ordinary legal relation of trustee and cestui que trust. [Cockburn, C. J. A trust with reference to the subject matter in dispute between the parties?] Exactly so.

COCKBURN, C. J. A very important question is involved in this case, and therefore we will take time to consider it.

Cur. adv. vult.

WILLIAMS, J., delivered the judgment of the court:—

In this case the defendants, who are executors of the late Charles Shadwell, are sued on an agreement under which the plaintiff claims the arrears of an annual payment of 150l.

The defendants, amongst other pleas, have pleaded, sixthly, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof.

The plaintiff, on an affidavit stating that he had written some letter to the testator relating to the annuity, the words of which he could not remember, and [689] also his belief that the defendants intend to rely on that letter as constituting the agreement alleged in the plea, but positively denying that any such agreement was ever

made, obtained a rule calling on the defendants to shew cause why the plaintiff should not be at liberty to inspect the letter.

On the argument, it was admitted by the plaintiff's counsel that the application could not be supported on any statutory enactment relating to the inspection of documents. It was contended, however, that the court ought to grant the inspection independently of those enactments.

But we are of opinion that the rule cannot be supported on this ground. The plea does not purport to rely on any instrument in writing: and it is plain that the plaintiff, being in utter ignorance of the means of proof which the defendants intend to adduce, conjectures that it may be some letter the contents of which he cannot recollect, and is desirous to ascertain. In other words, the real object of the application is, to obtain a discovery to which the applicant has no right, inasmuch as inspection is sought, not in order to support his own case, but in order to see whether and by what means a defence can be made out against him.

No doubt the courts have long exercised a power, independent of the statute 14 & 15 Vict. c. 99, s. 6, to grant inspection of agreements on which one party to a suit seeks to charge, or defend himself from, the other who has executed the instrument, when there is only one copy of it, on the ground that the party who has possession of it holds it in the character of trustee for the other party: see *Blogg v. Kent*, 6 Bingh. 614, 1 M. & P. 433, per Tindal, C. J.; *Bluck v. Gompertz*, 7 Exch. 70, per Parke, B. But we think the plaintiff has not sufficiently shewn these defendants to be trustees for him of an instrument on which they rely, within [690] the meaning of this rule. He has merely surmised that there may be some letter on which they may possibly rely, and which, if they do rely on it, they may perhaps hold under such circumstances as would entitle him to inspection at common law.

In effect, we think the application is nothing but an attempt to discover whether the defendants intend to rely on any and what instrument in support of their plea. And this, we think, cannot be allowed to be done indirectly under colour of the old practice, any more than directly under the new act.

It was urged, in support of the application, that, as the defendants have not denied the suggestion as to the supposed letter being the foundation of their case, they have in effect admitted it: and that the case is then the ordinary one, of one side applying for inspection of a document (of which he had no copy) stated by the other in his pleading. But it is obvious, that, if the plaintiff is allowed to put the defendants to say that they do or do not rely on the suggested letter, this is really nothing less than allowing him a discovery pro tanto as to the mode in which the defendants propose to maintain their case,—a discovery to which he certainly is not entitled.

The truth is, we think, that the court ought not to have granted the rule to shew cause. It ought to have been refused, because the plaintiff in his affidavit did not make a proper *prima facie* case that the defendants were in possession of any ascertained document which they held as trustee for him, so as to entitle him to call for an inspection of it.

My Brother Crowder concurs in this opinion, and the rule must therefore be discharged.

Rule discharged (a).

[691] SYMONDS AND ANOTHER v. LLOYD. June 12th, 1859.

The plaintiffs contracted (in writing) to build for the defendant the front and back walls of a house "for the sum of 3s. per superficial yard of work 9 inches thick, and finding all materials, deducting all lights." The lower part of the walls to the height of 11 feet were of stone two feet thick, the remainder of brick 14 inches thick:—Held, that evidence of the usage of builders at the place to reduce brickwork for the purpose of measurement to 9 inches, but not to reduce stonework unless exceeding 2 feet in thickness, was admissible; and that the

(a) Mr. Justice Willes was understood not to be an assenting party to this judgment.

proper construction of the contract was, that it provided only for the price of the brick-work, leaving the stone-work to be paid for on a quantum meruit.

This was an action for work done and materials provided by the plaintiffs for the defendant at his request, and for money found due upon accounts stated.

Pleas, —first, except as to 30l. 1s., never indebted, —secondly, except as aforesaid, payment, —thirdly, except as aforesaid, set-off, fourthly, payment into court of 30l. 1s.

The plaintiffs joined issue upon the first, second, and third pleas: and, as to the fourth plea, said that the sum brought into court by the defendant was not enough to satisfy their claim.

The particulars of demand were as follows:—"This action is brought to recover the sum of 169l. 10s. for building 1130 superficial yards of walling 9 inches thick, at 3s. per yard, at Llandudno, in the county of Carnarvon."

The particulars of set-off were for bricks and carting lime and coals from the 20th of September, 1858, to the 16th of November, 1858.

The cause was tried before Bramwell, B., at the last Spring Assizes at Carnarvon. It appeared that the plaintiffs were stone-masons and bricklayers at Llandudno. The defendant was a brick-maker at the same place. The action was brought to recover the balance of an account for building the front and back walls of a house at St. George's Crescent, Llandudno, in August, 1858, under the following circumstances: The defendant had entered into a contract with one Evans to build the house in question, and applied to the plaintiffs to do the stone and brick-work. After some preliminary negotiations, the terms were agreed upon and [692] were reduced into writing by the defendant, and signed by the plaintiffs, as follows,—

"Memorandum of agreement made this 31st day of August, 1858, between William Symonds and Richard Williams of the one part, and Captain David Lloyd of the other part, that is to say, that the said William Symonds and Richard Williams agree to build a house in St. George's Crescent for the said Captain Lloyd (the same being Mr. J. B. Evans's house), for the sum of 3s. per superficial yard of work 9 inches thick, and finding all materials, deducting all lights: and wages to be paid every floor."

The plaintiffs accordingly proceeded to build the front and back walls of the house, which to the height of 11 feet were of stone two feet thick, the remainder being of brick 14 inches thick, or a brick and a half.

There was conflicting evidence as to the value of the work, and also as to the mode of measurement. The principle of measurement insisted upon by the plaintiffs, was, to take stone-work, if thicker than 9 inches, as containing in each yard superficial so much more in proportion: and, upon this principle, the quantities were admitted to be, of brick work 703 yards, and of stone-work 427 yards. The mode of measurement contended for on the part of the defendant was, to reduce the brick work to 9 inches, but not the stone-work, and according to this mode of measuring the quantity was 934 yards in all.

On the part of the plaintiffs it was insisted that the defendant was bound by his agreement, the words of which were plain and unambiguous, "3s. per superficial yard of work 9 inches thick," and that evidence in support of the defendant's mode of measurement was not admissible.

For the defendant it was contended that he was at liberty to give parol evidence to shew that the usage [693] or custom of the place was, to measure brick and stone work in the way above suggested by him. The evidence was admitted.

Under the direction of the learned judge (the jury having found 3s. 2d. per superficial yard 9 inches thick to be the fair price), a verdict was taken for the plaintiffs for 28l. 15s., —with leave to the defendant to move to enter a verdict for him, if, upon the true construction of the agreement, stone work was not provided for, but was to be paid for on a quantum meruit, or if 3s. was the price for reduced brick work and unreduced stone-work; and, if the court should think the agreement insensible, to reduce the verdict to 7l. 15s. 8d.

Welsby, accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant, "on the ground that the plaintiffs were entitled to be paid only after the rate of 3s. per superficial yard of reduced brick work and of unreduced stone work."

Beavan (with whom was Lush, Q. C.) now shewed cause. The question is whether

the stone-work as well as the brick-work is to be reduced to 9 inches. If it is, the verdict for the plaintiff must stand. If, on the other hand, the brick-work only is to be reduced to 9 inches, the defendant will be entitled to the verdict. It is submitted that this question must be determined by the language of the contract itself, without reference to any usage of the place: for, though evidence of usage may be admitted to explain an agreement that is ambiguous, it is not admissible for the purpose of contradicting it where the terms are express and plain. In the notes to *Wigglesworth v. Dallison* (Dougl. 201), in 1 Smith's Leading Cases, 467 (4th edit.), the rule of law is thus laid down upon the subject:—"Evidence of usage, though sometimes admissible to add to or [694] explain, is never so to vary or contradict, either expressly or by implication, the terms of a written instrument: *Magee v. Atkinson*, 2 M. & W. 440; *Adams v. Hordley*, 1 M. & W. 374; *Truman v. Loder*, 11 Ad. & E. 589. Thus, in *Vates v. Pim*, 6 Taunt. 446, 2 Marsh. 141, Holt, 95, in an action on a warranty of prime singed bacon, evidence was offered of an usage in the bacon trade, that a certain latitude of deterioration called 'average taint' was allowed to subsist before the bacon ceased to answer the description of prime bacon. This evidence was held inadmissible, first at Nisi Prius, by Heath, J., and afterwards by the court of Common Pleas. In *Blackett v. Royal Exchange Insurance Company*, 2 Tyrwh. 266, which was an action on a policy upon 'ship, &c., boat and other furniture,' evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits on her larboard quarter: but was rejected at Nisi Prius, and the rejection confirmed by the court of Exchequer. 'The objection,' said Lord Lyndhurst, delivering judgment, 'to the parol evidence is, not that it was to explain any ambiguous words in the policy, or any words which might admit of doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used, viz. that whereas the policy imported to be upon ship, furniture, and apparel, generally, the usage is to say that it is not upon furniture and apparel, generally, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain.' So, parol evidence has been rejected, when tendered for the purpose of proving that the words 'glass-ware in casks,' contained in the memorandum of excepted articles in a fire-policy, meant, according to the understanding of insurers and insured, [695] such ware in open casks only: *Bond v. Georgia Insurance Company*, Sup. Ct. N. York, 1842, cited 2 Taylor on Evidence, 3rd edit. 952. Taking the agreement alone, the words "for the sum of 3s. per superficial yard of work 9 inches thick," cover the whole work. The agreement in terms provides for all the work to be done under it. The whole is to be measured and reduced to 9 inches, and paid for at the rate of 3s. per superficial yard.

Welsby and McIntyre, in support of the rule. This contract, like all other trading contracts, must be construed according to the intention of the parties as collected from the face of the instrument itself and the surrounding circumstances. One of the surrounding circumstances here was the usage in the neighbourhood, that, for the purpose of charge, brick-work is reduced to 9 inches, but that that usage does not apply to stone-work. The result is, that, while the brick-work is specially provided for by the contract, the stone-work is left to a quantum meruit. [Williams, J. "Finding all materials" has reference to the whole of the work. It would seem odd, therefore, to provide for the price to be paid for a portion only.] The contract is unintelligible per se. [Byles, J. There are three possible constructions,—first, that all the work is to be reduced to 9 inches,—secondly, that the 3s. per superficial yard applies to the brick-work only, and not to the stone-work,—thirdly, that it applies to the whole, without reduction as to the stone-work.] The second, it is submitted, is the more reasonable construction. [Williams, J. Allowing 3s. for the brick-work, and a quantum meruit for the stone-work, entitles the defendant to a verdict?] Yes.

WILLIAMS, J. The difficulty I have felt in arriving at [696] a conclusion as to the true meaning of this contract has arisen from the circumstance which I pointed out in the course of the argument, viz. the difficulty of adopting the construction which would apply the stipulated price to the brick-work exclusively, inasmuch as the contract provides that the builders shall find all materials, for the stone-work as well as for the brick-work. One would naturally have thought that the obligation to supply the materials and the stipulation for payment of the price would have been co-extensive. My learned Brothers, however, are of opinion,—and I am not disposed

to differ from them,—that the true construction is that contended for by the defendant, viz. that, although the defendant contracted to do the whole stone-work and brick-work, and to supply all the materials, there is no provision made beforehand as to the rate of remuneration, beyond the stipulation, that, as to the brick-work, he shall be paid at the rate of 3s. per superficial yard of work 9 inches thick. Taking that to be the only provision, it leaves the rest of the work unprovided for as to the remuneration. The case was properly left to the jury, and they have found an amount which entitles the defendant to the verdict. The rule, therefore, must be made absolute.

WILLES, J. I am of the same opinion. The memorandum in question certainly is not very intelligible. But, upon the whole, I think the preferable construction is that the 3s. per superficial yard of work 9 inches thick was intended only to apply to the brick-work. In order to ascertain the intention of the parties, it is necessary to look to that which was the subject of communication at the time, or which was afterwards done. It appears that the work to be done consisted of the two walls (back and front) of a house, of [697] which the lower portion to the height of 11 feet was to consist of stone 20 inches thick, and the upper part of brick-work. The plaintiffs agree to build such walls “for the sum of 3s. per superficial yard of work 9 inches thick.” That could only be meant to apply to the brick-work. The words “finding all materials” do not, I confess, weigh much on my mind. The result, in my opinion, is, that the parties stipulate that the brick-work is to be paid for at 3s. per superficial yard 9 inches thick. And, as that does not provide for the entire payment for the work to be done under the contract, the rest is left to be paid for according to the ordinary price of stone-work. Estimating the brick-work at 3s. per superficial yard 9 inches thick, and the stone-work at measure and value, the claim of the plaintiffs is covered by the set-off and the payment into court. The rule must, therefore, be made absolute to enter a verdict for the defendant.

BYLES, J., concurring,
Rule absolute.

[698] GRINDELL v. BRENDON. June 15th, 1859.

[S. C. 28 L. J. C. P. 333; 5 Jur. N. S. 1420; 7 W. R. 579. Applied, *Waddington v. Roberts*, 1868, L. R. 3 Q. B. 584. Referred to, *Mason v. Wool*, 1875, 1 C. P. D. 68.]

The 1st section of the 17 & 18 Vict. c. 36, enacts that every bill of sale of personal chattels, or a true copy thereof, together with an affidavit of the time of such bill of sale being made, &c., shall be filed with the officer acting as clerk of the docket and judgments in the court of Queen's Bench, within twenty-one days after the making of such bill of sale. And by s. 3 the officer is required to keep a book containing particulars of every bill of sale so filed, together with the dates of the execution and filing of the same, &c.:—Held, that the bill of sale and affidavit must be filed at the same time; and that the book kept by the officer is a “public document,” and therefore that a certified copy or extract is, by force of the statute 14 & 15 Vict. c. 99, s. 14, evidence of the filing of the bill of sale and affidavit, and of the time of their being filed.

This was an interpleader issue which was tried at the last Spring Assizes at Gloucester, when a verdict was found for the plaintiff.

In order to prove a bill of sale under which the plaintiff claimed the property in question, a clerk from the Queen's Bench Office was called to produce the copy bill of sale filed pursuant to the 17 & 18 Vict. c. 36, s. 1, and the affidavit filed therewith, and to prove the date of filing the same.

Upon taxation of the plaintiff's costs, the master disallowed him the expenses of the attendance of this witness, being of opinion that a certified copy of the bill of sale and affidavit, and of the entry in the office book of the filing thereof, would have been sufficient proof, under the 14 & 15 Vict. c. 99, s. 14.

A summons was taken out calling upon the defendant to shew cause why the master should not review his taxation. The matter was heard before Willes, J., who referred the parties to the court.

H. James now moved accordingly. The question turns upon the 1st and 2nd sections of the 17 & 18 Vict. c. 36, and the 14th section of the 14 & 15 Vict. c. 99. The 1st section of the 17 & 18 Vict. c. 36, enacts that "every bill of sale of personal chattels made after the passing of that act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to [699] seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docket and judgments in the court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the [700] debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be." The 3rd section enacts that "the said officer of the said court of Queen's Bench shall cause every bill of sale, and every such schedule and inventory as aforesaid, and every such copy filed in his said office under the provisions of this act, to be numbered, and shall keep a book or books in his said office, in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or in whose favor the same shall have been given, together with the number, and the dates of the execution and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable, according to the form contained in the schedule to this act, which said book or books, and every bill of sale or copy thereof filed in the said office, may be searched and viewed by all persons at all reasonable times, paying to the officer for every search against one person the sum of 6d. and no more; and that, in addition to the last-mentioned book, the said officer of the said court of Queen's Bench shall keep another book or index, in which he shall cause to be fairly inserted, as and when such bills of sale are filed [701] in manner aforesaid, the name, addition, and description of the person making or giving the same, or of the person against whom such process shall have issued, as the case may be, and also of the persons to whom or in whose favor the same shall have been given, but containing no further particulars thereof; which last-mentioned book or index all persons shall be permitted to search for themselves, paying to the officer for such last-mentioned search the sum of 1s." The only provision in the act for office-copies or extracts is s. 5, which provides that "any person shall be entitled to have an office-copy or an extract of every bill of sale, or of the copy thereof filed as aforesaid, upon paying for the same at the like rate as for office-copies of judgments in

the said court of Queen's Bench." No provision is made for office-copies or extracts of affidavits. The 14th section of the 14 & 15 Vict. c. 99, enacts, that, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, &c., provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted," &c. The question is whether the entry in the book is a public act done by the officer, so as to make a certified copy or extract admissible under the last-mentioned statute; and that depends upon the meaning of the words "together with" in the 1st section of the 17 & 18 Vict. c. 36. The words of the old statute 3 G. 4, c. 39, s. 1, were identical: but there is no authority to shew that the filing of the affidavit is to be contemporaneous with the filing of the bill of sale. [Byles, J. Would not a [702] man who goes to the office see there everything he wants to see?] Yes; but not everything he wants to prove. [Willes, J. I apprehend the officer would not be justified in receiving the bill of sale without the affidavit.] That depends upon the effect of the words "together with,"—whether it means "simultaneously" or "at the same time." [Willes, J. In *Richardson v. Mellish*, 2 Bingh. 229, 9 J. B. Moore, 435, books containing lists of passengers, deposited at the India House in pursuance of the 50 G. 3, c. 155, were held to be admissible in evidence as a document of a public nature. Would not the book kept at the Queen's Bench Office pursuant to the 3rd section of the 17 & 18 Vict. c. 36, be admissible on the same ground? If so, a certified copy or extract would clearly be receivable under the 14 & 15 Vict. c. 99, s. 14.] No doubt a certified copy of the book would be admissible; and *Bath v. Sutton*, 27 Law J., Exch. 388, shews that the affidavit would be admissible as a public document: but the question is, what it would prove when received,—whether the clerk is to be the judge of whether the act has been complied with or not.

Macnamara shewed cause in the first instance. The book in question is clearly a public document: it consists of entries made by a public officer duly appointed for that purpose, under the authority of the act of parliament, and for the use of the public, in order to enable them to ascertain what charges exist upon the personal chattels of persons with whom they are dealing. Those entries, therefore, are clearly provable by certified copies or extracts, under the 14 & 15 Vict. c. 99, s. 14. The officer whose duty it is to receive and file the bill of sale has no authority to receive it unless accompanied by the affidavit required by the statute.

[703] WILLIAMS, J. We are all of opinion that the statute 17 & 18 Vict. c. 36, s. 1, requires the affidavit to be filed at the same time with the bill of sale, and that the clerk has no authority to receive the one without the other. That which certifies the time of the receipt of the one, therefore, certifies the receipt of the other at the same time.

WILLES, J. I am of the same opinion.

BYLES, J. I think we should be astute to defeat the operation of a very beneficial act, if we were to assent to the validity of this objection. The rule must be refused, but without costs.

Rule refused.

COOPER AND ANOTHER v. HILL. June 15th, 1859.

[S. C. 28 L. J. C. P. 311; 6 Jur. N. S. 99.]

Under the table of fees settled by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55, the sheriff's officer is entitled to 1l. 1s. for arresting the defendant on a ca. sa., though within a mile of the officer's residence; but he is not entitled to charge 10s. "for conveying the defendant to gaol," or 5s. for an assistant, unless the necessity for an assistant is shewn: and, where the officer has improperly received such charges, he will be ordered to refund the excess, with costs of the application,—under pain of an attachment.

Prideaux, on a former day in this term, obtained a rule calling upon John Drew, bailiff of the sheriff of Cornwall, to shew cause why he should not refund to the

plaintiffs or their attorney the sum of 11. 5s. 6d., the amount overcharged as such bailiff for fees on the execution of a writ of ca. sa. issued in this cause at the suit of the plaintiffs, with costs : and why a writ of attachment of contempt should not issue against him for demanding and taking from the plaintiffs a greater amount of fees on the execution of the said writ than is allowed by law or by the statute 7 W. 4 & 1 Vict. c. 55.

[704] It appeared that the defendant was arrested within a mile of Drew's residence, and that the fees charged and received by Drew on the execution of the ca. sa. were as follows :—

	£	s.	d.
For arresting the defendant	1	1	0
Assistant		5	0
Conducting the defendant to gaol		10	0
Travelling expenses from Truro to Bodmin, 25 miles, at 1s. per mile	1	5	0
	£3	1	0

It was contended that there was an excess of 10s. 6d. in the first item, and that the charges for the assistant and for conducting the defendant to gaol were altogether unwarranted : and the case of *Blake v. Newburn*, 5 D. & L. 601, was referred to, where it was held, that, where a sheriff's officer takes more than the fees allowed under the 7 W. 4 & 1 Vict. c. 55, for executing a writ, the rule may call upon the sheriff to shew cause why he should not return the excess, as well as upon his officer to shew cause why a writ of attachment should not issue against him for his contempt in receiving the excess.

Collier, Q. C., now shewed cause, upon an affidavit by the officer stating that the fees charged on this occasion were those usually taken in Cornwall. The scale of fees allowed by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55 (a), authorizes the charge of 11. 1s. for the arrest, and 5s. for an assistant, where necessary. [Cockburn, C. J. To justify the charge, you must shew the necessity.] The third item is according to the scale, which allows "for the bailiff to conduct prisoner to gaol, per diem, 10s." [Cockburn, C. J. The [705] table is divisible into two parts,—the first part applies to mesne process only, the second to process of execution. Byles, J. The 10s. for conducting the party to gaol clearly applies to mesne process only.] Whether the process be mesne or final, the expense of conveying the defendant to gaol must be the same. Travelling-expenses, at all events, are properly charged. The officer, it seems, has acted with perfect bona fides ; and it certainly is not easy to put a sensible construction upon the scale.

Prideaux, in support of the rule. By the table of fees settled by the judges in pursuance of the statute, the fees allowed for an arrest on mesne process are as follows,—"not exceeding one mile from the officer's residence, 10s. 6d. : not exceeding seven miles, 11. 1s. ; exceeding seven miles, 11. 11s. 6d.:" and the only allowance "for conveying defendant to gaol from the place of arrest," is, 1s. per mile. There is, therefore, clearly an overcharge of 10s. 6d. on the arrest, and 10s. for conducting the defendant to gaol, which with the unauthorized charge of 5s. for the assistant, makes up the 11. 5s. 6d. the return of which is sought by this rule. If the officer has 11. 1s. for the arrest, he is not entitled to anything for his travelling-expenses.

COCKBURN, C. J. I am of opinion that this rule must be made absolute as to 15s., part of the excessive charge complained of. Upon looking at the table of fees as settled by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55, it seems to me that Mr. Prideaux is not justified in asking us to reduce the 11. 1s. charged for the arrest to 10s. 6d. ; for, though the first part of the scale, which relates to mesne process, limits the charge for the arrest to 10s. 6d. where the distance does not exceed one mile from the officer's residence, [706] yet, in the subsequent part, which deals with arrests upon writs of ca. sa. and other process of execution, the fee allowed to the bailiff for executing the warrant, "if the distance from the sheriff's office or the bailiff's residence do not exceed five miles," is 11. 1s. Then it is said, that, if that be so, and both parts of the table are to be looked at, the charge of 1s. per mile for travelling

expenses is only applicable where the bailiff gets the lower charge for the arrest. But, upon the whole, I do not see why the officer should not have the same allowance for travelling-expenses whether the arrest be on mesne or on final process. I think the true way of construing the table of fees is, by considering the earlier part as applicable to all writs and warrants except where some special provision is made in the subsequent part. I therefore think the officer was justified in charging 11. 1s. for the arrest, and 1s. per mile for travelling-expenses. The other two items of charge, however, must be disallowed, viz. 5s. for the assistant, and 10s. for conducting the defendant to gaol. All the officer was entitled to charge was, 1s. mileage: nothing for conducting. As this is the case of a public officer who has charged more than he is by law entitled to charge, acting upon the authority of the case referred to, we think the costs must follow; for, the only way in which sheriffs' officers can be kept in check is, by visiting them with costs where they are found guilty of exacting fees which the law does not justify. The rule will, therefore, be absolute for the return of 15s., with the costs of the application.

WILLES, J. No attachment will issue if the 15s. be returned to the plaintiffs or their attorney within ten days after the taxation of the costs.

The rest of the court concurring,

Rule absolute accordingly.

[707] BENNETT AND ANOTHER v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY. June 15th, 1859.

[S. C. 7 W. R. 585. See *South Eastern Railway v. Railway Commissioners*, 1880-81, 5 Q. B. D. 248; 6 Q. B. D. 586; *R. v. Railway Commissioners and Distington Iron Company*, 1889, 22 Q. B. D. 656.]

The Railway and Canal Traffic Act, 1854, was designed to afford a remedy against an undue preference or undue prejudice to a particular individual or class in respect of the traffic on the railway or canal; and was not intended to apply to the case of a breach or neglect by the company of a public duty which was already susceptible of redress by mandamus or by indictment.—The Manchester, Sheffield, and Lincolnshire Railway Company were the proprietors of the Grimsby Old Dock, and also of another dock called the Grimsby New Dock communicating with their railway. By act of parliament the company was authorized and required to maintain the Old Dock and the approach thereto of a given depth:—Held, that the failure to perform this duty, so that the dock and its approach became silted up, and the depth of water therein insufficient for vessels to get to the wharfs adjoining, was not the subject of redress under the Railway and Canal Traffic Act, 1854, —although it was suggested that the object of the company was to discourage the traffic to the Old Dock and to divert it to the new one.—And semble, that the dock or haven was not a canal or navigation within the statute.

The Manchester, Sheffield, and Lincolnshire Railway Company, under their various acts of parliament, all consolidated into one act, 12 & 13 Viet. c. lxxxi., intituled "An act to consolidate into one act and to amend the provisions of the several railway and dock acts relating to the Manchester, Sheffield, and Lincolnshire Railway Company, and to amend their canal acts," were the proprietors of a railway, canal, and docks, with warehouses round the docks, at Great Grimsby, in the county of Lincoln.

The 218th section recites and re-enacts a provision of the prior act, 39 G. 3, c. lxx., whereby the Grimsby Haven Company were authorized and required "to make and complete a dock or basin to the extent of 200 yards from or above (a certain) lock, of the width 100 yards, and upon a level with the sills of the floor of the said lock, also to make the said haven from thence upwards to the further extent of 300 yards, and upon the same level, with a bottom of 20 feet wide at the least, and to dispose of the soil to be excavated in such manner that wharfs on each side thereof to the extent of 100 feet in breadth, and beyond the water line of the scouring water next therein-after mentioned and provided, could or might be made, and from thence to or nearly to both of the before men-[708]-tioned sluices or bridges, with a bottom of not less width than 28 feet, and so as to afford a depth in water of 14 feet."

Cleasby, on behalf of the proprietor of a wharf adjoining the Grimsby Old Dock, moved for a rule calling upon the Manchester, Sheffield, and Lincolnshire Railway Company to shew cause why a writ of injunction should not issue against them under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), injoining them to give the applicant the facilities required to be afforded by the 218th section of their consolidation act.

The affidavits upon which the motion was founded, amongst other things, stated that the complainants were proprietors of a bone-mill, a flour-mill, an oil-mill, and a saw-mill, and two large warehouses, sheds, and yards adjoining the navigation in Great Grimsby, which in the 9th section of the Manchester, Sheffield, and Lincolnshire Railway Act, 1849 (12 & 13 Vict. c. lxxxi.), is called "The Grimsby Haven and Old Dock," and which mills and premises lay on the east side of and adjoin the said Old Dock, and were rendered very valuable to them on account of their contiguity to the Old Dock, and of the complainants' right to take ships with cargoes of merchandize alongside their premises, on payment of certain dock-dues mentioned in the 232nd and 233rd sections of the act: That, in and prior to the year 1849, vessels drawing 17 feet and 6 inches water could navigate that part of the said Old Dock, the bottom whereof may, as expressed in the 218th section, be made on a level with the sills of the floor of the lock therein mentioned, which are at a depth of 18 feet below the surface of the water: and that vessels drawing 13 feet 6 inches water could navigate that part of the said Old Dock in which the [709] depth of water is mentioned in the said 218th section as authorized to be made to the depth of 14 feet: That nearly all the warehouses, yards, quays, wharves, landing-places, and frontages adjoining the said Old Dock belong to private individuals or corporations other than the said Manchester, Sheffield, and Lincolnshire Railway Company: and that a very small portion of such yards, quays, wharves, landing places, and frontages (only to the extent of about 200 yards) belongs to the said Manchester, Sheffield, and Lincolnshire Railway Company, and that the several owners of the said warehouses, &c., have several rights of landing goods and merchandizes in and on the said warehouses, yards, quays, &c., free of quay-rent, wharfage, or any other landing-charges: That, in or about the year 1846, the said Manchester, Sheffield, and Lincolnshire Railway Company commenced making, and they have since made and completed, a new dock of about 28 acres at Great Grimsby, and near the said Old Dock, which new dock was opened in the year 1852; and the said Manchester, Sheffield, and Lincolnshire Railway Company are now the proprietors of the said new dock, and all the warehouses, sheds, yards, quays, wharves, timber-ponds, landing-places, and frontages adjoining the said new dock, and are also the proprietors of a considerable quantity of land around and adjoining the said new dock and the said warehouses, sheds, yards, quays, wharves, timber-ponds, landing-places, and frontages: and no person can hire any of the said warehouses, &c., and land around and adjoining the said new dock, except of the said Manchester, Sheffield, and Lincolnshire Railway Company: That, in the year 1853, the gates, sills, and floor of the lock of the said Old Dock were dilapidated and defective, and have so continued up to the present time; and that, in consequence of the dilapidated and [710] defective state of the said gates, sills, and floor, the water runs out of the said Old Dock so low that even at spring-tides the statutable depths of water cannot be maintained in the said Old Dock: That, since the opening of the said new dock, the said Manchester, Sheffield, and Lincolnshire Railway Company have allowed the mud which accrues from the back or drainage-water which runs from four to six miles of the adjoining country into the said Old Dock, and from the tidal water which is let into the said Old Dock at spring-tides, and other matter, to accumulate in the channel or fairway of the said Old Dock: and that, by reason of such accumulations, the same dock is not now navigable for ships drawing less water than the statutable depths: That, by reason of the loss of water occasioned by the said dilapidated and defective state of the said works, and by reason of the said accumulations, no vessel drawing 16 feet water can now navigate that part of the said Old Dock where the bottom, as mentioned in the said 218th section, is authorized [and required] to be made upon a level with the sills of the floor of the said lock, which sills are laid so low as to afford a depth of 18 feet water over them: and that no vessel drawing 12 feet water can now navigate that part of the said Old Dock where the depth of water is authorized [and required] by the said 218th section to be 14 feet: That, in and continuously ever since the year 1855, the complainants

and several other merchants who have had vessels drawing less water than the depths of 18 and 14 feet respectively have not been able to get such vessels up to their respective places in the said Old Dock for the discharge of their respective cargoes, but have had in very many instances, and in fact in nearly every instance, to unload and deliver large parts of such cargoes into lighters, carts, and waggons, and then to take [711] such parts so unloaded, in such lighters, carts, and waggons, up to the respective places of destination of such cargoes respectively, and have such parts again delivered, instead of delivering the whole of such cargoes at their respective places of destination in the first instance: That, in October, 1857, the Danish schooner "Embla," drawing 9 feet 7 inches water forward, and 10 feet 11 inches aft, brought the complainants a cargo of linseed from Cronstadt to Great Grimsby, and the said schooner was brought into the said Old Dock, where she took the ground in that part of the said Old Dock where the statutable depth of water is 18 feet, there being then only 10 feet 8 inches and 10 feet 7 inches water in the middle of the said Old Dock where the said schooner grounded, and a great part of such cargo had to be taken out of the said schooner and put into lighters, and taken thence about half a mile to their mills, which adjoin that part of the said Old Dock where the statutable depth of water is 14 feet: and that, in consideration of their being only 10 feet 8 inches water in the said Old Dock when the last-mentioned cargo was discharged, the complainants were put to an extra expense, in lighterage and labour, of 5l. 8s. 9d. [Several other instances were then given of vessels coming to the complainant's premises grounding in the Old Dock in consequence of the water therein being less than the statutable depth]: That, at spring-tides, the tidal water is taken from the river Humber into the said Old Dock; but that, in consequence of the dilapidated and defective state of the gates, sills, floor, and walls of the said lock, the additional water so taken into the said Old Dock soon runs out again; and the complainants cannot calculate on having any increase of water in the said Old Dock for more than about four or six days in every fortnight: That nearly the whole of the vessels which bring cargoes from [712] abroad into the said Old Dock belong to persons who are not interested in the mills, warehouses, yards, quays, wharves, timber-ponds, and other property adjoining the said Old Dock, or in the town and port of Great Grimsby; and that, in consequence of the depths of water and the present state of the said Old Dock being well known to the ship-owners and ship-brokers, the complainants and the other merchants in Great Grimsby have frequently experienced and still continue to experience the greatest difficulty in getting the owners of ships to charter them for the Old Docks, and in very many instances ship owners have positively refused to do so; and, in many cases where vessels drawing from about 13 to 17 feet water have been chartered for the Old Dock, the masters of such vessels have on their arrival at Great Grimsby (sometimes of their own accord, and sometimes acting on the advice and recommendation of the pilots who have taken charge of such vessels to pilot them into the dock), refused to allow their vessels to come into the said Old Dock, alleging, that, in consequence of the accumulation of mud and other matter and the scarcity of water therein, it would not be safe for their vessels to enter it: That the complainants believed that the said Manchester, Sheffield, and Lincolnshire Railway company would not attempt to keep the said Old Dock navigable, unless they could be compelled to do so, as they derived greater profits on vessels discharging cargoes in the new docks than on vessels discharging cargoes in the said Old Dock; and that the want of the statutable depths of water in the said Old Dock gave in respect of traffic an undue preference to the company and their tenants holding premises adjoining or near to the new dock over the complainants and the other holders of wharves and premises adjoining and about the Old Dock, by preventing vessels from using the Old Dock, and thereby increasing the traffic of the [713] new dock and the business of the said company and their tenants carried on by them on premises adjoining and near to the new dock, the amount of which business depended on the amount of the traffic of the new dock; and that the want of the statutable depths of water in the Old Dock was a great public inconvenience.

The complaint is, that the company, by omitting to perform the duty cast upon them by the 218th section of their consolidation act, of maintaining the proper depths of water at the entrance of the Old Dock, prevent the proprietors of wharves and premises round the Old Dock from competing with the occupiers of premises adjoining the new dock: and this they do for their own advantage as well as for that of their

tenants, inasmuch as their railway communicates with the new dock and not with the Old Dock,—thereby giving an undue preference to the occupiers of premises round the new dock, and imposing undue prejudice and disadvantage upon the complainant and the other proprietors of premises on the Old Dock. [Williams, J. Is not that of which you complain rather the subject of a mandamus or an indictment?] It is submitted this court has power to administer relief under this act. [Byles, J. The Grimsby Old Dock is neither a railway nor a canal.] By the interpretation clause of the 17 & 18 Vict. c. 31 (s. 1), it is provided that “the word ‘canal’ shall include any navigation whereon tolls are levied by the authority of parliament, and also the wharves and landing-places of and belonging to such canal or navigation, and used for the purposes of public traffic.” [Cockburn, C. J. Does the Railway and Canal Traffic Act apply to mere acts of omission (a)?] It is submitted that it does. [Cockburn, C. J. Do you shew that any traffic is impeded by something done by the company?] The affidavits disclose serious injury to the proprietors of mills, wharves, and premises round this navigation,—vessels of a certain draught being prevented from coming there. [Cockburn, C. J. Why not proceed by the remedies you had before the passing of Mr. Cardwell’s act? I cannot think the statute was intended to apply where a remedy before existed. Williams, J. You complain that the company are neglecting the performance of a duty cast upon them by the act of parliament: and it is suggested that their motive is, to prefer themselves and their tenants adjoining the new dock to the proprietors of premises abutting upon the Old Dock. But, are those proprietors,—assuming this to be a navigation,—persons who use the docks. Is not this rather like the case of a man having a public-house near a railway. It is perfectly indifferent to the shipowners which dock they go into. Cockburn, C. J. It is a public nuisance, not an undue preference or an undue prejudice. Byles, J. Why not issue a writ, and apply for a mandamus under the 68th section of the Common Law Procedure Act, 1854?] Possibly that course is open to the complainants: but the question is, whether they have not a right to apply to the court under this statute. They charter ships which but for the wrongful default of the company would be able to come up to their wharf to unload. [Cockburn, C. J. The difficulty is that the act cannot apply as between two navigations,—where one is stopped for the benefit of the other. Byles, J. Suppose a company possesses a canal and a railway running the same way,—is it the duty of this court to see that they do equal justice between the two?] It is impossible to conceive larger words than those used by the legisla- [715] true in this statute. [Willes, J. You must make out that this is traffic upon some railway, canal, or navigation.] The entrance to this dock is a navigation. [Cockburn, C. J. A “navigation” is, water communicating from one place to another.] This is a mile and a half long. [Willes, J. Do the company receive toll-traverse, or dock-dues only?] Dock dues.

COCKBURN, C. J. I am of opinion that this is not a case within the act. These are two distinct navigations: and the complaint is, that the company have virtually stopped one, with a view to promote the prosperity of the other. The complainants must be left to the ordinary remedy.

WILLIAMS, J. Not only do I concur in thinking that this case is not within the Railway and Canal Traffic Act, but I am not satisfied that this is a navigation.

WILLES, J., concurred.

BYLES, J. I agree with my Lord and my two learned Brothers in thinking that this case is not within the act. There is no branch of our jurisdiction which has occasioned the court greater labour and anxiety than that conferred upon it by this statute. But certainly we should be straining it very much if we were to hold the complainants to be entitled to the relief they ask. I am by no means satisfied that this Old Dock or Haven is a canal within the meaning of the act. It cannot in any sense be called a navigation. I agree with my Lord that the act refers to preferences given to one person or class of persons over another in the traffic along the same railway or canal. These two navigations, if navigations they be, are not in any sense the same: they start from different termini: and [716] they enter the Humber at different spots. They are, in fact, as distinct as Liverpool and Birkenhead. It seems

(a) The 3rd section enacts that “it shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this act, to apply,” &c.

to me, that, if we were to entertain this motion, we should be inundated with applications from competing railways and canals.

Rule refused.

MARSHALL, Clerk, v. THE BISHOP OF EXETER AND ANOTHER. May 26th, 1859.

[S. C. 28 L. J. C. P. 300; 7 W. R. 525. Approved, *Carlisle v. Whaley*, 1867, L. R. H. L. 416. For subsequent proceedings see 7 C. B. N. S. 653.]

Quare impedit is within the 80th section of the Common Law Procedure Act, 1852.

Quare impedit. The first count of the declaration stated, that Henry Bishop of Exeter and John Henry Coats Borwell, clerk, were summoned to answer Peter Charles Marshall, clerk, of a plea that they permit the said Peter Charles Marshall, clerk, to present a fit person to the parish church of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county of Cornwall, which is vacant, and belongs to his presentation; and thereupon the said Peter Charles Marshall, clerk, by Henry Dupleix, his attorney, complains, For that whereas he the said Peter Charles Marshall, to wit, on the 15th of November, 1855, was seised of the rectory and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, whereunto the advowson of the rectory and vicarage of the church aforesaid did and doth belong, in his demesne as of fee and right: and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, [717] presented to the said church and rectory and vicarage himself the said Peter Charles Marshall, clerk, as his clerk, who, on the presentation of himself the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our Sovereign Lady the now Queen of Great Britain and Ireland; and, he the said Peter Charles Marshall, clerk, being so seised of the said rectory and vicarage in the county aforesaid, whereunto the advowson of the said rectory and vicarage of the church aforesaid did and both belong, the said church and rectory and vicarage, to wit, on the 3rd of August, 1857, became vacant by the resignation of the said church and rectory and vicarage then duly made by him the said Peter Charles Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter, and ordinary in that behalf, whereby it then and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid: But the said Bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him.

The second count stated, that whereas also he the said Peter Charles Marshall, clerk, to wit, on the 15th of November, 1855, was seised of the advowson of the church, rectory, and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, as of gross by itself, as of fee and right: and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, presented to the said church and rectory and vicarage himself the said Charles Peter Marshall, clerk, as his clerk, who on [718] the presentation of himself the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our Sovereign Lady the now Queen of Great Britain and Ireland: and he the said Peter Charles Marshall, clerk, being so seised of the said advowson as in this count aforesaid, the said church and rectory and vicarage, to wit, on the 3rd of August, 1857, became vacant by the resignation of the said church, rectory, and vicarage then duly made by him the said Peter Charles Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter, and ordinary in that behalf, whereby it then and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid: but the said Bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him: Wherefore he the said Peter Charles Marshall, clerk, saith that he is injured and hath sustained damage to the value of 3000l., and therefore he brings his suit, &c.

Plea,—the said Henry Bishop of Exeter and John Henry Coats Borwell, clerk, by Frederick Sanders, their attorney, come and defend the wrong and injury when, &c. ; and the said John Henry Coats Borwell says that he is parson impersonate of the said church in the declaration mentioned, by the collation of the said bishop ; and the said bishop says that the said church is in his diocese, and that he hath not and doth not claim to have anything in the said church, except the admission, institution, and induction of parsons to the said church, and such other things as belong to the ordinary of the place as ordinary : And the defendants further say, that, after the said church became vacant and void by the resignation of the plaintiff, then and [719] thence and still being a clerk in Holy Orders, and the acceptance of such resignation by the defendant Henry Bishop of Exeter in the declaration mentioned, to wit, on the 16th of January, 1858, the plaintiff, being so seised as in the declaration mentioned, by writing under his seal, bearing date, to wit, the day and year last aforesaid, presented to the said bishop, so being such ordinary as aforesaid, one John Reid as his clerk, and requested the said bishop to admit, institute, and induct the said John Reid as his clerk to the said church so vacant and void as aforesaid : And the defendants further say that the said John Reid had not been ordained by the said Bishop of Exeter, or by any former or other Bishop of the diocese of Exeter, and that, at the time the said John Reid was so as aforesaid presented to said bishop, and of such presentation so being made, to wit, on the day and year last aforesaid, the said John Reid was a clerk in Holy Orders, and then came from a diocese in England other than the diocese of Exeter, to wit, from the diocese of Manchester, and not elsewhere or from any other diocese, and in which diocese he had then lately been a minister of the Church of England, and had then lately held a benefice and cure of souls ; and the said John Reid was then wholly unknown to the said Henry Bishop of Exeter : And thereupon, afterwards, to wit, on the day and year last aforesaid, the said John Reid, so being presented upon such presentation as aforesaid, and so coming from such other diocese as aforesaid, applied to the said Bishop of Exeter to admit, institute, and induct him the said John Reid to the said church, so being vacant and void as aforesaid ; but the said John Reid did not bring or produce to the said Henry Bishop of Exeter, from the bishop of the said diocese whence he came, and wherein he had lately held such benefice and cure of souls as aforesaid, and been a minister as aforesaid, [720] to wit, from the Bishop of Manchester, any sufficient testimony, according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or any such testimony as he the said bishop was bound and ought by the laws ecclesiastical of England to require and have and receive, from the bishop of the diocese from whence the said John Reid had come, and in which he so had lately held a benefice and cure as aforesaid ; but the said John Reid then, to wit, on the day and year aforesaid, when he so applied to be admitted, instituted, and inducted as aforesaid, brought testimony from the bishop of the diocese aforesaid, to wit, from the Bishop of Manchester, which he the said Henry Bishop of Exeter held not to be, and which was not, sufficient testimony according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the Bishop of the diocese from whence he [721] the said John Reid had come, and in which he had so lately held a benefice and cure of souls as aforesaid ; and the said Bishop of Exeter required further and sufficient testimony from the said Bishop of Manchester according to the ecclesiastical laws in that behalf, to wit, testimony of his the said John Reid's honest conversation, ability, and conformity to the said ecclesiastical laws, of which the said John Reid then had notice, to wit, from the said Henry Bishop of Exeter ; and thereupon, to wit, on the

day and year aforesaid, the said John Reid departed and went away from the said Bishop of Exeter, and the said John Reid never returned or came to the said bishop again : and such further and sufficient testimony as aforesaid from the said Bishop of Manchester was never obtained from such bishop, although a long space of time, sufficient to enable the said John Reid to obtain such testimony, and to come again to the said Henry Bishop of Exeter, elapsed before such collation by the said Henry Bishop of Exeter as hereinafter mentioned ; and the said Bishop of Exeter, after the said John Reid so departed and went away from him the said Bishop as aforesaid, not only never had or obtained or received from the said John Reid, or otherwise, any sufficient testimony from the said Bishop of Manchester, or any other testimony whatever, of the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England ; but, in fact, he the said Henry Bishop of Exeter, before such collation as hereinafter mentioned, had and received from the said Bishop of Manchester, and otherwise, further testimony, from which he the said Bishop of Exeter was induced to believe, and did believe, and had good and sufficient reason for believing, that the said John Reid had, whilst being a beneficed clergyman and having cure of souls within the diocese of the said Bishop of Man-[722]-chester, been guilty of an attempt to commit the offence of simony, to wit, by soliciting a certain other clerk in Holy Orders, to wit, one Francis Minden Knollis, to enter into a simoniacal contract with the said John Reid touching a certain other benefice then held by the said John Reid, contrary to the ecclesiastical laws of England in that behalf, and that he was not a person of honest conversation, or a person who conformed to the ecclesiastical laws of England, or a fit and proper person to be admitted, instituted, or inducted to the said church,—all which premises he the said John Reid long before the collation hereinafter mentioned well knew ; and, by reason of the premises, the said Bishop of Exeter, as such ordinary as aforesaid, after the lapse of six months from the avoidance of the said living, and within six months from such lapse, to wit, on the 1st of March, 1858, the said church still being and remaining vacant and void, collated the said church to the said defendant John Henry Coats Borwell, his clerk, and put him in the corporeal possession thereof, as it was lawful for the said bishop as such ordinary to do : And this the defendants are ready to verify ; wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action against them.

Coleridge, in Easter term last, obtained a rule calling upon the defendants to shew cause why the plaintiff should not have leave to reply double and demur to the above plea. Besides joining issue, the plaintiff proposed to plead as follows :

“That, at the time of the presentment to the said bishop of the said John Reid as his the plaintiff's clerk, and of the request of the said bishop to admit, institute, and induct the said John Reid as his the plaintiff's clerk to the said church as in the said plea mentioned, the said John Reid was, and [723] theretofore had been, and thenceforth always continued to be, a person of honest conversation and sufficient ability, and one who conformed to the ecclesiastical laws of England, and a fit and proper person to be admitted, instituted, and inducted to the said church, and was not guilty of any attempt to commit the offence of simony as in the said plea mentioned : That the said testimony brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter, when he the said John Reid so applied to be admitted, instituted, and inducted, and which the said Henry Bishop of Exeter held not to be, and which is alleged in the said plea not to have been, sufficient testimony, according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the Bishop of the said diocese from which the said John Reid had come, and in which he had so as aforesaid lately held a benefice and cure as aforesaid, was and is in the words and figures following, that is to say :—

“To the Right Reverend Henry Lord Bishop of Exeter,—

“We whose names are hereunder written testify and make known that the Rev. John Reid, M.A., clerk, formerly of St. John's College, Cambridge, and late of the rectory of Claughton, in the county of Lancaster, presented to the rectory of Tregony with the vicarage of Cuby annexed, in the county of Cornwall, in your Lordship's

diocese, hath been personally known to us for the space of three years last past; that we have had opportunities of observing his conduct; that, during the whole of that time, we [724] verily believe that he lived piously, soberly, and honestly, nor have we at any time heard anything to the contrary thereof; nor hath he at any time, as far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the United Church of England and Ireland. And, moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be admitted to the said benefice. In witness whereof, we have hereunto set our hands this 9th day of January, 1858.

“W. B. Grenside, M.A., Vicar of Melling, in the county of Lancaster.

“J. M. Wright, Rector of Tatham, in the county of Lancaster.

“Richard John Shields, Incumbent of Hornby, in the county of Lancaster.

“The subscribers are beneficed in the diocese of Manchester. Mr. Reid was long non-resident on his benefice; but I know no reason why he should be legally hindered from being allowed to take other duty.

“J. P. MANCHESTER.”

Which said testimony was duly signed by the said Bishop of Manchester: “That, from the time of the said bringing of the said testimony from the said Bishop of Manchester, to the time of the collation by the said Bishop of Exeter of the Rev. John Henry Coats Borwell, as by the said Bishop of Exeter in the said plea alleged (and which is the same and only collation by which the defendant John Henry Coats Borwell became, was, or is parson impersonate of the said church in the declaration mentioned, as by him alleged), the said Bishop of Exeter continued to require from the said John Reid a further testimony from the said Bishop of Manchester, satisfactory to the said Bishop [725] of Exeter in those respects wherein the said testimony so brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter was held by him the said Bishop of Exeter not to be, and alleged by him in the said plea not to have been, sufficient; and the said Bishop of Exeter never gave notice to the said John Reid or the plaintiff, nor ever gave them or either of them to understand or be informed or believe, that he the said Bishop of Exeter required the said further testimony to be procured by the said John Reid, or brought by him to the said Bishop of Exeter, within any fixed or specified time, or that he the said Bishop of Exeter would not receive the same after the lapse of six months from the avoidance of the said living, or after any specified time, nor did the said Bishop of Exeter ever at any time or in any way notify to the said John Reid, or to the plaintiff, nor did the said John Reid or the plaintiff ever know, that the said Bishop of Exeter had finally determined not to wait any longer for or to receive any such further testimony from the said Bishop of Manchester, or that the said Bishop of Exeter had finally determined to persist in his objections to the said first testimony as insufficient: That, from the time of the bringing of the said first-mentioned testimony as aforesaid, and thence continually until and at the time of such collation as aforesaid, negotiations between the said Bishop of Exeter and the said John Reid as to whether the said bishop would persist in requiring any further and what testimony to be procured by the said John Reid from the said Bishop of Manchester, in order to the admission, institution, and induction of the said John Reid by the said Bishop of Exeter to the said church, were pending, and neither the said John Reid nor he the plaintiff ever had any notice from the said Bishop of Exeter, nor ever in fact knew, before the said collation [726] that he the said Bishop of Exeter would or did claim to collate the said John Henry Coats Borwell, or any clerk of him the said Bishop of Exeter, to the said church: And that, save and except as aforesaid, the said Bishop of Exeter never at any time before the said collation by him of the said John Henry Coats Borwell, clerk, refused to admit, institute, and induct the said John Reid as the plaintiff's clerk to the said church.”

The ground of the proposed demurrer was, —“that the facts set forth in the plea do not shew any lapse entitling the said bishop to collate the said defendant Borwell.”

Karslake now shewed cause. The question is, whether the plaintiff in a quare impedit has a right to avail himself of the 80th section(a) of the Common Law

(a) Which provides that “either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party, or his attorney, if required by the court or judge, to the effect that he is advised and

Procedure Act, 1852 (15 & 16 Vict. c. 76). By the 14th section of the 2 W. 4, c. 39, which is intitled "An act for uniformity of process in personal actions in His Majesty's courts of law at Westminster," the judges were empowered to make general rules and orders for the effectual execution of the act: and by the 1st section of the 3 & 4 W. 4, c. 42, the judges are [727] empowered to frame rules for making alterations in the mode of pleading. In *Barnes v. Jackson*, 3 Dowl. P. C. 404, it was held that the rules made pursuant to the former act only apply to actions in which the courts who have made them have concurrent jurisdiction: and the like was held as to the rules of pleading under the last-mentioned act, in *Miller v. Miller*, 3 Dowl. P. C. 408, 1 Scott, 387. So, the powers of amendment under the Common Law Procedure Act, 1852, have been held not to be applicable to quare impedit: *Tolson v. The Bishop of Carlisle*, 3 C. B. 41. The general scope of the Common Law Procedure Act, 1852, applies only to personal actions. The title, it is true, is general,—“An act to amend the process, practice, and mode of pleading in the superior courts of common law at Westminster,” &c. The language of the 1st section also is general; but the 2nd section is expressly confined to “all personal actions brought in Her Majesty's superior courts of common law.” [Bytes, J. What is ejectment?] That is specially provided for by a series of sections, from 168 to 221. Under s. 223, the judges have power to make rules and frame writs and proceedings: the rules and forms made in exercise of that power are all confined to personal actions. The judges could not meet generally to make rules in quare impedit only. [Willes, J. The Crown may bring quare impedit in any court.] The last-mentioned section refers to the 13 & 14 Vict. c. 16, which clearly does not apply to real actions. The clauses (down to s. 25) relating to the service of process are applicable exclusively to personal actions: as also are those relating to appearance,—ss. 26 to 33. [Bytes, J. How did you appear here?] By some proceeding in the petty-bag office. The preambles to the sets of sections commencing respectively with ss. 33 and 41, speak of “joinder of parties to actions,” and “joinder of causes of action,” [728] without any restriction, except that the latter set of clauses are not to apply to replevin or ejectment. Now, the interpretation clause, s. 227, provides that the word “action” shall be understood to mean any personal action brought by writ of summons in any of the superior courts. The clause applicable to the raising of questions without pleadings,—s. 42,—clearly does not embrace real actions. As to the pleading rules,—in ss. 49 to 56 the word “action” does not occur; but it does in s. 57, but that can only refer to personal actions (a). The 70th section enables the defendant to pay money into court in all actions, except actions for assault and battery, false imprisonment, libel, slander, malicious arrest, &c., crim. con., or debauching of the plaintiff's daughter or servant. [Willes, J. That does not apply to detainee. Money cannot be paid into court in debt on bond under the statute of William: *The Bishop of London v. McNeil*, 23 Law J., Exch. 111 (b). Bytes, J. No doubt most of the clauses of the act contemplate personal actions, in the strictest sense of the word. But the language of the preamble to the pleading rules is as wide as possible,—“And, with respect to the language and form of pleadings in general, be it enacted,” &c.] The 84th section, which provides what pleas may be pleaded together without leave, in terms applies only to personal actions. The forms of pleading under s. 91, in like manner, are wholly inapplicable to any but personal actions. So, the provisions as to jury process, s. 104, et seq., are applicable only to ordinary actions. [Bytes, J. Including ejectment. Willes, J. The 105th section provides that the [729] precept issued by the judges of assize to the sheriff to summon jurors for the assizes shall direct that the jurors shall be summoned for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes.” Suppose this were made a special jury cause, would not the mode of

believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law: and it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of.”

(a) Section 59 provides that “every declaration shall commence as follows, or to the like effect:” and then it gives a form which is altogether inapplicable to real actions.

(b) And see *England v. Watson*, 9 M. & W. 333.

proceeding be regulated by the 108th section?] The power of amendment conferred by s. 222 has never been exercised in any real action, although the words are as general as may be. Doubts having been entertained whether the 52nd section was applicable to proceedings in mandamus,—see *The Queen v. The Saddlers' Company*, 22 Law J., Q. B. 451,—provision was made for that in the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, ss. 68, et seq. It is reasonable to expect that some traces of real actions would have been found in the act if they had been intended to be included in it.

Collier, Q. C., and Coleridge, in support of the rule. It would be a grievous blot in the Common Law Procedure Act if it were not to apply to quare impedit. To sustain the argument on the other side, it must go the length of contending that special demurrers in this form of action are not abolished, and that profert and oyer and the old provisions as to special juries are still applicable. The statute 4 Ann. c. 16, s. 4, the words of which are not so large as those of the Common Law Procedure Act, have been held to apply to real actions. [Byles, J. That statute uses the words “defendant or tenant.”] The title of the act and the preamble are in very general terms: and it is impossible to read the several provisions of it without seeing that justice cannot be done to the intention of the legislature if it is limited in its operation to personal actions. Some of its provisions apply no doubt to personal actions only: but to others no sensible construction can be given [730] without holding them to embrace real actions also. The 109th section, for instance, speaks of any action except replevin: it is clear, therefore, that the interpretation clause is to be taken with some qualification: and its literal construction was departed from by this court in *Messiter v. Rose*, 13 C. B. 162. [Byles, J. There the court construed this as a remedial statute. Willes, J. I am not at all sure that ejectment was not always a personal action.] The 3 & 4 W. 4, c. 27, s. 36, abolishes all real and mixed actions, except writs of right of dower, dower unde nihil habet, quare impedit, or ejectment. [Willes, J. Quare impedit is properly a mixed action: the plaintiff gets the living and damages also.] There can be no reason for confining the operation of the language of the act in the way contended for by the other side. [Willes, J. It is quite clear that “action” does not necessarily mean an action commenced by writ of summons. It is very likely that the distinction between real and personal actions was not within the contemplation of the person who drew the bill. But the only question we have to deal with is, what is the meaning of the words which the legislature have used? There is no one section throughout the act which deals with an ejectment, in which it is not called an action.] In form the writ of quare impedit is a writ of summons: Fitz. Nat. Brev. 32 E.; Bracton, fo. 113. The provisions as to view (s. 114), the death of parties (ss. 135-140), and writs of error (ss. 146-166), are all applicable to real as well as to personal actions. [Willes, J. In *Gomm v. Parrott*, 3 C. B. (N. S.) 47, this court entertained no doubt as to its jurisdiction to order an inspection of documents in a writ of dower. It is not pretended that the amendment clause (s. 222) does not apply to this form of action. [Byles, J. The words of that section are certainly most general,—“in any proceeding in civil causes.”] It has been observed that no forms of proceedings in real actions [731] are given either in the act or by the rules made in pursuance of the act. The same, however, might be said of replevin and account, which are clearly within the statute.

Cur. adv. vult.

WILLES, J., now delivered the opinion of the court:—

This was a rule obtained by the plaintiff in quare impedit, calling upon the defendant to shew cause why the plaintiff should not be at liberty to reply to several matters and demur.

The question is whether the 80th and 81st sections of the Common Law Procedure Act, 1852, apply to pleadings in quare impedit. It was argued before my Brother Byles and myself last term; and we took time to consider.

On the part of the defendant, upon the argument, it was pointed out that the act of parliament, as to the greater part, if not all, of its provisions, is expressly confined in its operation to actions over which the courts have a common jurisdiction; that, by the interpretation clause, the word “action” is to be understood to mean “any personal action brought by writ of summons in any of the courts:” that the word “action” in s. 81, so interpreted, would not include quare impedit; and that previous statutes for the amendment of the proceedings of the common law courts (2 W. 4,

c. 39, and 3 & 4 W. 4, c. 42), and the rules founded upon them, did not apply to real actions: *Barnes v. Jackson*, 3 Dowl. P. C. 404.

On the other side, it was argued that the words used are general, and therefore, according to the ordinary rules of construction, are to be generally applied, there being no absurdity, and nothing repugnant to any other part of the statute, in so doing; that, with respect to the argument founded upon the general scope of the act, it proves too much, because the provisions as to juries at least are applicable to all actions, whether [732] real or personal; and that the interpretation clause is inapplicable to restrain the language in question, because it could only do so by restraining the application of the word "action" to actions brought by "writ of summons," which would exclude replevin, and that would be inconsistent with the express mention of pleadings in replevin in the 86th section; and so, that there is "something in the subject or context repugnant to such limited construction."

With respect to decisions upon previous statutes and rules, they were distinguished, by reason of the different object in view and language employed. To this may be added, that the enactments in question are in *pari materia* with, and are introduced by way of extension of the provisions of Lord Somers's Act (4 Ann. c. 16, s. 4), which applies to all actions: see the argument in *Daries, Dem., Lowndes, Ten.*, 7 M. & G. 762, 7 Scott, N. R. 539, and the pleas in the case now under discussion.

Upon full consideration of the statute and the arguments, we have come to the conclusion that the sections in question do apply. No sufficient reason has, in our opinion, been shewn for refusing to give the words in question their ordinary meaning and construction. It may, indeed, be conjectured that this question did not suggest itself to the minds of the framers of the act, and even that they had no formed intention of dealing with actions other than personal: but the words which they have used are capable of, and, not being restrained by the context, ought to receive, the wider application.

The rule must therefore be absolute: but, as the form of the proposed pleadings was not discussed before us, we are not to be understood as expressing any opinion upon their propriety.

Rule absolute (a).

[733] TOMLINE AND ANOTHER v. CADMAN. June 16th, 1859.

A protecting order under the 211th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, is not void for want of notice to each creditor.—Neither is it any objection to its validity, in a proceeding in this court, that it professes to give protection until a certain day and until further order.

A writ of summons issued at the suit of the plaintiffs against the defendant on the 16th of June, 1858, indorsed for 33l. 2s. 3d. This writ was served on the 18th of June. On the 24th, the defendant presented his petition to the court of Bankruptcy under the arrangement clauses of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, and a protection granted both as to the person and property of the defendant, "until the 22nd of July or until further order." On the 25th, an appearance was entered in the action. On the 28th, a declaration was delivered. On the 4th of July the plaintiffs received notice of the filing of the petition. On the 8th, the defendant pleaded *nunquam indebitatus*. The trial took place on the 22nd of July, when a verdict was given for the plaintiffs, with immediate execution. On the same day, the defendant's proposal was accepted by the proper proportion of his creditors, and his protection renewed "until the 9th of August and until further order;" and on the 24th notice of the renewal of the protection was given to one of the plaintiffs. On the 27th judgment was signed in the action, and the costs taxed. On the 14th of August the plaintiffs issued a *fi. fa.*, under which the sheriff's officer entered on the 16th. He was informed of the protection; but the officer, being indemnified by the plaintiffs, sold the goods seized to them for the sum necessary to cover the amount of the execution and the costs. Shortly afterwards, the sheriff's officer having advertized the goods for public sale, the defendant, supposing that to be a proceeding under the execution, tendered a sum of money, and afterwards brought

(a) See the case on demurrer reported post, vol. vii.

an action against the sheriff to [734] recover it back. In that action he was nonsuited,—his proper remedy being (the sheriff having only obeyed the writ) by application calling on the sheriff to refund the money.

An application was afterwards made to Crowder, J., at Chambers; but that learned judge referred the parties to the court.

Manisty, Q. C., accordingly moved for a rule calling upon the sheriff (of Lancashire) or the plaintiffs to shew cause why the proceeds of the goods seized under the *fi. fa.* should not be paid over to the defendant. The application was founded upon the 211th section of the 12 & 13 Vict. c. 106, which enacts “that any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of the court of bankruptcy, and of submitting himself to the jurisdiction of the court in manner thereafter mentioned, may present a petition to the court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the court, on such petition, shall have power to grant such protection, and may renew the same from time to time as it shall think fit, and, if the petitioner be in prison or in custody for debt, may,—except in the cases next thereafter mentioned,—order his immediate release, either absolutely or on condition, and may take bail for his attendance at the several sittings of the court thereafter mentioned: Provided always that the court shall not order such release where it shall appear by any judgment, order, commitment, or sentence under which such petitioner is in prison or in custody, or by the record or entry of any such judgment, order, commitment, or sentence, and the pleadings or proceedings previously thereto, that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: Provided also, that such release shall in no wise affect any rights of the creditor at whose suit such petitioner may be in prison or in custody against such petitioner, except the right of detaining him in prison or in custody, whilst protected from imprisonment by order of the court.”

Welsby and McIntyre (*a*) shewed cause in the first instance. The first answer to this application is, that it is made too late. The *fi. fa.* issued on the 14th of August, 1858, and was executed on the 16th; and the defendant obtained his certificate under the 221st section. No application was made to the court or a judge; but the defendant erroneously brought an action against the sheriff (see the case *Iideal v. Fort*, 11 Exch. 849), and now, when the plaintiffs' position is materially altered, and they are precluded from obtaining a dividend from the estate, he makes this application to the equitable jurisdiction of the court.

The next objection is, that the protecting order of the 22nd of July was bad for want of due notice to the creditors. Here, the notice was served upon one only of the two plaintiffs, which is clearly insufficient: [736] *The Queen v. Gordon, Dearsley*, C. C. 586. [Willes, J. That was *inter apices*. The court were not unanimous. You have first to establish that there must be notice. The statute requires notice to be given: but the operation of the order of protection is not made conditional on the giving of the notice.] In *Lery v. Horne*, 5 Exch. 257, it was expressly held that the certificate given to a petitioning trader under the 216th section only protects him from arrest at the suit of persons being creditors at the date of the petition, and who have received the notices required by the act. [Byles, J. We are not now on the effect of the certificate, but of the protecting order. The 215th section requires notice of sittings to be personally served on every creditor who was not present at a former sitting: but there is no such provision as to the protecting order. Cockburn, C. J. It may be that the court of Bankruptcy will rescind its order, if it appear that notice has not been given.] It is a benefit given to the party, conditional on his complying with certain provisions. [Byles, J. Do you say that the

(*a*) As to the right of a second counsel to be heard on shewing cause in the first instance,—*Quære*!

miscarriage of a notice to one of a thousand creditors nullifies all that is done at the meeting!] As to the creditor who has not received notice. [Byles, J. This is only an interim order. *Levy v. Horn* was the case of a final certificate. Cockburn C. J. Upon what provisions of the statute do you found your distinction as to the inefficacy of the protecting order quoad the creditor who has not been served?] The 211th. The protecting order is in general terms. [Williams, J. The notice is made a condition precedent to the validity of the certificate under s. 216, but not of the protecting order.]

The protecting order of the 22nd of July is bad upon the face of it. It professes to give the trader protection till the 19th of August and till further order. The proper form of order is, "from the date hereof until the [737] day of next, or until further order;" see Arch. B. L. book ii., p. 183 (11th edit.). [Byles, J. "And" and "or" are precisely synonymous there.] The validity of an order for protection not expressly in accordance with the prescribed form, was discussed in *Ex parte Bowers*, 1 De Gex, M'N., & G. 460, and in *Bellhouse v. Mellor*, 4 Hurlst. & N. 116. There, the order was for protection until a certain time. There, it is indefinite. [Cockburn, C. J. It seems to be surplusage to say that the party shall have protection until a certain day and until further order.] The form is part of the code. [Cockburn, C. J. It is not to bind parties to a slavish adherence to the words. Byles, J. Or to contradict the express terms of the act.]

Then, the order is not operative as to the costs, which do not constitute a debt until judgment signed, and consequently the sheriff was justified in levying them, no judgment having been signed until after the date of the protecting order. [Williams, J. The costs are merely accessory. The certificate in bankruptcy and the final order in insolvency bar actions that are pending. In *Southgate v. Saunders*, 5 Exch. 565, it was held that the costs are accessory to the principal debt, and the claim for costs would be barred by a certificate under s. 221, as it would by a certificate in bankruptcy, although it could not be proved under the fiat.] Reliance is mainly placed upon the lapse of time. [Cockburn, C. J. It may under the circumstances be reasonable that the creditors should retain so much as the amount of the dividend which they might have received. Manisty. That would be offering a premium to a creditor holding out. Williams, J. If the defendant had taken the right course, and gone before a judge at Chambers, instead of bringing an action against the sheriff, the plaintiffs would have been in time to prove. Their position was prejudiced by the defendant's [738] erroneous proceeding. It would be better for the plaintiffs to adopt the suggestion of the court. McIntyre submitted that the plaintiffs should have half their costs also. Willes, J. They are not entitled to costs. The judgment was not obtained until after the making of the order. The petition is the dividing line. You could not have proved for the costs.]

Manisty, in support of his rule, was stopped by the court.

COCKBURN, C. J. *Bellhouse v. Mellor*, 4 Hurlst. & N. 116, is expressly in point to show that this order is not void for defect of form; and all that the Lords Justices say in *Ex parte Bowers*, 1 De Gex, M'N., & G. 460, is that such an order as that was may be irregular, and may be rescinded by the court of Bankruptcy. This order does not seem to me to be open even to the complaint of irregularity. The only ground not disposed of on the argument is, the delay. I think there was good ground to apply to the court, but not to the full extent. The course pursued by the defendant in the first instance was an erroneous one, and operated to the prejudice of the plaintiffs, by diverting them from the course they might otherwise have taken, viz. by proving for their debt. Therefore, if Mr. McIntyre would have acceded to the suggestion thrown out we should have been glad to be relieved from pronouncing a decision. He has, however, elected to stand upon his strict rights. I see no reason why the rule should not be made absolute; but I think it should be without costs.

WILLIAMS, J. I am of the same opinion. I must confess I have felt somewhat embarrassed by the case of *Ex parte Bowers*. But the court of Exchequer in [739] *Bellhouse v. Mellor* dealt with it in a way to bring it to the very words of this order. I do not think we can do better than follow the court of Exchequer.

WILLES, J. The objection in *Ex parte Bowers* was one of mere irregularity. I do not see how it can be necessary to renew an order made for protection until further order. I should have thought that the order in *Ex parte Bowers* could only be questioned in the court out of which the process issued. At all events, the case of *Bellhouse*

v. Mellor is an authority that this is a valid order. With regard to the costs, they are merely accessory. The rule will be absolute as against the plaintiffs.

BYLES, J. I am of the same opinion. As to the lapse of time,—it is to be observed that the sheriff has been guilty of a continuing breach of duty from the seizure to the present time.

Rule absolute, without costs.

[740] BUTLER v. ABLEWHITE. June 14th, 1859.

[S. C. 28 L. J. C. P. 292; 5 Jur. N. S. 1268; 7 W. R. 583.]

The plaintiff had two permanent places of residence,—one, in London, where the defendant dwelt, and where the cause of action accrued,—the other more than twenty miles from London. At the time of bringing the action, the plaintiff was living with his family at his country residence:—Held, a case of concurrent jurisdiction, and that the plaintiff was entitled to costs under the 15 & 16 Vict. c. 54, s. 4.

This was an action brought to recover a debt of 17l. 10s. for rent. After declaration, and before plea pleaded, an application was made to Byles, J., at Chambers, to stay the proceedings upon payment of the debt without costs, on the ground that this was not a case in which the superior courts had a concurrent jurisdiction, under the 128th section of the County Court Act, 9 & 10 Vict. c. 95. The learned judge referred the matter to the court.

H. James now moved for a rule to the same effect. The agreed facts were as follows:—The plaintiff had two residences,—one, in Warwickshire, which was more than twenty miles from the residence of the defendant,—the other, in Grosvenor Place, London, which was less than twenty miles from the defendant's residence; each of these residences being occupied by the plaintiff and his family during certain portions of the year. The defendant permanently resided and carried on business in London. The cause of action arose in London: and the action was commenced in this court at a time when the plaintiff and his family were residing at his country seat in Warwickshire.

The 128th section of the 9 & 10 Vict. c. 95 enacts that “all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, &c., may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed.” The question is whether the plaintiff, at the time of action brought, dwelt more than twenty miles from the defendant. The case of *Bailey v. Bryant*, 28 Law J., Q. B. 86, is precisely in point. There, the plaintiff, a member of parliament, had a house in London (within twenty miles of the defendant), in which he resided only for about three months in the year, in order to attend in parliament, and he resided chiefly the rest of the year at his iron-works in the country (more than twenty miles from the defendant), and he was residing there at the time when he brought an action in the court of Queen's Bench for a cause within the jurisdiction of the City Small Debts Act, 15 & 16 Vict. c. lxxvii., in which he recovered 31l. 10s. It was held that the plaintiff dwelt in London, and therefore did not dwell more than twenty miles from the defendant, and that the defendant was entitled to enter a suggestion under s. 119, to deprive the plaintiff of costs. Lord Campbell, in giving judgment, said: “Is the residence of the plaintiff Bailey in London for three months in the year, under the circumstances, a sufficiently permanent residence to be a ‘dwelling’ within the terms of the City Small Debts Act? I think that it is: and the action ought to have been brought in the inferior court.” [Cockburn, C. J. The question was discussed in this court in a case of *Macdougall v. Paterson*, 11 C. B. 755. It became unnecessary to decide it, because it appeared that the plaintiff had only a temporary place of abode within twenty miles: his only permanent residence being beyond that distance: but, in the course of the argument, Maule, J., says,—“A man may have a house in London, and a house at Richmond, and each may properly be called his ‘dwelling,’ but I doubt whe-[742]-ther a man

who takes lodgings at a watering-place for two or three months can be said to have a residence or to dwell there." "Assuming that a man may have a dwelling-house in two places at the same time, he may, as I read the act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells less than twenty miles off. There are no negative words in the act." The point was not decided there. If a man may avail himself of the concurrent jurisdiction clause by having a second place of abode more than twenty miles from London, the provisions of the act may be easily evaded. [Crowder, J. It is for you to make out, that, at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from London. Cockburn, C. J. It is a question that is deserving of serious consideration. A man may no doubt have several dwelling-places. But the question is, where did he dwell at a given time?] It is a fallacy to say that a man cannot dwell at two places at the same time. In *Laur v. Brooke*, 1 Co. Rep. 39 b., Wray, C. J., said, that, "if a man has a mansion-house, and he and his whole family upon some accident are part of the night out of the house, and in the meantime one comes and breaks the house to commit felony, that is burglary; for, though neither the owner nor any of his family be in the house, yet it is domus mansionalis." And accordingly it was resolved by Popham, C. J., and all the justices, "that, where a man has two houses, and dwells sometimes in one and sometimes in the other, and has a family and servants in both, and in the night, when his servants are out of the house, the house is broken by thieves, this is burglary for the said reason which Wray, C. J., gave." [Cockburn, C. J. All the authorities as to domicile are collected in Story's Conflict of Laws, §§ 39-49.]

[743] Watkin Williams shewed cause in the first instance. The language of the act was not sufficiently adverted to in *Bailey v. Bryant*. The judgment is very short and unsatisfactory. [Willes, J. It was decided on the last day of term; and the court overruled the opinions of Jervis, C. J., and Maule, J., without hearing counsel.] The word "dwell" properly means "abide," or "stay at." [Byles, J. If personal residence is necessary to satisfy the word used in the 128th section, the plaintiff did dwell more than twenty miles from the defendant; and, if personal residence is not necessary, he still did dwell more than twenty miles: either way, therefore, he was entitled to sue in the superior court, and entitled to costs under the 15 & 16 Vict. c. 54, s. 4.] Exactly so. Under the 9 & 10 Vict. c. 95, in order to enable the defendant to enter a suggestion to deprive the plaintiff of costs, he was bound to shew that the plaintiff did not reside more than twenty miles from his residence or place of business. How could such an affidavit have been made in this case?

H. James, in support of his rule. The court will have regard to the policy of the statute, which was to prevent vexatious and expensive proceedings in the superior courts for a cause of action which might be sued for in the county court. The personal residence of a plaintiff is the place where he usually abides: *Dunston v. Paterson*, ante, vol. v., p. 267. [Crowder, J. All we decided in that case was, that a temporary or compulsory residence at the time of the commencement of an action, in a gaol, does not constitute the place of detention the "dwelling" of the party, within the 128th section.] Where one of the two plaintiffs dwells within twenty miles, they are not entitled to costs if they sue in the superior court for a debt which might have been sued for in the county court: *Hicke* [744] v. *Salano*, 8 Exch. 59. [Cockburn, C. J. If the law denies the right of suing in the superior court to one, the action being joint, the right is negated as to both.]

Cur. adv. vult.

COCKBURN, C. J. This rule was argued before my Brothers Crowder, Willes, and Byles, and myself, upon a motion to stay proceedings, upon payment of the debt, without costs. The question had been brought before my Brother Byles at Chambers, and was referred by him to the full court.

The facts, as agreed on both sides, were these: The plaintiff had two residences, —one at his country-seat in Warwickshire, the other at his town house in Grosvenor Place; each residence being occupied by the plaintiff and his family during certain portions of the year. The defendant resided and carried on business, permanently, in London. The cause of action, which was for less than 20l., arose, and the action was brought in this court, at a time when the plaintiff and his family were residing at his country-seat in Warwickshire. It was undisputed, therefore, that the plaintiff had two permanent dwelling-places (as contrasted with lodgings or temporary

dwelling-places), one more than twenty miles, the other less than twenty miles from the defendant's residence: and the question raised for our decision is, whether the superior courts at Westminster had concurrent jurisdiction with the county-court to entertain the plaintiff's claim, within the meaning of the 128th section of the 9 & 10 Vict. c. 95; for, if they had, the plaintiff will be entitled to his costs under the 4th section of the 15 & 16 Vict. c. 54.

For the plaintiff, it was contended that he "dwelt," at the time of action brought, more than twenty miles [745] from the defendant, and so might sue in the superior court. For the defendant, it was contended that the plaintiff "dwelt" within twenty miles of him, and so was bound to sue in the county-court. And, in some sense, the admitted facts warrant each assertion. But the argument of the defendant was much strengthened by the authority of the court of Queen's Bench, in the case of *Bailey v. Bryant*, 28 Law J., Q. B. 86. That case would seem undistinguishable from the present, although it arose upon a different statute, viz. the London Small Debts Act, 15 & 16 Vict. c. lxxvii. There, the court of Queen's Bench held that there was no concurrent jurisdiction, as the plaintiff had one residence of a permanent character within twenty miles from the defendant, although he had two other residences of an equally permanent character more than twenty miles from the defendant, at one of which he was actually residing with his family at the time of the commencement of the action. In the report of this case, however, the judgment is very short, and no detailed reasons are given by the court for their decision.

We regret to say, that, after the fullest consideration, and with the greatest deference and respect for the opinion of the court of Queen's Bench, we find ourselves compelled to arrive at a different conclusion. In the case of *Marlborough v. Paterson*, 11 C. B. 735, the question was brought under the consideration of this court. It became, indeed, unnecessary to decide it; but the inclination of the opinion of the court would appear to have been in favor of the concurrent jurisdiction. *Jervis, C. J.*, in delivering the judgment of the court, says: "The defendant contended, that, at the time of the action brought, the plaintiff dwelt in two places,—in Scotland, and in Golden Square; and, perhaps, even if this had been the case, this court would [746] have had concurrent jurisdiction, because it could not in that case have been suggested on the roll that the plaintiff did not dwell more than twenty miles from the defendant." And, in the course of the argument, *Mr. Justice Maule* made this observation,—"Assuming that a man may have a dwelling-house in two places at the same time, he may, as I read the act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells less than twenty miles off. There are no negative words in the act." The impression of that learned judge, therefore, seems to have been, that, if the plaintiff has two permanent residences, one more and one less than twenty miles off, whether he be actually occupying the one or the other at the time of action brought, there is concurrent jurisdiction (a).

That point it is unnecessary for us to decide: for, in the present case, the plaintiff actually resided with his family, at the time of the commencement of the action, in the dwelling-house situate more than twenty miles from the defendant.

Before the passing of the 9 & 10 Vict. c. 95, the plaintiff would have been entitled to his costs by the Statute of Gloucester, 6 Ed. 1, c. 1; and, since the passing of the act of Victoria, he is equally entitled to them, if he dwelt more than twenty miles from the defendant at the time of the action brought. He is only disentitled to costs where it cannot be truly affirmed that he dwelt more than twenty miles from the defendant at the time of action brought. The court of Queen's Bench, in *Bailey v. Bryant*, decided that, as the plaintiff had a dwelling-house within twenty miles from the defendant, where he resided three months in the year,—although he clearly dwelt [747] at Nant-y-glo, in Monmouthshire, during the greater part of the year, and particularly at the commencement of the action,—he did not dwell more than twenty miles from the defendant, within the meaning of the act. In the present case, although the plaintiff had a dwelling-house in Grosvenor Place, he had equally a dwelling-house in Warwickshire, and actually resided there with his family when the action was brought.

It was admitted in the argument that the plaintiff's residence in Warwickshire and

(a) See *Walcot v. Bolfield*, Kay, 534.

in London at different periods of the year, was of the same character, and of about the same duration. It is plain, therefore, that he "dwelt" at both places,—with this difference only, that his actual residence at the time of action brought was in Warwickshire. And we think, that, in such a case, it is impossible to avoid coming to the conclusion that the plaintiff "dwelt" in Warwickshire, and so more than twenty miles from the defendant, at the time of the action brought. He is, therefore, within the affirmative words of the statute, and was warranted in bringing his action in this court, and is therefore entitled to his costs.

The rule must be discharged: but we think it should be discharged without costs.

Rule discharged, without costs.

[748] JORDAN v. ADAMS. 1859.

[Affirmed in Exchequer Chamber, 9 C. B. N. S. 483.]

Devise to W. J., for life; and after his decease, to the "heirs male of his body," for their natural lives, in succession, according to their respective seniorities, "or in such parts and proportions, manner and form, and amongst them, as the said W. J., their father, shall by deed or will, duly executed and attested, direct, limit, or appoint:"—Held, that, by "heirs male of his body" (as explained by the context), testator meant "sons," and consequently that W. J. took only an estate for life.

This is an action brought by the plaintiff against the defendant, to recover damages for the non-completion of a contract entered into between the plaintiff and Thomas Adams, deceased, for the purchase by the said Thomas Adams, deceased, from the plaintiff, of a certain farm, lands, and hereditaments, situate in Armscott, in the county of Worcester; and by order of Crowder, J., dated the 6th of May, 1859,—according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without pleadings:—

On or about the 18th of May, 1825, John Jordan, of Armscott, in the county of Worcester, by his last will and testament in writing, bearing date the day and year last aforesaid, and duly executed and attested as by law required for passing real and personal property, gave and devised as follows:—

"1. I give and devise unto my three friends Jeffery Bevington Lowe, of Eatingdon, in the county of Warwick, Thomas Stanley Hill, of Compton Scorpion, in the same county, and Thomas Davis, of Little Compton, in the county of Gloucester, all and singular my freehold and leasehold estates, lands, tenements, hereditaments, and premises, situate at Armscott aforesaid, Bourton, in the county of Oxford, Barton-on-the-Heath, in the said county of Warwick, and Little Compton aforesaid, or elsewhere, with their several rights, members, and appurtenances, to hold all my said several estates, with their appurtenances, unto the said Jeffery Bevington Lowe, Thomas Stanley Hill, and Thomas Davis, and the survivors and survivor of them, and the heirs, appointees, or assigns of such survivor, for [749] ever, to the uses, nevertheless, and upon the various trusts, ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same: and I earnestly entreat my said three friends to accept of such trusteeship, and to put and carry the uses and trusts of this my will into execution and effect:

"2. Therefore, as to that part of my estate at Armscott aforesaid which I purchased of Mr. Pearshouse's trustees, I devise and bequeath the use and occupation of the rents and profits thereof to and for the use of the eldest son of Thomas Partington, of Fodenham, in the county of Gloucester, yeoman, and his assigns, during his life, subject nevertheless to, and I do hereby charge the same with, the payment of an annuity of 20l. a year, by even and equal half-yearly payments, to his mother, for her life, to whom I devise and bequeath the same accordingly: And, from and immediately after the decease of such eldest son of the said Thomas Partington, then I devise and bequeath the use and occupation of the same estate, or the rents and profits thereof, to the first and every other son and sons of his body severally and successively, according to their respective seniorities, in tail-male: And, in default of such issue male of the eldest son of the said Thomas Partington as aforesaid, then I devise and bequeath the occupation of the rents and profits of the same estate to the daughters or daughter of such eldest son of the said Thomas Partington, to take as tenants in

common if more than one : and, for default of such issue, I direct my said trustees to remain and continue seised and possessed of the said estate, in trust for my kinsman William, the son of my cousin Richard Jordan, his heirs and assigns, for ever :

" 3. And, as to a certain other estate at Armscott aforesaid, consisting of a messuage or tenement, home [750] stall, and premises, and three yard lands, with the commons and appurtenances thereunto belonging, formerly Taylor's, except a close called Tubb's Close, -which close I direct shall henceforth for ever be deemed and considered as part and parcel of a certain other estate at Armscott aforesaid heretofore called Mansells, and now, together with other lands, hereditaments, and premises in the tenure or occupation of William Badger, -I do direct and appoint my said trustees to stand and remain seised and possessed thereof to the use of, and to permit and suffer my kinsman George Taylor the younger, the son of George Taylor, late of Stratford-upon-Avon, yeoman, and his assigns, to occupy and enjoy, or to receive the rents and profits thereof, during his natural life, subject nevertheless to, and charged and chargeable with, the payment of a clear annuity of 30*l.* payable thereout by even and equal half-yearly payments, to his said father George Taylor the elder, during his natural life, to whom I devise and bequeath the same accordingly : And, from and after the decease of the said George Taylor the son, then upon trust to permit and suffer the eldest son of the said George Taylor the son to hold and enjoy the same estate, or receive and take the rents and profits thereof, for his natural life, with remainder to his heirs for ever, subject to the payment of the said annuity to the said George Taylor the elder as aforesaid :

" 4. And, as to a certain other estate at Armscott aforesaid, consisting of two yard lands and a half, late Lord Wentworth's, now in the occupation of Daniel Bangham, I give, devise, and bequeath the use and occupation or the rents and profits thereof to and for the use of Thomas Jordan, the eldest son of my cousin Robert Jordan, of Little Compton aforesaid, and his assigns, during his life : and, from and immediately [751] after his decease, then I give, devise, and bequeath the use and occupation thereof, or the rents and profits of the same estate, to the first and every other son and sons of his body severally and successively, according to their respective seniorities, in tail-male : and, in default of such issue male, then I give and devise the occupation or the rents and profits of the same estate to the daughter or daughters of the said Thomas Jordan, to take as tenants in common : and, in default of such issue, I give and devise the same estate to the eldest brother of the said Thomas Jordan, and his heirs for ever :

" 5. And, as to all other my freehold and leasehold estates situate at Armscott aforesaid, consisting of various messuages, buildings, homestalls, cottages, and seven yard lands and a half, with right of common thereunto respectively belonging, the said close called Tubb's Close, and all other my freehold and leasehold estates, closes, lands, hereditaments, and premises at Armscott aforesaid, with the commons and other rights, members, and appurtenances thereunto respectively belonging, I direct and appoint my said trustees, their heirs, executors, administrators, and assigns, to stand and remain seised and possessed of, and to permit and suffer my said kinsman the said William Jordan, son of my said cousin Richard, to occupy and enjoy or to receive and take the rents, issues, and profits thereof for his own use and benefit, during his natural life : And I charge the same several estates with the payment of an annuity of 50*l.* a year to his father the said Richard Jordan, which annuity I direct shall be paid him half-yearly during his natural life, and I devise and bequeath the same to him accordingly : And, after the decease of the said William Jordan, then to permit and suffer the heirs male of his body to occupy and enjoy the same, or to receive and take the rents, issues, [752] and profits thereof for their several natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan their father shall by deed or will, duly executed and attested as by law is required for devising and disposing of real estates, direct, limit, or appoint : And, in default of such issue male of the said William Jordan, then upon trust to and for the use of his brother Richard Jordan, a younger son of my said cousin Richard, and his heirs male, in such parts and proportions, manner and form, as he the said Richard Jordan the younger shall by deed or will duly executed as aforesaid direct or appoint, charged and chargeable nevertheless, and I do accordingly hereby expressly charge the same several estates, lands, tenements, and premises, in case the said Richard Jordan the

younger or his heirs should so as aforesaid become seised and possessed thereof, with the payment of the sum of 2000*l.* unto and equally amongst and between the daughters or daughter of the said William Jordan (if any), to whom I give and bequeath the same accordingly, to be paid to them respectively as they shall attain the age of twenty-one years, with interest from the time of the above devise becoming vested in the said Richard Jordan the younger and his heirs as aforesaid : And, from and after the performance of the aforesaid trusts, and subject thereto, then my said trustees shall stand and remain seised and possessed of the said last-mentioned estate to and for the use and behoof of the right heirs of my cousin Robert Jordan, of Little Compton aforesaid, for ever :

"6. And, as to my said estate at Bourton aforesaid, in the said county of Oxford, I direct my said cousin Richard Jordan may occupy and enjoy the same, or receive and take the rents and profits thereof, until his second son, the said Richard Jordan the younger, [753] shall attain his age of twenty-five years : and then I give and devise the same estate unto the said Richard Jordan the younger for and during the term of his natural life, charged nevertheless and chargeable with the payment of an annuity of 50*l.* a year to his said father for his natural life, payable half-yearly : And, after the decease of the said Richard Jordan the younger, I give and devise the rents and profits of the same estate to the heirs male of his body lawfully begotten severally and respectively, according to their respective seniorities ; and, for default of such issue male, then I devise the same to his brother William and his heirs male lawfully begotten, remainder to his brother Thomas, in tail, remainder to his brother Robert, in tail-male : And, in default of all such issue male as aforesaid, I devise my said last-mentioned estate to my cousin Robert Jordan and the heirs male of his body lawfully begotten, for ever :

"7. And, as to my leasehold estate at Little Compton aforesaid, and I direct my said trustees to remain and continue seised and possessed thereof, and to pay the rents and profits thereof to or for the use of, or to permit and suffer my said cousin Robert Jordan, son of my uncle Jonathan, to hold and enjoy, or to receive and take the rents and profits thereof, to his own use and benefit during the term of his natural life : And, from and immediately after the decease of the said Robert Jordan, then I direct my said trustees to pay the rents and profits thereof to the issue male lawfully begotten, severally and respectively, according to their respective seniorities : And, for default of such issue male as aforesaid, I devise the same to the use of the eldest and all other the daughters and daughter of my said uncle Jonathan, according to their respective seniorities ; and, in default of such issue of my said uncle Jonathan, then I devise the same to the eldest daughter of [754] my said cousin Robert, for all my estate and interest therein."

After giving directions for the renewal of the said leasehold estate at Little Compton, the testator by his said will further gave and devised as follows,—

"8. And, as to my estate at Barton-on-the-Heath aforesaid, called Wheelbarrow Castle, I direct my said trustees to remain seised and possessed thereof, and to permit and suffer my cousin Thomas Jordan, son of my late uncle Jonathan Jordan, deceased, to hold and enjoy the same, or to receive and take the rents and profits thereof, during his natural life ; and, after his decease, I devise the same estate, and every part thereof, with the appurtenances, unto the heirs male of his body lawfully begotten, according to their respective seniorities ; and, for want and in default of such issue male, then I devise the same to all and every his daughters and daughter according to their respective seniorities ; remainder to my said cousin Robert Jordan and his heirs, for ever."

Several legacies and bequests were then given by the said testator : and his said will then proceeded as follows,—

"9. And, with respect to all the aforesaid legacies and bequests by this my will so given and bequeathed as aforesaid, and to be paid as aforesaid out of my personal estate, and which shall not be so paid, or become due and payable within one year after my decease, shall be raised and within such year be laid out and invested on some good and effectual securities or security to the satisfaction and approbation of my said trustees, and be respectively appropriated and declared to be for the discharge and payment of such respective legacies, annuities, and bequests so as aforesaid respectively given and bequeathed, —for which purpose I hereby expressly order and direct my said trustees [755] forthwith, or so soon as conveniently may be after my decease, to cause a particular inventory, account, and valuation of all my said personal estate

and effects to be made out, stated, and ascertained: and, should it so happen that the whole of my said residuary personal estate so as aforesaid made subject and liable to the payment of my said debts, legacies, and funeral expences, prove insufficient and inadequate for such several purposes, then I hereby charge all such deficiencies upon and to be paid out of my said estate at Armscott aforesaid hereinbefore given and devised to and for the use of my said kinsman William Jordan:

"10. Provided also, and I do hereby further order, declare, and appoint that my said trustees shall have power by all necessary deeds and conveyances by their joint natural lives, and the survivors and survivor of them, and the heirs of such survivor, from time to time to nominate, elect, and appoint, and I earnestly entreat and recommend, as often as any one of them, or their successors, appointees, or assigns, may happen to die, that the survivors or survivor do forthwith proceed to such election and appointment of some respectable, discreet, and intelligent persons or person as their or his successors or successor: and then I direct that they such persons or person so appointed, shall have the like power again to nominate and appoint others to be trustees for the purpose of continuing the uses and trusts, and carrying into effect this my will, and so from time to time as may be requisite and necessary: and I declare that the said estates so as aforesaid hereby vested in the said trustees, and by such appointments from time to time to be and become vested in such new trustees as aforesaid to be elected, are so now vested in them, and hereafter to become vested in manner aforesaid in their successors, heirs, executors, administrators, and assigns, for the various and [756] particular purposes, and to support the several and respective contingent and other uses and trusts hereinbefore expressed and declared, and to prevent the same from being diverted, changed, varied, defeated, prevented, extinguished, or in anyway destroyed: and, for that purpose, and in order effectually to carry the meaning and intention of this my will into complete operation and effect, my said trustees and their successors, heirs, executors, administrators, and assigns, shall and may from time to time make entries and bring actions as each particular case may require: and, in order that my said several messuages, buildings, estates, farms, lands, hereditaments, and premises may not be in any way deteriorated or injured by any of the devisees thereof and parties for the time being interested therein respectively, I hereby authorize, empower, and request my said trustees, from time to time, when they may deem it requisite and necessary, to enter into and upon the said hereditaments and premises, and every or any part or parts thereof, to view and inspect the state and condition of the repair thereof, and to order and direct all necessary reparations to be made and effected by and at the costs and charges of the respective tenants or parties interested therein for life or otherwise: and, in default of such requisite repairs being forthwith made and effected according to the direction of my said trustees, then I direct my said trustees to cause the same to be made, and to levy the costs and expenses thereof by distress and sale of the stock and effects of the defaulter which shall be found in and upon the said estate and premises, in like manner as for rent reserved in arrear, or recover the same by action at law.

"11. And moreover my further will and meaning is, that, upon the failure and extinction of such issue male in either of any of the respective families and [757] devisees above mentioned, and on all occasions when failure of such issue male shall happen, and as ultimate disposition of the estate and interest in remainder is devised, then and in all such cases I direct my said trustees, their successors, heirs, executors, administrators, and assigns, shall stand, remain, and continue seised and possessed of all such respective estates in remainder or reversion, and, where no such remainder or reversion is hereinbefore devised and disposed of, to and for the use of the eldest daughter of my said uncle Jonathan for her life: and, after her decease, then to the eldest son and heir male of the body of such eldest daughter and his heir male lawfully begotten: and, in default of such issue of the said eldest daughter of my said uncle Jonathan, to his other and younger daughters severally and successively, according to their respective seniorities, and their respective issue male, the eldest being always preferred, and to their heirs for ever."

The said testator afterwards made and published seven several codicils to his said will, all duly executed and attested as by law required for passing real and personal estate: but the only one of them material to the questions intended to be raised for the opinion of the court is the first, which was made on or about the day it bears date, viz. the 10th of June, 1826, and was as follows:—

"This is a codicil to the will of me the above named testator, John Jordan: Whereas, by my said will I have devised to my trustees therein named three yard lands, and a homestall thereunto belonging, and in the occupation of William Badger, for the use of George Taylor, and as therein is mentioned: Now, I do hereby revoke the whole of the said devise, and in lieu and instead thereof I devise to them my said trustees, for the use of the said George Taylor, and as in my [758] said will is mentioned, and charged with the like annuity to his father, all that messuage or tenement, homestall, and premises, wherein I now live, and the two yard lands and a half thereunto belonging, formerly Taylor's, with all the appurtenances, except the four cottages and gardens, all which premises were by my said will given and devised to my kinsman William Jordan: and I devise to him my said kinsman William Jordan the said messuage, three yard lands and cottages, and also a close that late belonged to Lord Wentworth, adjoining Bacon's estate, and devised by my will to Thomas Jordan, which devise, so far as it relates to the same close, I hereby all revoke; to hold to him my said kinsman William Jordan and his heirs, as in my said will is mentioned."

The testator died on or about the 1st of December, 1830, without having revoked (so far as the questions for the opinion of the court are concerned) his said will and first codicil.

The plaintiff is the William Jordan mentioned in the said will and codicil; and the defendant is the executor of the said Thomas Adams, deceased.

The testator at the time of making his said will, and from thence until and at the time of his death, remained and was seised in his demesne as of fee of and in the farm, lands, and hereditaments in respect of which this action is brought; and such farm, lands, and hereditaments are part of the testator's estate at Armscott, and were comprised in the devise set out in the fifth paragraph of the extracts of the said will set out in this case, but are not part of the lands first devised by his said will to George Taylor the younger, and afterwards by his said first codicil to the plaintiff, as in the said will and codicil respectively mentioned.

The said will and the several codicils thereto are to be referred to if necessary, and to be taken as part of this case.

[759] The questions for the opinion of the court are,—first, whether the plaintiff took under the said will and codicil a legal estate-tail in the property in respect of which the action is brought,—secondly, whether he took under such will and codicil an equitable estate-tail in the said property.

If the court shall be of opinion that the first or second question ought to be answered in the affirmative, then judgment shall be entered for the plaintiff for 1s. and costs of suit. If the court shall be of opinion that both the said questions ought to be answered in the negative, then judgment of nolle prosequi, with costs of defence, shall be entered for the defendant.

The case was twice argued. The first argument took place in Michaelmas Term, 1859, before Erle, C. J., Crowder, J., and Byles, J.

Atherton, Q. C. (with whom was Kemplay), for the plaintiff, submitted, that, under the terms of the devise contained in the fifth paragraph of the will, William Jordan took an estate-tail; and he referred to the following authorities:—*Shelley's case*, 2 Co. Rep. 88 b., 93 a., *Jesson v. Wright*, 2 Bligh, 1, *Featherston v. Featherston*, 3 Clark & F. 67, *Roddy v. Fitzgerald*, 6 House of Lords Cases, 823, *Toller v. Attwood*, 15 Q. B. 929, *Lower v. Davies*, 2 Ld. Raym. 1561, 2 Stra. 849, 1 Barnard. B. R. 238, and 2 Jarman on Wills, pp. 203, 303, 231.

Bovill, Q. C. (with whom was Charles), for the defendant, submitted that William Jordan, under the devise in question, took only an estate for life, citing the following authorities:—*Sibley v. Perry*, 7 Ves. 522, *Clay v. Pennington*, 7 Simons, 370, *Fruen v. Osborne*, [760] 11 Simons, 132, *Pope v. Pope*, 14 Beavan, 591, *Smith v. Horsfall*, 25 Beavan, 628, *Goodtitle d. Sweet v. Herring*, 1 East, 261, *North v. Martin*, 6 Simons, 266, *Gummoe v. Howes*, 23 Beavan, 184, *The King v. The Marquis of Stafford*, 7 East, 521, Sugden on Powers, 7th edit. 480, 483, Fearn's Contingent Remainders, 9th edit. 188, and 2 Jarman on Wills, 310. He also relied upon the eleventh clause of the will as throwing some light upon the construction of the fifth clause.

The court took time to consider; and Crowder, J., having died, and there being some difference of opinion amongst the other learned judges, a second argument was directed. The case was accordingly argued again in Hilary Term, 1860, before Erle, C. J., Williams, J., Willes, J., and Keating, J.

Kemplay (with whom was Atherton, S. G.), for the plaintiff, in addition to the authorities referred to upon the former argument, cited the following: —*Jones v. Morgan*, 1 Bro. C. C. 206, *Paole v. Paole*, 3 Bos. & P. 320, *Woodhouse v. Herrick*, 1 Kay & J. 352, 2 Jarman on Wills, 267, 268, 312, 313, 323, 371, and Hayes's Inquiry, 227, n.

Bovill, Q. C. (with whom were Archibald Smith and Charles), for the defendant, besides, the authorities he before referred to, cited *White v. Collins*, 1 Com. R. 289, *Perrin v. Blake*, 4 Burr. 2579, 1 Sir W. Bl. 672, and Hargreave's Tracts, 505.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the majority of the court:—

In this case the plaintiff contends that the devise to him for life, with remainder to the heirs male of his [761] body, has created an estate in tail-male in him; and it is clear that it does create that estate “unless a judicial mind sees with reasonable certainty from other parts of the will the testator's intention” (to use the words of Lord Wensleydale in *Roddy v. Fitzgerald*, 6 House of Lords Cases, 823, 877, that those words should not operate as words of limitation of the inheritance, but should be words of purchase creating an estate in remainder in the persons coming within the designation of heirs male of the body, and also within the further description contained in the will. We proceed, therefore, to examine the other parts of the will for the purpose of ascertaining that intention; and for this purpose all the parts of the will should be considered together, and effect given to every part, unless there should be absolute inconsistency. Now, every part of the devise here has effect according to the ordinary meaning of the words, if heirs male of the body of William are construed to be words of purchase, and to mean sons. First, the devise is to William for life: and, although this is of no avail where the rule in *Shelley's case*, 1 Co. Rep. 93 a., applies, still, until it is ascertained that the testator intended by the word “heirs” to pass the inheritance, that rule has no application. Here, that intention is the point in dispute; and, in weighing both sides, the express intention to devise to William for life operates against inferring an intention to give him an estate-tail.

Secondly, the devise is to the heirs male of the body for their natural lives. Now, the question being whether the intention was to pass an estate of inheritance by the use of the word “heirs,” the testator who has shewn by the will that he knew the difference between estates for life and estates of inheritance, has excluded the notion of passing the inheritance, by directing that the persons designated as heirs male of the body should take life-estates only.

[762] In *Archer's case*, 1 Co. Rep. 66 b., a devise to A. for life, remainder to the next heir male of A. and the heirs male of the body of such heir male, was construed to be an estate for life in A., and an estate-tail by purchase in the person who might be the next heir male of his body. The superadded words of limitation “to the heirs male of the next heir male” were held to negative the intention to pass the inheritance to the heirs of A. by descent, which would otherwise be presumed from the word “heir.” In the present case, the words superadded are more inconsistent with intending to pass the inheritance. In *White v. Collins*, 1 Com. 289, the gift was to A. for life, remainder to the heir male of his body for life, remainder over. There is a most elaborate argument by Comyns, to shew that A. took an estate-tail, and that the limitation for life to the heir male of his body should be rejected: but the court decided to the contrary, and construed the gift to be a gift of an estate for life to the son of A. This case is in point for the present defendant.

Thirdly, the devise is to them for their lives, either in succession according to their respective seniorities, or in such parts and proportions, manner, and form, and amongst them, as William Jordan, their father, shall appoint. If the first alternative is taken, then, upon the plaintiff's supposition that an estate-tail was intended, the words “in succession according to seniority” are wholly inoperative; but, on the defendant's supposition, that estates for life were intended, every word has effect. If the other alternative is taken, viz. that the estate should pass to the appointees, as their father should appoint, upon the supposition of an estate-tail in the father, these words must be rejected; upon the supposition of life-estates by purchase, every word has full effect. Furthermore, not only is an estate by appointment inconsistent with an estate-tail by descent, [763] but also this alternative brings the case within the rule, that heirs male of the body shall be construed to be sons, where the testator has so interpreted them in his will: for, if the power of appointment is exercised, the appointor must stand in the relation of father to the appointees: it follows that the

testator meant to designate sons as the heirs male of the body who might be appointees.

The devise proceeds to dispose of the remainder by the words "In default of such issue male of William Jordan, then to Richard and his male heirs." If this provision had been in default of issue male of William, the plaintiff would have had a strong support: but the words are, in default of such issue male; and this default must be construed by reference to the issue male before described; and, as above stated, the testator has explained issue male of William to mean sons.

The devise to Richard was contended by the plaintiff to be a contingent remainder after an estate-tail, and not a vested remainder after estates for life, because it provides in case the said Richard or his heirs male should become seised and possessed thereof, that the estate should be charged with 2000*l.* legacy to the daughters of William. But the words of contingency have a clear application without assuming an estate-tail in William; for, if the devise is to William for life, remainder to his sons for life in succession, remainder to Richard in tail-male, then it is a contingency whether Richard will have any son, and whether he or his son will ever have the estate in their actual possession; and it is only in that event that the 2000*l.* are given to the daughters of William. This is clear, because the testator provides for the failure of the heirs male of Richard, and in that event gives the fee to the heirs of Robert, without the charge of this sum on their estate.

[764] Other parts of the will confirm this construction. There are seven distinct devises. In making them, the testator shews that he well knew how to create either an estate for years, or for life, or in tail, or in fee; and, though he may not have known the rule in *Shelley's case*, he shews that he knew the distinction between these estates, and has given them by appropriate legal language; and he has invariably used the word heirs to pass the inheritance, except in the devise in question, where the heirs are directed to take for life.

The relation of the testator to the devisees respectively which appears in the will, is a further confirmation of this construction. The objects of the testator's bounty were all collateral relations, and therefore the usual argument against an intention to disinherit his own lineal descendants has no relevancy.

It should also be observed that he has, among the other devises, more than once given an estate to the father for life, remainder to his sons in tail, remainder to his daughters as tenants in common, remainder over. But, in the devise in question, he purposely omitted the daughters of William, and preferred Richard to them; giving them instead a contingent legacy charged on the estate. As he preferred Richard to the daughters of William in this instance, he may have had the same reason for preferring Richard's sons to the grandsons of William.

Though we are well aware of the importance of adhering to the doctrine laid down in *Jesson v. Wright*, 2 Bligh, 1, where it applies, we think, for the reasons above assigned, it does not apply here; and that the authorities cited by Mr. Bovill require us to hold that the meaning of the words "heirs male of the body" in the devise in question, is explained by the testator to be "sons."

Our judgment, therefore, is for the defendant, to the effect agreed on in the special case.

[765] WILLIAMS, J. I concur with the judgment of the rest of the court in this case; but I am induced so to do, solely on the ground of the use of the words "their father" in the power of appointment. I agree, though with no little doubt remaining on my mind, that those words may be taken to demonstrate, that, by "heirs male of the body," the testator meant "sons." But for those words I should have thought an estate in tail-male passed by such a gift, notwithstanding the inconsistent limitations and the other obstacles pointed out in the judgment, just delivered by my Lord, both because of the known legal import of the words employed, and also because of the apparent intention that the estate should go over to Richard Jordan and his heirs male upon failure of the issue male of William Jordan, and not until such failure. The language, perhaps, of Vice Chancellor Shadwell's judgment in *North v. Martin*, 6 Sim. 266, 270, justifies us in thus controlling the words "heirs male of the body," by the interpretative words "their father." But the decision in itself cannot properly be said to govern the present, because in that case words of inheritance were super-added to the words "heirs of the body," which are not to be found in this. In truth,

that gives rise to the difficulty which has mainly caused the hesitation I feel in concurring with the rest of the court.

Judgment for the defendant (an appeal is pending).

[766] LEVI v. LEWIS. June 15th, 1859.

[Affirmed in Exchequer Chamber, 9 C. B. N. S. 872.]

A. let premises to B. for a term which expired at Lady Day, 1858. B. had underlet to C. for the whole of his term. The term having expired, C. applied to A. to accept him as his tenant for a further term, which A. refused to do, saying that B. was his tenant. C. continued in possession till after Michaelmas 1858, when B. sued him for the half-year's rent, and afterwards paid A. (who received the same) the rent which would have become due from him (B.) to A., assuming his tenancy to be still subsisting:—Held, that the action was maintainable.

This was an action for use and occupation of premises in Fetter Lane. The plaintiff claimed a half-year's rent from the 25th of March to the 29th of September, 1858. The defendant pleaded never indebted, whereupon issue was joined.

The facts which appeared in evidence at the trial before Willes, J., at the sittings in Middlesex after last Michaelmas Term, were as follows:—One John Knight, the superior landlord of the premises in question, had let them to the plaintiff, Levi, for a term which expired at Lady-Day, 1858. Levi had underlet the premises to the defendant, Lewis, for the whole of his term. The term for which the premises had been so let by Knight to Levi, and by Levi to Lewis, having expired, Lewis, the undertenant, applied to Knight to accept him as his tenant for a further term: but Knight declined to do so, referring to Levi as being still his tenant. Lewis continued to occupy the premises; and, a half-year's rent becoming due at Michaelmas, 1858, Levi brought this action for use and occupation. After the commencement of the action Levi paid to Knight, and the latter accepted, the half year's rent which would have become due from Levi to Knight assuming that there was a tenancy subsisting between them.

On the part of the defendant it was submitted that there was no evidence to go to the jury of a use and occupation of the premises by Lewis as tenant to Levi; and the learned judge, being of this opinion, directed a nonsuit.

H. James, in Easter Term last, obtained a rule nisi for a new trial, on the ground of misdirection.

[767] Huddleston, Q. C., and G. Francis, on a subsequent day, shewed cause. There was no evidence to support the plaintiff's claim. To entitle him to sue for use and occupation, he was bound to shew the subsistence of a contract of tenancy, express or implied, between himself and the defendant. Express contract there was none; for, his term had expired: and no contract can be implied from the circumstance of the defendant continuing to occupy the premises. [Cockburn, C. J. In what character did he so continue to occupy?] As tenant on sufferance. [Cockburn, C. J. To whom?] To Knight. [Cockburn, C. J. The evidence is that Knight repudiated him, and treated Levi as his continuing tenant, and afterwards received the half-year's rent from Levi.] In Woodfall's Landlord and Tenant, 7th edit. p. 193, it is said: "A tenant on sufferance is he who enters by lawful demise or title, and afterwards wrongfully continues in possession; as, if tenant *pur autre vie* continues in possession after the death of the *cestui que vie*: so, any one who continues in possession without agreement, after a particular estate is ended: so, if a tenant for years surrender, and then hold over, he will be either tenant on sufferance or a disseisor, at the election of the landlord. An under-tenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is quasi a tenant at sufferance." And the authorities cited support these positions. In *Burne v. Richardson*, 4 Taunt. 720, it was held that a termor who lets to an under-tenant cannot, after his term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays him under threat of distress, although the under-tenant still retains the possession: and, according to the opinion of Sir James Mansfield, the under-tenant so retaining the possession after the expiration [768] of the term, and not the termor, would be the person liable for mesne profits. [Willes, J. That dictum of Sir James Mansfield has since

been over-ruled: see *Doe v. Harlow*, 12 Ad. & E. 40. Cockburn, C. J. In *Burne v. Richardson*, the party claiming was the superior landlord.] *Ibbs v. Richardson*, 9 Ad. & E. 849, 1 P. & D. 618, will probably be relied on by the other side; but the ground of the decision there was, that there was a continuing tenancy.

H. James, in support of the rule. The only question is, whether there was any evidence at all that Levi, with Knight's concurrence, remained tenant of these premises. Actual personal possession was not necessary. *Ibbs v. Richardson* is precisely in point. There, lessees for a term ending on the 11th of October, underlet to C. from year to year, subject to the determination of their own interest. Upon the expiration of the term C. refused to quit, and held over against the will of the lessees. On the 16th of October the lessees distrained on C. for rent due before the 11th. On the 14th of December, C. quitted; and the lessees then tendered possession to the original landlord, who refused to accept it. It was held that the lessee was liable, in an action for use and occupation, for the period between the 11th of October and the 14th of December. Lord Denman there says: "If the defendants, after the expiration of their lease, had let the premises anew to C., the case would have been a very clear one. Here they distrained, as upon a continuance of their own interest, and did not offer to deliver up the key or the possession until the 14th of December. When C. held over, there was a sufficient reversion, as between them and C., to enable them to distrain if they pleased." And Littledale, J., said: "No doubt, the ordinary course under these circumstances [769] would be to bring ejectment; but the plaintiff may waive the tort, and sue for use and occupation; or he might have maintained an action for not delivering up possession. After a recovery in ejectment, he might have recovered mesne profits until the day when the possession was tendered to him: so, here, he may recover rent for that period. C.'s possession, being obtained by and through the defendants, is to be taken as their possession." The acceptance by Knight of the half-year's rent from Levi, though after the commencement of the action, was a clear recognition by him of the continuance of Levi's tenancy: and the defendant could not set up the *jus tertii* without shewing an actual exercise of that right: *Delaney v. Fox*, ante, vol. ii., p. 768.

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WILLES, J., now delivered the judgment of the court (a).

The facts of this case seem to be these:—Knight, the superior landlord, had let the subject of occupation to Levi, the plaintiff. Levi had underlet to Lewis, the defendant, for the whole of his term, leaving no reversion in himself. Levi's interest and Lewis's having thus expired together, Lewis applies to Knight to be allowed to become tenant to him, Knight: but Knight refuses, and refers to Levi as still tenant. Lewis continues to occupy. Levi thereupon sues Lewis in this action for use and occupation after the expiration of his term. Levi, after action brought, pays rent to Knight for the time during which Lewis had occupied after the expiration of the term, which rent Knight accepts as due to him from Levi.

[770] The question is, whether there was any evidence to go to the jury of an implied contract by Lewis to pay Levi for the occupation of the premises.

We think there was. Conceding that the relative position of the parties would not alone have enabled Levi to bring the action, yet the conduct of the parties was such that we think there was evidence from which a jury might infer an understanding or implied contract between Levi and Lewis, that Lewis should pay Levi for the occupation of the premises. Knight insists on holding Levi still liable; and Lewis knows it. Indeed, Levi pays Knight rent. It is true that was after action brought: but it may, nevertheless, in the opinion of the jury, reflect light on the original understanding of the parties, and help to shew that the tenancy between Knight and Levi still continued, and was treated by all the parties as continuing. The jury might have thought that Lewis must have known that he was not considered as tenant to Knight, but that he was considered as tenant to Levi, and that Knight and Levi severally shew by their conduct that they each took the same view of the case.

We, however, give no opinion as to the conclusion to which the jury ought to

(a) The case was argued before Cockburn, C. J. Crowder, J., Willes, J., and Byles, J., but the Lord Chief Justice was translated before the judgment was prepared.

come, but only decide that there was evidence to go to the jury. The rule, therefore, must be made absolute.

The above is to be considered as the judgment of my Brothers Crowder and Byles. I retain the opinion I expressed at the trial, but do not think it necessary, this being a motion against my ruling, to deliver a formal judgment.

Rule discharged.

[771] SMITH v. SCOTT. June 15th, 1859.

[S. C. 5 Jur. N. S. 1356.]

The declaration stated, that, by deed,—reciting that the plaintiff had obtained a grant of letters-patent for his invention of certain improvements in manufacturing and getting up wire rope, —it was witnessed that the plaintiff did thereby grant to the defendant full and exclusive licence and authority to use, exercise, and put in practice the said invention, and to sell the wire rope so to be made by him, within a given district in England: And the defendant covenanted, amongst other things, “that he would well and truly pay to the plaintiff 1l. per ton for all wire rope manufactured by him by the aid of the machinery of the plaintiff under and by virtue of the said patent process,” at the end of every three months; “that he would make and deliver to the plaintiff at the expiration of every three months a true statement in writing of the number of tons of rope so manufactured by him as aforesaid: and also should and would permit and suffer the plaintiff at all reasonable time to examine his books and accounts, for the purpose of ascertaining the accuracy of the statement thereby covenanted to be delivered:” And the plaintiff by the said deed also covenanted with the defendant, that, during the continuance of the grant thereby made, he would not, without the consent in writing of the defendant, use, exercise, or put in practice, or vend, or grant to any other person or persons licence or authority to use, exercise, or vend wire rope manufactured as aforesaid within the district thereinbefore mentioned, but “that within such limits the defendant should have and be entitled to the exclusive right, liberty, and privilege of manufacturing, vending, and disposing of wire rope made under and by virtue of the said patent process.”—The breaches assigned were,—first, non-payment of the stipulated 1l. per ton,—secondly, non-delivery of tri-monthly accounts,—thirdly, refusal to permit the plaintiff to examine the defendant’s books and accounts.—The defendant pleaded,—fifthly, that the plaintiff did not give, nor did the defendant take or have, such exclusive licence within such district, as by the said deed provided for,—eleventhly, that the said invention was worthless and of no public utility or advantage, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof: that the defendant never got or took any advantage or benefit under the said deed in regard to the said invention: and that, at the time of the making of the said deed, the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof:—Held, that the fifth plea was bad, as traversing the effect of the deed: and that the eleventh plea was also bad as a plea of failure of consideration, the licence being by deed, and not amounting to a plea of fraud.

This was an action for the breach of an agreement under seal for a licence for the exclusive use of a patent invention.

The declaration stated, that, by deed,—reciting, among other things, that the plaintiffs had obtained a grant of letters-patent, bearing date the 24th of May, 1849, for his invention of certain improvements in manufacturing and getting up wire rope, for the term of years therein mentioned,—it was witnessed that the plaintiff did thereby grant unto the defendant full and exclusive licence and authority to use, exercise, and put in practice, at any work or works belonging to him, the said invention, and to vend, sell, and dispose of the wire rope so thereby allowed to be made and provided at such works, to any person or persons, com-[772]-pany or companies, within the county of Lancaster (except only the town of Liverpool), and within the counties of York and Derby, and the northern division of the county of Stafford, for and during and unto the full end and term granted by the said letters-patent: And the plaintiff thereby covenanted with the defendant, that he would supply to and erect and put up at the works of the defendant, situate at Knutsford Vale, near

Manchester, all the machinery, fittings, and apparatus necessary for the completion of four machines for the purposes of the said manufacture, and would well and effectually set up and finish the same in complete working order, and in full accordance with the said letters-patent, on or before the 25th of December, 1854, and would make charges to the defendant for the same at such prime cost prices only as he should have paid or expended for the same, —such charges under no circumstances to exceed on the whole the principal sum of 400l. ; and would, when required by the defendant, deliver in writing a true and just account of such charges: And the defendant covenanted with the plaintiff that he would, on the execution of the said deed, pay into the hands of the plaintiff the sum of 133l. 6s. 8d. in part discharge of the costs of supplying and erecting the said four machines as aforesaid ; and that he would also pay into the hands of the plaintiff the further sum of 133l. 6s. 8d. on the complete erection to the satisfaction of the defendant of two of the said machines in manner aforesaid ; and that, on the erection and fitting up of the whole of the said four machines in complete working order and condition in manner aforesaid to the entire satisfaction of the defendant, the defendant would, on a delivery to him of a true and just statement of the entire cost and charges expended in erecting the same, pay into the hands of the plaintiff the residue of such costs and charges, pro-[773]-vided the same did not on the whole exceed the sum of 400l. ; but, if such costs and charges should exceed in amount that sum, then that he would pay the same costs to the amount of 400l. and no more, inclusive of the two several sums of 133l. 6s. 8d. covenanted to be paid as aforesaid : And the defendant did further covenant that he the defendant would well and truly pay to the plaintiff the sum of 1l. sterling per ton for every ton weight of wire rope manufactured and provided by the defendant by the aid of the said machinery under and by virtue of the said patent process, such payment to be made at the end of three calendar months, and the first payment thereof to be made at the expiration of the first three calendar months after the defendant should have commenced working the said machinery ; and, further, that he the defendant would make and deliver to the plaintiff, at the expiration of every three calendar months as aforesaid, a true statement in writing of the number of tons weight of rope so manufactured and produced by him as aforesaid, the first statement thereof to be delivered at the expiration of the first three calendar months after the defendant should have commenced working the said machinery ; and also should and would, within one calendar month after each of the said days or times up to which the said statement should be prepared, certify the same either on oath or by solemn declaration as the law should permit and direct, if and when required by the plaintiff so to do ; and also should and would permit and suffer the plaintiff at all reasonable times in the day time to examine the books and accounts of the defendant for the purpose of ascertaining the accuracy of the said statement thereby covenanted to be delivered as aforesaid : And the plaintiff by the said deed also covenanted with the defendant, that, during the continuance of the grant thereby [774] made, he the plaintiff would not, without the consent in writing of the defendant first obtained for that purpose, use, exercise, or put in practice, or vend or dispose of, or grant to any other person or persons, company or companies, licence or authority to use, exercise, and put in practice, or vend and dispose of, wire rope manufactured as aforesaid within the counties and parts of counties thereinbefore mentioned, but that within such limits the defendant should have and be entitled to the exclusive right, liberty, and privilege of manufacturing, vending, and disposing of wire rope made under and by virtue of the said patent process, in the manner and subject to the covenants and provisos in the said deed mentioned and contained : Averment, that the plaintiff did, in pursuance of the covenants contained in the said deed, supply, erect, and put up at the works of the defendant situate at Knutsford Vale aforesaid, the said four machines according to his said covenant, and that the defendant commenced working the said machinery, and that all things had been done and happened which ought to have been done and happened to entitle the plaintiff to the performance by the defendant of the said several covenants by him to be performed according to the said deed ; and that, although the defendant manufactured and produced, by aid of the said machinery, under and by virtue of the said process, divers, to wit, 10,000 tons weight of wire rope ; yet the defendant did not nor would pay to the plaintiff the said sum of 1l. per ton upon the said quantity of wire rope so manufactured, or any part thereof, and that, although divers, to wit, ten periods of three calendar months each had

expired since the defendant commenced working the said machinery, the defendant did not nor would at or after the expiration of any of the said periods make and deliver to the plaintiff a true statement in writing [775] of the number of tons weight of wire rope so manufactured and produced by him; and that, although the defendant had been oftentimes requested by the plaintiff at reasonable times in the day in that behalf to permit and suffer the plaintiff to examine the books and accounts of the defendant for the purpose of ascertaining the accuracy of the statement by the defendant covenanted to be made as aforesaid, yet the defendant did not nor would permit or suffer the plaintiff so to do.

Fifth plea,—that the plaintiff did not give, nor did the defendant take or have, such exclusive licence within such district, as by the said deed provided for.

Eleventh plea,—that the said invention was worthless and of no public utility or advantage whatever, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof: and that the defendant never got or took any advantage or benefit under the said deed in regard to the said invention, and at the time of the making of the said deed the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof.

The plaintiff demurred to the fifth plea, the ground of demurrer stated in the margin being, “that the matter therein pleaded does not go to the whole consideration for the covenants of the defendant for the breach of which the action is brought.”

He also demurred to the eleventh plea, on the ground “that there is no warranty in the deed of the utility or novelty of the invention, or of the validity of the patent which the defendant by the deed obtained a licence to use.” Joinder.

W. S. Cross, in support of the demurrer. The fifth plea shews a partial failure of consideration only. The declaration alleges a grant of an exclusive licence to [776] use the patent. The defendant pleads that the plaintiff did not give, nor did he the defendant take or have, such exclusive licence as by the deed provided for. He admits, therefore, that he took some benefit from the licence. This plea seems to be founded upon *Chunter v. Leese*, 4 Exch. 295. There, by agreement, not under seal, between the plaintiff and A., B., and C., of the one part, and the defendant of the other part,—reciting that the plaintiff had obtained a patent for an improvement in furnaces, and was solely interested in another patent invention; that the plaintiff and A. had obtained a patent for another invention, the plaintiff and B. for another, and the plaintiff and C. for another,—it was agreed between the said parties, that, for the considerations therein mentioned, it should be lawful for the defendants exclusively to use, manufacture, and sell any or all of the said patent inventions, within certain limits, during the continuance of the several patents, on certain terms, viz. that an office and warehouse should be prepared for the sale of articles connected with the inventions, and that books of account of the sale of each of the inventions should be kept there by the defendants, and be open at all times to the inspection of the parties thereto of the first part; that the defendants should pay to the plaintiff 400l. a year as a consideration for the licence for the sale, &c. of all the aforesaid patents, and that such sum should be charged as a payment by the defendants in their books of account; that they should pay A. a certain rateable sum on all machines used, &c. on his patent principle; that they should also pay the plaintiff a moiety of the net profit to arise from all the said inventions (except those in which B. & C. were interested),—to the plaintiff and B. two thirds of the net profit to arise from theirs,—and to the plaintiff and C. two thirds of the [777] net profit to arise from theirs: and it was agreed that either of the parties might determine the agreement at the end of five, seven, or ten years. In an action on this agreement, by the plaintiff above, to recover a half-yearly payment of the 400l., the defendants set out the plaintiff's patent for the improvement in furnaces, and pleaded that it was not at the time of the grant a new invention as to the public use thereof in England, whereby the grant was void, which the plaintiff at the time of the making of the agreement well knew. It was held, on demurrer, that the plea was a bar to the action. But in that case the contract was altogether executory. Lord Abinger, in giving judgment, said: “In the present case it does not appear to the court that the defendants ever accepted or enjoyed any part of the patents which were the consideration of their agreeing to pay 400l. a year to the plaintiff, nor that the sum they so agreed to pay can in any manner be apportioned amongst the different patents which they might have had, the possession of all and each being an entire consideration.” [Willes, J. Is not this plea bad

on another ground, viz. that the defendant is estopped from denying that which is witnessed by the deed? The plea is non est factum or nothing. It is like a plea of non demiset, when the declaration shews a demise by indenture.] The estoppel appears upon the record. [Williams, J. The fifth plea only seems to deny that there was such a deed. Proceed to the eleventh plea.] The eleventh plea contains an allegation which is not found in the second plea in *Hall v. Conder*, ante, vol. ii. p. 22, viz. that the plaintiffs knew the matters aforesaid, and the defendant did not: but, in the absence of fraud, that clearly makes no difference, — *Smith v. Neale*, ante, vol. ii. p. 67; *Lawes v. Purser*, 6 Ad. & E. 930. [Williams, J. The plea does not aver that the plaintiff knew that the defendant [778] had no notice or knowledge that the invention was worthless and not new.] And it contains no averment of fraud or misrepresentation. The plaintiff contracted to grant a licence to use the invention such as it was. He was not bound to reveal all he knew.

Milward, contra. *Chanter v. Leese* is a distinct authority for the validity of the eleventh plea, which alleges that the plaintiff, at the time of the grant, knew that the thing the exclusive licence to use which he professed to grant to the defendant was worthless and not the subject of a patent. In *Hall v. Conder*, *Smith v. Neale*, and *Lawes v. Purser*, the plaintiff bona fide believed he had a valid patent. In giving the judgment of the Exchequer Chamber in *Chanter v. Leese*, 5 M. & W. 698, 700, Tindal, C. J., says: "The defendant is not in a situation with respect to the plaintiff similar to that of a tenant towards his landlord, and is in no way estopped from shewing any failure of the consideration for his promise to pay the annuity to the plaintiff, which may be sufficient to bar the plaintiff of his action. It is admitted by the demurrer that a partial failure of the consideration has taken place, viz. that one of the six patents is void. The learned counsel for the plaintiff argued, that, as no fraud is alleged, the defendant may have known that it was so void, and yet have entered into the agreement. We dissent, however, altogether from this reasoning. The patent being void, no benefit in respect of it could accrue to the defendants; and we think we are not to presume that any such improvident bargain took place." And in *Lawes v. Purser*, Erle, J., says,—"I am decidedly of opinion, that, if the plaintiff had known that the patent was void, this would prove fraud on his part:" and the judgment proceeded upon the ground of the want of any such allegation. [Willes, J. That shews that it is [779] matter of evidence only. Williams, J. If you want to allege fraud, why not plead it (a)? Would it be competent to the lessee, in an action upon the indenture, the lease being granted by a mortgagor, to plead that the plaintiff had no title? In the case of *Chanter v. Leese*, the contract was not under seal.] The plaintiff starts with the assumption that his patent is a valid one, and that it was competent to him to exclude all others from making and selling the patent article, and to convey to the defendant the exclusive right of making and selling it. As to the fifth plea, there is no estoppel. The declaration does not allege affirmatively that the plaintiff made the grant, but merely that it was witnessed that he made it. [Williams, J. That is quite sufficient in a declaration, though not in a plea.]

Cross, in reply. In *Chanter v. Leese*, the agreement has not been acted upon. Here, the plaintiff is merely suing for the royalty agreed to be paid for that which the defendant has actually manufactured under the patent. At the most the allegation can only amount to a partial failure of consideration. Both pleas are equally bad.

WILLIAMS, J. I am of opinion that the plaintiff is entitled to judgment on these demurrers. The fifth plea is clearly bad. It is not a plea of non est factum, but simply a plea denying the effect of the deed as stated in the declaration. The proper mode of taking advantage of a variance between the alleged and the real effect of a deed is, by a plea of non est factum, and not by such a plea as this. Then, as to the eleventh plea. That may be divided into two parts. The first part of that plea states that the said invention was worthless and of no public utility or advantage [780] whatever, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof. So far the plea is clearly bad, upon the authority of *Hall v. Conder*, ante, vol. ii. p. 22, *Smith v. Neale*, ante, vol. ii. p. 67, and *Lawes v. Purser*, 6 Ellis & B. 930. But then it is said that that, coupled with the latter part of the plea,—which alleges that the defendant never got or took

(a) There was a plea of fraud upon the record.

any advantage or benefit under the said deed in regard to the said invention, and at the time of the making of the said deed the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof,—amounts to an averment that the plaintiff at the time of the making of the deed knew that the patent was a nullity, and the defendant did not, and therefore the case ought to be governed by *Chanter v. Leese*, 4 M. & W. 295, 5 M. & W. 698, where, the plaintiff having contracted, that, in consideration of a certain yearly payment, the defendant should have the exclusive right to manufacture a certain patent article, it was held to be a good answer to an action for the annual payment to shew that by reason of the invalidity of the patent the consideration wholly failed. It is also said, that, besides failure of consideration, the plea imports knowledge on the plaintiff's part of the worthlessness of that the exclusive use of which he contracted to grant. This, however, being a contract under seal, the defendant is estopped from going into the consideration; and the allegation of knowledge in the plaintiff and absence of knowledge in the defendant does not amount to an allegation of fraud. The agreement being under seal, and no fraud being alleged, the parties are bound by it, and the plea is bad.

WILLES, J. I am of the same opinion. The fifth plea, which demises that the plaintiff gave and that the [781] defendant took or had such exclusive licence within such district as by the deed provided for, is plainly a bad plea, on the ground that it traverses the effect of the deed: see Com. Dig. Estoppel (A. 3); Co. Litt. 352 a. The reason is obvious: a party who executes a deed is estopped from denying that which the deed upon the face of it expresses. If he wishes to allege that the deed is not truly set out in the declaration, he must deny that it is his deed. If he admits that it is his deed, he cannot deny the effect of it. For this there is abundant authority. If a defendant were allowed so to plead, he would be going into matters of fact de hors the deed for the purpose of shewing that its effect was not as stated in the declaration. Thus, in the case of a demise not under seal, where there has been no entry,—if debt were brought on such a demise, the tenant might plead nil habuit in tenementis; and, if he shewed that the plaintiff had no title, he would succeed. But, if the demise were by indenture, the tenant would be estopped from pleading nil habuit in tenementis, or that the landlord did not demise, for then he would be allowed to shew that the deed had not the effect alleged. That is a familiar illustration of the law. Here, the way the plea would operate, if it were allowed to stand, would be this,—We are to assume that the patent is a valid patent, and that a licence for the exclusive manufacture has been granted. Then comes the plea, denying that the plaintiff gave or that the defendant took or had such exclusive licence. Now, that plea would be proved by shewing that an agent of the plaintiff had granted a licence to some small dealer in the district, and so, if allowed, it might defeat the deed altogether. In *Boman v. Taylor*, 2 Ad. & E. 278, 4 N. & M. 264, the same point arose, except that the deed there did not grant an exclusive licence. Taunton, J., there says that the case comes [782] within the rule that a party shall not deny what he has asserted by his solemn instrument under hand and seal: and he distinguishes the case from *Hayne v. Maltby*, 3 T. R. 438, by saying,—“Here, there is an express averment in the deed that the plaintiff is the inventor of the improvements; there, the articles of agreement averred nothing as to the originality of the invention, but merely stated that the plaintiffs were the assignees of the patent, which they might have been, though the assignor was not the original inventor.” The law of estoppel as thus applied is a most just and equitable one. It appears to me that the eleventh plea is also a bad plea. Considered as a plea of fraud, it is consistent with all that is alleged therein that the plaintiff may have been under the impression that the defendant knew as much of the invention as he himself did. Clearly, therefore, it is not good as a plea of fraud. As a plea of want of consideration, it is equally bad, no consideration being necessary in the case of a contract under seal. And considered as a plea denying the validity of the patent, the case falls within *Hall v. Conder*, *Smith v. Neale*, and *Laues v. Purser*, which shew such a plea to be invalid: for that, in such cases, the contract is for the use of the patent such as it is. The case of *Chanter v. Leese* falls within the rule as to failure of consideration, which is not applicable to an action upon an instrument under seal. For these reasons, I am of opinion that the plaintiff is entitled to judgment on both pleas.

BYLES, J. I am of the same opinion. In addition to the technical reasons given by my two learned Brothers, the fifth plea is obviously bad, inasmuch as it does not

shew an entire failure of consideration. It is quite consistent with what is there alleged, that the defendant may have had nearly the whole consideration [783] for which he bargained. The eleventh plea does go on to allege a total failure of consideration. To this it seems to me that there are two answers: in the first place, the contract being by deed, failure of consideration is immaterial: and in the next place, it is not competent to a defendant by plea to deny the effect of a deed which he has executed. He may plead non est factum; or he may allege fraud. Now, here, the plea does not allege fraud: it states merely that which may be evidence of fraud, viz. that at the time of the making of the deed the plaintiff knew that the alleged invention was not new or useful, and that the defendant had no notice or knowledge; but the plea omits to add that the plaintiff was aware of the defendant's want of knowledge. Independently, therefore, of the technical grounds of objection, it seems to me that the two pleas are clearly bad in substance.

WILLIAMS, J. I forgot to advert to the argument as to the testatum existit. It has long been established that it is allowable to the plaintiff to use that form of declaring. The rule as stated in 1 Wms. Saund. 274, n. (1), is as follows,—“In declarations, whether in debt or covenant, it is sufficient to say testatum existit, for it is only inducement to the action; but, in pleas and advowries, &c., it is the substance of the answer, and therefore the operation of the deed or instrument must be expressly averred, and not stated by way of recital or argument,”—citing *Stephenson v. Stephenson*, Cro. Eliz. 195, 1 Siderf. 375, *Batchelour v. Gage*, Cro. Car. 188, *Penning v. Plat*, Cro. Jac. 383, *Boswall v. Rawstorne*, Cro. Jac. 537, 1 Lutw. 535, *Cooker v. Child* 2 Lev. 75, Comyns's Digest, Pleader (E. 3).

Judgment for the plaintiff.

[784] WIGENS v. COOK. June 15th, 1859.

[S. C. 28 L. J. C. P. 312; 6 Jur. N. S. 72.]

The declaration contained seven counts, one of which was a count in trover for two deeds and two authorities for the delivery of deeds. By an order of nisi prius, it was agreed that the record should be withdrawn, and the cause and all matters in difference be referred to an arbitrator, who was to have “all the powers as to certifying of a judge at nisi prius,” the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator made his award in favor of the plaintiff as to the two authorities referred to in the count in trover, with one farthing damages, and found all the other issues for the defendant; and he gave the defendant the costs of the reference and award:—Held, that, as the event of the award was in favor of the plaintiff, he was entitled to the costs of the cause,—the 3 & 4 Vict. c. 24, s. 2, being inapplicable, inasmuch as there was no verdict.

The first count of the declaration stated, that, before the making of the promise thereafter next mentioned, to wit, on the 3rd of November, 1857, a certain person, to wit, one M. W. McGhee, had applied to the plaintiff to advance and lend a sum of money, and as a security for the re-payment of such advance, and interest thereon, at a future day, had proposed to deposit with the plaintiff certain title-deeds then in the custody of the defendant, relating to hereditaments, tenements, and premises situate in the city of Bath, and known, &c., and to convey the said property to the plaintiff, by way of mortgage, and of all which the defendant had due notice; and thereupon, in consideration that the plaintiff would make the said advance to the said M. W. McGhee, the defendant promised the plaintiff that he had authority to deliver, and that he would deliver, the said deeds to the plaintiff within a reasonable time then next following the making of the said advance; and although the plaintiff duly made the said advance, and all things necessary to entitle the plaintiff to have the said deeds delivered to him as aforesaid existed, and had happened before suit, yet the defendant had not delivered the said deeds or any of them to the plaintiff, nor had he at any time lawful authority to deliver the said deeds as aforesaid, whereby the plaintiff had wholly lost his said money so advanced, and the interest thereof.

The second count stated that theretofore, to wit, on the day and year aforesaid, the plaintiff, at the request of the defendant, had retained and employed the de-[785]-

fendant as his attorney and solicitor, for fees and reward to him in that behalf, to prepare a transfer and conveyance by way of mortgage, to wit, from the said M. W. McGhee to the plaintiff, of the said hereditaments, tenements, and premises, and to ascertain whether the plaintiff might safely advance the said person, to wit, the said M. W. McGhee, the money in the first count mentioned, on the security of the promise and agreement of the said M. W. McGhee thereafter to execute a good and effectual transfer or conveyance by way of mortgage of the said hereditaments, tenements, and premises to the plaintiff; and the defendant accepted the said retainer and employment: yet the defendant afterwards, without using due or any care in the premises, as such attorney and solicitor, wrongfully represented and stated to the plaintiff that he might safely make the said advance upon the security aforesaid, whereby the plaintiff was induced to make the said advance on the security aforesaid, when in truth and in fact the plaintiff could not safely make any such advance as aforesaid, that is to say, by reason that the said M. W. McGhee had no power, authority, or title to transfer or convey the said hereditaments, tenements, and premises as aforesaid, as the defendant might by the exercise of reasonable care and diligence in the premises have known; and by means of the premises the plaintiff had lost the amount of his said advance, and the interest.

The third count stated that the defendant, by falsely and fraudulently representing to the plaintiff that he might safely make the advance of money in the second count mentioned, on the security of the promise and agreement therein mentioned, induced the plaintiff to make such advance as therein mentioned, when in truth and in fact, as the defendant always well knew, the plaintiff could not safely make the said advance; [786] whereby the plaintiff had wholly lost his said money, and the interest thereof.

The fourth count stated that the defendant, by falsely and fraudulently representing to the plaintiff that he had power and authority to deliver over to the plaintiff, upon his making the advance in the first count mentioned, the deeds therein mentioned, induced the plaintiff to make the advance of money therein mentioned, whereas in truth and in fact the defendant had not, as he always well knew, any such power or authority as aforesaid; and by reason thereof, and that the said deeds had never been delivered to the plaintiff, he the plaintiff had wholly lost the said money so advanced, and the interest thereof.

The fifth count was trover for "the aforesaid title-deeds, and the authorities for the delivery thereof to the plaintiff."

The sixth count stated that theretofore, to wit, on the 1st of January, 1858, the said M. W. McGhee had committed an offence punishable by law, that is to say, the offence of obtaining from the plaintiff money or valuable security under false pretences, contrary to the statute in that behalf; and the plaintiff had thereupon duly and according to law obtained from one of Her Majesty's justices having authority and jurisdiction in that behalf a warrant for the apprehension and arrest of the said M. W. McGhee, in order that she might be dealt with according to law for her said offence,—of all which the defendant had due notice: yet the defendant, without any reasonable cause, wrongfully and maliciously caused and procured and counselled the said M. W. McGhee to, and she did accordingly, go and depart from her ordinary place of abode, and conceal herself from the plaintiff, in order to prevent her arrest under the said warrant, and to defeat the ends of justice, and to injure the plaintiff, as thereafter men-[787]-tioned, whereby the arrest of the said M. W. McGhee was delayed and hindered for a long time, and the plaintiff was put to great expense in and about searching for and causing to be arrested under the said warrant the said M. W. McGhee.

The seventh count stated that theretofore, to wit, on the 8th of December, 1857, and after the said M. W. McGhee had been apprehended under the warrant in the sixth count mentioned, and whilst she was in custody thereunder in order that she might be dealt with according to law for her said offence, the plaintiff duly and according to law caused to be issued out of the proper office in that behalf two of Her Majesty's writs of subpoena, whereby our Lady the Queen commanded one Adele McGhee to appear before certain of Her Majesty's justices having jurisdiction in the premises, at a time and place therein respectively named, as a witness to give evidence on behalf of our Lady the Queen against the said M. W. McGhee touching and relating to the said offence, she the said Adele McGhee being a material and necessary witness

for the plaintiff to support the charge so made against the said M. W. McGhee; and the plaintiff was desirous, for the purpose aforesaid, to serve a copy of the said writs of subpoena respectively upon the said Adele McGhee, —of all which the defendant had due notice; yet the defendant, without any reasonable cause, wrongfully and maliciously, and in order to defeat the ends of justice, and to hinder the plaintiff from so serving the said Adele McGhee with a copy of the said writs of subpoena, and to prevent her attendance as such witness as aforesaid, and to injure the plaintiff as thereafter mentioned, caused and procured the said Adele McGhee to go and depart from her ordinary place of abode, and to conceal herself from the plaintiff, so that he could not serve or cause to be served on her any copy of the said writs of [788] subpoena; whereby the plaintiff was hindered in and altogether prevented from effecting the said service, and was put to great expense in searching for and endeavouring to find the said Adele McGhee; and the plaintiff said that all things necessary to entitle him to maintain the action existed and had happened before suit.

The defendant pleaded,—first, that he did not promise as alleged.

Secondly, to the first count, so far as the same related to the alleged breach of promise in the defendant not having authority to deliver the said deeds to the plaintiff, —that he had authority, to wit, from the said M. W. McGhee.

Thirdly,—to the first count,—that, before and at the time of the making of the said promise in that count mentioned, the said deeds and the property to which the same related belonged to a certain person, to wit, one Charlotte McDowell, for whom and as whose agent the defendant had the custody thereof, and not otherwise, and the defendant was induced to make and made the said promise at the request of the plaintiff and of the said M. W. McGhee, by reason of and in reliance upon a supposed authority in writing produced to him, purporting to be signed by the said person, authorizing and directing the defendant to deliver the said deeds to or for the said M. W. McGhee, —of all which the plaintiff then had notice; and that the said authority was not in fact signed by the said person by whom the same so purported to be signed as aforesaid, but had been and was forged, and that there was not nor ever had been any authority or direction from or by the said Charlotte McDowell to deliver the said deeds to or for the said M. W. McGhee, whereof the plaintiff and the defendant afterwards, and before any breach by the defendant of the said promise, had no-[789]-tice, wherefore the defendant refused to deliver the said deeds to the plaintiff, as he lawfully might for the cause aforesaid.

Fourthly,—to the first count,—that the plaintiff did not make the said advance in that count mentioned to the said M. W. McGhee, as in that count alleged.

Fifthly,—to the second and subsequent counts, not guilty.

Sixthly,—to the second count,—a denial of the alleged retainer and employment in that count mentioned.

Seventhly,—to the fifth count,—that the goods in that count mentioned were not, nor were any of them, the plaintiff's, as alleged.

The defendant demurred to the sixth and seventh counts, on the ground that those counts shewed no legal damage to the plaintiff in respect of which an action would lie.

The plaintiff joined and took issue upon all the pleas, joined in demurrer to the sixth and seventh counts, and demurred to the second and third pleas, on the ground that the second plea raised an issue only upon an unimportant and immaterial allegation which had no bearing on the merits, and raised an issue on matter not alleged by the plaintiff; and that the third plea was bad because the defendant's promise was absolute, and not conditional on the authority being genuine, and because such plea did not affect the plaintiff with notice until after the contract and after the plaintiff's advance of the money. Joinder.

By a judge's order made at the Bristol Assizes, dated the 26th of August, 1858, the record was withdrawn, and the cause and all matters in difference between the parties referred to a barrister, who was to have all the powers as to certifying of a judge *ad nisi prius*, —the costs of the cause to abide the event of the [790] award, and the costs of the reference and award to be in the discretion of the arbitrator; and the arbitrator to have full power and authority to dispose of the demurrers.

The arbitrator awarded as follows:—“Whereas the declaration in the said action consists of seven counts, and the pleas of seven pleas, and the sixth and seventh counts and third and fourth pleas have been demurred to as well as pleaded and replied to

respectively : and it was upon the hearing of the said reference before me expressly agreed between the said parties that I should have power to deal with the said several counts and pleas demurred to, and with the demurrers, pleas, replications, and subsequent pleadings, &c. relating thereto respectively in any way which I might think right : And whereas there were no other matters in difference between the said parties : Now, I the said arbitrator, having duly weighed and considered the several allegations and proofs brought before me by and on behalf of the said G. C. Wigen and R. A. Cook respectively in pursuance of the said reference, do make and publish this my award in writing of and concerning the premises, that is to say, I order and award that the said several counts and pleas demurred to, and the demurrers, pleas, replications, and subsequent pleadings, &c. relating thereto respectively, be struck out of the record : and, so far as I have authority in the matter, I further order that each party do pay his own costs of and occasioned by the said several pleadings and demurrers, &c. so ordered to be struck out as aforesaid : And I do further award and determine as follows,—As to the issue raised by the first plea I award and determine that the defendant did not promise as in the first count alleged,—As to the issue raised by the fourth plea, I award and determine that [791] the plaintiff did make the said advance as in the first count alleged,—As to the issues raised by the fifth plea, I award and determine that the defendant is not guilty of committing the grievances alleged in the second, third, and fourth counts, or any or either of them : that he is not guilty of the alleged conversion of the title-deeds in the fifth count complained of : but that the defendant is guilty of the conversion of the two authorities in the fifth count mentioned, as in that count alleged,—As to the issue raised by the sixth plea, I award and determine that the plaintiff did not employ and retain the defendant as in the second count alleged,—And, as to the issue raised by the seventh plea, I award and determine that one of the said authorities in the fifth count mentioned, that is to say, the authority from the said M. W. McGehee to deliver the said title-deeds to the plaintiff, was the plaintiff's, as in that count alleged, and that the remainder of the said goods were not, nor was any of them, the plaintiff's, as alleged : and I assess the damages of the plaintiff in respect of the said conversion by the defendant of the plaintiff's said authority, at one farthing : And, lastly, I order and award that the plaintiff do pay to the defendant the defendant's costs of the reference, to be taxed by the master, and that the plaintiff and the defendant do pay the costs of this my award in equal moieties, and, if either of the said parties shall upon the taking up of this my award, or otherwise, have paid none, that a moiety of the said last-named costs, the sum so paid by him beyond the said moiety, shall be forthwith repaid him by the other party."

Upon taxation, the master ruled that the defendant was not entitled to the costs of the cause, because the plaintiff had recovered damages upon one issue ; and that the plaintiff was entitled to no costs, because he had only obtained a farthing damages, and the arbi-[792]-trator had declined to certify for costs. The plaintiff having obtained an order to review the taxation,

Cole, in Easter Term last, moved to set aside the order. He submitted that the master was right in holding that neither party was entitled to the costs of the cause ; that there could have been no doubt, if the plaintiff had obtained a verdict ; and that the arbitrator being by the assent of the parties placed in the position of a jury, the result must be the same as if a verdict had been taken. [Byles. J. Lord Denman's Act (3 & 4 Vict. c. 24, s. 2) only applies where there has been a recovery "by the verdict of a jury." These are not mere words of form, because "the judge or presiding officer before whom such verdict is obtained" is to certify.] The arbitrator here had all the powers of a judge as to certifying : and he has declined to exercise his power in this respect. [Byles, J. *Griffiths v. Thomas*, 4 D. & L. 109, seems to be very much against you. There, after issue joined in an action on the case for diverting a watercourse, "all matters in difference in the cause" were referred by a judge's order to arbitration : "the costs of the said suit to abide the event of the award," but no power was given to the arbitrator to certify under the 3 & 4 Vict. c. 24, s. 2. The arbitrator found for the plaintiff on all the issues, and assessed his damages at 6d. : and the master thereupon allowed the plaintiff his full costs : and the court held that he was right. Coleridge, J., says,—"It is plain that the statute of 3 & 4 Vict. c. 24, s. 2, does not apply in terms, for the plaintiff does not recover his 6d. by the verdict of a jury. But it was contended, and I think properly, that the true question turns

on the meaning of the submission. It was said, that, as the parties must be taken to have contemplated the bringing themselves within the statute of Gloucester, [793] so must they also within the recent statute above mentioned, and then, by its operation, the costs were taken away. There is some difficulty, however, in supposing this, when the action was clearly brought, not for real damages, but to try a right, and yet no power was given to the arbitrator to certify to that effect. It seems to me that the true meaning of the submission is what its words import, that costs, i.e. the payment of costs, should follow the event,—i.e. the legal event,—of the award; that he in whose favor the decision was should be paid by the other party the costs of the suit. The master, therefore, was right.” Your difficulty is, that here there is no verdict, nor anything that is equivalent to a verdict.] It is clear that the parties intended the arbitrator to be in the position of a jury, and to have all the powers of a judge as to certifying. [Byles, J. A judge could only certify on the back of the record. The record here is withdrawn.] There is a specific finding of the arbitrator upon each issue. [Byles, J. These findings could not be entered upon the record.] In *Swinglehurst v. Allham*, 3 T. R. 138, it was held, that, where a cause has been referred by an order of nisi prius, and the costs directed to abide the event, that must be taken to mean the legal event. Therefore, where an action of trespass was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants justified to all the counts except one, under different rights of way, and pleaded not guilty to the whole; and the arbitrator awarded a right of way to the defendants different from any of those pleaded by them, and found 5s. damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator,—it was held that the plaintiff was entitled to no more costs than damages; for, that the arbitrator's award was not tantumamount to [794] a judge's certificate under the 22 & 23 Car. 2. c. 9. In *Reid v. Ashby*, 13 C. B. 897 the first count charged the defendants with injury to the plaintiff's party-wall, by excavating by the side of it, and raising and overloading it. The defendants pleaded,—first, as to the raising and overloading, not guilty by statute,—secondly, as to the residue, payment into court of 30l. The plaintiff joined issue on the first plea, and replied damages ultra to the second. At the trial, a verdict was taken for the plaintiff subject to an award, but no power was reserved to the arbitrator to certify for costs, under the 3 & 4 Vict. c. 24, s. 2. The arbitrator having directed a verdict to be entered for the plaintiff on the first issue, damages 20s., and for the defendant on the second issue,—it was held that the plaintiff was not entitled to costs, having “recovered by the verdict of a jury less damages than 40s.” [Byles, J. The obvious distinction between that case and the present is, that there a verdict was taken.]

The court took time to consider; and, on a subsequent day, Willes, J., observed that they were inclined to let the rule go, but with a strong intimation of opinion that it was not likely to be successful.

Montague Smith, Q. C., and T. W. Saunders, now shewed cause. The plaintiff is clearly entitled to costs, unless the statute 3 & 4 Vict. c. 24, s. 2, deprives him of them. That statute, however, only applies where there has been a verdict of a jury or judgment by default. Here, the record was withdrawn; and by the order of reference the costs of the cause were to abide the event of the award, which is in favor of the plaintiff. *Griffiths v. Thomas* is precisely in point. In *Cooper v. Pepp*, 16 C. B. 454, the distinction now contended for was taken by the court. The plaintiff [795] claims costs here by virtue of the agreement he has entered into.

Cole, in support of his rule. If there had been a verdict here, it is plain that the plaintiff would not have been entitled to costs. [Cockburn, C. J. The plaintiff is only deprived of costs by the statute 3 & 4 Vict. c. 24, s. 2. How do you bring the case within that statute?] Having put the arbitrator in the place of a jury, the plaintiff is estopped from saying there is no verdict. In *Spain v. Cadell*, 9 Dowl. P. C. 745, an action of trespass was referred to arbitration: and by the order of reference the arbitrator was to have the same power to certify as a judge at nisi prius: the arbitrator found for the plaintiff with 1s. damages, and certified in his award, under the 3 & 4 Vict. c. 24, that the action was brought to try a right besides the mere right to recover damages: and it was held that the certificate was valid, and that it need not be indorsed of the back on the record. Here, the arbitrator is by agreement of the parties put in the place of jury as well as judge: as jury he gives a farthing damages, and as judge he refuses to certify to enable the plaintiff to get

costs. [Cockburn, C. J. You have made an agreement as to the costs.] For what was the power of certifying given? [Byles, J. It might be for many purposes besides that of giving costs. For instance, that a document was proved, which the other side had refused to admit.] If it be put on the ground of agreement, the defendant has succeeded upon six counts and upon a material part of the seventh. He has, therefore, substantially succeeded in the action. [Byles, J. I think not: there must be a judgment for the plaintiff, notwithstanding your success.]

COCKBURN, C. J. I am of opinion that this rule must [796] be discharged. But for the statute 3 & 4 Vict. c. 24, s. 2, a plaintiff who recovers any damages however small is by the statute of Gloucester (6 Ed. 1, c. 1) entitled to costs. It is urged on the part of the defendant that the effect of the first-mentioned statute is to deprive the plaintiff of costs because he has recovered less than 40s. damages, and there is no certificate. The answer given on the part of the plaintiff is, that he rests his claim to costs, not upon the statute, but upon the agreement contained in the order of reference,—that the costs of the cause should abide the event of the award. Now, the “event” must be taken to mean such a finding in favor of one party as will entitle him to a judgment in the cause. The plaintiff has such a finding in his favor here; and, by the agreement into which the parties have entered, the costs must follow. Mr. Cole suggests that the clause giving the arbitrator all the powers as to certifying of a judge of nisi prius, will be nugatory, unless it is held to include the power of certifying for costs. But, in all probability, this order of reference being in a printed form, that clause was inadvertently left in: or, as my Brother Byles has suggested, there are other certificates to which the clause might apply, besides the certificate for costs. Independently, however of this technical view, it is not impossible that the arbitrator may have had in his mind the consequence of awarding the plaintiff a farthing damages, as he gave the costs of the reference and award to the defendant. He might have intended thus to make it a drawn battle as to the costs. This, however, is mere speculation. Having no means of knowing what the learned arbitrator’s view was, we should very likely be running counter to his intention if we were to interfere. It has been suggested that it might be advisable to refer to the arbitrator. We cannot refer back an award except upon a ground [797] which we should hold sufficient to set aside the award for. We must deal with the arbitrator’s decision as we find it. The agreement of the parties is, that the costs of the cause shall abide the event of the award; and the event is in favor of the plaintiff. The consequence must necessarily follow.

WILLIAMS, J. I am of the same opinion. With respect to the case of *Griffiths v. Thomas*, I will only observe, that, although my Brother Coleridge gave an additional reason for his decision which is not applicable here, yet the general ground upon which he proceeded is applicable, viz. that, inasmuch as the reference was before verdict, the case was not within the 3 & 4 Vict. c. 24, s. 2. It is so treated in *Cooper v. Perry*, 16 C. B. 264, 274. With regard to the power of certifying reserved to the arbitrator, unless it means some different sort of certificate, it is impossible that it could apply to the 3 & 4 Vict. c. 24, s. 2, there being no verdict.

WILLES, J., concurred.

BYLES, J. I am entirely of the same opinion. The only effect of sending the matter back to the arbitrator would be in all probability to induce him to do that which I am clearly of opinion he has no power to do, viz. to certify.

Rule discharged, without costs.

[798] THE LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY,
LIMITED, v. DRAKE. June 16th, 1859.

[S. C. 28 L. J. C. P. 297; 5 Jur. N. S. 1407; 7 W. R. 611. Followed, *Saint v. Pilley*, 1875, L. R. 10 Ex. 139. See *Moss v. James*, 1877-78, 37 L. T. 717; 47 L. J. C. P. 162; 38 L. T. 595. Referred to, *Clements v. Matthews*, 1883, 11 Q. B. D. 819. Adopted, *In re Glasdir Copper Works*, [1904] 1 Ch. 824.]

A lessee mortgaged tenant’s fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant:—Held, that the mortgagees

had a right to enter and sever the fixtures, it not being competent to the tenant, to defeat his grant by a subsequent voluntary act of surrender.

The first count of the declaration was trover for goods; the second was for wrongfully depriving the plaintiffs of the use and possession of divers goods and fixtures of the plaintiffs in and affixed and fastened to a certain dwelling-house and premises in St. Mary Axe; and the third was for seizing and taking certain goods and fixtures of the plaintiffs in and affixed and fastened to the said house and premises in the said second count mentioned.

The defendant pleaded, not guilty, and a traverse that the several goods and fixtures in the several counts mentioned were the goods and fixtures of the plaintiffs. Issue thereon.

The cause was tried before Crowder, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—One Robinson, who was tenant of the premises in question (an eating-house in St. Mary Axe) under a lease of which seven years were unexpired, on the 4th of September, 1857, borrowed a sum of money of the plaintiffs, giving them by way of collateral security a bill of sale upon all his furniture and effects upon the premises including certain tenant's fixtures. The bill of sale contained an absolute assignment of all the goods and effects therein comprised, subject to a proviso making the same void if Robinson should repay the money borrowed by certain instalments; and also an agreement, that, in case default should be made in payment of the money, or if, amongst other things, the said goods and effects should be distrained for rent, it should be lawful for the plaintiffs to enter into and upon the premises, or [799] wherever else the said goods and effects should be, and to receive and take into their possession and thenceforth to hold to the same, &c. Default having been made by Robinson, the plaintiffs, by one Priest, on the 30th of March, 1858, entered upon the premises for the purpose of making a seizure, but found that the landlord had already distrained for arrears of rent, and that his broker was in possession. Priest, however, claiming the fixtures, left a man also in possession; but the fixtures were not severed.

On the 8th of March, 1858, Robinson had given his landlord an authority to distrain the fixtures; and on the 5th of April he made a formal surrender of the term to him. A fresh lease was afterwards granted by the landlord to Drake,—the tenant's fixtures which had formerly belonged to Robinson still remaining upon the premises unsevered from the freehold. The plaintiffs made a formal demand of the fixtures upon the defendant, who declined to give them up, saying that he had purchased them from Robinson.

Upon these facts being proved, the learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for 23l. 2s., if the court should be of opinion that they were under the circumstances entitled to recover in respect of the fixtures.

Atherton, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly. He submitted that it was not competent to Robinson by surrendering his term to his landlord to derogate from the grant he had previously made to the plaintiffs.

Day shewed cause. Fixtures have no legal independent existence whilst attached to the freehold: consequently, the defendant, who is in possession of [800] the premises as tenant, and has bona fide purchased the fixtures without notice of the plaintiffs' claim, is entitled to retain them: *Colegrave v. Dias Santos*, 2 B. & C. 76, 3 D. & R. 255; *Ex parte Gowan, In re Barclay*, 25 Law J., Bankruptcy, 1. There is no such thing known to the law as a grant of fixtures independently of the possession of the premises to which they are annexed. The only way such an instrument could operate would be by way of licence to enter and remove them. [Cockburn, C. J. The tenant assigns the fixtures to the plaintiffs before he surrenders his lease to the landlord. Supposing he had not surrendered, he would have had an undoubted right to remove the fixtures, and so would his assignees. It may be that it was not competent to the grantor by the surrender to derogate from his grant.] The first count is clearly not sustainable, because it will be conceded that trover will not lie for fixtures (a). The second count is also in substance a count in trover. And there is no evidence to sustain the third count, which is trespass. [Crowder, J. The evidence was that the

(a) *Roffey v. Henderson*, 17 Q. B. 574.

defendant was using the fixtures every day in his business of an eating house keeper.] At the date of the execution of the conveyance, it was contemplated that the fixtures should for a time remain parcel of the soil, to be removed only upon a contingency. [Williams, J. Suppose tenant for years sells growing crops, and then surrenders his term, would not the vendee be entitled to go upon the land and take the crops?] Growing crops are subject to very different incidents from fixtures: the tenant has a right to go in and sever them after the expiration of his term. [Williams, J., referred to *Hallen v. Runder*, 1 C. M. & R. 266.] That was put on the ground of a sale of a right to remove the fixtures. Here, there is no count for preventing the plaintiffs from removing [801] these fixtures. [Willes, J. You say there is a grant here of a right to go in and take the fixtures. The tenant, having granted that right, surrenders his term. Why should not the right remain? In Co. Litt. 338 b., it is said, that, "if tenant for life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he cometh in under the charge." If that law be applicable here, the plaintiffs would have a right to come in at any time and take the fixtures.] This is a mere personal licence, like that in *Hovvs v. Ball*, 7 B. & C. 481, 1 M. & R. 288. [Willes, J. *Roffey v. Henderson*, 17 Q. B. 574, seems to shew that such an authority if by deed would be good.] There is no authority to shew that it is competent to a tenant for years to confer on a third party an estate in the fixtures independent of the soil. The case of *Keppell v. Baileu*, 2 Mylne & K. 517, is a strong authority to shew the disinclination of the courts to countenance the annexation of such burthens as these to estates. The Monmouthshire Canal Act provided, that, upon auxiliary rail-roads made by private individuals under the authority of the act, the tolls should not exceed the rate charged by the canal company, which, for the articles of lime-stone and iron-stone, was restricted to 2½d. a ton per mile; and it also empowered the canal company, by agreement with the land-owners, itself to construct auxiliary rail-roads, on which tolls not exceeding 5d. a ton per mile might be charged. Certain land-owners and owners of iron-works, and, among others, the lessees of the Beaufort Works, formed a joint-stock company, and, under the powers given by the act, constructed a rail-road connecting a lime-quarry called the Trevil Quarry with the several iron-works and with the rail-roads of the canal company. In the partnership deed of the rail-road company, the lessees of the Beaufort Works covenanted, for themselves, their [802] heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns, should occupy the Beaufort Works, to procure all the lime-stone used in the said works from the Trevil Quarry, and to convey all such lime-stone, and also all the iron-stone from the said mines to the said works, along the Trevil rail-road, and to pay a toll of 5d. a ton per mile for the same. Upon a bill filed by the shareholders of the rail-road to enforce this covenant against a person who had purchased the Beaufort Works, with notice of the partnership-deed,—it was held that the covenant did not run with the land, so as to bind assignees at law; and that a court of equity would not, by holding the conscience of the purchaser to be affected with the notice, give the covenant a more extensive operation than the law allowed to it. The Lord Chancellor (Lord Brougham), in delivering the judgment of the court, said,—“There are certain known incidents to property and its enjoyment: among others, certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law. In respect of possession, the property may be in one, while the reversion is in another; in respect of interest, the life-estate in one, the remainder-in-tail in a second, and the fee in reversion in a third. So, in respect of enjoyment, one may have the possession and the fee-simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement as, a right of way upon it, or of common over it. And such last incorporeal hereditament may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was after-[803]-wards granted by him with the benefit, while the other was left subject to the burthen. All these kinds of property, however, all these holdings, are well known to the law, and familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude

to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow : but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion : and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But, if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive : for, there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised.' And [804] this dictum is quoted with approbation in *Dayrell v. Hoare*, 12 Ad. & E. 356. [Willes, J. And also in a more recent case in this court,—*Aerkoyd v. Smith*, 10 C. B. 164.]

J. Brown (with whom was Lush, Q. C.), in support of the rule. The property in these fixtures vested in the plaintiffs from the moment default was made by Robinson : and the surrender of the term by him does not affect them ; but, so far as they are concerned, the original term has continuance for the purpose of supporting the grant or assignment to them. In *Doe d. Beadon v. Pylke*, 5 M. & Selw. 146, it was held, that, although a surrender of a life-estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet may it have continuance to uphold a prior interest derived under it. Therefore, where J. B. C., having a lease for three lives of a manor where by the custom the copyholds were demiseable by copy, made a lease for years by indenture of a copyhold tenement to the defendant's father, and afterwards the estate of J. B. C. was surrendered to the lord of the fee, who made a lease of the manor to the lessor of the plaintiff,—it was held, that, inasmuch as the lease to the defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff should not avoid the same during the continuance of one of the three lives in the lease to J. B. C., notwithstanding the surrender of that estate. Lord Ellenborough, in giving judgment, there says : "The conveyance to the bishop, as between him and the conveying parties, operated as a surrender of the lease of 1751 ; and it was urged that such a surrender would annihilate all interests derived under that lease. No authority, however, which goes the [805] length of that position was adduced ; and we consider it as clear law, that, though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons who at the time of the surrender had rights which such extinguishment would destroy, and that as to them the surrender operates only as a grant, subject to their right, and the interest surrendered still has for the preservation of their right continuance. This is established by the plain and unequivocal language of Co. Litt. 338 b., and other authorities ; and the law would work great injustice were it otherwise. Lord Coke, after noticing, that, as between the parties to a surrender, the estate is absolutely drowned, says, 'But, having regard to strangers who were not parties or privies thereunto (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender), the estate surrendered hath in consideration of law a continuance : ' and, amongst other instances, he puts this,—'If tenant-for-life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he (that is, the surrenderee) cometh in under the charge. So that, though the life-estate out of which the rent is granted is, as between the surrenderor and surrenderee, extinct and gone, yet, as between the surrenderee and the grantee of the rent-charge, it has continuance so as to support the rent-charge till the original tenant-for-life dies. *Davenport's case*, 8 Co. Rep. 144 b., supplies another instance still nearer the present case. Tenant for fifteen years of a rectory, to which the advowson of a vicarage was appendant, granted to the plaintiff the next presentation to the vicarage, if it should become vacant during the term of years which the grantor then had in the rectory. The grantor afterwards

surrendered his term to the reversioner, after which the vicarage [806] became void : and in quare impedit the question was whether the surrender, which, as between the parties, had put an end to the term of years, had extinguished the plaintiff's right, and it was resolved that it had not : because the term for the benefit of the grantee has to some respect continuance, although in rei veritate it is determined. There are other authorities to the same effect : and none the other way." That is undoubted law to this hour. *L'essant d. Hayton v. Benson*, 14 East, 234, lays down the same principle. It was there held, that, where tenant from year to year underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole (supposing that anything short of a regular notice to quit from the landlord to his immediate tenant would after such sub-letting have determined the tenancy in the whole) ; yet the landlord could not entitle himself to recover against the sub-lessee (there being no privity of contract between them,) upon giving half a year's notice to quit in his own name, and not in the name of the first lessee : for, as to the part so underlet, the original tenancy still continued undetermined. Bayley, J., says : " Hayton made Wilkes tenant from year to year, by which Wilkes acquired a legal interest in the premises, not determinable by Hayton except upon giving him six months' notice to quit. But, so long as that term continued, the lessee had a right to act on it, and to grant to third persons the interest which he himself had in it. And I take it that the surrender of the lessee would not destroy any interest which a stranger claiming under him had acquired in the term in the mean time." And he refers to the passages in Co. Litt. 338 b., already cited. And see note (m) to *Thursby v. [807] Plant*, 1 Wms. Saund. 235 c., and *Pike v. Eyre*, 9 B. & C. 909, 4 M. & R. 661. [Crowder, J. Does the right or interest spoken of in these cases refer to anything but a term ?] There is no authority for so limiting it. Fixtures are often of infinitely greater value than the premises to which they are attached : and they are frequently made the subject of mortgage,—as, for instance, salt-pans and mining machinery. [Cockburn, C. J. It may be that the grant here is of the right to take away the fixtures at the end of the term. The question is whether a mere tenant for years can by assigning the fixtures prevent himself from afterwards bonâ fide surrendering his term to his landlord.] The grant is of the property in the fixtures, coupled with a right of removal. It is said that this is not a grant, but a mere licence,—a personal licence. But Robinson professes to assign all his interest in these fixtures to the plaintiffs. [Cockburn, C. J. Has the tenant a property in these fixtures whilst they are attached to the soil ? Williams, J., referred to the 14 & 15 Vict. c. 25, s. 3, which enacts, " that, if any tenant of a farm or lands shall, after the passing of the act, with the consent in writing of the landlord for the time being, at his own costs and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removeable by him, notwithstanding the same may consist of separate buildings, or that the same, or any part thereof, may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, [808] or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed : Provided nevertheless that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do ; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord ; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same." That seems to treat the tenant's interest as a mere right of removal, and not as property. It is difficult to say that the decision in *Hallen v. Runder*, 1 C. M. & R. 266, is law, if the tenant has a property in fixtures.] The expression which is found in some of the older cases, that

fixtures unsevered at the end of the term become "a gift in law to the landlord," is certainly inconsistent with the absence of property in the tenant. [Cockburn, C. J. It may mean a gift of the right of removal. Crowder, J. Suppose the tenant (Robinson) had been guilty of a forfeiture the day after the assignment to the plaintiffs, what would have been the position of the latter?] It is not contended that the plaintiffs have an absolute indefeasible title; but that the surrender, as against them, operates no further than if the tenant had assigned his interest in the term to a third person. The subject was much discussed in *Muskett v. Hill*, 5 N. C. 694, 7 Scott, 855, [809] where it was held that a licence to search for and raise metals, and also to carry them away and convert them to the licensee's own use, passed an interest which was capable of being assigned. [Crowder, J. Gibbs, C. J., in *Lee v. Ridsden*, 7 Taunt. 188, 2 Marsh. 495, treats the tenant's right as a simple privilege to remove the fixtures during the term. Williams, J. With the qualification mentioned by Parke, B., in *Hallen v. Rinder*. Cockburn, C. J. The question is whether the grant is not subject to the contingency of the grantor's term being determined quacunquo modo.] It surely cannot be subject to the contingency of his making a subsequent grant, or a surrender to his landlord, in derogation of his former grant. It is impossible in principle to distinguish a grant or assignment of fixtures by a tenant from any other interest which he has by grant carved out of his term. In Sheppard's Touchstone, 7th edit., by Preston, it is said, that, "If one that hath a lease for life or years of the manor to which an advowson is appendant, grant the next avoidance that shall happen during the lease, or grant a rent out of the manor, and then surrender the manor, so that his estate is gone; in this case, notwithstanding, the grant of the next avoidance and of the rent doth continue good; and the grantee shall enjoy it according to the grant, as long as the estate that is surrendered should have had continuance [if not surrendered: 3 Prest. Convey. 574. For, the grantor cannot by his act prejudice those who claim under him, though he may think proper to give up his own estate. So, if the lessor had made an underlease, reserving rent, and had afterwards surrendered the original lease, or there had been a merger of his estate, the underlease should continue in force; but, as the reversion is gone, the remedy for the rent, conditions, covenants, &c., is extinguished: *Webb v. Russell*, 3 [810] T. R. 409; 3 Prest. Convey. 129. And it may be observed that the rule cessante statu primitivo cessat et derivativus applies only when the original estate determines by limitation, or is defeated by a condition. It does not apply when the owner of the estate does any act which amounts to an alienation or transfer, though such alienation or transfer produces an extinguishment of the original estate.]" [Willes, J. Mr. Preston is there speaking of a surrender of an estate.] If any difficulty arises from the form of action, that may be obviated by an amendment.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

The question in this case is, whether, if a lessee mortgages tenants' fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them.

The principles of law applicable to this point are well settled: the difficulty lies in the application of them. It is fully established that the right of the lessee to remove fixtures continues only during the term, and during such further period of possession by him as he holds under a right still to consider himself as tenant: and it is plain that the right of his assignee can extend no further. On the other hand, it is laid down, as to a surrender, in Co. Litt. 338 b., that, "having regard to strangers who were not parties or privies thereto (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender) the estate surrendered hath in consideration of law a continuance." This doctrine has been fully adopted and acted on in modern cases,—as, in *Pleasant v. Benson*, 14 East, 234; *Doe d. Beadon v. Pike*, 5 M. & Selw. 146; *Pile v. Eyre*, 9 B. & C. 909, 4 M. & R. 661 (a).

[811] The question is thus reduced to the inquiry whether the mortgagee's right to sever the fixtures from the freehold is a "right or interest" within the meaning of this rule of law. And we are of opinion that it is. Certainly it is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. But we think that it is so far connected with the land

(a) And see *Ex parte Bentley*, 2 M. D. & De Gex, 591.

that it may be considered a right or interest in it, which if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender.

We are, therefore, of opinion that the plaintiffs may maintain an action against the defendant for preventing them from exercising their right to sever, and may in such action recover the value of the fixtures as severed.

Rule absolute.

PHILLIPS v. BALL AND OTHERS. May 27th, 1859.

[S. C. 29 L. J. C. P. 7; 6 Jur. N. S. 48.]

According to the custom of a manor, a grant by copy of court-roll "to A., B., and C., for their lives and the life of the longest liver of them, successively, according to the custom of the manor," gave the first taker an absolute power of disposing of the estate in his life-time:—Held, a good custom: and that it was sufficiently proved by shewing four instances of surrender and admittance of the person first named, in exclusion of the others.—An alienation of the fee by the lord of a manor does not affect the rights of the copyhold tenants.—Therefore, where the lord had granted the inheritance of a portion of the manor to A.,—Held, that it was competent to a copyhold tenant to dispose of his interest to the grantee by an ordinary common-law conveyance: the customary mode of conveyance being rendered impossible by the act of the lord.

This was an ejectment brought for the recovery of three messuages and three closes of land in the parish of St. Austell, in the county of Cornwall, formerly copyholds of the manor of Treverbyn Courtenay, and parcel of the possessions of the Duchy of Cornwall.

The cause was tried before Channell, B., at the last [812] Summer Assizes at Bodmin. It appeared that down to the year 1799, the premises in question formed part of the copyhold tenements of the manor of Treverbyn Courtenay; that, by the custom of the manor, the copyhold tenements were held by grant from the lord for the lives of three persons, who take successively in the order in which their names appear on the court-rolls and admittance: and that the widow of any person dying tenant for his life of any tenement, is entitled to hold the same during her widowhood, or so long as she shall continue chaste.

The following entries appeared upon the court-rolls of the manor, which are in the custody of the Duchy of Cornwall:—

"At a court held of the said manor on the 11th of November, 1762, came Ann Wallis and Richard Williams the younger, by the nomination of John Wallis, and took of the lord two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, formerly in the possession or occupation of the said John Wallis or his under-tenants, To hold to Ann Wallis and Richard Williams the younger for the lives of the longest liver of them successively in reversion of the said John Wallis, according to the custom of the said manor, at the old yearly rent of 8s. 6d.; and they gave to the lord for such estate and entry in the premises to be had the sum of 15l.: and thereon Ann Wallis and Richard Williams the younger were admitted tenants in reversion, according to the custom of the said manor; and their fealties were respited until their particular estates happen."

By a warrant under the hand of Lord North, dated the 26th of February, 1779, duly inrolled,—reciting that Richard Williams, by his petition, set forth that he holdeth for his own life by the aforesaid copy of [813] court-roll of the 11th of November, 1762, the two small tenements, with the appurtenances, in Austell, containing three acres and a quarter of land, part of the manor of Treverbyn Courtenay, and parcel of the annexed Duchy of Cornwall, in the county of Cornwall, at the yearly rent of 8s. 6d., and pray that the same may be granted by copy of court-roll for two such lives as the petitioner, Richard Williams, should name, in reversion of himself, for a moderate fine, at the same old rent; which petition was referred to the surveyor-general of the Duchy of Cornwall, who had reported that he was of opinion a copy for two lives to be named by the said Richard Williams in reversion of himself might be granted of the said two tenements in Austell for a fine of 17l. 10s., reserving the

old rent of 8s. 6d. per annum,—Upon consideration of such petition and report, the said Lord North did authorize the steward of the said manor to grant, by copy of court-roll of the said manor, the said two tenements in Austell, with the appurtenances thereto belonging, “to the said Richard Williams, for two such lives as he should name,” to hold to such two persons so by him to be nominated, for their lives successively, according to the custom of the said manor, in reversion of the said Richard Williams, for a fine of 17l. 10s., reserving the yearly rent of 8s. 6d.

“At a court held of the said manor on the 6th of August, 1779, came Richard Williams and took of the lord two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, formerly in possession of Tristram Carlyon, gentleman, since of John Wallis, and now of Richard Williams, or his under-tenants, for the lives of Richard, son of Richard Williams, aged about nine months, and Mary, daughter of said Richard Williams, aged about three years, by nomination [814] of him the said Richard Williams the father, To hold to the said Richard Williams and Mary Williams for their lives and the life of the longest liver of them, successively, in reversion of him the said Richard Williams, according to the custom of the said manor, by and under the old yearly rent of 8s. 6d.; and they gave for such estate and entry on the said premises to be held the sum of 17l. 10s.”

In 1784, Richard Williams died, having by his will devised the copyhold tenement to his widow, who duly surrendered, and took a re-grant from the lord. This surrender and admittance were as follows:—

“At a court held of the said manor on the 19th of January, 1786, came Elizabeth Williams, widow of Richard Williams, deceased, one of the copyhold tenants of said manor, and surrendered into the hands of the lord two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, formerly in the possession of Tristram Carlyon, gentleman, deceased, afterwards of John Wallis, also deceased, since of Richard Williams, deceased, and then of the said Elizabeth Williams, his widow, and which she is entitled to hold for a widowhood, and a copy of court-roll thereof, dated the 10th of November, 1762, granted to said Richard Williams, deceased, and Ann Wallis, also deceased, for their lives, and one other copy of court-roll of 6th August, 1779, granted to Richard Williams, deceased, for the lives of Richard Williams, his son, then aged about nine months, and Mary Williams, his daughter, then aged about three years, by the nomination of Richard Williams the father: and all the estate, &c. of the said Elizabeth Williams: And whereupon, at same court came Elizabeth Williams, and took of the lord of said manor, by delivery of the steward, by virtue of a warrant under the hands of Henry Lyte, Thomas Erskine, and Arthur Piggott, [815] Esquires, bearing date the 27th of July, 1785, to the steward directed, the said two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, then in possession of the said Elizabeth Williams or her under-tenants, for the lives of Joseph Phillips, late of Redruth, in the said county, but then of St. Austell, aged about thirty years, Richard Williams, then aged about seven years, and Mary Williams, then aged about ten years, son and daughter of said Richard Williams, deceased, successively, according to the custom of said manor, To hold the said tenements, with the appurtenances, to the said Joseph Phillips, Richard Williams, and Mary Williams, for their lives and the life of the longest liver of them, successively, according to the custom of the said manor, by and under the old yearly rent of 8s. 6d.: And she gives to the lord of the said manor for such estate and entry in the said premises to be had the sum of 24l. 7s.; and thereupon the said Elizabeth Williams is admitted tenant; and the said Richard Williams and Mary Williams are admitted tenants for their lives successively, according to the custom of the said manor: and their fealties are respited until their particular estates shall respectively happen.”

Shortly after this, viz. on the 29th of January, 1786, Mary Williams married Joseph Phillips. She died in 1792. The following entry appears on the court rolls under the date of 27th September, 1792:—

“At a court held of the said manor on the 27th of September, 1792, the homage present the death of Elizabeth Phillips, wife of Joseph Phillips, who died tenant for her own life of two small tenements or cottages, with the appurtenances, in St. Austell, containing about three acres and a quarter of land, part of said manor, and that the

said Joseph is entitled to the [816] same for his own life, being the next life named in the court-roll of this manor; and he is admitted and taken tenant for the same."

The next entry which appeared upon the court-rolls with reference to these premises, was as follows:—

"At a special court held of the manor of Treverbyn Courtenay, in the county of Cornwall, on the 15th of April, 1797, Joseph Phillips, of St. Ewe, in the county of Cornwall, one of the copyhold tenants of the said manor, surrendered into the hands of the Prince of Wales and Duke of Cornwall, lord of the said manor, All that dwelling-house and bricklet, then in the occupation of Thomas Towsey, together with one field in Kiln Lane, containing about half an acre of land, then also in the occupation of Thomas Towsey, All that other dwelling-house adjoining the said first-mentioned dwelling-house, then in the occupation of Edward Hennah, One other field in Kiln Lane, then in the occupation of Richard Hennah, containing about an acre and a quarter, And one other field in Tregonissey Lane, and then in the occupation of William Dawe, containing about one acre,—all which said premises are situate in the parish of St. Austell aforesaid, and are parcels of the said manor, and held by the said Joseph Phillips by copy of court-roll thereof for the 19th of January, 1786, granted to Elizabeth Williams, widow, then deceased, for the lives of the said Joseph Phillips, Richard Williams, and Mary the wife of Alexander Truscott the younger, late Mary Williams, spinster, And all the estate, &c. which the said Joseph Phillips then had or could have in said premises by virtue of said copy court-roll, or by any other ways or means whatever: And, thereupon, at the same court came again the said Joseph Phillips, and took of the said lord of the said manor, by delivery of the steward of the said manor, all and singular the [817] aforesaid premises, with the appurtenances, for the lives of the said Joseph Phillips, Joseph Phillips, his son, and Eliza Phillips, his daughter, successively, according to the custom of the said manor, To hold said premises to said Joseph Phillips, Joseph Phillips, his son, and Eliza Phillips, his daughter, for their lives and the longest liver of them, successively, according to the custom of the said manor, by and under the rent therein mentioned, and by all heriots, customs, and services due and of right accustomed: and he gave to the lord of the said manor for such estate and entry in the said premises to be had the sum of 80*l.*; and thereupon said Joseph Phillips was admitted tenant and did his fealty: and the said Joseph Phillips, his son, and Eliza Phillips, his daughter, were admitted tenants for their lives, successively, according to the custom of the said manor, and their fealties were respited until their respective estates should respectively happen."

The plaintiff, Joseph Phillips, the son, claimed under this last-mentioned admittance.

By the certificate of the surveyor-general of the Duchy of Cornwall, bearing date the 6th of July, 1799, it is certified, that, by virtue of a warrant from the council of His Royal Highness the Prince of Wales and Duke of Cornwall, the said surveyor-general had contracted and agreed with William Flamank for the sale to the said William Flamank of (inter alia) All those two houses situate in the market-place in the town of St. Austell, then or late in the occupation of Thomas Towsey and George Tullach, and all that field, containing one rood or thereabouts, situate in Kiln Lane, then or late in the occupation of the said Thomas Towsey, And all that other field in Kiln Lane aforesaid, containing 1*a.* 2*r.* 18*p.*, or thereabouts, then or late in the occupation of Richard Hennah, clerk, And all that field lying in Tregonissey Lane, then or [818] late in the occupation of William Daere, and containing 1*a.* 0*r.* 23*p.* or thereabouts, which said two houses and three several fields are parcel of the said manor of Treverbyn Courtenay, and were then held by copy of court-roll, bearing date the 15th of April, 1797, for the lives of Joseph Phillips, Joseph Phillips the younger, his son, and Eliza Phillips, his daughter, under the yearly rent of 5*s.* 10*d.*, except as therein excepted, at or for the price of 1130*l.*, to be paid by the said William Flamank within forty days from the date of the now certificate of contract into the Bank of England, and carried to the account of the Duchy of Cornwall; and from and immediately after the payment of the said sum in manner aforesaid, and the inrolment of the now stating certificate, the receipt for the said purchase-money, in the office of the auditor of the Duchy of Cornwall, and thenceforth for ever, the said William Flamank, and his heirs, successors, or assigns, should be adjudged, deemed, and taken to be in the actual seisin and possession of the said dwelling-houses or tenements, lands, and premises so by him purchased (except as before excepted), and should hold and enjoy

the same peaceably and quietly in as full and ample manner to all intents and purposes as His said Royal Highness the Prince of Wales, his heirs or successors, Dukes of Cornwall, might or could have held and enjoyed the same, by force and virtue of an act of parliament passed in the 38 G. 4, intituled "An act for making perpetual, subject to redemption and purchase in the manner therein stated, the several sums of money then charged in Great Britain as a land-tax for one year from the 25th of March, 1798."

By indenture dated the 30th of December, 1803, between Joseph Phillips of the one part, and the said William Flamank of the other part,—reciting the before-stated copy of court-roll of the 15th of April, 1797; [819] also reciting that the reversion, freehold, and inheritance of the said dwelling-houses, fields, closes, or parcels of land and premises so granted to the said Joseph Phillips as aforesaid, together with other hereditaments, were, on or about the 6th of July, 1799, purchased by the said William Flamank under and by virtue of the 38 G. 3, c. 60, and the same had been accordingly conveyed to the said William Flamank and his heirs, pursuant to the directions of the said act; also reciting that the said William Flamank had contracted and agreed with the said Joseph Phillips (party thereto) for the absolute purchase and surrender of the said dwelling-houses, fields, or closes of land and premises so granted to him as aforesaid for the lives of himself and the said Joseph Phillips and Eliza Phillips, his children, and the life of the longest liver of them, successively, according to the custom of the said manor, at or for the price or sum of 1000l.,—it was witnessed, that, in pursuance of the said agreement, and in consideration of the sum of 1000l. to the said Joseph Phillips paid by the said William Flamank, he the said Joseph Phillips did surrender and yield up unto the said William Flamank and his heirs, all and singular the aforesaid dwelling-houses, fields, closes, or parcels of land, and all and singular other the premises so granted to the said Joseph Phillips for the lives of himself and the said Joseph Phillips and Eliza Phillips, his children, and the life of the longest liver of them, successively, according to the custom of the said manor as aforesaid, together with the aforesaid copy of court-roll, and all the estate, right, title, use, trust, benefit, property, claim, and demand whatsoever, as well legal as equitable, of him the said Joseph Phillips of, in, to, or out of the said dwelling-houses, fields, closes, or parcels of land and premises, and every or any of them, and every or any part thereof respectively, To hold unto the said William Flamank and his heirs, [820] to the end and intent that the aforesaid estate and interest therein granted to the said Joseph Phillips for the lives of himself and the said Joseph Phillips and Eliza Phillips, his children, and the life of the longest liver of them, successively, according to the custom of the said manor as aforesaid, might be merged and extinguished in the reversion, freehold, and inheritance thereof: And the said Joseph Phillips did thereby covenant that he had in himself good right, full power, and lawful and absolute authority to surrender the said dwelling-houses, fields, closes, or parcels of land and premises mentioned and intended to be thereby surrendered unto the said William Flamank and his heirs in manner aforesaid, and according to the true intent and meaning of that indenture; and also that he the said William Flamank and his heirs should or lawfully might from time to time and at all times thereafter peaceably and quietly enter into, have, use, occupy, possess, and enjoy the said dwelling-houses, fields, closes, or parcels of land and premises mentioned and intended to be thereby surrendered, and receive and take the rents, issues, and profits thereof to and for his and their own proper use and benefit, without the lawful denial, eviction, suit, trouble, interruption, disturbance, claim, or demand of the said Joseph Phillips, and Joseph Phillips and Eliza Phillips, his children, or either of them, or any person or persons lawfully claiming by, from, under, or in trust for him or them respectively; And further, that he the said Joseph Phillips, his executors and administrators, and also the said Joseph Phillips and Eliza Phillips, his children, and each or either of them, and all and every other person or persons having or lawfully claiming any estate, right, title, trust, or interest, either at law or in equity, of, in, to, or out of the said dwelling houses, fields, closes, or parcels of land, hereditaments, and premises [821] mentioned and intended to be thereby surrendered, or either of them, or any part thereof respectively, by, from, or under, or in trust for them respectively, should and would from time to time and at all times thereafter, at the request and expense of the said William Flamank or his heirs, make, do, and execute, or cause and procure to be made, done, and executed, all such acts, deeds, conveyances, and assurances in the law whatsoever for the further,

better, more perfect, and absolute surrendering and assuring of the same dwelling-houses, fields, closes, or parcels of land and premises, and every or any of them, and every or any part thereof respectively, unto the said William Flamank or his heirs.

Flamank continued in possession of the premises under this conveyance until his death in 1810; and the defendants claimed under his devisees.

Joseph Phillips died in 1825. Mary Williams (one of the lives mentioned in the admittance of 1786) died in 1809; the other, Richard Williams, died in 1826, leaving a widow, Catherine Williams, who died in March, 1857.

The plaintiff, Joseph Phillips, the son, claimed to be entitled in remainder under the admittance of the 15th of April, 1797,—insisting that his title did not accrue until the death of Catherine Williams in 1857.

On the part of the defendants, it was contended, that, according to the custom of the manor of Treverbyn Courtenay, a grant by copy of court-roll “to A., B., and C., for their lives and the life of the longest liver of them, successively, according to the custom of the said manor,” gave the first taker an absolute power of disposing of the estate in his life-time; that, in the absence of an exercise of this power by the first taker, the other cestui qui vies would take in succession, as a kind of special occupant; and that Joseph Phillips, [822] the father, the first taker under the admittance of the 18th of April, 1797, had duly exercised this power by the conveyance which he made to Flamank in 1803.

The following instances, taken from the court-rolls of the manor (which commenced in the year 1600), were adduced by the defendants as evidence of the custom relied on by them, of a right in the first taker to deal with the estate:—

16th June, 1709. Admittance of Thomas Hext and Francis John Hext, to the reversion of a tenement called Grieth, otherwise Grey, then in the tenure of Samuel Hext during his life, To hold the said reversion to the said Thomas Hext and Francis John Hext for the term of their lives and the life of the longest liver of them, successively, according to the custom of the manor, when (after the death, surrender, or forfeiture of the estate of the aforesaid Samuel) the same reversion should happen.

14th August, 1725. Surrender by Henry Hawkins of a tenement held by him “during his life, with the widowhood incident,” and admittance of the said Henry Hawkins, Thomas Hext, and John Michell, To hold to the said Henry Hawkins, Thomas Hext, and John Michell, “for the term of their lives and the life of the longest liver of them, successively, according to the custom of the manor.”

20th September, 1734. Surrender by Thomas Hext of a messuage in St. Austell, held by him by copy of court-roll of the 16th of June, 1709, for his life and the life of Francis John Hext, and the life of the longest liver of them, successively, according to the custom of the manor; and admittance of Thomas Hext, Francis John Hext, and John Hext, To hold to them “for the term of their lives and the life of the longest liver of them, successively, according to the custom of the manor.”

[823] 28th August, 1761. Surrender by Grace Tremayne, widow, who was stated to hold by copy of court-roll of the 14th August, 1725, “for the lives of Thomas Hext and John Michell, and the life of the longest liver of them, successively, according to the custom of the manor;” and admittance of her eldest son Lewis Tremayne, Henry Hawkins Tremayne, her youngest son, and Grace Tremayne, her daughter, To hold to them “for their lives and the life of the longest liver of them, successively, according to the custom of the manor.”

Same date. Surrender by Grace Tremayne of other tenements, and admittance of the same parties.

11th May, 1782. Admittance of Francis Polkinhorne^(a) to a tenement in St. Austell, containing about an acre and a half of land, formerly in the possession of John Williams, afterwards of Phillipa Williams, his widow, and then of the said Francis Polkinhorne or his under-tenants, for the lives of Arthur Kempe, then aged 38 years, and Charles Trevanion Kempe, his son, then aged 4 years, successively, according to the custom of the said manor, “To hold said tenement and premises, with their appurtenances, to said Arthur Kempe and Charles Trevanion Kempe, by the nomination as aforesaid of the said Francis Polkinhorne, for their joint lives successively, in reversion of the said Francis Polkinhorne, according to the custom of the said manor.”

(a) Francis Polkinhorne appears to have been deputy-steward of the manor.

14th February, 1785. Surrender by William Flamank of a tenement in St. Austell, containing about an acre and a half of land, "formerly in the possession of John Williams, deceased, afterwards of Francis Polkinhorne, then of Arthur Kempe, and now of the said [824] William Flamank or his undertenants, and which he was entitled to hold for the lives of Francis Polkinhorne, Arthur Kempe, and Charles Trevanion Kempe, his son, and the life of the longest liver of them, successively, according to the custom of the said manor, by virtue of a copy of court-roll of the 11th May, 1782, granted to the said Arthur Kempe, and by him conveyed to the said William Flamank;" and admittance of William Flamank "for the lives of the said William Flamank, then aged about 46 years, Arthur Kempe, then aged about 41 years, and Charles Trevanion Kempe, son of the said Arthur Kempe, then aged about 7 years, successively, according to the custom of the said manor, To hold the said tenement and premises, with the appurtenances, to the said William Flamank for his life and the lives of the said Arthur Kempe and Charles Trevanion Kempe, and the life of the longest liver of them, successively, according to the custom of the said manor."

It was further contended on the part of the defendants, that, assuming the evidence not to be sufficient to establish the custom relied on, the plaintiff's title, if any, accrued on the death of Richard Williams in 1826; and consequently that his claim was barred by the statute of limitations.

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendants to move to enter a verdict for them if the court should be of opinion that the evidence established their case,—the court to be at liberty to draw inferences of fact as a jury.

Kinglake, Serjt., in Michaelmas Term last, obtained a rule nisi accordingly.

Montague Smith, Q. C., and Karslake, now shewed [825] cause. The question is, whether the surrender of the first tenant for life operates upon the estates of those who are designated to take in succession. The habendum is not to Joseph Phillips for his life and the lives of the other two persons named, but to "Joseph Phillips, Joseph Phillips his son, and Eliza Phillips his daughter, for their lives and the life of the longest liver of them, successively, according to the custom of the said manor." In *Smartle v. Penhallow*, 1 Salk. 188, by the custom lands were demiseable by copy of court-roll to two or three persons for their lives and the life of the survivor, habendum successive sicut nominantur in charta, et non aliter; and it was held good. So, in *Right v. Bawden*, 3 East, 260, the form of the grant was, habendum to A. for the lives of B. & C., his grandsons, during the life of either of them longest living, successively, according to the custom, &c. Lord Ellenborough there said: "Without any custom appearing in this manor for the cestui que vies to take the legal estate in reversion, to be sure the words granting the estate to William Bawden, to hold to him for the lives of Robert and William Bawden, his grandsons, and the life of the longest liver of them, successively, only conveyed the estate to William Bawden, the grandfather, during the lives of the persons so named. Had such a custom been stated, it might have had the effect of passing the estate to the other persons named: but without it I cannot say that they took the reversionary estate under the words of the copy." In *Doe d. Nepean v. Goddard*, 1 B. & C. 522, 2 D. & R. 773, the custom was in much the same terms as in the case of *Right v. Bawden*, viz. that, when a copyhold tenement is granted by copy of court-roll to any person, to hold the same to such person for the lives of two or more other persons, and the life of the longest liver of such other persons, successively, and [826] the grantee dies during the life or lives of any one or more of such other persons, without having devised the said copyhold tenement, such other person or persons shall be entitled, by virtue of such grant, to take and hold the copyhold tenement, successively, as they are respectively named in the grant, during his or their life or lives respectively; but, if the grantee devises the copyhold tenement, the devisee shall take and hold it during the life or lives of the cestui que vies: and it was held that the custom was good. "The word 'successively,'" said Abbott, C. J., "in this grant is not, as it appears to me, an idle word. It is applicable to a holding by several, one after another, and would be unnecessary, and indeed unintelligible, if applied to S. Goddard alone." Here, the habendum is to the three successively; and the three are admitted tenants. [Willes, J. Everything you have said will be satisfied by a special occupancy.] There can be no occupant of a copyhold: *Smartle v. Penhallow*, 1 Salk. 188. In *Sheppard's Touchstone*, by Atherley,

p. 75, speaking of the habendum, it is said,—"The office hereof is, to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use." So, in 2 Bl. Com. 298, it is said,—“The office of the habendum is properly to determine what estate or interest is granted by the deed; though this may be performed, and sometimes is performed, in the premises. In which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises.” An instance of this is given by Mr. Atherley in the note to Sheppard, p. 76,—“If a lease be made to two persons, the one moiety to one and the other moiety to the other, the habendum qualifies the premises and makes the lessees tenants in common, whereas by the premises, [827] they were joint-tenants.” [Willes, J. In Comyns’s Digest, Faint (E. 9), it is said that “the habendum may abridge or alter the generality of the premises: Hob. 171.” But (E. 10) “the habendum cannot enlarge the premises: and therefore, if A. leases land to B. for years, habendum to B. and C. for life, nothing passes to C., nor shall B. have an estate but for his own life. Jon. 310.”] Where the granting part is ambiguous, the habendum may explain it. [Williams, J. In *Doe d. Timmis v. Steele*, 4 Q. B. 663, 3 G. & D. 622, tenant in fee conveyed lands “to H., her heirs and assigns, to hold to H. and her assigns during the life of G.” G. was H.’s heir-at-law. It was held, that, after H.’s death, G. was entitled to hold for his life as special occupant, and that the land did not pass to H.’s executors by the words in the habendum. Lord Denman, in giving judgment, said: “The proper office of the habendum being to limit, explain, or qualify the words in the premises, provided it be not contradictory or repugnant to them, no doubt can be entertained but that the words ‘for and during the natural life of George Timmis’ must be allowed to limit the duration of the estate, and to explain and qualify the meaning of the word ‘heirs’ in the premises, so as to make the person designated by that word take as special occupant, and not as heir by descent.”] In Mr. Preston’s edition of Sheppard’s Touchstone, pp. 75, 76, it is said: “If the name of the grantee be not contained in the premises, yet, if it be in the habendum, it may be good enough. As, if one give or grant land, habendum to B. and his heirs, and he is not named in the premises, yet this is a good deed to make an estate in fee-simple. And yet, if the thing granted be only in the habendum, and not in the premises of the deed, the deed will not pass it.” [“Probably,” says Mr. Preston, “this proposition is too general.”] [828] “And therefore, if a man grant Blackacre only, in the premises of a deed, habendum Blackacre and Whiteacre, Whiteacre will not pass by this deed.” [Williams, J. I do not understand it to be disputed here that the second succeeds to the tenement if the first does not dispose of the estate.] That brings us to the second point. Assuming that the persons named take in succession, unless the first has surrendered, there having been no surrender here, the plaintiff is entitled to recover. [Williams, J. If there be a custom for the first taker to deal with the estate, your argument is worth nothing.] If a part of the inheritance is severed from the manor, all the customs of the manor as regards it are ended. In *Scriven on Copyhold*, 4th edit. 12, it is said,—“If one grant away any part of the demesne in fee, they are severed from the manor, and can never be part of it again, *Sir Mogy. Finch’s case*, 6 Co. Rep. 65, though it be but for an instant. Then the question will be, whether the manor can be divided. It cannot by act of the party; and the reason will be the same of freehold and copyhold, for, a manor must be time out of mind, and cannot be created at this day: *Per Holt*, in *Lemon and Blackwell’s case*, Skin. 191. And in the case of *The Queen v. The Duchess of Bucklew*, 6 Mod. 151, the fifth resolution by the whole court was, that ‘a manor is an entire thing, and not severable.’ It is quite clear from the above authorities, that, since the statute of quia emptores, a manor cannot be divided by the act of the party, not even as between joint-tenants; *per Periam, J.*, in *Marshe and Smith*, 1 Leon. 27; and the better opinion is, that, after a severance of a copyhold tenement of a manor, either under a conveyance of the freehold interest of the lord, or a conveyance of the manor itself, with an exception of the particular copyhold, without, perhaps, the sanction or even the knowledge of the copyholder, the [829] court is lost, as far as respects such copyhold tenement, and that, as no admittance could be compelled, so no fine could afterwards be recoverable.” In *Murel v. Smith*, 4 Co. Rep. 24 b., it was laid down that a copyhold is not destroyed by severance of the inheritance of the copyhold from the manor: but, after such severance, the copyholder cannot devise, for the grantee cannot take a surrender; nor can the

copyholder alien otherwise than by decree in Chancery, by which the interest in the land is not bound, but the person only.

Kinglake, Serjt., and Kingdon, in support of the rule. The true effect of the grant of the 15th of April, 1797, is, that it grants the tenements to Joseph Phillips for three lives, which, by the custom of this manor, entitles the first taker in his life-time to dispose of the whole estate, to the exclusion of the other two. The evidence adduced clearly establishes the existence of this custom; for, though the instances are not numerous, there is abundant authority to shew that much less evidence is necessary to establish a copyhold custom than would be required in the case of other customs, which, in general, are encroachments on the rights of the public. And there are many cases to shew that such a custom is good and valid. [Willes, J. In *Scriven on Copyhold*, p. 99, it is said, —“It is sufficient to create an estate, if the person intended to take is named in the habendum of a copy, though not in the grant, for, in many manors, it is customary to insert the words of grant and limitation in the habendum only: *Brooks v. Brooks*, Cro. Jac. 434, Poph. 125.”] No one was named in the premises there: here Joseph Phillips is named [Cockburn, C. J. We must look at the whole instrument.] In Cruise's Digest, vol. 4, title 32, Deed, ch. 21, §§ 67, 68, it is said, —“With respect to the habendum, its office is only to limit the [830] certainty of the estate granted: therefore, no person can take an immediate estate by the habendum of a deed, where he is not named in the premises; for, it is in the premises of a deed that the thing is really granted. If land be given to J. S., habendum to him and a stranger, for a certain estate, this is void as to the stranger, because he was not mentioned in the premises; and, when J. S. dies, there will be no occupancy: for, the grant to the stranger in the habendum was intended an estate to him, and not as a limitation of the estate of J. S.” In *Doe d. Foster v. Scott*, 4 B. & C. 706, 7 D. & R. 190, copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered, and kept possession for more than twenty years. On his death, C. brought ejectment: and it was held that the action was barred by the statute of limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. [Willes, J. The case of *Doe d. Nepean v. Goldard*, 1 B. & C. 522, 2 D. & R. 733, is clearer. Bayley, J., there says: “The meaning of the custom, as stated, plainly is, that, if the grantee shall not, by surrender during his life, or by will, dispose of the estate, then the cestui que vies shall take it; and the word ‘successively’ shews how they are to take. It is clear, that, if a copyhold be given to A. and his heirs during the life of B., the heir of A. will be a special occupant. But there is no general occupancy of copyholds. Of freeholds there is, by the common law, a general occupancy; and the question is, whether by custom that may not extend to copyholds, and whether the same custom may not point out who shall be occupants.” Williams, J. In *Swift d. Farr v. Davis*, H. 39 G. 3, cited in a note to *Doe d. Burrough v. Reade*, 8 East, 354, it was held, [831] that, where three lives in a copy are to take successive, and a father, who is sole purchaser, puts in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as, in that case, by taking at the same court a licence from the lord to himself and his mother (who had her widowhood right in the copyhold) to lease for seventy years; in which case, if the father afterwards grant a lease by way of mortgage pursuant to such licence to lease, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may so far operate as to divest the legal estate of the lives in reversion, and give it to the lessee.] In *Roe d. Bendall v. Summerset*, 2 Sir W. Bl. 694, the court say, that, “in the West, it is usual upon copyholds for lives, that the cestui que vies take in the order they stand in the copy: but the person who puts in the lives, and pays the fine, has a power of disposing of the estate.” [Williams, J. In Burton's Compendium (which I have always found to be a very accurate book), 6th edit. 517, n., 7th edit. 419, n., it is said, that, “If a copyhold be limited to A. for the life of B., and A. die first, the estate will go to the surrenderor or grantor (see Harg. Co. Litt. 59 b., n. (2).) for, there can be no general occupant of copyholds, nor is the statute 29 Car. 2, c. 3, s. 12, applicable to them: *Zouch v. Forde*, 7 East, 186. But there may be a special occupant named in the surrender or grant: *Doe d. Lempiere v. Martin*, 2 Sir W. Bl. 1148. In many manors, the custom is only to grant copyholds for lives; and, in some, to grant them

to three persons for their lives successively as they are named, but so that the first has an absolute power of alienation,"—citing *Swift v. Farr* v. *Davis*, and *Doe d. Nepean v. Goddard*.] *Zinzan v. Talmage*, T. Raym. 402, is a distinct authority. There, [832] the grant was "to Henry Zinzan, sen., habendum to him and to Henry Zinzan, jun., and Peter Zinzan, sons of the said Henry Zinzan, sen., for their lives, successively, as they are named in the grant, at the will of the lord, according to the custom of the manor:" and it was held a good custom. [Williams, J. The reason given for the custom, in the report in Sir T. Jones, 142, is, "because the first is intended to be the purchaser."] A similar custom is stated in *Salisbury v. Hurd*, 2 Cowp. 481, and also in *Prankerd v. Prankerd*, 1 Sim. & Stu. 1: and in *Seriven on Copyhold*, 411, n. (g), it is said that such a custom exists in the manor of Ittleby, in Oxfordshire. [Byles, J. The instances brought from the court-rolls are all calculated to shew that there is a custom in this manor conformable to the authorities cited by you and by my Brother Williams, and tend to shew that Joseph Phillips did what he had a right to do in displacing the two lives placed after him in the admittance, and, consequently, that the plaintiff's title accrued at least as early as 1826. But, assuming the custom to exist and to be a good one, the custom must be pursued strictly: whereas, here, the alienation is by an ordinary common-law conveyance.] It is true, that, as between the copyhold tenant and a stranger, the tenant can only convey in the customary mode, viz. by surrender and admittance. But that does not apply as between the copyhold tenant and the lord or a person who stands in his place. In *Seriven on Copyhold*, 3rd edit. 151, it is said: "There can be no substitution of a person into the tenancy, but by a surrender, —*Knight v. Cooke*, 2 Ch. Ca. 43; nor is such a substitution complete until admittance. So, if two copyholders are desirous of exchanging their copyhold lands, it can only be effected by surrendering to the use of each other, and each being admitted under such respective surrenders: *Kitch.* 171; *Co. Cop.* § 36, Tr. 83; *Earl of Carlisle* [833] v. *Armstrong*, 1 Burr. 333. The word 'surrender' is said by C. J. Coke to be vocabulum artis, and to admit of no qualified term; but this rule does not extend to the lord, for, between the tenant and him, the conveyance need not be according to the custom, but may be made by bargain and sale, or other less formal act: and in *Blennerhasset v. Humberstone*, Hutt. 65, Sir W. Jones, 41, Lord Hobart thought that a copyholder declaring himself weary of his copyhold, and requesting the lord to take it, was equal to a surrender. Mr. Watkins contends that the rule does not extend even to a return of the copyhold into the lord's hands, for the purpose of being conveyed to a stranger, unless the rights of a third person are prejudiced, as was the case in *Zinzan v. Talmage* (or *Talmash*), Pollexf. 564, Sir T. Raym. 402, 2 Show. 130, T. Jones, 142, 1 Freem. 263, where the first cestui que vie was allowed by the custom to destroy the whole estate by surrendering into the lord's hands, and it was held that his joining with the lord in levying a fine of the lands did not operate as a surrender within the custom. When the act is such as amounts to an absolute relinquishment of the estate to the lord, it would certainly seem that the above rule is not applicable, although the lord subsequently grant the estate out again to the nominee of the copyholder: but, when the lord is merely the conduit-pipe of assurance to a third party, it may be doubtful whether the word 'surrender' is not essential to conclude the interest of the customary heir." In *Cruise's Digest*, vol. 1, 325, it is said: "If a copyholder releases all his estate and interest to the lord of the manor, it will operate as an extinguishment of his copyhold. For, although a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's intention to hold the lands no longer; and the rule is, that everything amounting to a deter-[834]-mination of the copyholder's will to hold no longer, extinguishes the copyhold. So, if the lord conveys away the freehold of a copyhold to a stranger, and the copyholder releases to the stranger, this will also extinguish the copyhold:" citing *Wakeford's case*, 1 Leon. 102, *Wilson v. Allen*, 1 Jac. & W. 611, and *Mortimer's case*, Hetley, 150. And this is adopted by Serjeant Seriven, vol. i., p. 625, —"When a copyholder conveys his interest to the lord, whether by surrender or release, or bargain and sale, or does any other act indicatory of an intention to relinquish his tenancy, the copyhold interest is for ever extinguished. And it has been decided that a release of copyholds to the grantor of the freehold, operates as an extinguishment of the copyhold interest, the same as a conveyance to the lord of the manor, when there has been no severance of the freehold:" *Wakeford's case*. [Williams, J. *Zinzan v. Talmash*, 2 Show. 130, is rather against you on this. The

court there say: "It is by a custom that this remainder only can be barred, and that custom ought to be strictly pursued, therefore a surrender by implication will not suffice: and Mr. Pollexfen's construction would take away the assurance of the copyhold titles which is accounted the best, because none can have a title but that which may be seen on the court-rolls." It is still more strongly put in the report of the case in Freeman, 263, under the name of *Talmarsh v. Zinzay*,—"For, this being a custom against common right, that one man should destroy the right of another, it ought to be pursued strictly: and, the custom being found to do it by surrender, a fine shall not have that operation within the custom."] *Wakeford's case*, 1 Leon. 102, shews that the present mode of conveyance is valid. There, the lord of the manor sold the freehold interest of a copyholder of inheritance unto another, so as it is now no part, but divided from the manor, and after-[835]-wards the copyholder doth release to the purchaser. It was holden by the court "that by this release the copyhold interest is extinguished and utterly gone. But it was holden, that, if a copyholder be ousted, so as the lord of the manor is disseised, and the copyholder releaseth to the disseisor, nihil operatur." If an estate pur autre vie be given to A. and the heirs of his body, with remainders over, A. may dispose of the whole, and defeat the remainders, by any conveyance during his life-time: *Doe d. Blake v. Lutton*, 6 T. R. 289. [Williams, J. That is a case of special occupancy.]

COCKBURN, C. J. I am of opinion that this rule must be made absolute. It is unnecessary, in the view I take, to consider whether Joseph Phillips, the first taker under the admittance of the 15th of April, 1797, and the other two persons named therein, Joseph and Eliza, his son and daughter, were to take successive estates for life, or whether the two latter were put in as special occupants only; for, if by the custom of this manor, the first taker under such a form of admission has an absolute power to alienate, so as to bar the interests of the other two, that would be equally applicable whether these were successive estates, or the first taker has an estate for the three lives, the two last named being merely special occupants. The first question, therefore, which we have to determine is, whether there was evidence of the custom, viz. that the person first named in the admission, and who puts in the other two lives, has power to bar their interest. I am of opinion that there was abundant evidence of such a custom. It is plain from the authorities cited that this is by no means an unusual custom, especially in the west of England, and that it has been several times recognised as a good and valid custom. Four instances, besides the somewhat doubtful one of 1786, [836] were shewn in the court-rolls of this manor,—not very antient certainly, the earlier court-rolls having been lost,—where the first tenant for life has surrendered the copyhold and taken a fresh estate, ousting the lives mentioned in the previous admittance. Being, then, of opinion that there is sufficient evidence of such a custom in this manor, the next question is, whether by the conveyance of 1803, Joseph Phillips, the first tenant under the admittance of 1797, did effectually convey his interest in the tenement in question so as to bar the other two lives. The only difficulty that occurs in this part of the case is, that he did not make over his interest by the ordinary form of surrender to the lord. But that, I think, is satisfactorily accounted for by the new state of things which had arisen since the last admittance. The lord had conveyed away a portion of the freehold of the manor, including the property now in dispute, to William Flamank. The land so conveyed, consequently, ceased to be part of the manor, except for the maintenance of the interests of the copyhold tenants. The law seems to be well ascertained, that the lord cannot by alienating work any prejudice to the interests of his tenants: and it also seems to be clear, that, where a portion of the freehold has been severed from the manor, the copyhold tenant may release to the lord by a common-law conveyance. That appears to be a sound view, because otherwise, the customary mode of alienation having become impossible, unless the tenant was at liberty to resort to the ordinary common law conveyance, his power of alienation would be gone altogether. That being so as to the lord himself, there is authority that the tenant may in like manner release to one to whom the lord has alienated a portion of the freehold of the manor. Here, it appears that Joseph Phillips in 1803, by indenture, conveyed [837] all his estate and interest in the premises in question to William Flamank, who had already acquired the freehold by purchase from the lord. The question is, what did that conveyance comprehend? Not the right of possession for his life only: but, according to the custom of the manor, also the right and power to oust those named after him in the admittance of 1797 under which he held. I am,

therefore, of opinion that Joseph Phillips, by the indenture of 1803, conveyed to William Flamank not only his own life-interest, but also the rights, such as they were, of his son and daughter, Joseph and Eliza, whether of succession or special occupancy; and consequently that the defendants, who claim under William Flamank, are entitled to succeed in this ejectionment.

It is not necessary to give any opinion,—though I must confess I entertain a very strong one,—whether the statute of limitations would have afforded an answer to the plaintiff's claim.

WILLES, J. I am of the same opinion. The reasoning in *Bell and Langley's case*, 4 Leon. 230, seems to me to be conclusive. There, “A., the lord of a manor of which B. held Blackacre by copy of court-roll in fee according to the custom, made a feoffment of Blackacre to a stranger. B. died. The point was, if now the customary interest be determined against the heir of B.; for it was moved because that the feoffee had not any court, the heir of B. could not be admitted, nor the death of his ancestor presented, because but one copyholder. But all the court held the contrary, and that the copy should bind the feoffee, and the ceremony of admittance was not necessary; for, otherwise every copyholder in England might be defeated by the sole act of the lord, viz. by his feoffment. But the lord by his own act, which shall be accounted his folly, hath lost [838] his advantages, viz. fines, heriots, and such other casualties.” That decision is in strict accordance with the principle of law that a man's rights are not to be prejudiced by the acts of others to which he is no party: and it is exceedingly important, as shewing the opinion of the court that the interests of the copyhold tenants are not to be affected by the severance of the inheritance of the copyhold from the manor. Applying that here, the rights of Joseph Phillips as copyhold tenant remained notwithstanding the conveyance of the fee by the lord of the manor to Flamank in 1799. One of those rights was, not only the right of disposing of his own life-estate, but also to dispose of the estates of the other two persons named in the admittance, to a purchaser from him. The instances produced as proof of the custom were all, it is true, instances where the alienation had been by surrender to the lord, and regrant from him. But I do not think the form of conveyance is part of the custom, because the persons to take were strangers, who could take by no other mode. It appears to me that it would be an extraordinary thing that a copyholder having that power of conveying to a stranger, should not be capable of conveying to the lord by another and an equally appropriate mode of conveyance. I should have thought the evidence established the right to aliene by any appropriate form of conveyance, to whomsoever the conveyance was made. There is no doubt that the conveyance in question would have been a perfectly valid one if made before the execution of the deed of 1799, conveying the fee to Flamank. And, if Joseph Phillips could by the same sort of conveyance aliene to the person who by that deed obtained the inheritance of the copyhold,—which I think he could,—it appears to me that he has done this by the conveyance of 1803.

[839] BYLES, J. I also am of opinion that the defendants are entitled to have the verdict entered for them. It is unnecessary to decide whether or not the claim of the plaintiff was barred by the statute of limitations: but, as far as I understand the title, I cannot help saying that I feel great difficulty in seeing what has estopped the plaintiff from entering for the last thirty-four years, if he had any title at all. I do not, however, desire to give any positive opinion upon this point.

But, upon the other point it seems to me to be clear, from the numerous authorities which have been cited, that the custom relied upon by the defendants is a reasonable and a good one. I agree with Mr. Kingdon that a small number of instances shewn by the court-rolls of the manor kept by the steward, who is always present, and must know of the custom, affords cogent evidence of its existence. And I agree also with my Lord Chief Justice, that abundant evidence of the custom was given,—a custom which it seems is very common in the West of England. The custom, then, being reasonable and good, and proved to be an existing custom in this manor, it is clear, that, if Joseph Phillips had, before the severance of the copyhold in question from the manor in 1799, surrendered to the lord, the whole interest, including the successive estates, created by the admittance of 1797, would have been barred and extinguished. The lord having alienated the inheritance, it has now become impossible to have recourse to the customary mode of conveyance. Are we, then, to look at the form or the substance? Good sense and sound law clearly require us to look to the

substance of the thing,—especially when we see the reason given for the custom in the case of *Zinban v. Talmage*, Sir T. Jones, 142, viz. “because the first [taker] is intended to be the purchaser.” If, there-[840]-fore, we were to regard the form and neglect the substance, we should be preferring the interests of a stranger to those of the real purchaser, who, as appears by the indenture of 1803, gave a valuable consideration for the property in question.

WILLIAMS, J., who had left the court, previously intimated his concurrence in the above judgment.

Rule absolute.

End of Trinity Term.

[841] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN TRINITY VACATION, IN THE TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banco in this Vacation, were,—Williams, J., Crowder, J., and Willes, J.

SANTOS v. ILLIDGE AND OTHERS. July 9th, 1859.

[Reversed in Exchequer Chamber, 8 C. B. N. S. 861.]

A sale of slaves by a British subject to a Brazilian subject, in the Brazils, where slavery is by law permitted, for the purpose of being used and employed as slaves in that empire, is rendered illegal by the 6 & 7 Vict. c. 98, though such slaves were acquired and were in the possession of the seller before the passing of that Act.

This was an action upon a contract for the sale by the defendants, British subjects, to the plaintiff, a Brazilian, of certain slaves in the Brazils.

The declaration stated that the defendants, being the directors of an association or copartnership established for carrying on mining operations within the dominions of the Emperor of Brazil, under the name and style of the Imperial Brazilian Mining Association, agreed in [842] writing to sell to the plaintiff, who then agreed to purchase and take from them, certain slaves belonging to and in the possession of the said association or copartnership in the Empire of Brazil, at and for the price or sum of 32,000*l.*, and to deliver the said slaves to the plaintiff in Brazil aforesaid on a certain day which elapsed before the breach hereinafter set forth; and that, although the plaintiff had done all things on his part, and all things had happened and been done, to entitle him to have the said slaves sold and delivered to him according to the said agreement, and had paid to the defendants the sum of 1000*l.* as a deposit in part payment of the said price, yet the defendants had broken their agreement, and had wholly refused to sell or deliver, and had not delivered to the plaintiff the said slaves, or any of them, whereby the plaintiff had lost and been wholly deprived of the use and benefit of the said slaves, and of the said sum of 1000*l.*, and had been otherwise damaged.

The defendants pleaded, that the said association or copartnership was and is an association or copartnership consisting of the defendants and others, all of whom were and are British subjects, and resident and domiciled in Great Britain, and that the said agreement was made after the coming into operation and effect of an act of parliament made and passed in the session of parliament holden in the 6 & 7 Vict. (c. 98), intituled “An Act for the more effectual suppression of the slave trade,” and that the said agreement was and is illegal and void.

The plaintiff replied that the said slaves so agreed to be sold and delivered by the defendants to the plaintiff were and are, as to some of them, slaves lawfully acquired and purchased by the said association or copartnership in the said empire of Brazil before [843] the coming into effect of the said act in the plea of the defendants mentioned, for the lawful purpose of being employed and used as slaves within the said empire of Brazil, and not otherwise, and, as to the residue of them, were and are respectively the children and offspring of the slaves so lawfully acquired and used and employed as aforesaid; and that the said slaves were, and each of them was, lawfully

in the possession of the said association or copartnership at the time of the coming into effect of the said act; and that the acquiring, purchasing, and holding of slaves within the said empire of Brazil was and is, by the laws in force within the said empire, lawful and permitted; and that the plaintiff, at the time of the said agreement, was, and from thence hitherto has been and still is, a subject of the Emperor of Brazil, and domiciled within the said empire, and amenable to the laws thereof, and was not nor is a British subject, or amenable to the laws and jurisdiction of this realm; and that the said slaves were so agreed to be sold and delivered for the *bonâ fide* purpose of their being used and employed by the plaintiff in the said empire of Brazil, and not elsewhere.

The defendants rejoined, that the said slaves in the replication mentioned to have been acquired and purchased by the said association and copartnership, were acquired and purchased by them after the coming into operation of an act passed in the 5 G. 4 (c. 113), intituled "An Act to amend and consolidate the laws relating to the abolition of the slave-trade."

To this rejoinder the defendants demurred,—the grounds of demurrer stated in the margin, being, "that the rejoinder confesses, without avoiding, the plaintiff's replication, inasmuch as by the act 5 G. 4, c. 113, the acquiring and purchasing of slaves by British subjects in a foreign state where slavery was not unlawful, for [844] the purpose of being used and employed in such state, was not prohibited or made or declared to be an offence; and that, by force of the proviso in the 5th section of the 6 & 7 Vict. c. 98, the sale by British subjects of slaves lawfully acquired by them and in their lawful possession at the coming into operation of that act, and of the children of such slaves, to a subject of Brazil, not being a British subject, was and is lawful." Joinder

Bovill, Q. C. (with whom was Malcolm), in support of the demurrer (*a*). There is nothing illegal in this contract. The plaintiff is a Brazilian: and there is no act of parliament which makes the purchase or the possession of slaves by a Brazilian in the Brazils illegal. The defendants are the directors of a company called the Brazilian Mining Association, formed for the [845] working of mines in the Brazils,—an English company. The company being in course of winding up in the court of Chancery, an order was made in the suit for the sale of their property and effects, including a number of slaves of which they had become possessed; and one of the directors proceeded to the Brazils for the purpose of effecting a sale. On his arrival at Rio de Janeiro, the director contracted for the sale of the slaves to the plaintiff, but was prevented by the interposition of the British consul there from carrying it into effect. For this breach of contract the present action is brought: and the question for the opinion of the court upon this demurrer is, whether the contract can be enforced in a court of law. At common law, the traffic in slaves was legal. [Willes, J. Not so in Lord Coke's time. Trover would not lie for slaves: *Smith v. Gould*, 2 Salk. 666, 2 Lord Raym. 1274.] *Smith v. Brown*, 2 Salk. 666, 2 Lord Raym. 1274, seems to shew that *indebitatus assumpsit* would at that time lie for a negro sold in a country where the possession of slaves was not illegal. There, the plaintiff declared in an *indebitatus assumpsit* for 20*l.* for a negro sold by the plaintiff to the

(*a*) The points marked for argument on the part of the plaintiff, were,—“That the rejoinder is insufficient and discloses no material fact in answer to the replication; that the facts stated in the replication bring the case within the provisoes in the 5th and 6th sections of the 6 & 7 Vict. c. 98; that the holding of slaves by British subjects in a state in which slavery is by the law of such state permitted and legalised, is not prohibited either by the 6 & 7 Vict. c. 98, or by the 5 Geo. 4, c. 113, or by any other act of parliament anterior to the passing of the first-mentioned act, and was and is lawful, and that, consequently, by virtue of the proviso in the 5th section of the 6 & 7 Vict., it was lawful for the defendants to sell and transfer the slaves so lawfully held by them, and to enter into a contract for such sale and transfer; that the same result would follow from the proviso in the 6th section, which authorizes the selling of slaves which were lawfully in the possession of the seller at the time of the passing of the act, except that this might not apply to slave-children born since the passing of the act; and that the provisions of the 5 G. 4, c. 113, did not, before the passing of the 6 & 7 Vict. c. 98, apply to sales and transfers of slaves by British subjects in foreign states not amenable to the laws of England.”

defendant, viz. in parochia beatae Mariae de Arcubus in warda de Cheape, and verdict for the plaintiff: and, on motion in arrest of judgment, Holt, C. J., held, that, as soon as a negro comes into England, he becomes free: one may be a villein in England, but not a slave. Et per Powell, J. "In a villein the owner has a property, but it is an inheritance: in a ward he has a property, but it is a chattel real; the law took no notice of a negro." Holt, C. J. "You should have averred in the declaration that the sale was in Virginia, and, by the laws of that country, negroes are saleable; for, the laws of England do not extend to Virginia: being a conquered country, their law is what the King pleases: and we cannot take notice of it but as set forth:" therefore he [846] directed the plaintiff should amend, and the declaration should be made, that the defendant was indebted to the plaintiff for a negro sold here at London, but that the said negro at the time of sale was in Virginia, and that negroes by the laws and statutes of Virginia are saleable as chattels. In *Madrazo v. Hilles*, 3 B. & Ald. 353, it was held that a foreigner who is not prohibited from carrying on the slave-trade by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure by a British subject of a cargo of slaves on board of a ship then employed by him in carrying on the African slave-trade. Abbott, C. J., there says: "I had at first thought that it was not competent, even for a foreigner, to come into an English court of justice, and there to recover damages for a loss sustained by him in the prosecution of a trade declared by the British legislature, in such strong language (a), to be unlawful. But I am now satisfied that the words used by the legislature, although large and extensive, can only be taken to be applicable to British subjects." And Best, J., says: "Most of the states of Christendom have now consented to the abolition of the slave-trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of these states could not, I think, maintain an action in the courts of this country for any injury happening to them in the prosecution of this trade: but Spain has reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for any injury sustained by them from such an interruption. These principles are confirmed by the decisions of the court of Admiralty, and also by a judgment of Sir W. Grant pronounced at the Cock-pit. The cases to which I allude, are *The Fortuna*, *The Donna Marianna*, and *The Diana*, in the Admiralty court, and *The Amelie*, before the Privy Council,—Dodson's Adm. Rep. 81, 91, 95. These cases establish this rule, that ships which belong to countries that have prohibited the slave-trade are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade cannot be interrupted while carrying it on. It is clear, from these authorities, that the slave-trade is not condemned by the general law of nations." The subject was much discussed in the case of *Le Louis*, 2 Dodson's Adm. Rep. 210, where Sir W. Scott goes very fully into the general law. Parke, B., in his summing-up in the case of *Baron v. Dunman*, 2 Exch. 167, 186, thus states the substance of that very learned judgment:—"The law on the subject of slaves has been settled by the case of *Le Louis*, which has been referred to. That case was decided in the year 1817, by Sir William Scott, who went fully into the question of the legality of the slave-trade, and laid down certain positions which have since been acquiesced in both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a treaty with the country to which they belong prohibiting the slave trade, secondly, that trading in slaves is not a crime by the law of nations, thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong,—and fourthly, that, if there be a law in a particular country prohibiting the slave-trade, it is not open to every one [848] to punish the offender against that law, but proceedings must be taken in the tribunals of his own country. These propositions being clear, a question arises whether the plaintiff can maintain this action for taking away his slaves. It is not necessary to decide whether, if he had been simply in possession of slaves, using them as slaves, he could have recovered against any person who took them away: on that point it is not

necessary to give an opinion, because, according to the evidence on both sides, he was living at Gallinas, where it was lawful to possess slaves." In *Somerset v. Stewart*, Loft, 1, 17, which came before the court upon a return to a habeas corpus to bring up a negro, from which it appeared that the negro had been a slave to Mr. Stewart, in Virginia and had been purchased from the African coast, in the course of the slave-trade, as tolerated in the plantations; that he had been brought over to England by his master, who, intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by order of his master, in the custody of Captain Knowles, detained against his consent, until returned in obedience to the writ,—Lord Mansfield said: "Contract for sale of a slave is good here: the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of the inquiry; which makes a very material difference." The statutes more immediately affecting the question are, the 5 G. 4, c. 113, and the 6 & 7 Vict. c. 98, and the decision will mainly turn upon the construction of the 1st section of the latter act. The 5 G. 4, c. 113, is very general in its terms; and it is an extremely penal act. The 6 & 7 Vict. c. 98, shews, that the former act only applied to British subjects in British possessions; and the statute of Victoria extends to British subjects in [849] all parts of the world. The 1st section recites the 5 G. 4, c. 113, whereby it was enacted (among other things), "that it shall not be lawful (except in such special cases as are hereinafter mentioned) for any persons to deal or trade in, purchase, sell, barter, or transfer, or to contract for the dealing or trading in, purchase, sale, barter, or transfer of slaves or persons intended to be dealt with as slaves; or to carry away or remove, or to contract for the carrying away or removing of slaves or other persons as or in order to their being dealt with as slaves; or to import or bring, or to contract for the importing or bringing into any place whatsoever slaves or other persons as or in order to their being dealt with as slaves: or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board any ship, vessel, or boat, slaves or other persons for the purpose of their being carried away or removed as or in order to their being dealt with as slaves: or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons for the purpose of their being imported or brought into any place whatsoever as or in order to their being dealt with as slaves; or to fit out, man, navigate, equip, dispatch, use, employ, let or take to freight or on hire, or to contract for the fitting out, manning, navigating, equipping, dispatching, using, employing, letting or taking to freight or on hire, any ship, vessel, or boat, in order to accomplish any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or to lend or advance, or become security for the loan or advance, or to contract for the lending or advancing, or be-[850]-coming security, for the loan or advance of money, goods, or effects employed or to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or to become guarantee or security, or to contract for the becoming guarantee or security, for agents employed or to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or in any other manner to engage or to contract to engage, directly or indirectly, therein as a partner, agent, or otherwise; or to ship, tranship, lade, receive, or put on board, or to contract for the shipping, transshipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or to take the charge or command, or to navigate or enter and embark on board, on to contract for the taking the charge or command or for the navigating or entering and embarking on board of any ship, vessel, or boat, as captain, master, mate, petty officer, surgeon, super-cargo, seaman, marine, or servant, or in any other capacity, knowing that such ship, vessel, or boat is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so take the charge or command, or navigate or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and con-

tracts have hereinbefore been declared unlawful; or to insure or to contract for the insuring of any slaves, or any property, or other subject-matter engaged or [851] employed or intended to be engaged or employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful: and it is expedient that from and after the commencement of this act the provisions of the said act hereinbefore recited shall be deemed to apply to, and extend to render unlawful and to prohibit the several acts, matters, and things therein mentioned when committed by British subjects in foreign countries and settlements not belonging to the British Crown, in like manner and to all intents and purposes as if the same were done or committed by such persons within the British dominions, colonies, or settlements; and it is expedient that further provisions should be made for the more effectual suppression of the slave-trade, and of certain practices tending to promote and encourage it." It then enacts "that all the provisions of the said Consolidated Slave-trade Act hereinbefore recited and of this present act shall, from and after the coming into operation of this act, be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country; and all the several matters and things prohibited by the said Consolidated Slave-trade Act, or by this present act, when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, except only as is hereinafter excepted, shall be deemed and taken to be offences committed against the said several acts respectively, and shall be dealt with and punished accordingly." That section, it is to be observed, is enacting, and not declaratory. The 5th section provides and enacts, "that, in all the cases in which the holding or taking of slaves shall not be prohibited by this or any other act of parliament, it shall be lawful to sell or trans-[852]fer such slaves, anything in this or any other act contained notwithstanding." And the 6th section provides and enacts "that nothing in this act contained shall be taken to subject to any forfeiture, punishment, or penalty any person for transferring or receiving any share in any joint-stock company established before the passing of this act, in respect of any slave or slaves in the possession of such company before such time, or for selling any such slave or slaves which were lawfully in his possession at the time of passing this act, or which such person shall or may have become possessed of or entitled unto *bonâ fide* prior to such sale, by inheritance, devise, bequest, marriage, or otherwise by operation of law." Here, the Imperial Brazilian Mining Association were in possession of the parent slaves before the passing of the act, and therefore come within the true meaning of that section. And it is to be borne in mind that this contract was made under an order of the Lords Justices. The only other question is as to the offspring. These, —like the ordinary increase of sheep and cattle,—must follow the parents. [Byles, J. According to the old maxim, "*Partus sequitur ventrem*."]

Lush, Q. C. (with whom was the Common Serjeant), *contra* (a). The question, which turns entirely upon the 6 & 7 Vict. c. 98, is twofold, —first, as to the slaves in existence at the time of the passing of that act, —secondly, as to those who were born since. The 1st section seems to extend the provisions of the 5 G. 4, c. 113, to British subjects in all parts of the world. That which is prohibited is found in the 1st section of [853] that act. The words of that section are very general, making it illegal to

(a) The points marked for argument on the part of the defendants, were, —

"That the contract for the sale by British subjects of slaves, though in a state where slavery is not unlawful, and for the purpose of being used as slaves in such state, is nevertheless unlawful and void:

"That trafficking in slaves is by the law of England unlawful, as contrary to morality:

"That the provisions of the 5 G. 4, c. 113, are of general application to all British subjects, and, except where otherwise expressly declared and provided in that act, any trafficking in slaves by British subjects, in any place or country, was by that act expressly forbidden, and declared to be illegal:

"That the holding by British subjects of slaves in any state or country, is, and at the time of the passing of the 6 & 7 Vict. c. 98 was, unlawful:

"And that, consequently, upon the plea, or upon the rejoinder, the defendants are entitled to judgment."

sell or to contract for or be in any way concerned in the selling of slaves. The 6th section of the 6 & 7 Vict. c. 98 merely exonerates the parties under certain circumstances from penalties: the prohibition was absolute. [Willes, J. The 39th section of the 5 G. 4, c. 113, expressly enacts "that every mortgage, bond, bill, note, or other security made in or to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have by this act been declared unlawful, shall,—except in the case of a bonâ fide purchaser or holder of any such of the said securities as are in their nature negotiable, who may have purchased or obtained the same without notice that the same were made or given for any such unlawful purpose, —be void."] The 6th section says that the party shall not be subject to any penalty or forfeiture for selling any such slaves as were lawfully in his possession at the time of the passing of the act: but it does not say that the contract shall be in force. [Williams, J. Before the statute of Victoria, was there any statute which prohibited a British subject from possessing or selling slaves in a country where slavery was not declared unlawful? Willes, J. The 5 G. 4, c. 113, makes the carrying on of the slave-trade piracy.] It applies to the trafficking in, and not to the holding of slaves.

[854] Bovill, in reply. The 13th 14th, and 15th sections shew by implication that the 5 G. 4, c. 113, was not intended to extend beyond the dominions of the British Crown: and the provisions of the statute 6 & 7 Vict. c. 98 must be read in connection with that act. There is, prior to the last-mentioned act, none which prohibits the holding of slaves, except the Emancipation Act, 3 & 4 W. 4, c. 73: and that clearly applies only to the British dominions. [Willes, J. It does not follow, that, because the holding of slaves was lawful, their sale would be so.] The 6th section of the 6 & 7 Vict. c. 98 evidently pointed at the possession of slaves by associations like the present.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

This case arises upon demurrer, and was argued at the sittings after last term, before my Brothers Williams and Byles and myself.

It appears by the pleadings that the plaintiff is a Brazilian, and that the defendants are British subjects domiciled in Great Britain, who were members of a partnership consisting of themselves and other British subjects, called the Imperial Brazilian Mining Association, and that, after the coming into operation of the 5 G. 4, c. 113, intituled "An act to amend and consolidate the acts relating to the abolition of the slave-trade," but before the 6 & 7 Vict. c. 98, intituled "An act for the more effectual suppression of the slave-trade," they purchased slaves in Brazil, for the purpose of being used and employed in that empire, and retained those slaves and their offspring until and after the passing of the 6 & 7 Vict., when they contracted to sell them, together with their offspring born subsequent to that statute, to the plaintiff. All that was [855] done was valid according to the law of Brazil; and, the defendants having refused to deliver the slaves to the plaintiff as agreed, the plaintiff brings this action to recover damages for that breach of contract.

The question thus raised is, whether the contract of sale was or was not contrary to the law of England. We are of opinion that it was.

The legislature having rendered trade in slaves by British subjects generally illegal, as being contrary to justice, humanity, and sound policy, it is for the plaintiff to establish that the alleged sale of slaves by British subjects was in the particular instance valid. For this purpose he relies upon the act 6th & 7th of the Queen, above referred to, ss. 5 and 6. Unless these sections, or one of them, authorized the sale, it was illegal. The 5th section enacts, that, "in all cases in which the holding or taking of slaves shall not be prohibited by this or any other act of parliament, it shall be lawful to sell or transfer such slaves, anything in this or any other act contained notwithstanding." This section is inapplicable, if the holding or taking of the slaves was prohibited by act of parliament. The 6th section enacts that "nothing in this act contained shall be taken to subject to any forfeiture, punishment, or penalty, any person for transferring or receiving any share in any joint-stock company established before the passing of this act, in respect of any slave or slaves in the possession of such company before such time, or for selling any slave or slaves which were lawfully in his possession at the time of passing this act, or which such person shall or may have become possessed of or entitled unto bonâ fide prior to such sale, by inheritance, devise, bequest, marriage, or otherwise by operation of law."

It is unnecessary for us to consider how these two sections are reconcileable, so far as they relate to slaves [856] possessed at the time of the passing of the act. It is enough to say that the 6th section, so far as it affects the present case, only applies to the sale of slaves which were "lawfully" in the possession of the seller at the time of the passing of the act. And we are of opinion that the holding and taking of the slaves in question by the defendants was prohibited by the act of 5 G. 4, c. 113, ss. 2 and 10; and that, by reason of the provisions of that act, the slaves were not lawfully in the defendants' possession at the time of the passing of the 6th and 7th of the Queen, and, consequently, that the alleged sale was illegal and void.

The 2nd section of the 5 G. 4 enacts, in the most general language, and in a context expressly applicable to parts beyond the seas, that "it shall not be lawful (except in such special cases as are hereinafter mentioned) for any persons to deal or trade in, purchase, sell, barter, or transfer, or to contract for the dealing or trading in, purchase, sale, barter, or transfer of slaves, or persons intended to be dealt with as slaves; or to carry away or remove, or to contract for the carrying away or removing of slaves or other persons, as or in order to their being dealt with as slaves; or to import or bring, or to contract for the importing or bringing into any place whatsoever, slaves or other persons, as or in order to their being dealt with as slaves; or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves, or other persons, for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves: or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel, [857] or boat, slaves or other persons for the purpose of their being imported or brought into any place whatsoever, as or in order to their being dealt with as slaves; or to fit out, man, navigate, equip, dispatch, use, employ, let or take to freight or on hire, or to contract for the fitting out, manning, navigating, equipping, and dispatching, using, employing, letting or taking to freight or on hire, any ship, vessel, or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or to lend or advance, or become security for the loan or advance, or to contract for the lending or advancing, or becoming security for the loan or advance of money, goods, or effects, employed or to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or to become guarantee or security, or to contract for the becoming guarantee or security for agents employed or to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or in any other manner to engage or to contract to engage directly or indirectly therein as a partner, agent, or otherwise; or to ship, tranship, lade, receive, or put on board, or to contract for the shipping, transshipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or to take the charge or command, or to navigate or enter and embark on board, or to contract for the taking the charge or command, or for the navigating or entering and embarking on board of any ship, vessel, or boat, as [858] captain, master, mate, petty officer, surgeon, super-cargo, seaman, marine, or servant, or in any other capacity, knowing that such vessel, ship, or boat is actually employed, or is in the same voyage, or upon the same occasion in respect of which they shall so take the charge or command, or navigate or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or to insure or to contract for the insuring of any slaves, or any property or other subject-matter engaged or employed, or intended to be engaged or employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful."

The 10th section makes the committing an act within the 2nd felony, punishable with transportation or imprisonment.

The exceptions in the above acts no longer exist: see the 3 & 4 W. 4 c. 73, and 1 Vict. c. 191; and this case did not come within any of them.

The question, in the point of view in which we are considering it, turns upon the construction of the act of George the 4th : and it is, whether that act was confined in its operation to acts done within the British dominions. The trial of offences against this act, if committed abroad, is provided for by sections 48, 49, 50, and 51. The treaties therein confirmed are foreign : s. 52. Upon this question we cannot bring ourselves to entertain any doubt. One of the principal objects of the act was, to strike at the root of the slave-trade at that time in Africa, out of the British dominions. The acts which it was passed to amend and consolidate, in terms referred to foreign parts, and mentioned the British dominions when they only were intended ; and it would be strange if this act, [859] which makes the law more stringent, were to limit its field of operation : see 46 G. 3, c. 52, 46 G. 3, c. 119, 47 G. 3, sess. 1, c. 36, 47 G. 3, sess. 2, c. 44, s. 4, 51 G. 3, c. 23, 53 G. 3, c. 112, 55 G. 3, c. 172, 58 G. 3, c. 49, 58 G. 3, c. 98, 5 G. 4, c. 17. If this question had been raised before the passing of the 6th & 7th of the Queen, or without reference thereto, it would have been difficult to advance a plausible argument in favor of the more limited construction. Indeed, the very point was decided in the case of *The Queen v. Zuluetu*, 1 Car. & K. 215, where the prisoner was indicted upon the same sections of the act of 5 G. 4 upon which the present case depends, for a felony in fitting out a ship for the African slave-trade. At the trial at the Old Bailey, before Maule and Wightman, JJ., it was argued for the prisoner that the case was not within the statute, because it did not apply to foreign parts, but only to the British dominions. The learned judges were of opinion that the case was within the statute, and overruled the point ; Maule, J., saying,—“ I cannot help thinking that the legislature had the intention, among other things, of preventing Englishmen from dealing in slaves on the coast of Africa.” If on the coast of Africa out of the British dominions, of course also, as the words are general, elsewhere out of the British dominions. And, upon the defendant's counsel requesting the judges to reserve the point, Maule, J., said that they did not entertain any doubt upon the subject, and therefore should decline to do so.

Now, the alleged offence in that case was committed before the passing of the 6th & 7th of the Queen, and although the case was tried more than two months after the passing of that act, it does not appear from the report in Car. & K. to have been referred to in the argument. The case is, however, at least a strong authority for construing the 5 G. 4, c. 113, ss. 2 and 10, according to the plain and obvious sense of the [860] general language used, construed with a due regard to the subject-matter as applicable generally ; unless, indeed, the 6 & 7 Vict. c. 98, s. 1, establishes the contrary. That section,—after reciting the 2nd section of the 5 G. 4, c. 113, and that it was expedient, that, from and after the commencement of that act the provisions of the said act thereinbefore recited should be deemed to apply to, and extend to render unlawful, and to prohibit, the several acts, matters, and things therein mentioned, when committed by British subjects in foreign countries and settlements not belonging to the British Crown, in like manner and to all intents and purposes as if the same were done or committed by such persons within the British dominions, colonies, or settlements ; and that it was expedient that further provisions should be made for the more effectual suppression of the slave-trade, and of certain practices tending to promote and encourage it,—enacts “ that all the provisions of the Consolidated Slave-trade Act hereinbefore recited, and of this present act, shall, from and after the coming into operation of this act, be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country ; and all the several matters and things prohibited by the said Consolidated Slave-trade Act, or by this present act, when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, except only as is hereinafter excepted, shall be deemed and taken to be offences committed against the said several acts respectively, and shall be dealt with and punished accordingly : Provided, nevertheless, that nothing herein contained shall repeal or alter any of the provisions of the said act.”

It appears from this section that some doubt had [861] been raised, possibly in the consideration of the very case above referred to before the trial, whether the 5 G. 4 was sufficient to reach such a case, however clearly within the intention of the legislature : and the 1st section of the 6 & 7 Vict. may have been introduced to preclude any such doubt for the future. The section seems to have been most carefully framed, and the most guarded language to have been used, not to enact that the 5 G. 4 should

be extended to foreign parts, but that, after the passing of the act, whatever might be the case with regard to prior transactions, the former act should be deemed to extend to British subjects and their acts, wheresoever being or committed; and at the end it is carefully provided that "nothing therein contained should repeal or alter any of the provisions of the 5 G. 4."

It was contended, however, that, as the section purports to be enacting, and not merely declaratory, it amounts to a legislative adjudication binding upon us, that what was so enacted to be, was not previously the true construction of the 5 G. 4. The proviso already referred to is a sufficient answer to this argument; and, although, if the construction of the former act were open to doubt, the enactment of the latter might be a considerable make-weight towards a decision, yet, as we consider the construction of the former act clear, we are bound by the proviso in the latter act to act upon that construction, notwithstanding it may follow as a consequence that the latter act was unnecessary, except to remove for the future the possibility of a doubt. Nor is this the first instance of an enactment extending, or professing to extend, the construction of a former act to cases which the unaided course of judicial decision might have brought within it. Another instance will be found in the 9 G. 4, c. 14, s. 7, and the case of *Pierce v. Arnold*, 2 C. M. & R. 613.

[862] The true meaning of the 5 G. 4 appears to us to be to prohibit the trade in slaves by all persons within the control of the legislature, including British subjects all over the world.

Upon this construction of the act, the purchase of slaves by the defendants after it passed, though before the 6th & 7th of the Queen, was rendered illegal by the 2nd and 10th sections of the former act: which, therefore, prohibited the holding of slaves, and rendered the possession of them unlawful: consequently, neither the 5th nor 6th section of the latter act authorized the sale, and it was a violation of the law of England.

It is hardly necessary to add that the fact of the plaintiff being a foreigner does not authorize him to sue in the courts of this country for the breach of a contract entered into by a subject, in violation of our laws: see *Esposito v. Bowden*, 7 Ellis & B. 763.

It has been strongly urged upon us, for the plaintiff, that this contract of sale was entered into under an order of the Lords Justices, for whose authority we entertain unfeigned respect: but it does not appear that the matter was discussed before those learned judges, nor that the order had the sanction of their deliberate opinion. And the order in itself is no justification for an illegal act.

For the above reasons, without saying that there are not others, we are of opinion that the contract of sale was unlawful both as to the parents and as to their offspring, and that no action for its breach can be maintained.

Our judgment, therefore, is for the defendants.

Judgment for the defendants (a).

[863] HALE, *Appellant*; THE GUARDIANS OF THE POOR OF THE CITY OF LONDON UNION, *Respondents*. July 9th, 1859.

[S. C. 29 L. J. M. C. 5; 6 Jur. N. S. 74. See *Tynemouth Guardians v. Blackworth Overseers*, 1888, 57 L. J. M. C. 55.]

By the 81st article of the Consolidated Order of the Poor Law Commissioners, 1837, it is provided that "the clerk shall, four weeks at least before the 25th of March and the 29th of September respectively in each year, refer to and ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half-year of the last year corresponding to the half-year next coming, and shall estimate, and, as near as may be, divide amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year, and he shall also estimate the probable balance due to or from the parish at the end of the current half-year, and shall then prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the union for the coming half-year," &c.—And the 82nd article provides that "the guardians shall

(a) An appeal is pending. [See 8 C. B. N. S. 86.]

make orders on the overseers or other proper authorities of every parish of the union, from time to time, for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the guardians on the parish," &c.—The guardians of the London Union made a contribution-order pursuant to the 82nd article: but the clerk, in preparing it, disregarded the terms of the 81st article, inasmuch as, in computing the sum for which the parish of St. M. B. was to be ordered to contribute to the expenses of the union, he omitted to estimate "the probable balance due to that parish;" for, if he had taken that balance into account, it was so largely in its favor that no sum whatever would have been needed to meet the cost of the maintenance of its poor, and the other charges for which the order was made. The reason for this omission was, that the balances in favor of that and several other parishes in the hands of the treasurer of the union had been fraudulently appropriated by an officer of the union who was employed to collect the rates for certain of the parishes forming the union, of which the parish of St. M. B. was not one:—Held, that, as the guardians might by taking the proper steps, —either by orders apportioning the amount of the loss amongst the various parishes of the union, or by orders apportioning it exclusively amongst those parishes for which the defaulting officer was collector,—realize the balance due to the parish of St. M. B., they had no right to treat it as non-existing, and, consequently, that the order was illegally made, and could not be enforced.

This was a case stated by justices for the opinion of the court, pursuant to the statute 20 & 21 Vict. c. 43.

On the 19th of February, 1859, at a special session of the peace for the city of London, a complaint was preferred by the respondents against the appellant, one of the overseers of the parish of S. Mary Bothaw, for non-compliance with a contribution-order made by the respondents upon the overseers of the poor of the said parish, dated the 31st of August, 1858, requiring them to pay to the treasurer of the said union, towards the relief of the poor of the said parish, and to the contribution of the said parish to the common fund of the union, and such other expenses as were chargeable by the respondents on the said parish, the sum of 65l. on [864] the 10th of October then next. The justices determined the said complaint against the appellant, and issued a warrant for levying and recovering the amount of the said contribution, but suspended its execution. The appellant being dissatisfied with such determination, the justices, with the consent of the parties, stated the following case:—

Upon the hearing of the said complaint, it was proved, that, on the 31st of August, 1858, the respondents made the contribution-order or call already mentioned upon the appellant's parish, for the sum of 65l. The following is a copy of the order,—

"City of London Union.

"To Ford Hale, Frederick Barry, Daniel Judson, and John Baird Cooper, Charles Milner, and William Hayward, overseers of the parish of St. Mary Bothaw, Dowgate.

"You are hereby ordered and directed to pay to Samuel George Smith, Esq., of No. 1 Lombard Street, on behalf of the guardians of the poor of the City of London Union, on the 12th day of October next, at No. 1 Lombard Street aforesaid, the sum of 65l. towards the relief of the poor thereof, and to the contribution of the parish to the common fund of the union, and such other expenses as are chargeable by the said guardians on the said parish, and to take the receipt of the said Samuel George Smith indorsed upon this paper for the said sum of 65l.

"Given under our hands, at a meeting of the guardians of the poor of the said City of London Union, held on the 31st day of August, 1858."

(Signed) "JAMES ABBIS, Presiding Chairman.

"J. C. DIX, } Guardians."
"JOHN FINLAY, }

(Counter-signed) "JOHN BOWRING,
"Clerk to the Guardians."

[865] "Note.—The overseers are requested to be punctual in making the above payments: see 2 & 3 Vict. c. 84, s. 1. They are also requested to pay no more than the sum ordered.

"See back hereof for treasurer's receipt. The treasurer can give no other receipt.

"This order is only for a portion of the estimated contribution for the half-year ending Lady Day, 1859: the order for the remaining portion will be made when the accounts for the several parishes to Michaelmas next shall have been balanced in the parochial ledger."

It was admitted by the appellant that the proceedings had before the justices were legal and regular, and that, if the said call was legally and properly made, and the appellant's parish was legally liable to pay to the respondents the sum of money so demanded, the said warrant had been properly issued.

The appellant, however, objected to the liability of the said parish to pay the sum of money thus required to be paid by the said parish, on the ground that it appeared by entries in the parochial ledger of the union, in the union accounts made up to Lady-Day, 1858, and also in the accounts made up to Michaelmas, 1858, and duly audited, that there was a balance in favor of the parish exceeding the amount of the said call.

To this objection it was answered, on behalf of the respondents, that, although it was true that it did appear by the parochial ledger of the union that there were balances in favor of the appellant's parish, both at Lady-Day and at Michaelmas-Day, 1858, as alleged, in the hands of the treasurer of the union, to an amount exceeding the amount of the call, yet that in fact the respondents had no balance at all in the hands of the treasurer: and it was further stated on behalf of the respondents, and admitted by the said appellant, that seventy-five parishes [866] of the union, the appellant's parish being one, appeared by the said parochial ledger to have had balances in their favor at Lady-Day, in 1857, amounting in the whole to 11,000*l.*, and that the respondents thereby also appeared to have a balance in their favor at the said time, to the same amount, in the hands of their treasurer, entered to the credit of the said respective parishes: but that, in fact, instead of there being at the said time a balance in favor of the respondents in the hands of their treasurer to the credit of the said several parishes, the respondents' account had at Lady-Day, 1857, been overdrawn with their treasurer to the extent of 4200*l.*, and that this discrepancy was occasioned by the fact that one Manini, a collector for certain of the parishes of the union, with the assistance of one Paul, a clerk of the respondents, had for a series of years preceeding Lady-Day, 1857, embezzled the funds of the said parishes entrusted to him, instead of paying them into the treasurer's hands, and had caused the copies of accounts of the said treasurer rendered to the said respondents to be falsified, so as to make it appear therefrom that the respondents had received credit in the books of the treasurer for the sums of money which he had embezzled.

It was then contended, on behalf of the appellant, that, notwithstanding these facts, inasmuch as the said appellant's parish had in fact paid into the hands of the treasurer all the sums of money appearing to the credit of the parish, as well in the parochial ledger of the union as in the treasurer's books, the said appellant's parish was entitled to take credit for the said balance appearing in their favor at Michaelmas, 1858: and, for the purpose of enabling the court to determine the said questions raised between the parties the following further facts were stated and agreed upon between the parties:—

[867] The respondents are a corporation constituted by an order of the poor-law commissioners, dated the 10th of March, 1837.

The City of London Union consists of ninety-eight parishes, of which the appellant's parish is one. The respondents have the management of the relief of the poor of the various parishes: and the course of practice with regard to the contribution of the said parishes towards the expenses of the union, is as follows:—

The clerk of the respondents four weeks at least before the 25th of March and the 29th of September respectively in each year refers to and ascertains the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half of the last year corresponding to the half-year next coming, and estimates, and, as near as may be, divides amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year; and he also estimates the probable balance due to or from the parish at the end of the current half-year, and then prepares the orders on the several parishes for the sums which upon such computation it appears necessary for them to contribute to

the expenses of the union for the coming half-year; and the orders so prepared are laid before the respondents for their consideration three weeks at least before the expiration of the current half-year.

The respondents make orders on the overseers and other proper authorities of every parish of the union, from time to time, for the payment to the respondents of all such sums as are required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the respondents on the parish; and in such orders the contributions are [868] directed to be paid in one sum, or by instalments on days specified, as to the respondents seems fit.

The overseers or other proper officers of the various parishes make rates upon their respective parishes for the purpose of meeting the said calls of the respondents, and also for the purpose of defraying other parochial expenses with which the union has no concern.

The various parishes on or before the day mentioned in the said calls of the respondents pay the amounts of the said calls to the treasurer of the union. The treasurer places the whole amount of the moneys thus paid into his hands to the credit of the respondents generally; at the same time distinguishing the several amounts paid in by each parish respectively, and entering the same in an account in which credit is given to each parish for the sums of money actually paid in by such parish to the account of the respondents. A clerk of the respondents, whose special duty it is to do so, makes out from time to time, for the use of the respondents, copies of the above-mentioned accounts of the treasurer, shewing the total amounts standing to the credit of the respondents in the treasurer's books, and also shewing the particular amounts paid in by each parish making up these totals.

The respondents have a book called the Parochial Ledger of the union, in which every parish is credited with the sums of money paid in by such parish from time to time to the treasurer of the union, to the account of the respondents; and this portion of the ledger is made up in the first instance from the returns made to the respondents by their clerk as aforesaid.

The account of every individual parish is made up and balanced in this ledger by the respondents every half-year, at Michaelmas and Lady-Day; and the balance appearing in favor of or against any given parish is carried over to the account of the succeeding half-year.

[869] Annexed is a copy of the account of the appellant's parish so made up in the union parochial ledger for the year ending Lady-Day, 1857 (see next page):—

Copies of accounts for the half-years ending Michaelmas, 1857, Lady-Day, 1858, and Michaelmas 1858, were set out in the case, and were in form similar to the above; and each of them shewed a balance in favor of the parish.

The appellant's parish had in fact paid to the treasurer of the union all the sums of money for which credit is given to the said parish in the respondents' accounts; and all the accounts stated by the respondents with the appellant's parish by which the above balances are arrived at are correct, so far as the charges of the respondents against the appellant's parish, and the payments made by the said parish to the treasurer of the union, are concerned.

The half-yearly statement of accounts in the said ledger at Lady-Day, 1857, shewed balances in favor of seventy-five parishes, including the appellant's parish, amounting in the whole to 11,000*l.*: and it also appeared by the said ledger that a sum of 11,000*l.* was standing to the credit generally of the respondents in their account with the treasurer of the union, and entered in the treasurer's books to the credit of the said seventy-five parishes, in the several particular and respective amounts of the said balances appearing in favor of each parish respectively in the said parochial ledger.

It was also an admitted fact that all the accounts of the respondents with the whole of the seventy-five parishes were correct, and that every one of these parishes had in fact paid to the treasurer of the union the sums of money with which they were respectively credited in the said ledger; and it so appears by the treasurer's book: and the accounts shewing the said balances, [871] amounting to 11,000*l.* as aforesaid, were, as between the respondents and the said parishes, correct.

It was also an admitted fact, that, at the very time that the said ledger account shewed a balance of 11,000*l.* in favor of the respondents in the account with the treasurer as aforesaid, the respondents had not only no balance in their favor in the

hands of their treasurer, but there was a balance against them to the amount of 4200l.

The circumstances which gave rise to this deficiency and to the discrepancy in the accounts, were as follows:—Several years previously to 1856, one Charles Guerrino Manini was duly appointed by the board of guardians, with the approval of the poor-law board, pursuant to the statute and the orders of the poor-law commissioners made by virtue of the same in that behalf, the paid collector of poor-rates for eight of the parishes in the said union: and one John Paul had been appointed the clerk to the respondents, whose duty it was to make the copies of the treasurer's books, and return the same to the respondents as aforesaid.

It was the uniform practice for the overseers of the said eight parishes to permit their collector Manini to pay over directly into the hands of the treasurer of the union, not only the amount of calls from time to time made upon them by the respondents, but the whole amount of all rates collected by him on behalf of the said parishes; and when, as was in fact usually the case, the amount of rates collected by Manini exceeded the amount of the said call, the overseers of each parish were in the habit of obtaining from the respondents, from time to time as they required, their cheques on account of the difference between the amount of rate collected by Manini and the amount of the call made upon them.

For a series of years Manini was in the habit of [872] keeping back large portions of the rates so collected by him, instead of paying them into the hands of the treasurer: and, in order to prevent detection, he induced the said John Paul to falsify the copies of accounts returned by him to the respondents, and to make it appear by the said returns that Manini had in fact paid to the treasurer the whole amount of the rates collected by him, and to make it appear also that the respondents and the said eight parishes had credit respectively, in the manner hereinbefore explained, in the books of the treasurer, to the full amount of all the rates collected by him.

The accounts of the said eight parishes in the parochial ledger of the union were made up from these false returns: and in this manner the said eight parishes had credit given to them in the said ledger for moneys which were never in fact paid by them into the hands of the treasurer of the union, and for which they never were in fact credited in the books of the treasurer.

Manini, the more effectually to carry out his embezzlements, induced the said John Paul to intercept the cheques drawn by the respondents upon the treasurer of the union upon the faith of the balance in their favor to the amount appearing in the parochial ledger as aforesaid, in the following manner:—The respondents were in the habit of drawing cheques in favor of the creditors of the union, and handing them to their said clerk Paul to be paid over. A large quantity of these cheques were not paid to the creditors in whose favor they were drawn.

Up to Lady-Day, 1857 (after which no embezzlement was committed), Manini had, in the manner described, embezzled moneys to the amount of 22,407l. 8s. 2d. John Paul had also embezzled the sum of 4404l. 15s. 8d., which however was reduced by 500l. recovered from his sureties, leaving a net loss by Paul of 3904l. 15s. 8d.; [873] making the total amount embezzled 26,312l. 3s. 10d. This amount is represented in the accounts by the three following classes of deficiencies,—the said surplus moneys, amounting to 11,000l., paid by the seventy-five parishes to the treasurer of the union as above mentioned,—the sum of 4200l., the amount to which the respondents had overdrawn their account with the treasurer of the union as aforesaid,—and the residue, 11,112l. 3s. 10d., the amount to which creditors of the union had been improperly left unpaid.

In consequence of the loss of their funds as aforesaid, by the embezzlements and frauds before mentioned, the guardians of the said union were without the means of providing for the maintenance and support of the poor, and for the other payments which the said guardians were and are bound to make.

The order on the appellant's parish was made for the said sum of 65l., which amount was the sum required to be contributed by the said parish towards the relief of the poor thereof, and to the contribution of the said parish to the common fund of the said union, and such other expenses as were chargeable by the said guardians on the said parish.

It was agreed, that, if either party should wish to refer to any order or orders of the poor-law commissioners not set out in the body of this case, such party should be

at liberty so to do, and that, for that purpose, the orders should be taken to be as set out in the book intituled "The Consolidated and other Orders of the Poor-Law Commissioners, and of the Poor-Law Board, &c.," by William Cunningham Glen,—a copy of which accompanied the case.

The questions for the opinion of the court were,—first, whether the said contribution-order of the 31st of August, 1858, was legally and properly made,—secondly, whether the appellant was liable to pay, on [874] behalf of the said parish of St. Mary Bothaw, to the respondents the said sum of 65l., or whether the appellant was not entitled to have credit for the said balance appearing in favor of the said parish in the union parochial ledger at Michaelmas, 1858, although neither at that time nor at Lady-Day, 1857, was there any balance actually in the hands of the treasurer of the said union.

If the court should be of opinion that the said order was legally and properly made, and the appellant liable as aforesaid, and not entitled to have credit for the said balance, or any part thereof, then the said warrant was to be executed: but, if the court should be of opinion otherwise, then the determination of the justices was to be reversed, and the said complaint dismissed.

Watkin Williams (with whom was Bovill, Q. C.), for the appellant. The question in this case turns upon the construction to be put upon the 81st and 82nd articles of the Consolidated Orders of the Poor Law Commissioners, made pursuant to the 4 & 5 W. 4, c. 76. The 81st article provides that "The clerk shall four weeks at least before the 25th of March and the 29th of September respectively in each year, refer to and ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half-year of the last year corresponding to the half-year next coming, and shall estimate, and, as near as may be, divide amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year, and he shall also estimate the probable balance due to or from the parish at the end of the current half-year, and shall then prepare the orders on the several parishes for the sums which upon such [875] computation it shall appear necessary for them to contribute to the expenses of the union for the coming half-year; and the orders so prepared shall be laid before the guardians for their consideration three weeks at least before the expiration of the current half year." And the 82nd article provides that "the guardians shall make orders on the overseers or other proper authorities of every parish of the union, from time to time, for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the guardians on the parish; and in such orders the contributions shall be directed to be paid in one sum, or by instalments, on days specified, as to the guardians may seem fit." In consequence of the fraud of a collector employed by nine of the parishes which compose the union, a large deficiency having occurred in the funds, the guardians in February, 1857, made an order charging each parish in the union (ninety-eight in number) with its quota of the deficiency thus occasioned. Upon an appeal against this order, the court of Queen's Bench held, that, as the defaulting collector was appointed by the guardians, and was to be considered as the officer of the union, the deficiency was properly charged upon all the parishes constituting the union: but the court of Exchequer Chamber, upon appeal, reversed that decision,—holding that the loss thus occasioned was not properly chargeable upon a parish not being one for which the officer making default acted as collector: see *Huddleston v. The Guardians of the London Union*, 28 Law J., M. C. 113. In this case, the guardians have made a call upon the parish of St. Mary Bothaw, Dowgate, to contribute a sum towards the collector's deficiencies although he was not their collector, and [876] although there was at the end of the preceding half-year a balance in their favor in the treasurer's account of upwards of 450l. The balance in favor of the appellant's parish is not the less due to them, because the guardians have by their carelessness lost it, no negligence in the appellant being shewn.

Le Breton (with whom was Huddleston, Q. C.), contra. The order in question was properly made under the 82nd article of the Consolidated Orders. The 81st is merely directory. There is nothing on the face of the order to shew that it was made for any other purpose than that for which the guardians are bound to provide funds, viz. the prospective relief of the poor of the several parishes constituting the union. To

entitle the appellant to set off any balance, it must be shewn to be an available balance. *Christie, App., The Guardians of the Poor of St. Luke, Chelsea, Resp.*, 27 Law J., M. C. 153, was referred to.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

The question in this case arises on the 81st and 82nd articles of the consolidated order of the poor-law-commissioners.

The facts shew that the clerk, in preparing the order in dispute, had not conformed with the terms of the 81st article, inasmuch as, in computing the sum for which the parish of St. Mary Bothaw, Dowgate, was to be ordered to contribute to the expenses of the union, he omitted to estimate the probable balance due to that parish; for, if he had taken that balance into account, it was so largely in favor of the parish that no sum whatever would have been needed to meet the [877] cost of the maintenance of its poor and the other charges for which the order was made. It was, therefore, argued on behalf of the appellant, that the order was invalid and not enforceable: and that it would be most unjust to make the parish pay over again the sums which they had already duly paid to the treasurer of the respondents, and which had been lost or misapplied while in his hands, without any fault or neglect whatever on the part of the parish.

On the other hand, it was argued on behalf of the respondents that the order itself does not in any respect go beyond the terms of the 82nd article (under which it was made), it being simply an order for the payment of such a sum as was needed prospectively for the relief of the poor of the parish, and for its contribution to the common fund of the union, and for other lawful expenses chargeable by the guardians on the parish. And it was further urged, that, as, in point of fact, there was no balance or available fund whatever in the hands of the guardians and since it is plain that no order could legally be made on any of the other parishes of the union for contribution to the maintenance or relief of the poor of the particular parish, there would be no means whatever of maintaining or relieving them, if this order could not be made.

The question thus raised is certainly one of difficulty. But, after much consideration, we are of opinion that the arguments for the appellant ought to prevail.

It appears to us that the balance which the respondents have lost by the defalcations of Manini ought to be made good in their hands, either according to the opinion of the court of Queen's bench in *Waddington v. The Guardians of the Poor of the City of London*, 28 Law J., M. C. 113, by orders apportioning the amount amongst the various parishes of the union, or, [878] according to the course suggested by the court of Exchequer Chamber in the same case, by throwing the whole loss on those parishes exclusively for which Manini was collector. If the former course be the proper one, the parish of the appellant would, of course, contribute its just proportion. But the order in question, in effect, makes that parish contribute to Manini's defalcation, by arbitrarily confiscating the whole amount of the balance which happens to be due to it.

As the guardians may, by taking the proper steps, realize that balance, they had, we think, no right to treat it as non-existing; and they ought to have taken it into account before making any order on this parish.

For these reasons, we think this order was illegally made, and cannot be enforced. Judgment for the appellant (a).

THE GOVERNORS AND DIRECTORS OF THE POOR OF THE PARISH OF ST. JAMES, WESTMINSTER, *Appellants*: THE OVERSEERS OF THE POOR OF THE PARISH OF ST. MARY, BATTERSEA, *Respondents*. July 9th, 1859.

[S. C. 29 L. J. M. C. 26; 6 Jur. N. S. 100.]

The 158th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts that "every vestry and board shall distinguish in their orders sums required for defraying expenses connected with sewerage, and also, where the Lighting Act 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect

(a) See the 22 & 23 Vict. c. 49.

of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing of this act, distinguish, as regards such parish or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this act."—The board of works of the Wandsworth district made an order upon the overseers of the parish of Battersea, under the above section, to levy a certain sum for lighting one of the four districts into which that parish was divided, called the "out district," and also to levy certain other distinct sums for lighting the three other districts.—Neither the 3 & 4 W. 4, c. 90, nor any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, was in force in the "out district" at the time of the passing of the 18 & 19 Vict. c. 120, though the first-mentioned act was in force at that time in two of the other districts, and a private lighting act in the fourth district: and for these three districts a similar order for the levying of distinct sums for lighting expenses was at the same time made:—Held, that the order, and the rate made in pursuance thereof, were valid.

This was a case stated by justices for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43.

On the 2nd of November, 1858, a summons issued at [879] the instance of the overseers of the poor of the parish of St. Mary, Battersea, in the county of Surrey (hereinafter called "the respondents"), calling on the governors and directors of the poor of the parish of St. James, Westminster, in the county of Middlesex (hereinafter called "the appellants") to shew cause why they had not paid, and refused to pay, the sum of 25l. at which they had been rated and assessed in and by a certain lighting-rate, for the lighting part of the said parish styled "the remainder of the said parish," known or called the out district, made on the 8th of April, 1857, came on for hearing before the undersigned, one of the magistrates of the police-courts of the Metropolis, sitting at the Wandsworth police-court, within the metropolitan police-district.

The respondents produced a rate of which the title was in the following words:—
"A rate or assessment, called a lighting rate, made the 8th of April, in the year of our Lord 1857, for the carrying into effect the purposes of the act of the 18th and 19th years of the reign of Her present Majesty Queen Victoria, cap. 120, intituled 'An act for the better local management of the Metropolis,' and also under and by virtue of an act of parliament made and passed in the 9th year of the reign of Her present Majesty Queen Victoria, intituled 'An act for the better ascertaining and collecting the poor and other rates in the parish of Battersea, in the county of Surrey,' for the remainder of the parish of St. Mary, Battersea, in the county of Surrey (including Battersea Fields and Wandsworth Common, known or [880] called the out district), being a rate or assessment made upon owners and occupiers of houses, buildings, property, and land in that part of the said parish of St. Mary, Battersea, in the county of Surrey, hereinafter set forth and written, and rateable and rated, according to the last valuation made and acted upon for the relief of the poor in the said parish of St. Mary, Battersea, in the said county of Surrey, at the rate of 2s. in the pound."

No objection was raised to the title of the rate; and the fact of its having been properly and regularly made and duly allowed and published, was not questioned: the sole object of the parties being, and being stated to be, to obtain a decision of the question hereinafter mentioned.

By the rate the appellants appeared to be duly rated and assessed in respect of a certain building with land adjoining belonging to and occupied by them, known as "St. James's Industrial School," and hereinafter called "the premises," at 2s. in the pound on a rateable value of 250l.: whereupon the counsel for the appellants stated that the statute 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, was not in force in and throughout the whole of the said parish of Battersea at the time of the passing of the statute 18 & 19 Vict. c. 120; that the 3 & 4 W. 4, c. 90, was at the said time in force in certain several parts or districts of the said parish of Battersea; but that the premises were situate wholly without every of such

parts or district. This statement was admitted to be true by the counsel for the respondents, subject to the more specific and minute account of it hereinafter set forth.

Upon this admission, the counsel for the appellants [881] contended that the appellants were not liable to be assessed to a lighting-rate in respect of the premises, inasmuch as by the 158th section of the 18 & 19 Vict. c. 120, the power and duty of vestries and district boards to distinguish sums required for defraying expenses of lighting, from sums required for defraying other expenses of executing that act, only existed when the act of 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, was in force in any parish or a part of a parish at the time of the passing of the 18 & 19 Vict. c. 120, and then only as regards such parish or part of parish; and therefore that the district board of works had not authority by law to order the respondents to make any separate rate for defraying the expense of lighting, to be called a lighting-rate, whereby the appellants should be assessed in respect of the premises; that any order of the district board of works purporting so to order the respondents, was either bad so far as the appellants and the premises were concerned, or ought to have been understood and carried out by the respondents in such wise that the appellants should not be assessed thereby in respect of the premises; and therefore that the appellants were no more liable to the rate in question in respect of the premises than they were in respect of premises belonging to them in another parish altogether.

The counsel for the respondents thereupon made the following statement:—At the time of passing the act for the better local management of the Metropolis, 18 & 19 Vict. c. 120, the 3 & 4 W. 4, c. 90, was in force in a district of the said parish called the North Western District, also in a second district of the said parish called the South Eastern District; and an act to repeal [882] an act of the 52nd year of the reign of King George the 3rd [c. 112] for lighting and watching the road leading from Newington Butts to the Nag's Head, in the Wandsworth Road, and other places communicating therewith, in Lambeth, Clapham, and Battersea, in Surrey, and for making other provisions for lighting and improving the said road and other places adjacent or near thereto (the 9 & 10 Vict. c. 350, local and personal),—and which said act was to form part of this case, and might be referred to by either party,—was at the time of the passing of the said act for the better local management of the Metropolis in force in a third district of the said parish, called the Wandsworth Road District. The remainder of the parish is called the Out District. There was no lighting-act in force within the said Out District or any part thereof at the time of the passing of the said act for the better local management of the Metropolis. The rate mentioned in the summons was made by the overseers of the said parish of Battersea on the persons and in respect of the property by law rateable to the relief of the poor in the said Out District, in compliance with an order of the board of works for the Wandsworth District, within which district the said parish of Battersea is situated, duly made under their seal, whereby they required the overseers of the poor of the said parish of Battersea to levy and pay into the Southwark branch of the London and Westminster Bank, Wellington Street, Borough, to the credit of the board of works for the Wandsworth District, a sum in the said order named, for expenses of lighting the said Out District, by the instalments and at the times in the said order mentioned; and the appellants, who were the beneficial occupiers of the said lands and buildings called “The St. James's Industrial School,” situate within the said Out District, were rated in the said rate in [883] respect of the said land and buildings at the said sum of 25l. By the same order, the said board of works for the Wandsworth District had required the said overseers of the parish of Battersea to levy in like manner the several sums therein respectively mentioned, for expenses of lighting the North Western District, the South Eastern District, and the Wandsworth Road District of the said parish of Battersea respectively; and rates had accordingly been made for this purpose on the said districts respectively.

The counsel for the appellants admitted this statement to be true.

The counsel for the respondents thereupon contended, that, as the statute 3 & 4 W. 4, c. 90, was in force in certain parts of the said parish, and the statute 9 & 10 Vict. c. 350, in another part of the said parish, at the time of the passing of the act

for the better local management of the metropolis, the said district board of works were not only justified in ordering, but were bound to order, the expenses of lighting the said parish to be defrayed by a lighting-rate, as distinct from a general rate : and that the appellants were liable to be assessed to the said rate so ordered to be made on the Out District, in respect of the premises, although the same were not situate within any district in which the lighting-act was in force at the time of the passing of the said act for the better local management of the Metropolis ; and that, if they were not, they would be exempt altogether from contributing towards the expense of the lighting the said parish, as the same could not be defrayed out of a general rate.

The counsel for the appellants, in reply, contended that by law they were only liable to a general rate and a sewer-rate : and that, if the law did not provide the means for making them liable to a lighting-rate, neither the district board of works nor the respondents had authority to supply the defect.

[884] As both parties were desirous of having the question of law settled by the opinion of one of the superior courts of law, on a case setting out the facts, the undersigned, with their consent (given for the purpose only of enabling them to bring the said question in that form before such court), determined that the appellants, for the reasons of the respondents above set forth, were liable to the said rate, and ordered the amount thereof to be levied on them by his distress-warrant. And thereupon, the appellants, being dissatisfied with the said determination as being erroneous in point of law, duly complied with the requisitions of the statute 20 & 21 Vict. c. 43, and applied to the undersigned to state and sign a case setting forth the facts and grounds of his determination, in the form of a special case for the opinion thereon of the court of Common Pleas. The statements above set forth are such special case.

The land in respect of which the appellants are assessed in and by the said rate consists of fifteen acres of land adjoining and belonging to the said house and within the said curtilage, which are cultivated for culinary produce by the spade-labor of the boys in the establishment. A part of the produce is consumed for the purposes of the establishment : another part is consumed for the purposes of the workhouse of St. James, Westminster, which is situate within that parish : and the remainder is sent to market and sold, the proceeds being applied in aid of the poor-rate of that parish.

The appellants claim, under the 165th section of the Metropolis Local Management Act, to be assessed in respect of these fifteen acres at one-third only of the rate at which houses, buildings, and property other than land, are assessed in and by the said rate.

It is agreed between the parties, that, if the appellants are liable to be assessed to the said rate in respect of the said premises, but are nevertheless entitled to [885] have the said fifteen acres rated, as land, at one-third only of the rate at which houses, buildings, and property other than land, are rated in and by the said rate, the sum of 3l. 6s. 8d. shall be deducted from the sum which the applicants are to pay, and for which my distress-warrant is if necessary to issue.

The questions for the opinion of the court, are, —first, whether the appellants were by law liable to be assessed to the said rate in respect of the premises, —secondly, if the court will indulge the parties by deciding it, whether the appellants are entitled to have the said fifteen acres rated as land within the meaning of the 165th section of the Metropolis Local Management Act.

Lush, Q. C. (with whom was David Keane), for the appellants (a). The parish of

(a) The points marked for argument on the part of the appellants, were as follows :—

"1. That, as it is admitted that the premises in respect of which the appellants are rated are situated in the Out District, and also that at the time of the passing of the Metropolis Local Management Act, 1855, no lighting-act was in force for the whole parish, or in the Out District, a lighting-rate on them in respect of their occupation of their said premises, is not warranted by law :

"2. That, by the 161st section of the Metropolis Local Management Act, 1855, the power of the overseers to make a lighting-rate depends on the existence of an order of the district board of works for levying a separate sum for defraying expenses of lighting ; that such order must be one which the district board of works is by law entitled to make : and that, by the 158th section of the same act, such an order can only be made 'where the act of the session holden in the 3rd and 4th years of King William the 4th, c. 90, or any other act by virtue whereof land is rated in respect of

St. Mary Battersea is [886] divided, for lighting purposes, into three districts: in two of these, the lighting-act 3 & 4 W. 4, c. 90, has been applied: in the third there is a private lighting-act, 52 G. 3, c. 112: as to the fourth, or "out-district" (where the property sought to be charged with the rate in question is situate), it had no lighting-act at all, and in point of fact was not lighted. The question is whether the board of works had any power to make a lighting-rate for that out district. The 71st section of the general lighting act, 3 & 4 W. 4, c. 90, enacts that [887] the provisions of that act may be adopted in any parish either as to lighting or as to watching, or as to lighting and watching, as may be deemed expedient: and the 73rd section enacts that it shall be lawful for the inhabitants of part of any parish to hold a meeting of the inhabitants of such part, to be convened in manner therein directed, and to be composed of such inhabitants only, for the purpose of determining whether the provisions in that act contained, or any of them, shall be adopted and carried into execution in such part of the said parish: and that the overseers of the poor of the said parish, or of any township or division of the said parish, shall be amenable to the provisions of this act, so far as they may relate to the part of such parish situate within or partly within the division or district for which such overseers shall act, for the purpose of levying, raising, and paying the rates within the part of such parish adopting the provisions of this act, in the same manner as they would be if the whole parish, township, or place for which they act had adopted the provisions of that act. The rate in question was made under the authority of the 158th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which enacts that "every vestry and district board shall from time to time, by order under their seal, require the overseers of their parish, or of the several parishes in their district, to levy, and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this act (and such orders may be made wholly or in part in respect of expenses already incurred or of expenses to be thereafter incurred): and every such vestry and board shall distinguish in their orders sums required for defraying expenses of constructing, alter-[888]-ing, maintaining, and cleansing the sewers, or otherwise connected with sewerage, and also, where the 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing

expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish or part of any parish, and then only 'as regards such parish or part;' that neither the act of the 3 & 4 W. 4, or any other act of the kind described in the 159th section, extends to the whole parish of Battersea or to the Out District: and yet that the order relied on is one for making a separate lighting-rate for the Out District:

"3. That the intention of the legislature was, as is shewn by the 158th and 165th sections of the Metropolis Local Management Act, 1855, that no separate rate should be made for defraying the expenses of lighting, unless some act was in force in the parish or part rated directing that land should be rated less in proportion than houses, or be wholly exempt: and that the imposition of a lighting-rate on the Out District, or the inclusion of it in a lighting-rate extending over a large area, will defeat such intentions, inasmuch as, if the rate be imposed on the Out-District only, there would be no authority by law to rate land at an amount less in proportion than houses, or to exempt land, and if a lighting-rate be imposed upon a district including the Out District and some other part of the parish, the rate would press unequally on land in the Out District, in comparison with land in the other part so included:

"4. That the Out District is subject only to a general rate and a sewer-rate, in the former of which the expenses of lighting the Out District are to be included: and the case of the parish of Battersea is one not provided for by the act, and an omission of the legislature which the court will not supply:

"5. That the land cultivated as in the second part of the case mentioned, if rateable to a lighting-rate at all, is only rateable at an amount one-third less in proportion than property other than land is rated at."

of this act, distinguish, as regards such parish or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this act: but every such vestry and board may cause to be raised as expenses connected with sewerage such portion of the expenses incident to the conduct of their business in relation to sewerage, in common with the conduct of their other business under this act, as to such vestry or board may seem just; and the overseers or collectors, in the receipts to be given for the sums levied or collected by them, shall distinguish the rate in the pound required for sewerage expenses, and the rate required for the other expenses of this act." The parish of St. Mary Battersea forms part of the Wandsworth District. The object of the 158th section was, to transfer to the vestry or the district board the powers of lighting, but not to alter the ratio in which the parishes were liable to be rated under the act. The 161st section provides that the rate so ordered shall be collected by the overseers in the same manner as the poor-rate: and the 165th section enacts, "that, in every parish or part of a parish in which, at the time of the passing of this act, the 3 & 4 W. 4, c. 90, is in force, the owners and occupiers of houses, buildings, and property other than land, shall be rated to every lighting-rate made under this act at a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated [889] in such lighting-rate; and, in every parish or part of a parish in which, under any other act, land is now rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is now wholly exempted from being rated in respect of such expenses, such land shall continue to be rated to every lighting-rate made under this act at such less amount, or, where such land is now wholly exempted as aforesaid, shall be wholly exempted from such rate." The lighting-act having never been applied to this district, the only rates which the board of works could order, are, the sewer-rate and the general rate. The overseers can only levy a lighting-rate where it has been duly ordered to be levied; and it could only legally be ordered to be levied where the lighting-act had been applied. [Willes, J., referred to s. 159, which enables vestries and boards to exempt from payment any particular part of the parish or district not benefited by the expenditure. Byles, J. How is the lighting to be paid for?] Out of the general rate, if at all. But this particular district, it appears, is not lighted at all.

Prideaux (with whom was Jackson), for the respondents (*a*). No general rate can be made on the whole [890] parish which contains anything for lighting. The 3 & 4 W. 4, c. 90, is impliedly repealed by the 19 & 20 Vict. c. 120, s. 158; therefore that act cannot now be adopted, as suggested. The 159th section is conclusive, and seems to have been framed for the very purpose of meeting a case like the present. It enacts, that, "where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied as aforesaid, have or has been incurred for the special benefit of any particular part of their parish or district, or otherwise have or has not been incurred for the

(*a*) The points marked for argument on the part of the respondents were as follows:

"That, under the circumstances set forth in the case, the district board of works were bound to order the expenses of lighting the said parish, and the several districts thereof, to be defrayed by lighting-rates: That, even if they were not bound so to do, they were justified in so doing: That the said order of the district board of works was authorised by the provisions of the Metropolis Local Management Act, and that the overseers of the poor of the said parish of St. Mary, Battersea, were by virtue thereof authorised and bound to make and levy a lighting-rate on the said Out District, for defraying the said expenses of the said Out District: That the appellants were liable to be assessed to the said rate, in respect of the premises: That land within the said Out District is not entitled to the benefit of the provisions of the 165th section of the Metropolis Local Management Act, the 3 & 4 W. 4, c. 90, not having been in force in the said district at the time of the passing of the Metropolis Local Management Act: That the said fifteen acres of land appurtenant to the said house, and within the said curtilage, cannot be deemed 'land,' within the meaning of the 165th section of the Metropolis Local Management Act: And that the appellants are not entitled to have the said fifteen acres rated as 'land,' within the meaning of the said last-named section."

equal benefit of the whole of their parish or district, such vestry or board may, by any such order, direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require; and any such board may refrain, where any entire parish ought in their judgment to be so exempt, from issuing an order for levying any money thereon, notwithstanding they may issue an order or orders for levying sums upon any other parish or parishes in their district." Here the [891] rate is made upon the out district under the order of the board of works, for the express purpose of lighting that district: and the court will assume that the order was rightly made, if a state of circumstances existed to justify the making of it. The second question is not one submitted by the magistrates: but it would be desirable for the parties to have the opinion of the court upon that also. [Willes, J. I for one am not disposed to indulge the parties with an opinion upon that question.]

Lush, in reply. The order is a general order to levy a rate upon the whole parish. The board therefore have not exercised the power supposed to have been conferred upon them by the 159th section of the 18 & 19 Vict. c. 120. Neither the order nor the rate is warranted by the act. [Williams, J. There certainly are difficulties in the way of applying the 159th section to this case.]

There was a second case between the same parties, involving the same question in respect of a rate made on the 13th of October, 1857.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

In these two cases, the questions submitted for our consideration respectively are, whether the lighting-rates which are the subject of dispute are valid and enforceable. And we are of opinion in the affirmative.

The validity of the rates is dependent on the validity of the orders made on the respondents by the board of works of the Wandsworth district. As to one of the rates, that of April 8th, 1857, the order is, to levy a certain sum for lighting one of the four districts into [892] which the parish of the respondents is divided, called "the out district," in which the premises of the appellants are situate, and also to levy certain other distinct sums for lighting the three other districts. As to the other rate, that of October 13th, 1857, the order is, to levy a single sum for lighting the parish of Battersea generally.

These rates and six others were made under the 158th and 161st sections of the statute 18 & 19 Vict. c. 120: and the question turns entirely on the construction of that act.

The appellants contend that the 158th section, in ordinary cases, prescribes that the board shall (except as to sewerage expenses) order, generally, the overseers of the several parishes in the district to levy the sum required for the expenses incurred in the execution of the act, and only allows the board to order a distinct sum for lighting to be levied in cases where the statute 3 & 4 W. 4, c. 90, or some other act by virtue whereof land is rated, as to lighting expenses, at a lower amount than houses, is in force in the parish or any part thereof. And in such cases the board is to distinguish, "as regards such parish or part," the sum required for lighting, from the sum required for the general expenses of executing the act. The argument, then, is, that the board, by this enactment, is directed in this instance to order a distinct sum for lighting only as regards the three other districts, in which, by virtue respectively of the statute 3 & 4 W. 4, c. 90, and a local act, land is rateable at a lower amount than houses; and that the expenses of lighting the remaining district, i.e. the out district, must be defrayed under a general order, and a general rate founded thereon, and not by a distinct order for lighting, and a lighting-rate such as those in question. But, if this were the construction, it is plain that the three other districts would have [893] to contribute to the general rate, as well as to their own special lighting-rate: in other words, besides paying for their own lighting, they would have to pay a very great proportion of the expenses of lighting the out district.

It is impossible to suppose that the legislature intended anything so unreasonable and unjust: and we think, that, when the board is directed to distinguish, as regards any particular part of any parish, the sums required for defraying the expenses of lighting the parish from the sums required for the general expenses, they are, by implication, directed to distinguish the sum required for lighting the whole parish,

which must be levied by a lighting-rate over the whole parish, having regard, in making the rate, according to s. 165, to those particular parts of the parish wherein by reason of the statute 3 & 4 W. 4, or other act, land is rateable at a lower amount than houses.

Substantially, we think the rates and orders in dispute have been made in conformity with this construction of the statute, and are therefore valid and enforceable.

We have been requested to answer another question in dispute between these parties: but, as it has not been submitted to us by the special case, we think we are bound to decline giving any opinion with respect to it.

Appeal dismissed.

[394] SIR THOMAS BLAIKIE, KNIGHT, AND OTHERS, v. STEMBRIDGE.
July 9th, 1859.

[S. C. 29 L. J. C. P. 212; 2 L. T. 570; 6 Jur. N. S. 825; 8 W. R. 239. Followed, *The Catharine Chalmers*, 1874, 32 L. T. 847; 2 Asp. M. C. 598.]

Semble, that a merchant sending goods to be loaded on board a general ship is not entitled to assume, without inquiry that they are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with the master, or wrong done by him or the crew, to insist upon holding the master liable for damage done to the goods in the loading thereof.—In the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner of a ship, to receive and properly stow on board the goods to be carried; and, for any damage to the goods occasioned by negligence in the performance of this duty, the owner (and probably also the master, if the damage result from the neglect or misconduct of himself or of those for whose acts he is responsible,) is liable to the shipper.—A ship was chartered by the owner to one A. for a voyage with cargo to Port Louis and back, for a stipulated rate of freight per ton on the homeward cargo,—the cargo to be taken to and tendered alongside at the charterer's risk and expense, the ship to be consigned to charterer's agents at ports of loading and discharge, and a stevedore for the outward cargo to be appointed by the charterer, but to be paid by and to act under the captain's orders. The charterer put up the ship as a general ship for Port Louis, and appointed a stevedore, who with his men went on board for the purpose of stowing the vessel, in the usual course of his business. The master gave no orders to or in any way interfered with the stevedore, only looking into the hold occasionally to see how the cargo was being stowed, for the safety of the ship. The plaintiffs' agent arranged with the broker of the charterer for the freight and carriage to Port Louis of certain sugar-pans, and sent them alongside the ship. Whilst the pans were being hoisted on board from the lighter by the stevedore and his men, two of them were by their negligence damaged:—Held, that, under these circumstances, the stevedore was not the servant or agent of the master, so as to render him responsible.

This was an action brought by the plaintiffs, who are iron-founders, against the master of a vessel called the "Gundreda," for alleged negligence in loading certain sugar-pans on board that vessel.

The declaration stated that theretofore, and before the commencement of the suit, the plaintiffs, at the request of the defendant, caused to be delivered to the defendant in London, alongside a certain ship called, to wit, the "Gundreda," divers goods and merchandize of the plaintiffs, to wit, fourteen sugar-pans, of great value, to be loaded by the defendant on board the said ship, and in and on board the said ship to be carried and conveyed by the defendant from London aforesaid to Port Louis, in the island of Mauritius, and there to be delivered, to wit, to the plaintiffs, for freight and reward to the defendant in that behalf; the act of God and the Queen's enemies, and dangers of the seas, excepted: and the defendant then took and received the same accordingly for the purpose and on the terms aforesaid: yet the defendant so negligently, carelessly, [895] and improperly conducted himself in and about the said loading of the said pans on board the said ship, that, by and through the carelessness, negligence, and improper conduct of the defendant and his servants in that behalf, and not by reason of any dangers of the seas, or the Queen's enemies, or the act of

God, divers, to wit, two of the said pans were much damaged and broken, and the same became and were and are of no use or value to the plaintiffs.

The defendant pleaded,—first, that the plaintiffs did not cause to be delivered, nor did the defendant take or receive the said sugar-pans for the purpose and on the terms alleged,—secondly, not guilty. Issue thereon.

The cause was tried before Wightman, J., at the last Spring Assizes for Surrey. It appeared that the defendant was master of a ship called the “Gundreda,” belonging to one John Hillman : and that, on the 5th of May, 1857, the ship was lying in the port of London, and she was chartered by one Gallard for a voyage to Port Louis and back. The following is a copy of the charter-party :—

“London, 7th of May, 1857.

“It is this day mutually agreed between John Hillman, owner of the good ship or vessel called the ‘Gundreda,’ A 1, thirteen years, of the measurement of 444 tons or thereabouts, now in London, whereof Edward Stenbridge is master, of the one part, and J. R. Gallard, of London, merchant and freighter, of the other part,—That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall in the London Docks load such lawful merchandize as the charterer may tender alongside, and therewith, with all convenient speed, sail and proceed to Port Louis, Mauritius, and discharge the same agreeably to bills of lading : after which she shall there load from the charterer’s agents a full and [896] complete cargo of sugar in bags. Cargos to be brought to and taken from alongside at merchants’ risk and expense, which the said charterer binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture : and, being so loaded, shall therewith proceed to a safe port of discharge in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive, excluding Amsterdam : calling at Queenstown or Falmouth for orders, which are to be given by return of post from London, or so near thereto as she may safely get, and deliver the same, on being paid freight at and after the rate of, for the voyage out and home, 4l. 5s. sterling per ton of 20 cwt delivered at the Queen’s beam, net, in full, for the United Kingdom : if ordered to the Continent, as above, 10s. per like ton additional (the act of God, the Queen’s enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted) : The freight to be paid on unloading and right delivery of the homeward cargo, by approved bill on London at two months’ date, or cash equal thereto, at merchant’s option : £700 to be advanced on sailing from London, in cash, less two months’ interest, or by bill at two months, at owner’s option : Thirty-five running days are to be allowed the said charterer (if the said ship be not sooner despatched) for unloading and re-loading at Mauritius : and to be discharged on her return, with all despatch, as customary : Forty-five running days for loading in London : and ten days on demurrage, over and above the said laying days, at 8l. per day.

“Money for ship’s ordinary disbursements to be advanced by the charterer’s agents, free of interest and commission, but subject to insurance : The captain to [897] sign bills of lading at any rate of freight, not under the current rate, without prejudice to this charterparty.

“The ship to be consigned to charterer’s agents at ports of loading and discharge, paying one commission of 2½ per cent. : Stevedore for outward cargo, to be appointed by charterer, but to be paid by and to act under captain’s orders : Penalty for non-performance of this agreement, estimated amount of freight.”

(Signed)

“JOHN HILLMAN.
“J. R. GALLARD.”

The charterer appointed one George Locke to be the stevedore : and he and his men thereupon went on board for the purpose of loading and stowing the cargo according to ordinary usage. The master was aware of the terms of the charterparty, and that the stevedore was to be paid by him, and act under his orders : but he gave the stevedore no orders, and in no way interfered, but looked occasionally into the hold to see how the cargo was stowed, for the safety of the ship.

The master was not on board when the plaintiffs’ goods came alongside of and were loaded on board the ship, nor did he in any way interfere with them : the mate was

at that time on board in charge of the ship, but did not interfere in the loading. No crew was on board, nor had any been procured at the time the injury took place.

The pans were sent to London, and the plaintiffs' agent saw the brokers of the charterer and arranged with him for the carriage of the pans on board the ship, and paid him for freight of the same about 250l. The pans, twenty in number, were sent alongside the ship by the plaintiff's agent, in a lighter. The ship's people do the loading; the lighterman does not. The pans were then hoisted on board by the stevedore and his men, by hooks put into the lugs of the pans: and, by the pans being so lifted, or by the hoist being out of [898] the perpendicular, two of the pans were injured; and this action was brought for the damage thereto. The other pans, together with two afterwards sent to replace those damaged, were safely loaded and stowed on board by the stevedore, and the master signed the bill of lading for them.

At the trial, the judge left the question of negligence of the stevedore to the jury, who found for the plaintiffs as to one of the pans, with 14l. damages: but the counsel for the defendant contended, that, assuming the stevedore to have been negligent, the master was not liable for his negligence; and the judge reserved leave to the defendant to move to enter the verdict for him, if the court should be of opinion that there was no evidence to charge the master.

Bovill, Q. C., accordingly, in Easter Term last, obtained a rule to enter a verdict for the defendant, on the ground "that he was not shewn to be responsible for the negligence of the stevedore."

Holl and Jacob shewed cause. The grounds upon which it is sought to establish the non-liability of the defendant, the master, for the injury complained of, are, that he was not personally present, and that a stevedore had been appointed by the charterer to superintend the stowing of the cargo. Now, it is the master's duty to see to the loading of the vessel: and, though the stevedore in this case was appointed by the charterer, it is expressly stipulated by the charter-party that he was to be paid by and to act under the orders of the captain. [Willes, J. By some of the foreign ordinances and codes, the master is responsible for the negligence of those acting under him: but is that so here? In the case of a stage-coachman, the liability for the loss by negligence of a parcel attached [899] not to him, but to the proprietors.] If there had been no charter and no stevedore, the master clearly would have been responsible: *Morse v. Shue*, 1 Ventr. 190, 238, Sir T. Raym. 220, 1 Mod. 85, 2 Keble, 806, 3 Keble, 72, 112, 135, 2 Lev. 69. And there is nothing in this charterparty to alter his position. In the report of that case in 1 Ventr. 238, Hale, C. J., says,—“By the admiral civil law, the master is not chargeable pro damno fatali, as, in case of pirates, storm, &c.; but where there is any negligence in him, he is.” Again,—“’Tis objected that the master is but a servant to the owners. Answer: The law takes notice of him as no more than a servant. ’Tis known that he may impawn the ship, if occasion be, and sell bona peritura. He is rather an officer than a servant. In an escape, the gaoler may be charged, though the sheriff is also liable: for, respondeat superior. But the turnkey cannot be sued, for he is but a mere servant. By civil law, the master or owner is chargeable, at the election of the merchant.” [Williams, J. *Morse v. Shue* is a very obscure case: the great question there was whether the common-law liability of a carrier extended to a carrying beyond seas. You have to make out that the master is liable for misfeasance as between him and the owner of the goods. Generally speaking, the only duty owing from an agent or servant is to his principal or master. Byles, J. There has been no misfeasance, no personal negligence here: all that is charged is, that an intermediate agent has failed in exercising due vigilance in the stowage of goods.] The master of a ship stands in a very different position from an ordinary intermediate agent. *Morse v. Shue* is treated in the text books,—Abbott on Shipping, and Maude & Pollock on Shipping,—as an authority for the liability of the master where he has been guilty of negligence. In Abbott on Shipping, 7th edit. 167, it [900] is said: “The great trust reposed in the master by the owners, and the great authority which the law has vested in him, require on his part, and for his own sake, not less than for the interest of his employers, the utmost fidelity and attention. For, if any injury or loss happen to the ship or cargo by reason of his negligence or misconduct, he is personally responsible for it.” Again, p. 346,—“It is in all cases the duty of the master to provide ropes, &c., proper for the actual reception of the goods into the ship; Laws of Oleron, art. 10; Laws of Wisbuy, art. 22; Wellwood, tit. 9. And, if a cask be accidentally staved in letting it down

into the hold of the ship, the master must answer for the loss:" *Goff v. Clinkard*, cited 1 Wils. 288. [Williams, J. The authorities seem to shew, that, for public convenience, the master may be treated as a common carrier. But you want to shew that that principle is applicable where there is an express contract as to the stowing between the merchant and the owner.] The goods were not received under the charter. The ship was put up as a general ship: the receipt of the goods was the only evidence of the contract [Willes, J. If any one is liable, it must be the owner.] It does not follow that the master may not be liable also. The appointment of a stevedore can make no difference. [Byles, J. Suppose the master were to depute one of the crew to execute his duties, would the person so deputed be liable for negligence?] Clearly not. [Byles, J. You would say that that would be the case of the sheriff, the gaoler, and the turnkey?] Exactly so. The position of the master is an exceptional one. In *Story on Agency*, § 314, the law is thus laid down:—"There is one important exception to the rule already stated, as to the non-liability of agents to third persons for the negligences and omissions of duty of themselves and of their sub-agents, founded upon [901] the principles of the maritime law. In the case of masters of ships, who, although they are the agents or servants of the owners, are also in many respects deemed to be responsible as principals to third persons, not only for their own negligences and nonfeasances, but also for the negligences, nonfeasances, and misfeasances of the subordinate officers and others employed by and under them. We have already seen that the master of the ship is responsible upon contracts made by him in regard to the usual employment of the ship, and also upon contracts made by him for the repairs and necessities supplied for the ship, as well as for the wages of the seamen employed in navigating the ship. This liability is founded upon the doctrine of the maritime law, which treats the master not merely as an agent contracting on his own behalf as well as for the owner; but which, upon a broader policy, treats him as in some sort a subrogated principal, and qualified owner of the ship, possessing authority in the nature of the exereitorial power, for the time being. And his liability, founded upon this consideration, extends not merely to his contracts, but to his own negligences and nonfeasances and misfeasances, as well as to those of his officers and crew. His responsibility for the officers and crew has this additional reason for its support, that he is thus induced to exercise a superior watchfulness over their acts and conduct; and, if he were not so made liable for their acts and conduct, he might often, by his connivance in their frauds, misfeasances, and negligences, or nonfeasances, subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has, therefore, indissolubly connected his personal responsibility with that of all the other persons on board, who are under his command, and are [902] subjected to his authority." [Byles, J. In *Boson v. Sandford*, 1 Show. 101, for the loss of goods by his neglect, Lord Holt says "The master is liable, and may be sued alone."] All the authorities shew, that, for damage resulting from his negligence, the master is equally liable with the owners. And he is clearly not relieved from that responsibility by the fact of a stevedore being appointed by the charterer. It being stipulated that the stevedore should act under his orders, the master was as much responsible for his acts as for those of any other of the crew.

Bovill, Q. C., and C. Pollock, in support of the rule. The case of *Morse v. Slue* has no application here. To render the present defendant liable, the plaintiffs must shew that he did some act or gave some command which operated to make the acts of the stevedore his acts, or that there was some contract to make him chargeable. Contract there was none: there was no bill of lading, not even a mate's receipt, given for these pans. The facts put the plaintiffs out of court. The owners of the ship charter her to one Gallard, who puts her up as a general ship, and engages a stevedore to superintend the loading, the stevedore being paid by the ship's broker, for the owners. The plaintiffs contract with the charterer for the carriage of certain sugar-pans; and, whilst these pans are in the act of being hoisted on board for the purpose of stowage by the stevedore and his men, an accident happens whereby two of them are injured. There is no case to be found where the master of a vessel has been held liable, except as for a tort qua common carrier, or, where the vessel is at sea, by reason of some negligence on the part of the crew. [Williams, J. The case of *Morse v. Slue* seems to establish

that the master and the owner may be treated alike. Willes, J. How do you get over [903] the case put in Abbott,—“If a cask be accidentally staved in letting it down into the hold of the ship, the master must answer for the loss?”] The master may be responsible for an injury occurring in the receiving of the goods in the ordinary course, he himself remaining on board as exercitor navis. But, how can he be liable for the acts of an independent agent of the owner or the charterer, with respect to whom no relation of master and servant ever existed? [Willes, J. It is the master's duty to receive goods on board; the stevedore's duty to stow them in the hold. In practice, the master is seldom present at the loading; but he takes the risk of his duty being properly performed by the mate and the crew.] The evidence shews that the injury complained of happened whilst the pans were being got out of the lighter by the stevedore and his men. The stevedore, as well as the master, may be the agent of the charterer, and not of the owner: *Marquand v. Banner*, 6 Ellis & B. 232. The old doctrine of *Bush v. Stinman*, 1 Bos. & P. 404, is not now sustainable: *Cessante ratio cessat et ipsa lex*. The business of a stevedore is as familiarly known as that of a drover. If he has a superior who is responsible for his nonfeasance or misfeasance, it must be the owner or the charterer, not the master. Wherever the doctrine of respondeat superior applies, the superior has a remedy over against the agent for his negligence. Here, the master could have no recourse to the stevedore, who was merely the servant of the charterer. [Willes, J. Is it not part of the ordinary duty of the master to provide the means and to employ those means for getting the goods on board?] The practice in the city of London is to employ a stevedore. [Willes, J. No such usage was proved or found here.] It was in evidence that the stevedore and his men went on board for the purpose of loading and stowing the cargo, according to the ordinary usage. [Wil[904]-liams, J. That means as between the owners and the charterer. There was no privity between the owners of the ship and the merchants here.] None: nor between the owners and the stevedore. Is the captain responsible for the negligence of every seaman on board? [Williams, J. Yes. He is responsible for the consequences of the negligence of any one who is employed under him to perform any duty which the law casts upon him. If goods are lost by the negligence of one of the crew, the master is liable.] The master never had charge of these goods.

WILLIAMS, J. This being a case of very general application, we will take time to consider and give our reasons; though I must say, that, as at present advised, I feel no difficulty as to the conclusion we ought to arrive at.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court (a):

This was an action brought by the plaintiffs, who are ironmongers, against the master of a vessel, for alleged negligence in loading some sugar-pans aboard his ship the “Gundreda.”

The declaration alleged that the plaintiffs, at the defendant's request, delivered the pans to the defendant in London alongside, to be loaded by the defendant on board the ship, and carried therein by him from London to Port Louis, in the Mauritius, and there delivered to the plaintiffs for freight, the act of God and the Queen's enemies, and dangers of the seas, excepted; that the defendant received the pans accordingly; and that two of them were broken by the negligence of himself and his servants in loading them.

[905] The defendant pleaded,—first, a denial that the plaintiffs delivered and the defendant received the pans for the purpose and on the terms alleged,—secondly, not guilty. On these pleas the plaintiffs took issue.

At the trial, before Wightman, J., at the last Surrey Assizes, it appeared that the defendant was master of the ship “Gundreda,” belonging to John Hillman, and that, on the 7th of May, 1857, she was lying in the port of London, and was then chartered by the owner to J. K. Gallard for a voyage with cargo to Port Louis and back, for a certain specified rate of freight per ton on the homeward cargo, 700l. whereof was to be advanced on the vessel's sailing from London. The cargo was to be taken to and tendered alongside at the charterer's risk and expense: the captain to sign bills of lading at any rate of freight, not under the current rate. “The ship to be consigned to charterer's agents at ports of loading and discharge.” “Stevedore for outward

(a) The case was argued before Williams, J., Willes, J., and Byles, J.

cargo to be appointed by charterer, but to be paid by and to act under the captain's orders."

The charterer, being thus entitled to take a cargo to Port Louis, put the "Gundreda" up as a general ship, through his agent David Thomas. At that time no crew was on board, nor had any been procured at the time the injury complained of took place: and this was not alleged to have been unusual or improper. The charterer appointed George Locke as stevedore, and he and his men went on board for the purpose of loading and stowing the vessel in the usual course of his business. The master was aware of the terms of the charterparty, but gave the stevedore no orders, and in no way interfered with him, contenting himself, according to his view of his duty, with occasionally looking into the hold to see how the cargo was being stowed, for the safety of the ship. The master was not on board when [906] the plaintiffs' pans came alongside: and he in no way interfered with them, unless indeed the stevedore is to be considered as his agent. The mate was on board in charge of the ship, but did not interfere with the loading. The pans in question were sent to London, to go by the ship. The plaintiffs' agent saw the broker of the charterer, and arranged with him the freight and carriage of the pans, and paid him the freight, 250l.

From the evidence of the agent, it should seem that he was aware of the ship being chartered: but it is unnecessary to rely upon that circumstance, because, if he did not know it, that was no fault of the owner's or master's. If he did, and there was no other ground upon which to dispose of the case, we might have had to consider how far the ruling of Lord Wensleydale in *Major v. White*, 7 C. & P. 41, bore upon it.

To return to the facts:—The pans were sent alongside in a barge, and they were thence hoisted on board by means of hooks in the lugs. During this operation, either by reason of the pans being lifted by the lugs, or by the purchase not being perpendicular, two of the pans were broken: and to recover damages for this injury this action was brought. The other pans were safely loaded and stowed, and bills of lading given for them by the mate.

At the trial, counsel for the defendant contended, that, upon this evidence, assuming that the stevedore was guilty of negligence, the master was not answerable. The learned judge reserved this question for the opinion of the court, and left to the jury the question of negligence only, which they found for the plaintiffs, who accordingly had a verdict.

In Easter Term last, the defendant obtained a rule to enter a verdict for him upon the point reserved at the trial: and the case was argued before my Brothers [907] Williams and Byles and myself during the last term, when we took time to consider our judgment, which I now proceed to deliver.

By the maritime law, in the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner, to receive and properly stow on board the goods to be carried: which, ordinarily, are to be delivered to him alongside. For any damage to the goods occasioned by negligence in the performance of such duty, the owner is liable to the shipper. If the damage result from misconduct of the master, he is answerable to the owners, and probably also directly to the shipper. Where it happened through the misconduct of the mate or others of the crew, without fault on the part of the master, it was held by the majority of the court of session, in *Petrie's Executors v. Aitchison*, 15 Faculty Decisions, 493 (6th of February, 1841), that the master is not answerable to the owners, though it appears to have been there taken for granted, perhaps upon the principle asserted by Story, J., in the passage cited, that the master would in such case have been answerable to the shipper.

This duty of the master has, however, in many cases been modified by custom or contract. In some, the cargo has been receivable at a distance from the ship's side,—see *Cobban v. Donne*, 5 Esp. N. P. C. 41: and in others his liability has been postponed until the goods have been actually stowed on board. In the latter class of cases, a stevedore appointed by the shipper is employed to perform that part of the ordinary duty of the master for the owner, which consists in loading and stowing the goods: and the employment of such an intermediate agent appears to be of early origin. In the Consulate of the Sea, ch. cxcii. of the edition of Pardessus, to be found in the 2nd volume of his great work (*Collection des Lois Maritimes*), [908] p. 220, a stevedore (in the original Catalan "stibador,") appointed by the shipper is familiarly spoken of: and it is there laid down, that, when the stevedore is so appointed, the master is

absolved from liability: and the master, in another clause, is advised, for his own indemnity, to stipulate that such an agent should be present on the part of the shipper to attend to the stowage.

It appears, therefore, that a stevedore has from early times been known as an agent distinct from the crew, and that for his conduct when appointed by the shipper the master is not responsible. This was decided to be the law in *Swainston v. Garrick*, 2 Law J. (N. S.) Exch. 225 (25th of May, 1833), where the ship was hired by a charterparty stipulating that a stevedore should be appointed by the charterer, and it was held that the master was not answerable even to the owner for damage occasioned to the latter, the appointment of the stevedore having entirely relieved the master from liability for bad stowage: and Bayley, B., in that case made a suggestion which probably led to the introduction in this and other cases, for the security of the owner, of the clause providing that the stevedore should "act under the captain's orders." If that stipulation had not been introduced, the authorities referred to shew that the master would not have been liable; and, for this reason, viz. that the negligence which caused the damage was not that of himself, or of his agent or servant. Nor, in our opinion, does the clause as framed in the present case create any liability on the part of the master for the acts of the stevedore, not done in pursuance of his orders. The stevedore was to be appointed by the charterer, and therefore to act for him and represent his interests. For this purpose, he had the charge and custody of the goods until they were laden and stowed on board. The master, on the [909] part of the owners, with a view to the trim and safety of the ship, had control over the stevedore; but there was no stipulation that he should in any other way assist the latter.

The payment of the stevedore was merely matter of bargain between the owner and the charterer, and did not make the stevedore the servant of the master: see *Quarman v. Burnett*, 6 M. & W. 499.

The true construction of the charterparty appears to be, that the cargo is to be brought alongside at the risk and expense of the charterer, and that it is to be shipped and stowed by his stevedore, consequently at his risk, though at the expense of the ship-owner, and subject to the control of the master on behalf of the ship-owner, with a view to protect his interests.

Upon these grounds, it appears to us, that unless the plaintiffs can establish some peculiar and exceptional rule of liability with respect to the master of a ship, the defendant is entitled to the verdict: and, indeed upon the argument, it was contended that such a rule did exist. The authorities relied upon are, however, in our opinion, inapplicable. With respect to the case of *Morse v. Slue*, 1 Vent. 238, &c., it was founded upon a contract to carry goods actually delivered to and in the custody of the master on board the ship: and he was bound, as he would have been here if a bill of lading had been given for the injured pans, to deliver the goods in the state in which he received them, except prevented by the act of God or the Queen's enemies, or other expressly excepted peril. Accordingly, in *Abbott on Shipping*, part 2, ch. 2 (10th edit.), p. 91, referring to *Morse v. Slue*, the law is laid down as follows:—"It is true that the master also is answerable for his own contract: for, in favor of commerce, the law will not compel the merchant to seek after the owners and sue them, although it gives him [910] the power to do so, but leaves him a twofold remedy, against the one or the other." Another authority relied upon was *Story on Agency*, §§ 314-318, in which it is stated that the case of masters of ships is an exception to the rule previously laid down as to the nonliability of agents to third persons for the negligences and omissions of duty of themselves and their sub-agents. And it is there laid down that "this liability is founded upon the doctrine of the maritime law, which treats the master not merely as an agent contracting on his own behalf as well as for the owner; but which, upon a broader policy, treats him as, in some sort, a subrogated principal, and qualified owner of the ship, possessing authority in the nature of the executorial power for the time being. And his liability founded upon this consideration extends not merely to his contracts, but to his own negligences and nonfeasances and misfeasances, as well as to those of his officers and crew. His responsibility for the officers and crew has this additional reason for its support, that he is thus induced to exercise a superior watchfulness over their acts and conduct: and, if he were not so made liable for their acts and conduct, he might often, by his connivance in their frauds, misfeasances, negligences, or nonfeasances, subject the shippers of goods, as

well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has, therefore, indissolubly connected his personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority."

However, upon examination of the authorities cited by the very learned author, we find that they are confined to cases of contract and of collision (upon which latter subject the American decisions seem to have gone farther than ours); and, after a diligent search, [911] we have not found any authority for the position that a person sending goods to be loaded on board a general ship is entitled to assume, without inquiry, that his goods are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with or wrong done by the master or crew, to insist upon holding the master liable.

The rule to enter a verdict for the defendant is therefore made absolute.
Rule absolute.

Feb. 4, 1860.—The plaintiffs, pursuant to the Common Law Procedure Act, 1854, appealed against this decision.

The question for the decision of the court of appeal was,—whether or not the defendant was entitled to have the verdict entered for him on the issue upon the first plea.

If the court should be of opinion in the negative then the verdict for the plaintiffs was to stand, and judgment to be entered for them, for the damages assessed by the jury, with costs of suit. If the court should be of opinion in the affirmative, the verdict for the plaintiffs on the said issue was to be set aside, and entered thereon for the defendant, with judgment for the defendant accordingly.

The case was argued in the Exchequer Chamber on the 3rd and 4th of February, 1860, before Pollock, C. B., Wightman, J., Bramwell, B., Channell, B., Hill, J., and Blackburn, J.

Lush, Q. C. (with whom was Manisty, Q. C.) for the plaintiffs. The plaintiffs rest their right to recover [912] upon two propositions,—first, that, assuming that by the terms of the charterparty the stevedore is made the agent of the charterer and not of the master, still the master is liable to the shipper, who had no notice of that arrangement,—secondly, that the charterparty does not make the stevedore the agent of the charterer; it only gives him authority to appoint a person, who is to become the servant of the master as soon as appointed. It is clear that, unless the shippers knew of the stipulation in the charterparty, they were entitled to assume that the stevedore was the agent of the master. [Blackburn, J. It does not appear from the case that the plaintiffs knew that the ship was chartered. Pollock, C. B. It does appear that the plaintiffs' agent arranged with the brokers of the charterer for the carriage of the pans.] It is part of the ordinary duty of the master to superintend the shipment and stowage of the cargo: he does not stand in the ordinary position of a servant, but rather in that of owner, because he has the custody of the goods: and it is upon that ground that he is held responsible for negligence,—*Morse v. Slue*, 1 Ventr. 190, 238, Sir T. Raym. 220, 1 Mod. 85, 2 Keble, 806, 3 Keble, 72, 112, 135, 2 Lev. 69; Abbott on Shipping, 10th edit. 259. And the master cannot absolve himself from this liability, unless by usage or agreement his duty in that respect is to be performed by some person appointed by the merchant. [Bramwell, B. As the contract was with the charterer only, is not he solely liable?] The master, it is submitted, would still be liable, even if he could be considered as the agent or servant of the charterer. [Blackburn, J. I think you must make out that there was a contract with the master.] The master's liability rests not upon contract, but upon the footing of his duty. In Story on [913] Agency, § 116, it is said: "The master of a ship has various incidental powers, resulting from his official capacity, which have been long recognized in the maritime law, and are not now open to judicial controversy. Thus, for example, he has an incidental authority to make all contracts belonging to the ordinary employment of the ship: as, for example, to let the ship on a charterparty, and to take shipments on freight, if such is the usual employment of the ship, but not otherwise: to hire seamen for the voyage; to contract for necessary repairs and equipments for the voyage: and to hypothecate the ship in foreign ports for moneys advanced to supply the necessities

of the ship, if they cannot otherwise be supplied. In these cases, and in others of the like nature, he often enters (as he may well do) into the contract in his own name; and he may thus become personally liable, as well as his principal, to fulfil the same; for, he is treated, not as an ordinary agent, but as, in some sort and to some extent, clothed with the character of a special employer or owner of the ship, and representing, not merely the absolute owner (*dominus navis*), but also the temporary owner, or charterer for the voyage (*exercitor navis*). In short, our laws treat him as having a special property in the ship, and entitled to the possession of it, and not as having the mere charge of it as a servant. On this account he may bring an action of trespass for a violation of that possession; and, where the freight has been earned under a contract to which he is a party, or under a bill of lading signed by himself, he may bring a suit for the freight due on the delivery of the goods." And, in § 319, after speaking of the authority of the master in a foreign port, it is said,—“Even in the home port, however, there are many acts which are so invariably confided to [914] the master as to amount to a positive delegation of authority. Thus, the master is ordinarily intrusted with the authority of shipping the officers and crew, of superintending the ordinary outfit, equipments, repairs, and other preparations, of the vessel for the voyage, of lading and unlading the cargo, and, in cases of a general ship, of receiving goods on board on freight, and of signing bills of lading for the same.” In *Major v. White*, 7 C. & P. 41, it was laid down by Parke, B., that, if a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods be injured by bad stowage. But, unless he has notice to the contrary, the shipper has a right to assume that the persons he sees stowing goods on board the ship are the servants of the master. In *Swainston v. Garrick*, 2 Law Journ., N. S., Exch. 255, Lord Lyndhurst says: “The master, as servant of the owner, is bound to superintend the stowage; and if, in consequence of improper stowage, the owner has been called upon, and has satisfied any claim for damage, the master is liable to him. But, where the master is told by the owner some one will come to superintend and do that which would otherwise be his duty, he is exonerated.” Here, the plaintiffs were no parties to any contract by which the master could be relieved from any of the responsibilities which the law casts upon him. Story, § 315, says,—“The master of a general or carrier ship, as well as the owner, is treated as a common carrier. He is responsible for the goods in the like manner as any other common carrier: and nothing will discharge him from his responsibility to the owners of the goods, but a loss by some act of Providence, or by some inevitable casualty, or by some public enemy. If the goods, therefore, are injured, or perish, by the negligence or misfeasance of the crew; or if they are stolen, the master, as well as the [915] owner, is severally liable therefor.” And see *Colvin v. Newberry*, 1 Clark & Fin. 283.

Bovill (with whom was C. Pollock), for the defendant. If a shipper who contracts with a charterer does not inquire into the charterer's interest, he takes the risk. The stevedore here was not in fact, nor was he held out as, the servant of the master. The circumstance that the stevedore was to be subject to the orders of the master makes no difference. [Pollock, C. B. I attach no importance to the fact that the stevedore was to obey the orders of the master. Without any such stipulation, it would have been the duty and the right of the master to direct the stevedore where to place the goods, for the safety of the vessel. Bramwell, B. Though the stevedore is appointed by the charterer, he is to be paid by the master, and to act under the master's orders. I am not at all sure that he is not to be considered as the master's servant.] He has an independent employment. For any injury resulting from the negligence of the stevedore, the rule respondeat superior would make the charterer liable, not the master. *Major v. White*, 7 C. & P. 41, is a distinct authority to shew that the shipper of goods cannot sue the owner for negligence, —and, of course, not the master,—where he knows that the ship is chartered, and contracts with the charterer.

Manisty was heard in reply.

POLLOCK, C. B. We are all of opinion that the judgment of the court below should be affirmed. The true principle is that which is stated in the latter part of that judgment, where it is said that the master is not liable except in the case of a contract made with him, or some act done by him or the crew, from which he is [916]

responsible. Here, there is no contract made by the Master, and no act done by him or the crew which led to the damage. He, therefore, is not liable at all.

Judgment affirmed.

End of Trinity Vacation.

MEMORANDA.

In Trinity Term last, John Hinde Palmer, Esq., of Lincoln's Inn, Archibald John Stephens, Esq., of Gray's Inn, and William David Lewis, Esq., of Lincoln's Inn, were respectively appointed Her Majesty's Counsel learned in the Law, and took their seats within the Bar accordingly.

COMMON BENCH REPORTS. New Series. CASES
ARGUED and DETERMINED in the COURT of
COMMON PLEAS, and in the EXCHEQUER
CHAMBER, in Michaelmas Term, 1859, and
Hilary Term and Vacation, 1860. By JOHN
SCOTT, Esq., of the Inner Temple, Barrister-at-
Law. Vol. VII. London, 1860.

- [1] CASES UPON APPEAL FROM DECISIONS OF REVISING-BARRISTERS, ARGUED AND
DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN
THE TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA.

COUNTY OF DERBY—SOUTHERN DIVISION.

JAMES MELBOURNE, *Appellant*; RICHARD WILLIAM GREENFIELD, *Respondent*.
Nov. 16th, 1859.

[S. C. K. & G. 261; 29 L. J. C. P. 81; 1 L. T. 93; 6 Jur. N. S. 510. Followed,
Calon v. Roberts, 1871, 25 L. T. 753.]

The “place of abode” of the objector in the notice of objection under the 7th section of the 6 & 7 Vict. c. 18, means that which is his actual place of abode at the time of signing the notice, and not that described in the register. —And a misdescription in that respect is not cured by s. 101, that section only applying where there is an inaccuracy or mistake in the mode of describing that which the party intended to describe.

At a court held for the revision of the lists of voters for the southern division of the county of Derby, James Melbourne objected to the name of Richard William Greenfield being retained on the list of voters for the parish of All Saints, Derby, in the southern division of the county of Derby. The following is a copy of the notice of objection :—

[2] “To Mr. Richard William Greenfield.

“Take notice that I object to your name being retained in the All Saints, Derby, list of voters for the southern division of the county of Derby.

“JAMES MELBOURNE,
“of Cowhill, Belper, on the
register of voters for the parish
or township of Belper.”

“Dated, August 15th, 1859.

The appellant’s (objector’s) name appeared on the register of voters for the township of Belper, and was therein described as follows :—

Name of voter.	Place of abode	Qualification	Street, lane, &c., where property situate, &c.
Melbourne, James.	Cowhill, Belper	Freehold houses and land.	Gutter.

It was proved in evidence before the revising-barrister that James Melbourne, the appellant, had removed from Cowhill, Belper, in October, 1858, to a place called Gutter, in the same township of Belper, and that he was not residing at Cowhill at the time he signed the notice of objection, and described his place of abode "Cowhill, Belper": and upon this it was contended that the notice of objection so signed was invalid, as not giving the true place of abode of the objector within the meaning of the Registration of Voters Act, 6 & 7 Vict. c. 18.

The revising-barrister on that ground held the notice of objection insufficient, and retained the name of the respondent on the list of voters, without requiring proof of his qualification. If he was right in so holding, the name of the respondent was to be retained; otherwise, it was to be expunged from the list.

[3] The facts proved in reference to several other persons whose names were in a schedule annexed to the case being precisely the same, their names were to be retained in the list of voters or expunged therefrom according to the decision of the court in the principal case: and, the same principle of law being involved, the appeals were consolidated.

Hayes, Serjt., for the appellant. The question is whether the objector in this case has not sufficiently complied with the direction in the 7th section of the 6 & 7 Vict. c. 18, and in the form given in schedule (A.), No. 5, by describing himself as of the place of abode mentioned in the register. The section itself says nothing about the place of abode of the objector: that which is required is only to be collected from the form,—“(signed) A. B., of [place of abode], on the register of voters for the parish of . . .” Both in the 7th section and in the form, the place of abode of the person objected to is to be “as described in the list:” and there can be no reason why the same mode of description should not apply to both. The 100th section, which enables notices to be sent by post, clearly shews that the place of abode stated in the register or list of voters is the only thing looked to. If it were not so, the party receiving the notice of objection would have no means of knowing whether or not the person objecting is one who has a right to object. [Williams, J. It is a choice of difficulties.] Perhaps there is no real difficulty in either case: but a strict adherence to the words will be more convenient. In *Gadsby, App., v. Farburton, Resp.*, 8 Scott, N. R. 775, 7 M. & G. 11, 1 Lutw. Reg. Cas. 136, a notice of objection was signed J. G., of Poplar Grove, Didsbury, on the register of voters for the township of Manchester,—Didsbury being a township near Manchester, and the description of the party [4] being the same as in the register,—was held sufficient. Maule, J., there says,—8 Scott, N. R. 781,—“That which is meant there [schedule (A.), No. 5] is, a description of the party's place of abode as it appears on the register; for, the main object is, to shew that the barrister has jurisdiction to try, and that the objector has a right to object to the voter's name being on the list; and for this purpose it is necessary that the voter should have the means of identifying the objector as a person who is on the register: and it is convenient, therefore, that the description in the notice should correspond with that upon the register. Whether or not, in case of a change of abode of the objector, since his name was placed upon the register, it would be requisite also to insert in the notice his present residence, it is not necessary to determine: the inclination of my mind is that it would not be necessary. The expression in the sched. (A.), No. 5, is ‘A. B., of [place of abode],’ &c., which is rather descriptive of the residence of the party than of the place the notice is sent from. In the notice to the overseers (No. 4), the word ‘of’ does not appear; the signature is to be simply thus,—‘A. B. [place of abode].’ It might be that the one was intended to give the present place of abode, and not the other. But, at all events, I think this form No. 5 is sufficiently complied with by giving the place of abode that appears upon the register.” And Erle, J., said: “I apprehend there can be no doubt that the place of abode required to be inserted in the register by the 2 W. 4, c. 45, is a sufficient description of the place of abode for a notice of this sort. It seems to me to be most material that the same description should be given in both.” In *Pruen, App., v. Cor, Resp.*, 2 C. B. 1, 1 Lutw. Reg. Cas. 441, in a notice of objection, the objector described himself as of “No. 398 High Street, Cheltenham, on the register of voters [5] for the parish of Cirencester:” on the register so referred to, the objector was described as of “Cheltenham” only: and it was held that the notice was sufficient. [Erle, C. J. What has the party objected to, to do with the residence of the objector?]

Nothing. [Williams, J. It is suggested in Cockburn's Election Law, p. 97, that it may be requisite to have the true place of abode of the objector, so as to get a remedy against him if the objection turns out to be frivolous.] Everybody knows that the remedy in these cases is anything but substantial. In *Knowles, App., Brooking, Resp.*, 2 C. B. 226, 1 Lutw. Reg. Cas. 461, the majority of the court, — Tindal, C. J., Coltman, J., and Erle, J., — held a notice to be sufficient which described the objector as of his true place of abode. But Maule, J., in a very elaborate judgment, expressed his dissent from that conclusion. The question there turned upon the notices Nos. 10 and 11 in schedule (B), applicable to borough voters; but it involved precisely the same principle. Tindal, C. J., says, — 2 C. B. 231, — “It appears to me, that, looking at the concluding words of those two forms they do not in any manner qualify the sense of what had preceded, namely, ‘place of abode,’ nor in any manner refer to the place of abode contained in the list of voters; but that the whole sentence is satisfied, if the true place of abode of the objector at the time of giving the notice is inserted therein. The words between the parentheses are only ‘place of abode;’ words which, taken absolutely and by themselves, and in their natural sense, would denote the then place of abode of the party objecting; for, the words between the parentheses are not ‘place of abode on the list of voters,’ which would necessarily require the construction contended for by the appellant; nor are the words ‘as on the list of voters,’ which latter form would have also necessarily required the same construc-[6]-tion: but the words within the parentheses are simply ‘place of abode,’ and the words that follow contain a separate and distinct proposition that such name, not such place of abode, is to be found on the list of voters.” Again, at p. 233, — “The words ‘on the list of voters’ appear to me to be no more than a direct allegation of the existence of the fact which has been made essential by the 17th section, namely, that the objector’s name is on the register for the county, or the list of voters for the borough (as the case may be), a fact the truth of which may be determined by the overseers by reference to the register or list, of which a copy is in their custody; or by the party objected to, by his inspecting such register or list, which he is impowered by law to do.” Maule, J., who goes very minutely into the question, says: “It was not denied on the part of the respondent, that the notices in question ought to contain an assertion of the right to object; but it was contended that that right was sufficiently stated in the words ‘on the list of voters for the parish of _____;’ and that the preceding words ‘A. B. of [*place of abode*],’ were not intended as a statement of the name and addition of the objector as inserted in the list, but of his name and addition at the time of signing the notice. It is material, on this part of the discussion, to observe that the immediate subject of inquiry is, what is the meaning of a notice filled up according to the form; for, it is such notice, and not the form itself, that is sent to the party objected to. The want of adverting to this has, I think, produced some confusion. The form of notice has the words ‘place of abode’ in italics, within parentheses, between the words ‘A. B. of,’ and the words ‘on the list of voters’: but these parentheses are not to be retained in the notice when drawn, but are only meant to shew that the words within them are not to be the very words in the notice, but are [7] only a direction as to what those words shall be. This is manifest from the word ‘of’ in the form not being within the parenthesis; so that a notice drawn according to the form would, to take an example, for the sake of clearness, run thus, — ‘John Smith, of Broad Street, on the list of voters for the parish of St. Mary,’ without any parentheses. And the question is, how a notice in these words should be understood. It is a mistake to treat it as if the parentheses were retained. It is to be observed that the right to object does not, since the act of Victoria, depend on the right to vote, or the right to be on a list: for, a person may have a right to vote or to be on a list, and yet have no right to object, if, in fact, his name is not inserted in a list; or he may have no right to vote or to be on a list, and yet may have a right to object, in respect of being in fact on a list. The right to object, therefore, being entirely dependent on some one entry in a list of voters, whether the name and place of abode be correctly stated in such entry or not, it seems to me that such construction of the forms is more conformable to the general rules of law, and to the intention of the act of Victoria, which requires the notices to point out, distinctly, which of all the entries in the list is that which is relied on as the foundation of the right to object: thus, not merely claiming the right, or making a general assertion, from which it might be inferred, but (in conformity with the rule which prevails with respect to the exercise

of powers or authorities by writing) shewing, in particular, the fact on which the right depends, and enabling the voter to ascertain, by a simple inspection of the list referred to, whether the right to object which is relied on does really exist. A minute consideration of the terms of a notice drawn according to the form confirms this construction: the natural and obvious meaning of the words 'on the list [8] of voters for the parish of St. Mary,' following the words 'John Smith, of Broad Street' (to use the same example as before), is, that 'John Smith' and 'Broad Street,' are mentioned in the list as the name and place of abode of a voter, and not that the objector is a person whose present name and place of abode are 'John Smith, of Broad Street,' but whose name and place of abode on the list may be the same or different. It can hardly be denied, that, in the absence of parentheses, the words 'on the register of voters for the parish of St. Mary' are left to operate, in like manner, on the whole clause which precedes them,—'John Smith, of Broad Street,'—or they operate on no part of it: for, it seems very difficult to contend that they operate differently on the words 'John Smith,' and on the intervening words 'of Broad Street,' so as to mean that the name of the voter on the list was 'John Smith,' but not to mean that the place of abode on the list was 'Broad Street;' and, accordingly, it was argued for the respondent that the words 'on the list,' &c. did not import that either the name 'John Smith,' or the place of abode 'Broad Street,' was mentioned on the list; and that is, certainly, a more reasonable construction than that which treats the words 'on the list,' &c., as operating on the words 'John Smith,' and as having no operation on the intervening words 'of Broad Street,' which construction seems to rest on a tacit but erroneous application of the parentheses which are found in the form, to the words of the actual notice, in which they are not found. That the notice is to be understood, not merely as affirming that the objector is on the list of voters, and therefore has a right to object, but as referring to a particular entry, is further confirmed by the forms requiring the notices to specify the particular list on which the objector is to be found. If it were intended as a mere assertion [9] of a right to object, it would be sufficient to state that the objector was on a list of voters for the borough, and, in the corresponding case in counties, that the objector was on the register, without saying, as is required by schedule (A.), No. 5, for what parish. As the particular list is referred to, it is natural that the particular entry itself should also be referred to, each reference being in furtherance of the same object. It was contended for the respondent, that, by the construction contended for by the appellant, a voter who might wish to communicate with the objector, might be prevented doing so in the case of an objector whose present place of abode was different from that on the list referred to, whether this difference arose from error or from change. But it is doubtful whether the act contemplated any such communication: it does not authorize or require it; it imposes no duty to make, nor confers any right on the maker of, any such communication. But, if it did contemplate such communications, such communications must probably be very rare. The cases of error and change are a very small portion of the whole number of cases; and such errors or changes as would prevent the objector being reached by a letter directed to him at his abode as mentioned in the list, must be a very small portion of the whole number of cases of error and change: and it may be observed, that, in the case in judgment, no such inconvenience did arise. The legislature, in the much more important case of the service of a notice of objection,—the giving of which is essential to the objector's right, and the receipt of it to the voter's defence,—has considered that it is sufficient to send the notice to the abode mentioned in the list. Indeed, the general scope of the act of Victoria seems to be, that, for all purposes connected with registration, the description on the list, both by name and place of [10] abode, shall be taken to be the true description." And, towards the close of his judgment, speaking of the relative convenience of the two constructions, the learned judge says, "With regard to the comparative convenience in practice of the two constructions, there seems no doubt that that of the appellant is to be preferred. It enables the party objected to, and the revising-barrister, easily to ascertain by inspection of the notice and list, without any extrinsic evidence, whether the notice is sufficient, inasmuch as, on this construction, where the place of abode in the notice is the same as on the register, no question of law or fact can be made as to its validity; whereas, if the respondent's construction is to prevail, many questions of law may probably arise as to what is a sufficient description in the notice of the place of abode,—whether the county, parish, or post-town is to

be mentioned : and these will be the more numerous and doubtful, from the uncertainty of what the object was for which the insertion of the present place of abode was required by the act ; and in all cases it must be a matter of evidence, and may be one of controversy, before the revising-barrister, whether the place of abode be in fact truly stated in the notice. It was also suggested that the identification of the voter by his place of abode on the list would be unnecessary in a notice of objection, except in the case of two voters of the same name being on the list : but this is no answer to the argument arising from the convenience of the rule requiring identification by Christian name, surname, and place of abode : all three may be necessary in some cases, and they are required in all, for the sake of uniformity, simplicity, and convenience." [Crowder, J. The judgment of Erle, J., in that case is very cogent. What would a man of ordinary understanding, looking at this schedule, understand [11] that he was to do ! It must be observed that there is a marked distinction between the requirement as to the place of abode of the objector and that of the person objected to.] No case has ever decided such a notice as this to be bad. If the thing answers the purpose of a notice, it must be quite immaterial which mode of description, is adopted. At all events, this can be no more than an inaccuracy of description which the revising-barrister had power to amend under s. 101. That section provides that "no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice as to be commonly understood." That shews that technical objections are not intended to prevail, but that it is enough if the description is such that it cannot mislead the person to be affected by it. [Erle, C. J. Has any case decided that that provision applies to a case where the description given is that which was intended to be given ?] Not precisely ; but it is generally assumed that the notice will be upheld where it answers the purpose for which it is given.

Macnamara, for the respondent. It must now be taken to have been definitively decided, by the opinions of the majority of the court in *Knowles, App., Brooking, Resp.*, that the notice of objection must give the true place of abode of the objector at the time of giving the notice. And there is good reason for so holding ; for, in the county lists, the place of abode of the party does not appear at all : it merely designates the qualifying property. The voter may be in Australia, or "travel-[12]-ling abroad,"—*Walker, App., Payne, Resp.*, 2 C. B. 12, 1 Lutw. Reg. Cas. 325. In *Toms, App., Cumming, Resp.*, 8 Scott, N. R. 910, 7 M. & G. 88, 1 Lutw. Reg. Cas. 200, Maule, J., gives much the same reason for requiring the true place of abode as is given in Cockburn's Election Law. And in *Woollett, App., Davis, Resp.*, 4 C. B. 115, 1 Lutw. Reg. Cas. 607, Wilde, C. J., says : "By this enactment, the legislature plainly intended that the notice to be given should therein set forth all the requisite particulars to inform the party to whom the notice was to be given, of the place of abode of the objector : and it should be observed that voters for counties, in respect of property qualifications, are not, like voters for boroughs, restricted as to the place of their residence." [Williams, J. The description there per se was clearly insufficient ; and the court held that the misdescription could not be aided by coupling the notice with the register.] There is good reason why the objector should be required to give his own true place of abode, which he must know : and the inconvenience which would result from a contrary decision is abundantly pointed out in the judgment of Tindal, C. J., in *Knowles, App., Brooking, Resp.*, already referred to, as well as in that of Erle, J., who says,—"The appellant's contention that the words 'on the list of voters,' &c., apply to the place of abode, and that the form in question is to be understood to mean 'A B., described on the list of voters to be of the place of abode,' appears to me to be open to several objections. First, that the words must be altered before they express this meaning ; whereas, they are capable of a sensible application without any alteration. Secondly, when so altered, they contain an immaterial statement ; whereas, if applied to the person, they are material to shew his qualification. Thirdly, it gives different meanings to the same words in two acts in *pari materia*. And, [13] fourthly, if the described place of abode had been intended, these words would have been used, for they are used on several occasions in both statutes, where the writer of a notice is referred to the list for the place of abode of another person whom he may not know otherwise

than from the list : but the words in question in other instances denote the true place of abode of the writer, which he is presumed by the legislature to be able to give without difficulty. I cannot discover any good effect from requiring the place of abode as described in the list, instead of the true place. If communication is contemplated, the true place is best. If the name occurs only once, the identity is clear, without referring to place. If the name occurs twice, the objector is identified at the revision, which is as early as can be useful, if no communication is intended. If pretended objectors are to be guarded against, there would be no security from requiring the place to be transcribed. [Williams, J. If the place of abode at the time of giving the notice were inserted, would not that give rise to a difficulty in ascertaining whether the party objecting is qualified to object ?] That difficulty is adverted to in the judgment in *Knowles, App., Brooking, Resp.* [Williams, J. In *Hinton, App., Hinton, Resp.*, 8 Scott, N. R. 995, 7 M. & G. 163, 1 Lutw. Reg. Cas. 259, it was held that whether or not the name subscribed to a notice of objection is so subscribed as to be commonly understood to be the same as that by which the objector is designated in the list of voters, is a question of fact only, and not of law, and therefore one that cannot properly be referred to this court. There, the notice of objection was signed "William Nicholas;" and in the list of voters "William Nickless." Byles, J. Suppose the objector has changed his name since the making of the list, how is he to describe himself ?] By the name [14] which he bears at the time of giving the notice. [Williams, J. Would the notice be bad, if he signed his name as it appeared on the register ?] Clearly it would. Then, this is not a case of inaccurate description, so as to be aided by the 101st section. It is clear, that, when Mr. Melbourne wrote "Cowhill, Belper," he did not intend to describe "Gutter" as his place of abode. In *Gudshon, App., Warburton, Resp.*, there was no false statement: the only question was, whether the notice should not have been more explicit. The opinion there intimated by Maule, J., has since been dissented from and overruled: the true doctrine is to be found in *Knowles, App., Brooking, Resp.* Reason and convenience imperatively require that the true place of abode, and that alone, should be given.

Hayes, Serjt., in reply. The whole matter is so thoroughly sifted in the judgments given in *Knowles, App., Brooking, Resp.*, that nothing more can be said. The notion that personal communication was contemplated is perfectly idle and illusory. That case still leaves it an open question how the party must describe himself where there has been a change of abode. It is submitted that the one will answer the purpose the legislature had in view as well as the other. [Byles, J. What do you say to the case put as to the change of name ?] It is submitted that the objector could only sign a valid notice with the name by which he appeared on the register,—unless, indeed, he signed both. At all events, the inaccuracy is aided by the 101st section. In *Fiddon, App., Sawyers, Resp.*, 12 C. B. 680, 2 Lutw. Reg. Cas. 246, Tindal, C. J., says,—"The 101st section, I think, affords some light: it enacts, &c. I think the fair meaning of that section is, that, in dealing with these notices, we are not to put a mere technical and critical construction upon them, but to look at [15] them as persons of plain common sense would read them: and, if we see that the objector in his notice so describes himself as that any man of ordinary intelligence may understand what he means, the notice is a sufficient compliance with the act." [Williams, J. There the party did not describe that which he meant to describe. Here he has.] He meant to describe his place of abode as the act of parliament required him to describe it, and, instead of "Gutter" he writes "Cowhill, Belper." [Williams, J. He clearly did not mean in the notice to describe his present place of abode. Erle, J. The objector has fallen into no mistake of fact: he has merely misapprehended a requirement of the law.]

ERLE, J. I am of opinion that the decision of the revising barrister in this case was right. The objector is bound by the act of parliament to give in his notice of objection his "place of abode." The question which has been argued before us is, whether, seeing the way in which those words appear in the act, they mean his place of abode as mentioned on the register, or his true place of abode,—his then or his present place of abode. I am of opinion that the words used would in their ordinary acceptation mean the present place of abode of the party. I think it was a decided question at the time the case of *Knowles, App., Brooking, Resp.*, was before the court. It was there decided by the majority of the court, and thus became *res judicata*, that a notice of objection, pursuant to the 6 & 7 Vict. c. 18, s. 17, sched. (B.), Nos. 10, 11, signed

by the objector with the addition of his true place of abode, was sufficient, notwithstanding it differed from that erroneously placed against his name in the list of voters. I am at a loss to see how it can be said that the legislature meant by the words "place of abode" either the place [16] of abode described in the register, or the true place of abode, at the option of the party. I think that, it having been decided in that case that the insertion in the notice of the present place of abode of the objector is a compliance with the act, I should be conflicting with that decision if I held that the insertion of the past place of abode would also be a compliance with the act. It would be giving an unreasonable construction to the statute to hold that the objector has the option of using either his present or his late place of abode. At all events, that being a matter which has been decided on great deliberation, I adhere to it. I observe that the relative conveniences of the one construction and of the other were gone into with elaborate minuteness by the Lord Chief Justice Tindal on the one side and Mr. Justice Maule on the other. I took part in the decision, and concurred in the view taken by the majority of the court. But I do not say, that, if it were *res nova*, I should not be disposed to be astute to put such a construction upon the notice as would make the document valid, seeing that nobody has been misled by it. As to the 101st section, we should be running counter to what has in numerous cases been held to be the true construction of the provision that "no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to the act annexed, or in any list or register of voters, or in any notice required by the act, shall in anywise prevent or abridge the operation of the act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood," if we were to hold it to be applicable to a case where the party distinctly intended the place of abode he has put down, and made no mistake therein in the way of misnomer [17] or inaccurate description, but merely mistook the requirement of the law. For these reasons, I am of opinion that the decision of the revising-barrister is right. I say nothing about the comparative advantages or disadvantages arising from either construction; for, it is impossible to add anything to the arguments urged in *Knowles, App., Brooking, Resp.*, by Tindal, C. J., on the one hand, and Maule, J., on the other.

WILLIAMS, J. I am entirely of the same opinion. The point arises upon the construction of the form No. 5 in schedule (A.): the question being, what is the meaning of "place of abode" in the form there given. It seems to me to be abundantly clear that it must mean either the place of abode as described in the register, or the present place of abode of the person objecting. It never could have intended either the one or the other, at the option of the party. It is for us to decide which of the two it means. If the matter were free from authority, I should have no hesitation in holding that the natural meaning of the words "place of abode" in the form in question, as well as in No. 4, is the present place of abode. If authority were wanting, that of the case of *Knowles, App., Brooking, Resp.*, is clear and direct. It was there held, that it is sufficient to state the true place of abode. If it be sufficient, it can only be so because the legislature meant it; and, if they meant that, they could not have meant that the objector was at liberty to describe himself by his place of abode as given in the register. That case, therefore, is an authority for our holding that the notice which has been given in this case is not in conformity with the statute. Then it is said that the objection is cured by the 101st section of the act, which provides that "no misnomer or inaccurate description of any person, place, or thing named or de [18]-scribed in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in any wise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood." For the purpose of this point, it must be assumed that the law is, that the objector should in his notice describe himself as of his present place of abode. I understand the meaning of this provision in the 101st section to be, that, if the objector intended to comply with the act, and intended to describe his present place of abode, notwithstanding any mistake or inaccuracy in the mode of doing it, such mistake would not invalidate the notice, provided the description were such as to be commonly understood. But that clearly has no application to a case like this, where the party confessedly did not intend to describe his present place of abode, but intended to describe something else.

CROWDER, J. I must own that I have been unable during the argument which has been urged on the part of the appellant to entertain any doubt, whether the question is looked at with reference to the 7th section of the statute and the form given in schedule (A.) alone, or whether it is looked at with the aid of the authorities which have been decided upon it. Any person looking at the statute and at the form referred to (No. 5),—which is to be signed “A. B., of [place of abode], on the register of voters for the parish of _____” would naturally understand the meaning of that direction to be, that the person so signing the notice must describe himself as of his true place of abode at the time he so signed it. Very great ingenuity has been exercised for the purpose of shewing [19] that the statute means something different; and several authorities have been referred to. I agree with my Lord that the case of *Knowles, App., Brooking, Resp.*, contains every argument which could be urged on the one side and on the other by two of the most learned and acute lawyers who ever sat upon this bench,—the late Lord Chief Justice Tindal and Mr. Justice Maule: and I may say, that, in addition to what was said by the former of those two learned judges, we have the very cogent arguments of the present Lord Chief Justice, who on that occasion concurred with the view taken by the Lord Chief Justice Tindal. And I must say that I think there is a great deal of good sense and sound argument on the side of the majority. But, in either view, that case utterly destroys the argument which has been urged before us to-day by my Brother Hayes, viz. that it is optional with the objector to describe himself either of his place of abode as stated in the register or of his present and true place of abode: for, there the whole court were agreed that there was only one place of abode which could be inserted, though they differed as to which that one should be. The authority of that case is conclusive. I do not consider it necessary to go into the question of the balance of convenience of the one view or the other, though I must confess I should have had little difficulty in deciding with the majority. It is expedient to adhere to that decision. As to the other point,—which was a mere straw caught at by the learned Serjeant to prolong the struggle,—the authorities clearly shew that the 101st section of the 6 & 7 Vict. c. 18, never was intended to apply to such a case as this. The inaccuracy of description there referred to is an inaccuracy or imperfection in the mode of describing that which the party intended to describe. Notwithstanding all the ingenuity which was brought to bear [20] upon the argument in *Knowles, App., Brooking, Resp.*, both at the Bar and by the several members of the court, it was never for a moment suggested that the defect could be cured by the 101st section: and, though I do not say that that is or ought to be conclusive, it is at all events well worthy of consideration. Here, the objector intended to describe his place of abode as he has done: he did not write “Cowhill, Belper,” by mistake for “Gutter”; but, mistaking the place of abode intended by the statute, he designedly described himself as of his late, instead of his present, place of abode. I am clearly of opinion that the decision of the revising-barrister was right, and must be affirmed.

BYLES, J. I entirely concur in the conclusion at which my Lord and my two learned Brothers have arrived: and I place my judgment entirely on the weight of authority. The case of *Knowles, App., Brooking, Resp.*, has decided that the “place of abode” meant to be given by the objector in the forms numbered 4 and 5 in schedule (A.) is, his true place of abode at the time he signs the notice. Further, I think that that case has also impliedly decided the other question, viz. that the 101st section is inapplicable. On the ground, therefore, that this is *res judicata*, I agree with the rest of the court in thinking that the decision of the revising-barrister should be affirmed.

Decision affirmed, with costs.

[21] SOUTH LANCASHIRE.—TOWNSHIP OF MANCHESTER.

JOSEPH SHERLOCK, *Appellant*; JOHN STEWARD, *Respondent*. Nov. 19th, 1859.

[S. C. K. & G. 286; 29 L. J. C. P. 87; 1 L. T. 100; 6 Jur. N. S. 611. Referred to, *Rollston v. Cope*, 1871, L. R. 6 C. P. 298; *Buckley v. Wrigley*, 1871, L. R. 7 C. P. 189.]

A. and several other persons claimed to be registered for a county as the owners each of an undivided thirty-fifth share of freehold property producing a net rental sufficient to give to each of them 2l. 0s. 6d. per annum. This was reduced below 40s. to each

owner by the allowance of a commission of 5l. a year to one of the thirty-five, who undertook the management of the property and the transmission to each of the others of his share. The revising-barrister having found that "the allowance of such commission was from the nature of the property, necessary for the collection of the rents,"—Held that the court was bound by his finding, and therefore could not say that the claimants had freeholds of the clear yearly value of 40s.—But, the case being fairly arguable, costs were not given.

At a court held for the revision of the lists of voters for the southern division of the county of Lancaster, on the 20th of September, 1859, John Steward objected to the name of Joseph Sherlock, jun., being retained in the Manchester list of voters for the southern division of the county of Lancaster.

The said Joseph Sherlock was entitled to one undivided thirty-fifth share in property in Bloom Street and Richmond Street, Manchester, the gross rental of which was 110l. 14s. 4d. The out-goings for the year ending on the 31st of July, 1859, amounted to 39l. 17s. 6d., without including the sum of 5l. hereafter mentioned,—leaving 70l. 16s. 10d., or about 2l. 0s. 6d. per share.

The property was managed by one of the owners, who was allowed a commission of 5l. per annum for receiving the rents and transmitting to each owner his share; and which sum being deducted from 70l. 16s. 10d. left less than 40s. per share.

It was objected that the property did not produce a clear 40s. per share to the several owners.

The revising-barrister found that the allowance of such commission was, from the nature of the property, necessary for the collection of the rents; and he thought that such allowance was a charge reducing the clear yearly value of the property to each of the owners to a sum below 40s., and therefore struck out the name of [22] the appellant and twenty-one other owners of shares in the property.

If this objection was a good one, the decision was to be affirmed; if not, the names of the appellants (Joseph Sherlock and the other twenty-one owners) were to be restored to the register.

Welsby, for the appellant. The decision of the revising-barrister was wrong. It will be attempted to be supported by the case of *Hamilton, App., Bass, Resp.*, 12 C. B. 631, 2 Lutw. Reg. Cas. 213. There, A. was registered as a county voter in respect of an undivided thirtieth share of certain freehold property which was let at a gross yearly rent of 75l. 15s., with an agreement that the landlords should pay all rates and taxes. These reduced the annual value to 63l. 3s. 7d., and there was a further charge of 1l. 6s. for expenses of collection. The average annual expenses of repairs, which were done by the landlords, and which the revising-barrister found were necessary to enable them to obtain the net rent of 63l. 3s. 7d., had for the preceeding six years been 4l. per annum. The revising-barrister decided that the cost of repairs must be deducted from the rent, for the purpose of ascertaining the yearly value, and consequently that A.'s interest was of less than the value of 40s. by the year, and he expunged his name from the list: and it was held that he had correctly decided. That case turned upon the question of repairs: nothing was said as to the expenses of collection. The true criterion is, what is the property worth? what would it produce in the hands of a tenant? The expenses incident to the collection of the rents are not to be charged as a deduction from the yearly value of the property, any more than the salary of a steward would be, or the expense of an audit dinner. The question is, whether the parties are en-[23]-titled to receive from the property 40s. a year over and above all rents and charges payable out of or in respect of the same. Here, each is entitled to receive 2l. 0s. 6d. a year. [Crowder, J. *Astbury, App., Henderson, Resp.*, 15 C. B. 251, 1 K. & G. 6, shews that the true test is, what would a tenant give for it.] Jervis, C. J., there says,—“The true question is, what is the land reasonably worth? what would it fetch in the market?” [Crowder, J. In *Beamish, App., The Overseers of Stoke, Resp.*, 11 C. B. 29, 2 Lutw. Reg. Cas. 189, Maule, J., in the course of the argument, puts this case, —“Suppose a man agreed to stand in the claimant's shoes,—would it be worth his while to give 40s. a year for his interest in the land?” Williams, J. The revising-barrister has found that the employment of a collector was from the nature of the property necessary.] That means that it would probably cost each of the parties more than the value to collect the rents

themselves. The revising-barrister, in using that expression, could not have intended to point to a physical or moral necessity. The appellant is clearly entitled to be upon the register.

Monk, Q. C., for the respondent. It is not contended that the expense of collection is a "charge" upon the property. It is a question of fact, and purely of fact, whether the party has 40s. to expend by the year. By the 8 H. 6, c. 7, s. 1, it was "provided, ordained, and stablished," that "the knights of the shires to be chosen within the realm of England to come to the parliament of our lord the king hereafter to be holden, shall be chosen in every county of the realm of England by people dwelling and resident in the same counties, whereof every one of them shall have free land or tenements to the value of 40s. by the year at the least above all charges; and that they which shall be so chose shall be dwelling and resident within the same [24] counties: and such as have the greatest number of those that may expend 40s. by the year and above as afore is said, shall be returned by the sheriffs of every county knights for the parliament, by indentures sealed between the said sheriffs and the said choosers so to be made; and every sheriff of the realm of England shall have power, by the said authority, to examine upon the Evangelists every such chooser how much he may expend by the year, &c." By the 10 H. 8, c. 2, the qualification is declared to be freehold to the value of 40s. by the year at the least above all charges. And the 18 G. 2, c. 18, s. 5, enacts that "no person shall vote in any such election, without having a freehold estate in the county for which he votes, of the clear yearly value of 40s. over and above all rents and charges payable out of or in respect of the same." Here, the parties interested in this property have not an estate of the clear yearly value of 40s. over and above all charges payable out of or in respect of the same. The cost of collection is an expenditure to create the value, just as rates and taxes and repairs are, and it is found by the revising-barrister to be a necessary expenditure,—a very reasonable finding, if the court can inquire into its reasonableness. The judgment of the court in *Hamilton, App., Russ, Resp.*, 12 C. B. 631, 2 Lutw. Reg. Cas. 213, is conclusive. Jervis, C. J., says: "The real question to be decided is not as to the meaning of the word 'charges,' in the 8 H. 6, c. 7: for I do not think a mere voluntary payment can be said to be a 'charge.' But the other point arises, which was decided in the case of *Lee, App., Hutchinson, Resp.*, 8 C. B. 16, 2 Lutw. Reg. Cas. 159. The question is, what is the property worth? And the proper way to try that is, to ascertain what a tenant would give if he himself expended 4l. a year in repairs. The revising barrister finds, that, if the sum expended [25] for necessary repairs to enable the owners to obtain the rent of 63l. 3s. 7d. be deducted, the share of each is of less than the value of 40s. per annum. The question whether or not the premises are of the yearly value of 40s. is in each case a question of fact, to be determined by all the surrounding circumstances. Here, the barrister has found the fact, and I think correctly." Maule, J., in the course of the argument, there asks, "If a man has a piece of land by means of which he can enable himself to expend 40s. a year, by laying out 5s. upon it, can that be said to be of the value of 40s. by the year?" Take that with the finding of the revising-barrister here, the parties have each an estate of the yearly value of 2l. 0s. 6d., subject to a necessary expenditure of 3s. to produce it. This is as much an expenditure as the seed or the manure which must be expended before the productiveness of the land can be ascertained. In *Moorehouse, App., Gilbertson, Resp.*, 14 C. B. 70, 2 Lutw. Reg. Cas. 260, it was held that one who has a freehold interest in property of the value of 40s., but subject to an agreement to pay thereout a poor-rate charged upon his tenant in respect of the premises, has not a freehold of the "clear yearly value of 40s.," so as to entitle him to a vote for the county. Maule, J., says: "The interest which the voter has in the premises is, 40s. a year, subject to his agreement with the tenant to pay a charge which the tenant alone was liable to pay, viz. the poor-rate. With that stipulation, the interest of the voter is worth less than 40s. per annum. He does not get 40s. out of the land, but 40s. subject to the payment of a rate for which he has no equivalent." And Williams, J., says: "Mr. James was almost driven to admit that he must go the length of contending that a man would be entitled to vote, who could say, not that his freehold is worth 40s. a year, but that it would be worth that if it were not situate in a parish where the rates are so heavy."

[26] Welsby, in reply. Rent is not the test, but value. The illustrations put in the cases cited are all instances of compulsory payments in actual diminution of the value of the land. Suppose this person had to ride through a turnpike-gate in order

to obtain his 40s., would that be a deduction which would be taken into account in diminution of the yearly value?

ERLE, C. J. I think the decision of the revising-barrister in this case was correct, that is, that my judgment concurs with his by reason of the fact which he has stated, that the allowance of the commission of 5l. per annum for receiving the rents was, from the nature of the property, necessary for their collection. The appellant claims to be entitled to vote because he is possessed of a freehold estate of the clear yearly value of 40s. over and above all rents and charges payable out of or in respect of the same, or of which he may expend 40s. by the year at the least above all charges. That which we have to look to, therefore, is to see that the party has an estate of the clear yearly value of 40s. Now, it is found by the revising-barrister that the several owners of this property could not obtain the 40s. a year each which is required by the statutes, without incurring a necessary expenditure of a sum for its collection which would reduce the yearly value to each to a sum less than 40s. If this reduction was the result of a necessary outgoing, it is clear that the parties have not 40s. by the year which they may expend. The illustrations put by Mr. Welsby, of a landlord employing a steward at a salary to collect his rents, or giving a rent-dinner to his tenants, are cases where the expenditure is unnecessarily incurred; the employment of a steward or the giving a dinner being purely optional, and the landlord would still receive his 40s., though he might choose to expend a portion [27] of it in the manner suggested. But here the revising-barrister has found as a fact that the allowance of the commission for the collection of the rents was, from the nature of the property, necessary,—that is, as I understand it, that, but for the allowance which reduced the value to each of the owners below 40s. a year, he would not be in a position to expend 40s. by the year.

WILLIAMS, J. I am of the same opinion. I think we are bound in this case by the finding of the revising-barrister, which in effect amounts to this, that these persons had not a freehold estate of the yearly value of 40s. Upon the facts found, the rental does not represent the actual value of the property, because, according to the facts presented to us by the revising-barrister, we must necessarily deduct from the 2l. 0s. 6d., the proportion of the cost incurred in the collection, which will reduce the annual value to a sum less than 40s. I must confess I have some difficulty in conceiving a case where such an expenditure as this can be necessary, in the sense in which that word is used here: but, as I cannot say it is impossible that that can be so, I feel myself bound by the statement I find in the case. At the same time, I must not be understood as holding generally that the expenses of collection are to be considered a charge on the property, and to be deducted in estimating the yearly value. In general, the rental represents the yearly value: and the yearly value cannot vary as the landlord may or may not, in order to save himself the trouble and inconvenience of doing it himself, employ a collector to perform that service for him. Here, the expense is incurred, not for the mere purpose of avoiding trouble and inconvenience: but because, as the revising-barrister has found, it was necessary. I think we are bound by his finding.

[28] CROWDER, J. I am of the same opinion. I think the revising-barrister has come to a right conclusion from the premises. The argument of Mr. Welsby would go to shew that the facts are inaccurately stated, because he insists that the employment of a person to collect the rent was a voluntary act on the part of the landlord. The revising-barrister states that the employment of a collector was from the nature of the property necessary. If he had found that the employment of the collector was a voluntary act, for the mere convenience of the landlords, the expense thus incurred would not go in reduction of the rental. But he has found that it is necessary; and we have no means of judging whether that is so or not, and therefore cannot come to the conclusion that he is wrong. If it be a necessary expenditure, it must go in reduction of the yearly value, because without it the property would not produce to each owner the requisite value to give the franchise. The decision must therefore be affirmed.

Monk, for the respondent, asked for costs.

ERLE, C. J. We think this was a reasonable case for argument, and therefore that there should be no costs (a).

Decision affirmed, without costs.

(a) In affirmance of the rule suggested by the court in *Clark, App., The Overseers of*

[29] BOROUGH OF READING.

THOMAS ROGERS, *Appellant*; CHARLES EDWARD LEWIS, *Respondent*.

Nov. 19th, 1859.

[S. C. K. & G. 279; 29 L. J. C. P. 85; 6 Jur. N. S. 612; 8 W. R. 279.

See *Moger v. Escott*, 1872, L. R. 7 C. P. 161.]

In the case of an occupation of premises in succession, under the 2 W. 4, c. 45, s. 28, it is not necessary that the party's name should appear on the rate: it is enough that he has paid the rate.—And, semble,—per Erle, C. J.,—that the occupier is sufficiently rated, though the name of the owner of the premises only appears in the rate, a blank being left for that of the occupier,—where the latter is the person intended to be rated.—Quære, whether the omission of the occupier's name from the rate is an “inaccurate description,” within the 75th section of the 6 & 7 Vict. c. 18? Semble, that it is not.

At a court held for the revision of the list of voters for the borough of Reading, Henry Pocock objected to the name of John Jones being retained on the list of voters for the parish of St. Giles.

John Jones occupied a house in Crown Street till December, 1858, and was duly rated in the October rate, the only one made between July, 1858, and the end of his occupation. He moved in December to a house in Boults Walk. He claimed to be registered in respect of “houses occupied in immediate succession,” in “Crown Street, and Boults Walk, Whitley Street.”

Another rate was made in April, 1859, on which his name did not appear. He made no application to be rated: but the collector called on him, and he paid the rate, for which the collector gave the usual receipt. The house mentioned in this rate,—in Boults Walk,—is that for which the claim was made.

The following is a copy of the rating in the parish book:—

PARISH OF ST. GILES, READING.

Rate made the 21st day of April, 1859.

No.	Name of occupier.	Name of owner.	Description of property rated.	Name or situation of property.
365		Haslem, James.	House.	Boults Walk.

It was contended that the rating for the house to which the voter had removed was not necessary; and that, if it was, the payment of the rate to the collector, under the circumstances stated, was equivalent to a demand to be rated.

[30] The revising-barrister held that the rating to the second house was necessary; and that the payment to the collector was not equivalent to a demand to be rated: and he expunged the name of John Jones from the list.

If the court should be of opinion that this decision was wrong, the name of John Jones was to be restored to the list.

Dowdeswell, for the appellant (*a*). Under the 2 W. 4, c. 45, s. 28, rating was not necessary; and, if necessary, the voter was sufficiently rated; or, at all events, the defect is cured by the 75th section of the 6 & 7 Vict. c. 18. The question turns mainly upon the construction of the 27th and 28th sections of the Reform Act, 2 W. 4, c. 45. The 27th section enacts, “that, in every city or borough which shall return

Bury St. Edmunds, Resp., ante, vol. i., p. 23, 1 K. & G. 90, —that, where the decision upon an appeal is adverse to the claim of franchise, the court will grant or withhold costs according as they see that there was reasonable ground for the appeal; but that, where the decision against the appellant supports the franchise, costs will be given as a matter of course.

(*a*) The respondent did not appear.

a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being, either separately or jointly with any land within such city, borough, or place, occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough: Provided always, that no such person shall be so registered in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such [31] year, nor unless such person, where such premises are situate in any parish or township in which there shall be a rate for the relief of the poor, shall have been rated in respect of such premises to all rates for the relief of the poor in such parish or township made during the time of such his occupation so required as aforesaid, nor unless such person shall have paid, on or before the 20th day of July in such year, all the poor-rates and assessed-taxes which shall have become payable from him in respect of such premises previously to the 6th day of April then next preceding: Provided also, that no such person shall be so registered in any year unless he shall have resided for six calendar months next previous to the last day of July in such year within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof, or of any part thereof." And the 28th section enacts "that the premises in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any city or borough as aforesaid, shall not be required to be the same premises, but may be different premises occupied in immediate succession by such person during the twelve calendar months next previous to the last day of July in such year, such person having paid on or before the 20th day of July in such year all the poor-rates and assessed-taxes which shall previously to the 6th day of April then next preceding have become payable from him in respect of all such premises so occupied by him in succession." There is a plain distinction between the language of these two sections. The effect of them is thus stated in *Rogers on Elections*, 9th edit. 75,—“When the premises are situated in a place where there is a rate for the relief of the poor, he (the voter) must have been rated in respect [32] of the subject-matter of his qualification to all rates made during the period required for his occupation: 2 W. 4, c. 45, s. 27: or, if he has occupied different premises in succession, he must have paid all the rates for the premises which he has successively occupied: s. 28.” To this the author adds the following note,—“In case of a man occupying the same premises during the twelve-month, the 27th section enacts, not only that he shall have paid the rates, but that ‘he shall have been rated,’ i.e. appeared on the rate-book. With regard to premises occupied in immediate succession, however, the right to be registered would seem to depend upon the fact of ‘such person having paid, &c. all the poor-rates, &c. payable, &c.’ s. 28; and there is no provision in that section similar to that contained in the 27th, that such occupier ‘shall have been rated.’ Payment alone, therefore, would seem to be sufficient in the latter case.” Mr. Elliott, however, takes a different view of the matter.” “It has been observed,” he says,—*Elliott on Registration*, 2nd edit. 207, “that there is no provision in the 28th section requiring a person to be rated for premises occupied in succession; the party is only required to have paid all the rates and taxes which shall have, previously to the 6th day of April then next preceding, become payable from him in respect of all the premises so occupied in succession. But it is clear that this is only an explanatory provision relative to the premises occupied in succession; and all the provisions of the previous section must still be complied with, to entitle a person to be registered. The reasonable construction appears to be, that the voter must have been rated in respect of each set of premises to all rates made during the respective occupations, and must have paid the whole, or such proportions of each rate as he is by law liable to pay.” It is submitted that the former is the better opinion, and [33] more consonant with the language used in the different sections. It is further submitted, that, if necessary, the appellant was sufficiently rated. A blank is left for the name of the occupier: in all other respects, the property is sufficiently rated. The precise point was decided upon the 4 & 5 W. 4,

c. 76, s. 66, in *The Queen v. The Inhabitants of Hulme*, 4 Q. B. 538, 2 Gale & D. 682. There a pauper occupied for a year a tenement of more than 10l. annual value, and paid the rent and poor-rate for a year. In the rate, the landlord's name was inserted under the head "Name of owner," but, in the column headed "Name of occupier," no name was entered: and it was held that the pauper gained a settlement, as being sufficiently "assessed" to satisfy the statute 4 & 5 W. 4, c. 76, s. 66. Lord Denman there says: "It appears to me that there is no difference between the words 'assessed' and 'charged.'" Mr. Martin suggests that the legislature must have had some reason for changing the expression (*a*)¹: but at any rate they do not say so. It is not provided that the name of the party should be inserted, but only that he should be assessed, and pay the rate, for one year. That points only to the necessity of the assessment continuing for a year, and payment being made by the same party: and this the individual in the present case has done." And Patteson, J., says: "The only question is, whether we can put a construction on the words of the statute 4 & 5 W. 4, c. 76, s. 66, different from that which has been put on those of the 3 & 4 W. & M. c. 11, s. 6: and I think we cannot. And, whether it ought to be lamented or not, it is certain that the construction here adopted by the sessions has been put on the statute 3 & 4 W. & M. c. 11, s. 6, [34] in scores of decisions." That case being cited in *Moss, App., The Overseers of St. Michael, Lichfield, Resp.*, 7 M. & G. 72, 8 Scott, N. R. 832, 1 Lutw. 184. Maule, J., says: "In such cases the assessment is upon the property;" and, Tindal, C. J., adds, "And whoever may be the occupier is charged. And, in giving judgment, Erle, J., says: "The real question is, whether the party was intended to be rated. In *The Queen v. The Inhabitants of Hulme* it was intended to rate the occupier, although a blank was left in the column in which his name should have been inserted." At all events, the difficulty is got over by the 75th section of the 6 & 7 Vict. c. 18, which declares and enacts, "that, where any person shall have occupied such premises as in the said recited act (2 W. 4, c. 4, s. 27,) are mentioned for twelve calendar months next previous to the last day of July in any year, and such person, being the person liable to be rated for such premises, shall have been bonâ fide called upon to pay in respect of such premises all rates made for the relief of the poor in such parish or township during the time of such his occupation so required as aforesaid, and such person shall have bonâ fide paid on or before the 20th day of July in such year all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the 6th day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the said recited act, and be entitled to be registered in respect of the same in any year, any misnomer or inaccurate or insufficient description in any rate of the person so occupying or of the premises occupied notwithstanding." Those words are large enough to embrace this case (*a*)².

[35] ERLE C. J. I am of opinion that our judgment in this case ought to be for the appellant. It appears to me that the argument urged by Mr. Dowdeswell upon the construction of the 28th section of the Reform Act, which applies to premises occupied in succession, is well founded. Where the qualification is in respect of one set of premises occupied continuously, to entitle the occupier to be registered for such occupation under the 27th section, he must have been rated and he must have paid the rates: but, according to the wording of the 28th section, where the qualification is in respect of premises occupied in succession, it is enough if the party has paid, "on or before the 20th day of July in such year, all the poor-rates and assessed-taxes which shall previously to the 6th day of April then next preceding have become payable from him in respect of all such premises so occupied by him in succession." It appears to me that the difference of language in these two sections abundantly justifies the conclusion sought to be drawn from the 28th section. Looking at the length of time for which the rates are made, the time during which they are in course of collection, and to the allowances usually made as between outgoing and incoming tenants upon a change of occupation, it seems to me to have been clearly the intention of the legislature, in framing the 28th section, to provide, that, in the case of succes-

(*a*)¹ The word used in the 3 & 4 W. & M. c. 11, s. 6, was "charged."

(*a*)² The omission of the name of the occupier in the rate was held in *Moss, App., The Overseers of St. Michael, Lichfield, Resp.*, not to be cured by the 6 & 7 Vict. c. 18, s. 75.

sive occupation, the payment of the rate should be sufficient. Great and unnecessary trouble and inconvenience would result if the law cast upon the occupier in such a case the duty of seeing that his name is put upon a rate made before his occupation commenced, and then in course of collection. It is manifest that the change of language in the two sections was adopted for a purpose such as that suggested, and that, under s. 28, it is not necessary that the name of the occupier should appear in the [36] rate in respect of the premises to which he has succeeded, provided he has paid the rates in respect of them. Our decision upon the first point disposes of the case, and therefore it is unnecessary to say anything upon the others. But, if it were necessary to consider the second point, I should incline to think that the same construction ought to be put upon "rating" for the purpose of conferring a qualification to vote for members of parliament, as that which has been put upon the word "charged" or "assessed" for the purpose of a settlement under the poor laws. Many cases occurred in the court of Queen's Bench in my time, where, for the purpose of gaining a settlement, the payment of rates by the occupier, he being the person intended to be charged or assessed, was held sufficient to satisfy the requirements of the law. It was so held in the case referred to, of *The Queen v. Hulme*, 4 Q. B. 538, 2 Gale & D. 682. It is unnecessary, however, to dwell upon this point, inasmuch as our decision upon the other disposes of the whole case. For these reasons, I am of opinion that the conclusion arrived at by the revising barrister was an erroneous one, and that our judgment must be for the appellants.

WILLIAMS, J. I entirely agree with my Lord in the construction which he has put upon the 28th section of the 2 W. 4, c. 45; and I think it unnecessary to say anything upon the other point.

CROWDER, J. I also agree with my Lord and my Brother Williams, in the construction they have put upon the 28th section of the Reform Act, and do not desire to be understood as having formed any opinion upon the other point.

Appeal allowed.

[37] BOROUGH OF ASHBURTON.

THOMAS POPE SMERDON, *Appellant*; ROBERT TUCKER, *Respondent*. Nov. 16th, 1859.

[S. C. K. & G. 305; 29 L. J. C. P. 93; 1 L. T. 549; 6 Jur. N. S. 557; 8 W. R. 151.]

Premises consisting of five closes of land, a barn, and other buildings, of the annual value of 40l., were let to A., as tenant from year to year, at the yearly rent of 40l. Prior to the last day of July 1859, the landlord assigned his interest in the barn and other buildings to a third person, for the express purpose of depriving the tenant of the right of voting,—the premises retained by the landlord not being sufficient of themselves to confer a vote:—Held, that the requisitions of the 27th section of the 2 W. 4, c. 45, in respect of occupation "under the same landlord," had been substantially complied with, and that the severance of the reversion did not affect the tenant's right to be upon the register,—the taking from the same landlord of premises of sufficient value being the principal test relied on by the legislature.

At the court held on the 4th of October, 1859, for the revision of the lists of voters for the parish of Ashburton, Robert Tucker duly objected to the name of Thomas Pope Smerdon being retained on the list of persons entitled to vote in the election of a member of parliament for the borough of Ashburton.

The facts were as follows:—"Thomas Pope Smerdon occupied as tenant from the 31st of July, 1858, to the 31st of July, 1859, five closes of land and a barn and other buildings situate within the borough of Ashburton, of the annual value of 40l. The only objection to the vote was, that the premises were not occupied under the same landlord.

On the 31st of July, 1858, John Sparke Amery was owner in fee and landlord of all the premises. The tenancy was a tenancy from year to year under a verbal agreement, at an annual rent of 40l. John Sparke Amery is still landlord and owner of the five closes: but, on the 16th of July, 1859, he sold to the objector, Robert Tucker, an interest in the barn and buildings.

By a deed of that date, duly executed, in consideration of 20l., John Sparke Amery

conveyed to the objector, Robert Tucker, the barn and all the buildings occupied by the voter, to hold the same during the joint lives of John Sparke Amery, the grantor, and Robert Tucker, the grantee. The following is a copy of the deed :—

[38] “This indenture, made the 16th of July, 1859, between John Sparke Amery, of, &c., of the one part, and Robert Tucker, of, &c., of the other part : Whereas the said John Sparke Amery is seised of the premises hereafter described and released, and he hath contracted and agreed with the said Robert Tucker for the absolute sale to him of the said premises, for the joint lives of both of them, for the sum of 20l. : Now this indenture witnesseth, that, in pursuance of the said contract, and in consideration of the sum of 20l. to the said John Sparke Amery in hand now paid by the said Robert Tucker, the receipt whereof is hereby acknowledged, he the said John Sparke Amery doth hereby grant, bargain, sell, alien, and release unto the said Robert Tucker, his heirs and assigns, All that barn, together with the yard, curtilage, and all other the buildings adjacent thereto, situate at Byland near Headborough, in the parish of Ashburton aforesaid, and now in the occupation of Thomas Pope Smerdon, as tenant thereof, and of the said John Sparke Amery, Together with all edifices, buildings, walls, ways, paths, passages, easements, rights, members, privileges, and appurtenances whatsoever to the said barn, yard, curtilage, and buildings belonging or in any wise appertaining, To have and to hold the said barn, curtilage, and buildings, with their appurtenances, unto and to the use of the said Robert Tucker and his assigns during the joint natural lives of the said John Sparke Amery and Robert Tucker : And the said John Sparke Amery doth hereby covenant with the said Robert Tucker and his assigns, that he the said John Sparke Amery now hath in himself good right and full power to grant the aforesaid premises unto the said Robert Tucker and his assigns in manner aforesaid : And it is hereby declared, that, as long as the portion of the said barn, curtilage, and [39] buildings now occupied by the said Thomas Pope Smerdon shall be occupied by him, together with other premises the property of the said John Sparke Amery, at one rent, the proportion of rent to be paid to the said Robert Tucker by the said Thomas Smerdon for the premises hereby granted in his occupation shall be 1l. 10s. annually. In witness,” &c.

The transaction was a bona fide sale for adequate value. The consideration was really paid ; but no notice of the conveyance was ever given to the voter ; and he did not know of it until it was disclosed in court.

On the 23rd of September, 1859, Thomas Smerdon paid to the grantor, John Sparke Amery, the rent which had become payable on the 25th of March, 1859, in respect of all the premises. He has not paid any subsequent rent either to the grantor or grantee.

The barn and buildings conveyed to Robert Tucker are not of the annual value of 10l. There is no building on the fields retained by John Sparke Amery. The objector admitted that the object of the arrangement was, by severance of the reversion to destroy the vote.

On the part of Thomas Smerdon it was contended, that, inasmuch as there had been no attornment by him, nor any apportionment of rent agreed to by him, nor any other recognition by him of any other landlord, he still continued (notwithstanding the execution of the conveyance) to occupy all the premises under John Sparke Amery, the original landlord ; and that even the statute 4 Ann. c. 16, s. 9, which has rendered attornment unnecessary in certain cases, was imperative in this case, inasmuch as no notice of the conveyance had been given to Thomas Smerdon before the 31st day of July, 1859.

The revising-barrister was of opinion that the statute 2 W. 4, c. 45, s. 27, required not only an original taking, [40] but a continued occupation, under the same landlord ; and that, after the execution of the conveyance, John Sparke Amery ceased to be landlord of the premises thereby conveyed : and he therefore decided that the voter had not proved his qualification, and expunged his name from the list.

If the court of Common Pleas should be of opinion that this decision was wrong, the name of Thomas Pope Smerdon was to be restored to the list of persons entitled to vote in respect of property, —for “building and land,” occupied within the parish of Ashburton.

Karslake, for the appellant. The question in this case turns upon the construction of the 27th section of the 2 W. 4, c. 45, which enacts, “that, in every city or borough which shall return a member or members to serve in any future parliament, every

male person of full age, and not subject to any legal incapacity, who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being either separately, or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough," &c. The object of the act was, to prevent a person from acquiring a vote by joining together several small takings under different landlords, so as to make up the required qualification. Suppose, during the tenancy, the landlord were to devise the reversion to five different persons, so that each would have an interest of less than [41] 10*l.* a year,—could it be said that the tenant's right to vote was gone? Besides, it cannot be said that the assignee here has become landlord at all within the act: this is not a demise under seal, but a mere tenancy from year to year: the assignee could not sue upon that contract under the statute 32 H. 8, c. 34. [Byles, J. That statute only applies to conditions and covenants.] Yes: *Standen v. Christmas*, 10 Q. B. 135; *Bickford v. Parson*, 5 C. B. 920; *Doe d. Agar v. Brown*, 2 Ellis & B. 331. To enable a party to sue for use and occupation, there must be some contract, express or implied. Thus, in *Churchward v. Ford*, 2 Hurlst. & N. 446, copyhold lands were devised to the plaintiffs, in trust for F. for life, but the plaintiffs were never admitted to the copyhold. At the time of the death of the testator, the lands were in the possession of the defendant, to whom F., with the assent of one of the plaintiffs, afterwards re-let them in her own name. The plaintiffs then gave notice to the defendants to pay the rent to them: and it was held that an action for use and occupation would not lie by the plaintiffs against the defendant, because no contract could be implied between them there having been an existing contract between the defendant and F., and the occupation having been by the permission of F. Bramwell, B., there says,—“The word ‘landlord’ does not mean the lord of the soil, but the person between whom and the tenant the relation of landlord and tenant exists.” [Byles, J. In Co. Litt. 148 a., it is said: “If the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for, the rent is incident to the reversion.”] An apportionment is not binding on the tenant, without the intervention of a jury. In *Bloss v. Collins*, 5 B. & Ald. 876, two messuages were conveyed to such uses as A. should appoint, and, in default of appointment, to A. for life, and, after the determination [42] of that estate in his life-time, to B. for the life of A., in trust for A. and his assigns; with remainder to A. in fee. A. leased both these messuages to a tenant at an entire rent of 65*l.* 10*s.* for a term of years, and, during the continuance of that term, contracted to sell the reversion of one of the messuages to C. In the contract the messuage was described on lease, together with another, and the apportioned rent in respect of it was 40*l.* A. and B. afterwards conveyed the reversion of both houses, and the entire rent of 65*l.* 10*s.*, unto D., to certain uses, viz. as to the said messuage which A. had contracted to sell, and the yearly rent of 40*l.*, together with all powers and remedies reserved for recovering the rent of 65*l.* 10*s.*, to such uses as A. should appoint; and, as to the other messuage, and the residue of the entire rent, to the use of A. in fee. A. afterwards appointed the messuage which he had contracted to sell, and the apportioned rent, to the vendee: and it was held that the latter did not acquire the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury,—the lessee for the term not being bound by an apportionment made without his consent. And see *Roberts v. Snell*, 1 M. & G. 577. The statute 4 Ann. c. 16, s. 9, which renders attornment unnecessary, provides against the tenant being prejudiced by the want of notice of the grant.

Coleridge, for the respondent. The question arises upon the provision in the 27th section of the Reform Act, which requires that the occupation which is to confer the right of voting shall be under the same landlord,—“Provided always, that no such person shall be so registered in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year.” [43] Any change in the tenancy during the year puts the voter in the same position as if he had originally taken the premises in the same manner as he holds at the time of registration. The real question, therefore, is whether an original taking such as is here described as the holding at the time of registration would have sufficed.

[Byles, J. What do you say to a holding under three tenants in common?] In that case there would be three landlords. [Byles, J. It would be one right. Take the case of a holding under two trustees or executors.] Where the landlords hold as joint-tenants, it would do; but not where they are tenants in common. The words of the act point at identity of landlord and of occupation. Here, the voter cannot be said to have held during the whole year under the same landlord. [Byles, J. If the landlord dies during the year, and the land descends to his heir-at-law, you would say the vote is gone?] Certainly. [Crowder, J. The voter's title, if that be the proper construction of the statute, is a very precarious one. Williams, J. The legislature never could have contemplated or foreseen such a consequence.] If the plain letter of the statute be departed from, where is it to stop? If the present holding is good for this year, why may it not be good for ten or twenty years to come? The point is, in effect, decided in two cases which have already been before the court, viz. *Capel, App., The Overseers of Aston, Resp.*, 8 C. B. 1, 2 Lutw. Reg. Cas. 143, and *Burton, App., The Overseers of Aston, Resp.*, 8 C. B. 7, 2 Lutw. Reg. Cas. 143. There, it was sought to combine property of which the voter was owner with property which he occupied as tenant; but the court held that that could not be done. Maule, J., says (2 Lutw. Reg. Cas. 154), "The words 'therewith,' and 'under the same landlord,' require an identity of the person under whom he holds as tenant." Mr. [44] Rogers, adverting to this,—Rogers on Elections, 9th edit. p. 63, says: "This restriction may enable a landlord to deprive a tenant holding two tenements of him of his vote: for, if he chose in the course of the year to dispose of one of the tenements held by the voter, the latter would not then 'occupy as tenant under the same landlord.'"

Karslake, in reply. The dictum attributed to Maule, J., in the report of *Capel, App., The Overseers of Aston, Resp.*, in Lutwyche, is not found in the contemporaneous reports: and it was not the point decided. The real question was whether an occupation qualification insufficient in itself could be eked out by joining with it a freehold occupied by the party, which was sufficient to confer a vote for the county. In *Collins, App., Thomas, Resp.*, 12 C. B. 639, 2 Lutw. Reg. Cas. 219,—where it was held, that a party who occupies a house and a garden immediately adjoining the house, but both occupied by him as tenant under the same landlord, and at one entire rent exceeding 10l. per annum, is entitled to be registered,—Maule, J., in the course of the argument, observes, "You assume that it [occupied therewith] means 'under the same demise.' That, however, is not so in terms. Suppose a man hires a house on one day, and next day a garden contiguous thereto, both from the same landlord, and together worth 10l. a year, though separately of less value, would he not be qualified?" A holding under several joint-tenants clearly would be a holding under the same landlord. So, where several tenants in common join in a lease, they must be considered as one and the same landlord. The fair construction of the statute is, that, so long as the holding continues, it continues to be a holding under the same landlord,—under the original take.

[45] There were two other cases in which similar questions were raised,—*John French, App., Robert Tucker, Resp.*, and *Amos Bickley, App., Robert Tucker, Resp.*

In the former, the appellant occupied as tenant from the 31st of July, 1858, to the 31st of July, 1859, a building and land situate within the borough of Ashburton, of the annual value of 11l.; William Tucker, a son of the objector, being on the 31st of July, 1858, the landlord of all the premises. The tenancy was a tenancy from year to year, under a verbal agreement, at the annual rent of 11l. The estate of William Tucker was an estate for a long term of years, and he still retained that estate in part of premises: but, on the 12th of July, 1859, he sold to his father, the objector, Robert Tucker, an interest in part of the premises. By a deed of that date, duly executed, William Tucker, in consideration of 1l. (which was really paid), demised to the objector, Robert Tucker, one of the fields occupied by the voter, to hold during the joint lives of the said William Tucker and Robert Tucker, subject to the payment of a rent-charge of 4l. issuing out of all the premises occupied by the voter. No notice of the sale or conveyance was ever given to the voter. No rent had been paid since the execution of the conveyance either to William Tucker or Robert Tucker. The premises retained by William Tucker, and the premises demised by him to Robert Tucker, were not when separated of sufficient value to confer a vote.

In the latter case, the appellant occupied as tenant from the 31st of July, 1858

to the 31st of July, 1859, a house with a garden attached thereto, and an orchard separated from the house and garden. The premises were all situated within the borough of Ashburton, and were together of the annual value of 14l. On the 31st of July, 1858, the objector, Robert Tucker, was [46] the landlord of all the premises. The tenancy was a tenancy from year to year, expiring at Christmas, under a verbal agreement, at the annual rent of 14l. The estate of Robert Tucker was an estate for his own life, and he still retained that estate in the house and in the orchard; but, on the 23d of June, 1859, he sold to his son and partner, Robert Coard Tucker, an interest in the garden only, for 20l., which sum was duly paid. By a deed of that date, duly executed, the objector, Robert Tucker, conveyed to his son, Robert Coard Tucker, the garden, to hold to him during the joint lives of the grantor, Robert Tucker, and the grantee, Robert Coard Tucker. No notice of the sale or conveyance was ever given to the voter. The rent had been paid to Robert Tucker up to Christmas, 1858, but none had been paid since. On the 22nd of June, 1859, the day preceding the execution of the conveyance, Robert Tucker had given the voter notice to quit all the premises at Christmas, 1859. The house and orchard, without the garden, were not of the annual value of 10l.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

In this case the question was whether the voter was qualified under the 27th section of the Reform Act, 2 W. 4, c. 45, by the occupation of a house with land under the same landlord.

The premises were demised to him by the same landlord, so that his qualification was inchoate. But, in the course of the year of occupation, the landlord sold the reversion in a part of the premises to a third person, so that in one sense the reversion was not in the same landlord during the whole year: and, because the occupation was in this sense not under the same [47] landlord during the whole year, it was contended that the qualification was destroyed. But we are of a contrary opinion, thinking that the requisitions of the statute have been substantially fulfilled.

It seems to us that the taking from the same landlord of premises of sufficient value is the principal test relied on by the legislature. If the voter so takes the premises, as long as he continues to hold under that take, he holds upon the same terms, and the reversion, whether severed or not, is, as to his interest, the same reversion.

The statute does not express that a change of landlord during the year would destroy the qualification; and we do not gather from the context that the legislature had any such intention.

If an assignment of a part of the reversion would disqualify, it is obvious that the power might be used to prevent the free exercise of the right of voting, and to defeat in many cases the intention of the tenant in taking the premises.

The appeal is therefore allowed, and the decision of the revising-barrister reversed.

Decision reversed.

[48] COUNTY OF DURHAM—NORTHERN DIVISION.

WILLIAM PROCTOR, THE YOUNGER, *Appellant*; RALPH ANNISON, *Respondent*.
Nov. 24th, 1859.

[S. C. K. & G. 297; 29 L. J. C. P. 90; 1 L. T. 187; 6 Jur. N. S. 656; 8 W. R. 140.]

The owner of a copyhold house in a borough divided it into several tenements, so as, if of sufficient value, to give to each occupier a right to vote for the borough under the 2 W. 4, c. 45, s. 27:—Held, that he was by force of the 25th section deprived of the right of voting for the county, the whole being of sufficient value to confer on him the right of voting for the borough, if occupied by himself.

At the court for the revision of the list of voters in the election of knights of the shire for the northern division of the county of Durham, holden at Sunderland on the 7th of October, 1859, William Proctor the younger objected to the name of Ralph

Annison being retained in the township of Bishopwearmouth list of voters in such election for the said division. Ralph Annison was entered on the list thus :—

Name of occupier.	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Annison, Ralph.	13 Sans Street.	Copyhold house, in tenements.	Darcy Street.

Many years ago Ralph Annison became seised at law in his demesne as of fee, at the will of the lord of the manor, according to the custom of the manor, of the copyhold house so described in the lease, and has ever since continued so seised, and been in the actual receipt for his own use of the rents and profits.

The house is of more than the clear yearly value of 10l., over and above all rents and charges payable out of or in respect of the same. It is situate within the borough of Sunderland, which borough was for electoral purposes created by the Reform Act, 2 W. 4, c. 45. It is two storeys or floors high, has only one entrance from the street, and a door at that entrance, with a bolt but no lock on it. The entrance-passage and staircase and landing at the top of the staircase are the same as in ordinary dwelling-houses. All the doors of [49] the rooms of the house have locks. Neither floor is, together with the staircase and entrance-passage, of the yearly value of so much as 10l. Each floor has been always let separately and as a distinct tenement by Ralph Annison, at a yearly rent of less than 10l., to a separate tenant from year to year, the tenant of the upper floor having the staircase and the use, in common with the other tenant, of the entrance-passage. Except as to the common use of the entrance-passage, each tenant has always, and throughout the six calendar months ending on the last day of last July, had the exclusive use and occupation of the tenement so let to him. The entrance-door has very rarely been bolted or fastened. The doors of the rooms have been locked by night; and, but for such locking, there would have been free access from the street into the rooms. The whole house might conveniently be the residence of one family.

The objection was, that, upon the facts above stated, Ralph Annison was by the 25th section of the Reform Act, 2 W. 4, c. 45, not entitled to have his name retained on the list.

The revising-barrister decided that that section did not affect his right, and that the name should be retained on the list.

The like decision was come to in the cases of fifty-two other persons similarly circumstanced. These were all consolidated with the principal case: and, if the court was of opinion that the decision of the revising-barrister was wrong, the whole were to be erased from the list.

Maistry, Q. C., for the appellant. The claimant is the owner of a copyhold house of such value as would confer upon him a vote for the borough. And the question is whether the circumstance of his having let [50] the house to separate tenants in such a manner as would have given them a qualification for the borough for separate tenements, if they had been of sufficient value, makes the single house equivalent to separate houses whilst thus occupied, so as to confer upon the owner the right of voting for the county. This depends upon the construction of the 25th section of the Reform Act, 2 W. 4, c. 45, which enacts, "that, notwithstanding anything hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament in respect of his estate or interest as a copyholder or customary tenant, or tenant in antient demesne, holding by copy of court-roll, or as such lessee or assignee, or as such tenant and occupier as aforesaid (s. 20), in any house, warehouse, counting-house, shop, or other building, or in any land occupied together with a house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately, or jointly with the land so occupied therewith, of such value as would according to the provisions hereinafter contained (s. 27) confer on him or on any other person the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in

respect thereof." The 27th section confers a right of voting for the borough upon the occupier of copyhold premises of the yearly value of 10l.: and the question is, whether the owner of a copyhold in a borough of the value of 10l. a year can acquire to himself a vote for the county because he chooses to let the premises to several tenants neither of whom pays a sufficient amount of rent to entitle him to a vote for the borough. There is no foundation for the claim. If the claimant had occupied the premises himself, he [51] would have had a right to vote for the borough: but, though, by the mode of dealing with the property, the borough vote is gone, he clearly has no right to vote for the county.

Davison, for the respondent. The 27th section of the Reform Act confers a right of voting for the borough upon every person occupying therein "as owner or tenant, any house, warehouse, counting-house, shop, or other building," of the clear yearly value of not less than 10l. Under that section it has been held that a "part of a house" is a "house or building,"—see *Wright, App., The Town-Clerk of Stockport, Resp.*, 7 Scott, N. R. 561, 5 M. & G. 33, 1 Lutw. Reg. Cas. 32; *Score, App., Huggett, Resp.*, 8 Scott, N. R. 919, 7 M. & G. 95, 1 Lutw. Reg. Cas. 198; *Daniel, App., Coulsting, Resp.*, 8 Scott, N. R. 949, 7 M. & G. 122, 1 Lutw. Reg. Cas. 230; *Toms, App., Luckett, Resp.*, 5 C. B. 23, 2 Lutw. Reg. Cas. 19; *Downing, App., Luckett, Resp.*, 5 C. B. 40, 2 Lutw. Reg. Cas. 33. The same construction must be put upon the same words in the 25th section. Taking, therefore, the several parts into which these premises had been divided as separate tenements, each of which would, if of sufficient value, confer upon the occupier the right of voting for the borough, inasmuch as neither is of sufficient value to confer such vote for the borough, there is nothing in the 25th section to disentitle the owner to a vote for the county. This point is virtually decided by the case of *Webb, App., The Overseers of Aston, Resp.*, 7 Scott, N. R. 545, 5 M. & G. 14, 1 Lutw. Reg. Cas. 18. There, the lessee of several houses locally situate within a borough, for the unexpired residue of a term originally created for a period of not less than sixty years, of the clear yearly value of not less than 10l., is entitled to a vote for the county, notwithstanding one of the houses is of [52] sufficient value to confer a vote for the borough, if the rest are individually of less but collectively of a greater yearly value than 10l. clear. And Tindal, C. J., said: "So far as the words of the 20th section go, the claimant has a clear right to vote. Then comes the 25th section; and the question which arises upon that is, whether an intention is expressed with equal clearness of taking away his right; if not, we are bound to say that the right still remains in the party. The 25th section disqualifies a person from voting for the county in respect of his estate or interest as lessee in any house of such value as would confer on him, or any other person, the right of voting for the county." A man may have a vote under s. 20 for any number of copyholds, the whole amounting in value to 10l. a year. Does the 25th section take away that right? In a note to that section in Chitty's Statutes (edit. Welsby & Beavan), vol. 3, p. 346, referring to *Webb, App., The Overseers of Aston, Resp.*, it is said: "The difference of expression in these two clauses [ss. 24 and 25], on the one hand as respects freeholds, and on the other as respects copyholds and leaseholds, is to be observed. In the former case, the owner of property situate within a city or borough, occupied by himself, is prevented from acquiring a right of voting for the county in respect thereof as a freeholder, if the property be of such a description and value, and occupied in such a manner, that it might be made use of by him for the purpose of acquiring a vote for the city or borough; in the latter case, the party is excluded from the county franchise, if the property be of such a description and value, and so occupied, that it might be made use of for the purpose of acquiring a vote for the city or borough, either by the claimant himself or any other person." Here, the voter does not claim in respect of "house," but of "copyhold house, in tenements;" if that is an inaccurate [53] rate description, it may be amended, —*Howitt, App., Stephens, Resp.*, 5 C. B. (N. S.) 1, 1 K. & G. 183.

Manisty, in reply. It is sought upon the other side to construe the 25th section of the Reform Act as if the words "and so occupied" were introduced into it. The 24th section, which relates to freeholds, mentions occupation; but the 25th section turns upon value only, whether the premises are occupied or not, and whether the owner or any other person may or may not have acquired the right to vote for the borough in respect thereof. [Williams, J. In *Webb, App., The Overseers of Aston, Resp.*, 5 M. & G. 32, Maule, J., says: "The question amounts to this. Is the party registered

as a voter for the county, as having a right to vote in respect of his estate or interest in any house that would confer a vote for any borough? And I think it is clear from the facts that he is not so registered." If this is to be looked at as a single house, your argument is unanswerable: but, if it is to be taken as several tenements, I do not see how you can get over the case of *Webb, App., The Overseers of Aston, Resp.* It is submitted, that, under this section, value is the test, not occupation. The owner does not acquire the right to vote because no one else has acquired the right of voting in respect of the premises (a). They might be let to a female, who has no vote.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

In this case the claimant is the owner of a copyhold house of such value as would confer on him the right [54] of voting for the borough. He appears, therefore, to be disqualified, according to the express words of the 25th section of the Reform Act, 2 W. 4, c. 45. But he has contended that the letting of the house to separate tenants in such a manner as would give to them a qualification for the borough for separate tenements if they were of sufficient value, makes the single house equivalent to separate houses during the time it is so occupied. And it is true, that, if the two tenements, instead of being in the vertical line under the same roof, had been in the horizontal line under separate roofs, the separate value of each being insufficient for the borough, but the aggregate value of both being sufficient for the county, he would have been qualified for the county: *Webb, App., Aston-juxta-Birmingham, Resp.*, 5 M. & G. 14, 7 Scott, N. R. 545, 1 Lutw. Reg. Cas. 18. But, in the case supposed, they would be separate houses: here, it is found to be one house, and, being so, it gives no qualification for the county. And the clause at the end of the section expressly provides that it is immaterial whether the owner or any other person shall have acquired a right to vote for the borough in respect of the house or not.

Our judgment, therefore, is for the appellant, and the decision of the revising-barrister is reversed in this case and in the other appeals consolidated herewith.

Decision reversed.

End of the Registration Cases.

[55] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN MICHAELMAS TERM, IN THE TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in banco in this term, were,—Erle, C. J., Williams, J., Crowder, J., and Byles, J.

COX v. MITCHELL. Nov. 2nd, 1859.

[S. C. 29 L. J. C. P. 33; 1 L. T. 8; 6 Jur. N. S. 225; 8 W. R. 45. Not applied, *Alexander v. Adams*, 1867, 16 L. T. 384. Considered, *The Mali Iro*, 1869, L. R. 2 A. & E. 358; *M'Henry v. Lewis*, 1882, 22 Ch. D. 397. See *Peruvian Guano Company v. Bockwoldt*, 1883, 23 Ch. D. 228; *The Christiansborg*, 1885, 10 P. D. 146; *Mutrie v. Binney*, 1887, 35 Ch. D. 623.]

It is no ground for staying proceedings in an action here, that proceedings are pending between the parties for the same cause of action in the United States.

The plaintiff, a merchant at Liverpool, having commenced an action in one of the superior courts of the United States against the defendant, a merchant in South Carolina, for an alleged breach of a contract for the purchase of a quantity of cotton, the proceedings in which were still pending, commenced another action against the defendant for the same cause in this court, and, having procured an order for a capias under the 1 & 2 Vict. c. 110, s. 3, held him to bail.

[56] Mellish now moved for a rule calling upon the plaintiff to shew cause why the proceedings in this action should not be stayed, and the bail discharged, and an

(a) See *Dewhurst, App., Fielden, Resp.*, 8 Scott, N. R. 1013, 7 M. & G. 182, 1 Lutw. Reg. Cas. 274.

exoneretur entered on the bail-piece. The matter was before Blackburn, J., on summons, at Chambers; but that learned judge referred it to the court. He submitted that it would be great injustice to the defendant to allow the proceedings to go on in both jurisdictions simultaneously. [Erle, C. J. We might be doing great injustice to the plaintiff by suspending his proceedings here. Have you any authority for this?] There is no reported case: but there was a case a short time since before Coleridge, J., at Chambers, where that learned judge made an order for staying proceedings in an action here, upon its being made appear to him that an action for the same cause was pending in the Consular court at Constantinople,—the money being left in court (*a*). This application must found itself upon the general jurisdiction of the court to prevent an abuse of its process. If the plaintiff obtains final judgment in the United States court, the authorities shew that that might be pleaded in bar here (*b*). In cases of consolidation rules, the court is in the habit of imposing terms, to prevent injustice being done. Upon the same principle, the court may in its discretion restrain the plaintiff from proceeding in the action here unless he elects to abstain from going on in the foreign court. It may be that he might succeed in the one action and fail in the other.

ERLE, C. J. I am of opinion that there ought to be no rule in this case. No authority has been cited to [57] support it. Although there may be some hardship in having proceedings pending in the two countries at the same time, I think we are bound so to enforce the law as to enable the plaintiff to obtain satisfaction of his debt. There would be great danger interfering to prevent a man from being sued in this country, when he may have left his own for the very purpose of avoiding the consequences of a suit against him there.

WILLIAMS, J. I am of the same opinion. The question is whether the fact of the plaintiff having another action pending against the defendant in a foreign court is a bar of his remedy in the courts of this country. I am not aware of any principle upon which such an argument could rest; and, in the absence of any authority, we cannot interfere.

CROWDER, J. I also am of opinion that this is a motion which cannot be entertained. I see no reason whatever to justify such a course; and I can conceive very many good reasons the other way.

BYLES, J. Upon the ground of the total absence of authority for such an application as this, I concur with the rest of the court in the refusal of the rule. There must have been many cases where proceedings have been taken here and abroad at the same time, and yet I never heard of such a motion as this: nor has any been produced before us, save the somewhat shadowy case before my Brother Coleridge at Chambers.

Rule refused.

[58] MOTTERAM, *Appellant*; THE EASTERN COUNTIES RAILWAY COMPANY,
Respondents. Nov. 22nd, 1859.

[S. C. 29 L. J. M. C. 57; 1 L. T. 101; 6 Jur. N. S. 583; 8 W. R. 77.
Referred to, *Cor v. Hake*, 1890, 15 App. Cas. 543.]

Upon the argument of a case stated by justices under the 20 & 21 Vict. c. 43, no objection can be relied upon which was not taken before the justices.—Bye-laws duly made by a railway company, pursuant to the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, ss. 108-111, and confirmed and allowed as by law required, are “public documents,” a certified copy of which is admissible in evidence under the 14 & 15 Vict. c. 99, s. 14.—By the 109th section of the 8 & 9 Vict. c. 20, the company is empowered to make bye-laws to enforce the observance of its regulations by means of fines; and the 110th section requires that the substance of such bye-laws, when confirmed and allowed, “shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous

(*a*) Probably the case of *Barber v. Lamb*, which came before this court on demurrer in Easter Term, 1860. Vide post, vol. viii.

(*b*) See the case referred to in note (*a*).

part of every wharf or station belonging to the company, according to the nature or subject-matter of such bye laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed, &c. : and no penalty imposed by any such bye-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid." And s. 111 enacts that, "for proof of the publication of any such bye-laws, it shall be sufficient to prove that a printed paper or painted board, containing a copy of such bye-laws, was affixed and continued in manner by this act directed," &c. —A bye-law imposed a penalty not exceeding 40s. upon a passenger getting into or out of a carriage whilst in motion. Upon a summons before justices for a breach of this bye-law :—Held, —dissentiente Williams, J.,—that it was sufficient to shew that the bye-laws were affixed at the stations at which the party entered and quitted the train, without shewing publication at every station on the line.

This was an appeal against a conviction of Peter Clark Motteram by three justices of the peace for the county of Middlesex, for an alleged offence against the bye-laws of the Eastern Counties Railway Company. The following case was stated for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43 :—

The appellant, Peter Clark Motteram, was summoned before the justices upon an information and complaint laid by William Kent, superintendent of police of the Eastern Counties Railway Company, which charged that the appellant, on the 22nd of January, 1859, at the parish of Tottenham, in the said county of Middlesex, being a passenger on the Eastern Counties railway, unlawfully did quit a carriage on the said Eastern Counties railway while the train of which the said carriage formed part was in motion.

The offence charged is an offence against one of the bye-laws of the Eastern Counties Railway Company, made in pursuance of the power given by the statute 8 & 9 Vict. c. 20. The following is a certified copy of such bye-laws, so far as is material to this case :—

[59] "The Bye-laws of the Eastern Counties Railway Company

"NOTICE IS HEREBY GIVEN,

that the Eastern Counties Railway Company, acting under the powers and provisions contained in the several acts of parliament relating to their railways, have made the following

BYE-LAWS

for regulating the travelling upon and the use of their railways by travellers and passengers; which bye-laws have been duly allowed and confirmed as by law is required.

"8th. No passenger will be allowed to get into or upon any carriage after, or to quit any carriage when, the train of which it forms part has been put or is in motion; and every person doing so, or attempting to do so, is hereby subjected and made liable to a penalty not exceeding 40s.

"Given under the common seal of the Eastern Counties Railway Company the 5th day of April, 1850."

(Signed) "J. B. OWEN, secretary.

"Allowed by the commissioners of railways the 15th day of April, 1850."

(Signed) "GRANVILLE.

"EDWARD RYAN."

At the hearing of the said complaint, a copy of the company's bye-laws was produced: and it was proved by the informant that such copy had been examined by him with the original bye-laws in the custody of the secretary of the Eastern Counties Railway Company, and that such copy was a true and correct copy of the original.

To the copy of the bye-laws produced was attached the following certificate,—“I hereby certify that this is a true copy of the bye-laws of this company. J. B. Owen, secretary. 25th May, 1858.”

[60] It was proved that the signature “J. B. Owen” was in the handwriting of the secretary of the said company, and that he had the possession of the original

bye-laws as such secretary. It was also proved that the appellant was a passenger on the respondents' railway, from Bishopsgate to Tottenham, and that copies of the said bye-laws of the said company were hung up and affixed on a conspicuous part of those stations respectively.

It was objected, on behalf of the appellant, that the original bye-laws of the said company ought to be produced, and that the examined and certified copy thereof produced was not evidence. The justices declined to require the complainant to produce the original bye-laws of the said company, and admitted the examined and certified copy thereof in evidence.

It was also objected on the part of the appellant, that it was necessary for the complainants to prove that copies of the bye-laws were affixed to every station on the Eastern Counties railway line between the London and Yarmouth termini. This objection the justices also overruled: and, as the evidence substantiated the offence charged in the information, they convicted the appellant of the said offence, and adjudged him to pay a penalty of 5s. and costs.

The questions for the opinion of the court were,—first, whether the examined and certified copy of the bye-laws was rightly received in evidence,—secondly, whether it was necessary to prove that copies of the said bye-laws were hung up and affixed at every station on the railway of the said company, or whether it was sufficient to prove (as was proved) the publication thereof at the respective stations at which the appellant entered and got out of the train.

If the court should be of opinion that the examined and certified copy of the bye-laws was rightly received [61] in evidence, and that it was unnecessary to prove the publication thereof at any other stations than those at which the appellant entered and got out of the train, then the said conviction was to be confirmed. But, if the court should be of opinion that it was necessary to produce the original bye-laws of the said company, or that it was necessary to prove the publication thereof at every station on the whole length of the railway, then the conviction was to be quashed.

Norman, for the appellant (*a*). The question in this [62] case arises upon the construction of the 108th and some subsequent sections of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, empowering railway companies to make bye-laws for the regulation of the use of their railways. The 108th section enacts that “it shall be lawful for the company, from time to time, subject to the provisions and restrictions in this and the special act contained, to make regulations for the following purposes, that is to say,—For regulating the mode by which and the speed at which carriages using the railway are to be moved or propelled,—For regulating the times of the arrival and departure of any such carriages,—For regulating the loading or unloading of such carriages, and the weights which they are respectively to carry,—For regulating the receipt and delivery of goods and other things which are to be

(*a*) The points marked for argument on the part of the appellant, were,—

“1. That the information did not charge any legal offence; the quitting a railway-carriage while the train is in motion not being contrary to the statute or common law of the realm: 2. That the information ought to have set forth the bye-laws, and to have alleged a violation thereof: 3. That the existence of the bye-laws was not sufficiently proved: 4. That the original bye-laws of the company, bearing their common seal, ought to have been produced and put in, or their absence to have been duly accounted for: 5. That the copy of the bye-laws, certified by the company's secretary, was not admissible in evidence: 6. That the confirmation or allowance of the bye-laws was not sufficiently proved (9 & 10 Vict. c. 20, ss. 109, 110; 9 & 10 Vict. c. 105; 3 & 4 Vict. c. 97, ss. 7 to 9): 7. That the copy allowed by the commissioners of railways, and bearing their seal, ought to have been put in (9 & 10 Vict. c. 105, s. 4): 8. That the copy of the commissioners' certificate, certified by the respondents' secretary, was not admissible in evidence: 9. That the publication of the bye-laws was not sufficiently proved (8 & 9 Vict. c. 20, ss. 110, 111, 143): 10. That it ought to have been proved that the bye laws had been published and affixed at every station belonging to the company: 11. That, at all events, it ought to have been proved that they had been published and affixed at all the company's passenger-stations intermediate between Bishopsgate and Tottenham stations: 12. That it ought also to have been proved that the bye-laws were kept and continued published and affixed in like manner.”

conveyed upon such carriages,—For preventing the smoking of tobacco, and the commission of any other nuisance, in or upon such carriages, or in any of the stations or premises occupied by the company : And, generally, for regulating the travelling upon or using and working of the railway : But no such regulation shall authorize the closing of the railway or prevent the passage of engines or carriages on the railway at reasonable times, except at any time when in consequence of any of the works being out of repair, or from any other sufficient cause, it shall be necessary to close the railway or any part thereof.” The 109th section enacts, that, “for better enforcing the observance of all or any of such regulations, it shall be lawful for the company, subject to the provisions of the 3 & 4 Vict. c. 97, ‘An act for regulating railways,’ to make bye-laws, and from time to time to repeal or alter such bye-laws, and make others, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or [63] the special act : and such bye-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company ; and any person offending against any such bye-law shall forfeit for every such offence any sum not exceeding 5l., to be imposed by the company in such bye-laws as a penalty for any such offence : and, if the infraction or non-observance of any such bye-law or other such regulation as aforesaid be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere to obviate or remove such danger, or annoyance, or hindrance, and that without prejudice to any penalty incurred by the infraction of any such bye-law.” The 110th section enacts that “the substance of such last-mentioned bye-laws, when confirmed or allowed according to the provisions of any act in force regulating the allowance or confirmation of the same, shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such bye-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby : and such boards shall from time to time be renewed as often as the bye-laws thereon or any part thereof shall be obliterated or destroyed : and no penalty imposed by any such bye-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid.” And the 111th section enacts that “such bye-laws, when so confirmed, published, and affixed, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same : and, for proof of the publication of any such bye-laws, it shall be sufficient to prove that a printed paper or painted board, [64] containing a copy of such bye-laws, was affixed and continued in manner by this act directed, and, in case of its being afterwards displaced or damaged, then that such paper or board was replaced as soon as conveniently might be.”

The power to impose penalties by means of bye-laws being against common right, must be construed most strictly. Bye-laws of this sort were by the 3 & 4 Vict. c. 97, s. 8, to be approved by the board of trade, whose authority in these matters was by the 9 & 10 Vict. c. 105, s. 2, transferred to the commissioners of railways, and by the 14 & 15 Vict. c. 64, s. 1, re-transferred to the board of trade. There is no statement here that the bye-laws in question had been so allowed. [Keane, for the respondents, objected that this point was not open to the appellant, inasmuch as it was not made before the magistrates. So held by the court of Queen’s Bench in *Parkis, App., Hurtable, Resp.*, 28 Law J., M. C. 221.] Then, there was no sufficient proof of publication. To constitute a due compliance with the 110th section of the 8 & 9 Vict. c. 20, the company were bound to prove that the substance of the bye-laws was painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company. The only proof here was, that copies of the bye-laws were hung up and affixed on a conspicuous part of the stations at which the appellant got in and out of the carriage. As a general rule, no law is of any force until it has been duly promulgated. In 1 Bl. Com. 45, it is said : “A bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified

viva voce, by officers appointed for that purpose, as is done with regard to proclamations and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may, lastly, be notified by writing, printing, or the like, which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and conspicuous manner; not like Caligula, who (according to Dio Capius) wrote his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the people." Here, a particular mode of publication is pointed out, and that must be observed strictly, otherwise the law with a breach of which the party is charged is not brought home to him. In Taylor on Evidence, vol. 2, § 1470, it is said: "With respect to such bye-laws as any railway company is empowered to make for regulating the travelling upon or using and making the railway, or for imposing penalties upon persons other than its servants, it would seem, that, before they can be enforced, the company must produce a copy purporting to be under its seal, and must shew that a certified copy has been sent to the board of trade,—or, from the 9th of November, 1846, to the 18th of October, 1851, to the commissioners of railways,—and has been allowed, or, at least, not disallowed, by those respective bodies; and, further, that the bye-laws have been duly published: but, for the last purpose, it will be sufficient to prove that a printed paper or painted board containing a copy, was affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, [66] according to the nature of the respective bye-laws, and, in case of its being afterwards displaced or damaged, then that such paper or board was replaced as soon as conveniently might be." Another class of bye-laws, is provided for by the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, ss. 124, 125, 126, 127, viz. bye-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs; and by the last of these sections it is provided that the production of a written or printed copy purporting to have the seal of the company affixed thereto, "shall be sufficient evidence of such bye-laws in all cases of prosecution under the same." [Erle, C. J. The company have necessarily a very large number of stations. Was it necessary for them to prove the affixing of the bye-laws at every station? Is it not enough to shew that they were duly affixed at the station or stations used by the party complained against?] It is submitted that it is not. And there may be very good reason for requiring publication at all the stations, because by that means the bye-laws become so generally diffused that all persons using the railway may fairly be presumed to be cognizant of them. Then, as to the admissibility of the examined and certified copy,—the point does not arise under the 8 & 9 Vict. c. 113, s. 1(a), [67] but reliance will, on the part of the respondents, be placed upon the 14 & 15 Vict. c. 99, s. 14, which enacts, that, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract, by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person

(a) By which it is enacted that, "whenever by any act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding 4d. for every folio of ninety words." That statute was intended to apply to documents of a public nature, the withdrawal of which from the custody of a public officer might occasion public inconvenience, and not to documents of a private nature: *Hoe v. Nathorp (or Nalthorpe)*, 1 Lord Raym. 154, 3 Salk. 154; *Lynch v. Clarke*, 3 Salk. 154; note to *The King v. Lord George Gordon*, 2 Dougl. 593; Taylor on Evidence, §§ 1436, 1440; *The King v. Haines*, Comb. 337, Skin. 584; *The King v. Smith*, 1 Stra. 126. In Taylor on Evidence, § 1434, it [68] is said: "The most satisfactory mode of proving official registers and other public documents of a like nature, is, by producing the books or documents themselves, and shewing that they come from the proper repository. In some few cases this is the only legitimate mode of proof. Thus, the books of companies subject to the provisions of the Companies Clauses Consolidation Act, in which are entered the proceedings of the directors, of the committees of directors, and of the meetings of the company, and each entry in which must purport to be signed by the chairman of the meeting, cannot be proved by copies, however authentic; neither can the books of the proceedings of companies to which the Joint-Stock Companies Act of 1856 (19 & 20 Vict. c. 47) applies, be proved by copies, but the books themselves must be produced, when, if the entry sought to be read purports to be signed by the chairman of the meeting, it will be received as *prima facie* evidence: s. 40. So, the orders and other documents which have proceeded from the now abolished commissioners of railways, must, it seems, be proved by the production of the originals purporting to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of that body: and the same law would appear to extend to all documents relating to railways, which now emanate from the board of trade, and which must purport to be signed by one of the secretaries or assistant secretaries of the board, or by some officer appointed by the board to sign such documents." It is clear, therefore, upon the authorities, that no sufficient proof of the bye-laws in question has been given.

David Keane, *contra* (a). The 14th section of the [69] 14 & 15 Vict. c. 99, makes an examined copy or extract signed and certified to be a true copy or extract by the officer to whose custody the original is intrusted, admissible in evidence, wherever the document from which the copy or extract was taken would itself have been evidence. Then, as to the publication. It would be a most inconvenient construction of the statute to hold it to require the company, as a condition to the enforcement of their bye-laws against an offender, to prove that they were duly affixed, and continued at the time of the committing of the offence affixed, in the front of every one of their eighty stations. [Erle, C. J. It may be very inconvenient. It may be that no bye-law can be enforced, unless you have the station-master or some other person from every station to prove that the board was duly exhibited at the time of the alleged offence. Still, if the legislature have required it, it must be done. Williams, J. The 111th section in very general terms prescribes the mode of publication: it provides that the substance of the bye-laws, when confirmed or allowed, shall be painted on boards or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter [70] of such bye-laws respectively, and so as to give notice to the parties interested therein or affected thereby. I see no insuperable difficulty in proving the fact. A single witness that has seen the notices up would suffice; and the presumption would be that they continued up, in the absence of evidence to the contrary.] The declared intention of the act was that all parties interested or affected by the bye-laws should have notice,

(a) The points marked for argument on the part of the respondents were:—

"1. That the original of the bye-laws is a document of a public nature, admissible in evidence as such, and an examined copy of it proved to be such, or a copy purporting to be signed and certified as a true copy by the officer to whose custody the original is intrusted, is admissible in evidence: 2. That a publication of the bye-laws, which, by the means indicated in the 8 & 9 Vict. c. 20, s. 110, gives public notice of them to the parties interested therein or affected thereby, is sufficient, and is shewn by the case to have taken place: 3. That, regard being had to the nature and object of the bye-laws and the legislation relating to them, there was sufficient evidence of the statutory publication."

reasonable notice according to the subject-matter. The appellant here was only interested in a publication at the station at which he got in, and at that at which he got out: and that was proved. [Williams, J. There is no statement in the case that the bye-laws were affixed at all the stations which the appellant passed on the journey.] The obvious answer to that is, that the case is equally silent as to there being any intermediate stations. It would have been perfectly competent to the justices upon the evidence before them to have inferred that the company had performed the duty which the act of parliament imposes upon them.

Norman, in reply. The manner in which the publication of the bye-laws is to be proved is expressly provided for by the 111th section, which enacts that "it shall be sufficient to prove that a printed paper or painted board containing a copy of such bye-laws, was affixed and continued in manner by this act directed." There can be no difficulty in furnishing such proof: the man who regulates the clocks at the various stations might easily do it. And, even if it were difficult or inconvenient, that is no reason why a plain direction of an act of parliament should not be complied with.

ERLE, C. J. I am of opinion that the judgment in this case ought to be for the respondents. I think the [71] examined and certified copy of the bye-laws was properly received in evidence, as a document of a public nature. Railway companies certainly do affect and regulate the interests of the public to a very large extent and in a great number of ways. The statute contemplates that these bye-laws for regulating the use of and the traffic and travelling upon the railway shall before they shall be of any force receive the confirmation and allowance of the board of trade or the commissioners of railways. They are to have also the sanction of the common seal of the company: and one governing copy is to be kept by the secretary. I therefore think it is a document which falls within the common-law principle applicable to documents of a public nature. It also falls within the 14 & 15 Vict. c. 99, s. 14, which expands the rules of the common law as to the admissibility of public documents. The justices were quite right in admitting the copy in evidence.

Then comes the question whether there was sufficient proof of the publication of these bye-laws,—it having been shewn that the appellant got into the carriage at the Bishopsgate station and got out at Tottenham, and that a copy of the bye-laws had been properly affixed at both of those stations. The appellant objects that the requisitions of the 110th section have not been complied with. That section provides that "no penalty imposed by any such bye law shall be recoverable unless the same (?) shall have been published and kept published in manner aforesaid." The "manner aforesaid" is defined in the earlier part of the section, which enacts that "the substance of such bye-laws, when confirmed or allowed according to the provisions of any act in force regulating the allowance or confirmation of the same, shall be painted on boards, or printed on paper and pasted on boards, and [72] hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such bye-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed as often as the bye-laws thereon or any part thereof shall be obliterated or destroyed." It was insisted on the part of the appellant that no bye-law can be enforced without proof that a copy has been put up and remains affixed to the front or other conspicuous part of every wharf and station belonging to the company. But I am of opinion that the provision regulating the publication of these bye-laws must be read with a reasonable application to the subject-matter,—that is, that the bye-laws affecting wharfs shall be affixed to wharfs, and those affecting the railway and the stations thereon shall be affixed to the stations: but they need not be affixed at both. I also think the bye-laws must be held to be published "so as to give notice to the parties interested therein or affected thereby," if it is shewn that they are duly affixed at the station at which the party gets in and at the station at which he gets out. My Brother Williams, for whose opinion I entertain the greatest deference and respect, dissents from this view. I am also of opinion that the respondents are entitled to judgment upon the further ground urged by Mr. Keene, that it was the duty of the company to comply with the statute by publishing their bye-laws in the manner therein required, and there is a strong pre-umption that a public body has performed the duty which the law casts upon them; and that, upon proof that the copy of the bye-laws had been

duly published at the stations of departure and arrival in the particular instance, afforded ample [73] ground from which the justices would have been warranted in assuming that this duty had in like manner been performed at all the other stations. Upon the whole I am of opinion that the case of the appellant fails, and that the respondents are entitled to the judgment of the court.

WILLIAMS, J. I regret much to say that I feel obliged to come to a different conclusion. I think the penalty could not be legally enforced in this case for want of proof that the bye-laws in question had been duly published by being affixed and continued affixed at every station on the line of railway, according to the requirements of the 110th section of the 8 & 9 Vict. c. 20. The 108th section of that statute enables the company to make bye-laws for regulating the mode by which and the speed at which carriages using the railway are to be propelled,—the times of arrival and departure of such carriages,—the loading or unloading thereof, and the weights they are to carry,—the receipt and delivery of goods and other things which are to be conveyed upon such carriages,—the preventing of smoking and other nuisances in such carriages or in any of the stations or premises occupied by the company,—and generally for regulating the travelling upon or using and working of the railway. That section, therefore, enables the company to make laws which are to regulate the whole line, and by which all persons using the line, or any part of it, are to be bound. In s. 109, the statute proceeds to prescribe how such bye-laws are to be made, and what shall be the consequences of any breach of them. The 110th section then declares what shall be done when the bye-laws are made. It enacts that “the substance of such last-mentioned bye-laws, when confirmed or allowed according to the provisions of any act in force regulating the allowance or con-[74]-firmation of the same, shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such bye-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed as often as the bye-laws thereon or any part thereof shall be obliterated or destroyed.” I can readily understand that the legislature, having empowered the company to make a code of regulations, should go on to provide, for the purpose of insuring their publication amongst those who were likely to be affected by them, that notice should be given by affixing them at every station upon their line. Having provided that the bye-laws shall be stuck up at every station or wharf (according to the subject-matter), the clause then goes on to state how it shall be stuck up,—so as to give public notice thereof to the parties interested therein or affected thereby: so that that portion of the public who use the railway either for travelling thereon or transmitting goods thereby may have an opportunity of seeing them. The act having provided that the notice shall be thus given in order to ensure general notoriety amongst all who frequent or use the railway, then proceeds with a separate enactment,—“and no penalty imposed by any such bye law shall be recoverable unless the same shall have been published and kept published in manner aforesaid.” I am unable to give to the language of that section any other meaning than that it disables the company from enforcing any penalty for a breach of their bye-laws unless the direction therein contained as to their publication has been duly complied with.

It is contended on the part of the appellant that this [75] construction cannot be the true one, because of the great inconvenience which will be entailed upon the company by requiring proof that the bye-laws have been affixed at every one of their numerous stations. I must confess I do not see the great difficulty which has been suggested. But, even if such difficulty did exist to the fullest extent, I can give no other meaning to the section without doing an unjustifiable degree of violence to the language the legislature has used. It may be that the framer of the act and those who passed it have failed to perceive the difficulty, if any exists: but they have in plain and unmistakeable language declared that no penalty imposed by any bye-law shall be recoverable unless the bye-laws shall have been published and kept published in the manner prescribed. The question then is, whether or not that has been proved. I must confess I have great difficulty in applying the maxim “*omnia præsuntur ritè esse acta*” to this case, because the 111th section of the act goes on to say that “such bye-laws, when so confirmed, published, and affixed, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under

the same; and, for proof of the publication of any such bye-laws, it shall be sufficient to prove that a printed paper or painted board, containing a copy of such bye-laws, was affixed and continued in manner by this act directed, and, in case of its being afterwards displaced or damaged, then that such paper or board was replaced as soon as conveniently might be." It would seem by that section that the legislature in the case of railway companies, has thought fit to provide, that, in lieu of actual proof of the publication of their bye-laws, the course prescribed shall be taken to be sufficient proof of publication. But, to entitle them to avail themselves of that substituted mode of publication, the company must [76] prove that they have done it. We cannot presume that they have complied with the statute. But, even assuming that the maxim referred to could be applicable to such a case as this, it does not appear to have been applied by the justices: on the contrary, it would appear from the statement of the case that they declined to entertain the question. After stating the first objection, and the way it was disposed of, they go on to say,—"It was also objected on the part of the appellant that it was necessary for the complainant to prove that copies of the bye-laws were affixed at every station on the Eastern Counties line between the London and Yarmouth termini. This objection we also overruled," &c. They were therefore of opinion that it was not necessary to prove that the bye-laws were affixed at all the stations. They thought there was no foundation for the objection, and did not conceive it to be necessary to have recourse to the presumption. Now, if I am right in the construction I put upon the statute, viz. that, by the express terms of the 110th section, no bye-law can be enforced unless it has been published as the act requires, I cannot come to any other conclusion than that the conviction ought not to have taken place. The justices ought either to have held that the proof was necessary, or that they were satisfied to presume a due publication from the evidence they had before them.

I regret much to feel myself compelled to differ in opinion from my Lord and my two learned Brothers: and I also very much regret that the construction which I put upon the statute should be supposed to lead to harsh and inconvenient consequences. But I can see no reason why I should give to the words any other than their ordinary grammatical construction.

Upon the other point, I entirely concur in what has fallen from the Lord Chief Justice.

[77] CROWDER, J. I entirely concur in the opinion given by the Lord Chief Justice upon both the questions put to us by the justices in this case. The first question is, whether the examined and certified copy of the bye-laws was rightly received in evidence. Looking at the nature of railway companies, the purposes of their incorporation, and the large and general interests involved, it appears to me that their bye-laws, made under the sanction and authority of a public act of parliament, and sealed with the common seal of the company, and deposited with their public officer, must follow the general rule of evidence as to public documents,—which I understand to mean documents of such a nature and character that a large portion of the public are materially interested therein. Upon this ground, therefore, I am of opinion that the copy was properly admitted.

As to the other and more difficult question, I also agree in the construction which my Lord has put upon the several clauses of the Companies Clauses Consolidation Act upon which that question arises. If we were to hold that the 110th section means not only that copies of the bye laws shall be painted or printed and affixed on every one of the company's stations, but that, to enable them to enforce a penalty for the breach of any of them, it must be distinctly and affirmatively proved that they were affixed and that they still continue affixed at each station throughout the line, it seems to me that that would involve such difficulties as would virtually render the bye-laws nugatory. My Brother Williams seems to think that there would be no real difficulty, inasmuch as any officer of the company acquainted with the fact might be called to prove it. But it seems to me that it would be requiring a quantity of proof which the legislature never could have contemplated or intended: and, unless the language [78] used by them is so stringent and precise as to render it impossible to arrive at any other conclusion, I think we ought not to put such a construction upon it. Two questions arise upon this part of the case. First, do the words of the 110th section make it imperative that the bye laws shall be affixed at every station? secondly, assuming that they do so, was there evidence enough before the justices to

warrant the presumption that the direction of the statute had been complied with, and to support the conclusion they came to ! Now, looking at the language of the 110th section, it seems to me that the words, "so as to give public notice thereof to the parties interested therein or affected thereby," would be utterly nugatory if they did not mean something more than was meant to be conveyed by the previous part of the section. The section begins with saying that "the substance of such last-mentioned bye-laws, when confirmed, &c., shall be painted on boards or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company." If the section had stopped there, possibly the construction which has been contended for by the appellant, and adopted by my Brother Williams, would have been the true one, viz. that the notice must appear at every station. But then come the words to which I have adverted, and which I cannot help thinking must have been introduced for the purpose of limiting the scope of the previous general words, and confining them to the real purpose of the legislature, viz. to conveying notice of the bye-laws to all those who were interested therein or likely to be affected thereby. I feel the force of the observations of my Brother Williams : and, perhaps, if it had rested upon this alone, I should have desired time to consider. But then there is the other part of the case to which the Lord Chief [79] Justice has referred, viz. that the magistrates may have decided as they did upon the ground that they were satisfied from the evidence before them that the bye-laws had been duly affixed at every station on the line. It is not very clearly stated in the case upon what precise ground the decision was founded. But it seems to me to be consistent with what is stated, that the magistrates may have considered that the evidence of the affixing of the boards containing the bye-laws at the two stations more particularly affecting the party here charged, viz. at the station at which he got in and at that at which he got out, was sufficient to justify them, without distinct proof of the fact, in concluding that the requirements of the statute had been duly complied with by affixing copies at all the other stations. And I do not think that that is going at all beyond the ordinary rule that all things are to be presumed to be rightly done unless there is some proof or some irresistible presumption to the contrary. Upon this ground, therefore, as well as upon the ground that I think the construction which my Lord has put upon the 110th section of the statute is the correct one, I am unable to say that the decision of the justices was erroneous, and concur with the majority of the court in holding that the respondents are entitled to our judgment.

WILLES, J. I agree with my Lord Chief Justice and my Brother Crowder. Upon the first question,—whether the examined and certified copy of the bye-laws was rightly received in evidence,—we are all agreed that it was so. As to the necessity of proving that the bye-laws were affixed at every station on the line, however remote, so as to bind this appellant, I agree with what has fallen from my Lord and my Brother Crowder. It appears to me that we are not called upon to put any forced construction upon the words of [80] the statute in order to arrive at the only conclusion we could arrive at without imposing serious inconvenience not only upon the company but also upon the persons proceeded against. I should have thought that the direction that the substance of the bye-laws "shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, and so as to give public notice thereof to the parties interested therein or effected thereby," pointed to a mode of publication whereby persons dealing with the company at those particular places should receive notice of what they were to do or avoid. Even if that were not the true grammatical construction of the statute, I apprehend it would nevertheless be necessary so to construe it ; because, if the giving a strict grammatical construction to a statute leads to any repugnance or absurdity,—in the sense of being contrary to the mind and intention of the framers of the act,—we are bound so to read the words as to avoid that result (a). An instance of that is found in s. 111, which provides, that, "for proof of the publication

(a) A strict grammatical construction certainly cannot be applied to the latter part of s. 110,— "and no penalty imposed by any such bye-law shall be recoverable, unless the same (i.e. the penalty) shall have been published and kept published in manner aforesaid." See s. 143.

of any such bye-laws, it shall be sufficient to prove that a printed paper or painted board containing a copy of such bye-laws, was affixed and continued in manner by this act directed." Reading that literally, it would only be necessary, in proceeding against a party for a breach of the bye-laws, to prove that some one board having the bye-laws thereon was hung up or affixed at any one station on the line. It is impossible to reconcile [81] that section, if construed grammatically, with the 110th section: we are bound, therefore, to read the single printed paper or painted board there as a printed paper or painted board hung up and affixed at every station. A literal construction of the 111th section would lead to this absurdity,—that, in order to enforce a penalty against a man who gets in at the Bishopsgate station and out at Tottenham, it would be sufficient proof of publication to shew that a copy of the bye-laws was affixed at the station at Yarmouth. So, when you look at the 108th section, which points out the purposes for which the bye-laws may be made, you find that a valid bye-law may be made which would apply to one station, or one portion of the railway, and not to others. Then, the 109th section imposes a penalty for breach of the bye-laws not exceeding 5l.; and, taking the extent of the railway, and the great number of stations thereon, it would be repugnant and absurd to hold, that, in order to enforce so trifling a penalty, the almost inconceivably inconvenient quantity of proof of publication suggested should be necessary. All these considerations induce me to think that the proper construction of the 110th section is that which has been put upon it by my Lord and my Brother Crowder, and which supports the decision to which the justices came. The conviction must, therefore, be affirmed, but, under the circumstances, without costs.

Conviction affirmed, without costs (a).

[82] INGHAM v. PRIMROSE. June 28th, 1859.

[S. C. 28 L. J. C. P. 294; 5 Jur. N. S. 710. Referred to, *Foster v. Mackinnon*, 1869, L. R. 4 C. P. 713. Distinguished, *Société Générale v. Metropolitan Bank*, 1873, 27 L. T. 856. Referred to, *Arnold v. Cheque Bank*, 1876, 1 C. P. D. 588. Questioned, *Barclay v. Bennett*, 1878, 3 Q. B. D. 532. See *Scholfield v. Louthborough*, [1895] 1 Q. B. 546; [1896] A. C. 538. Approved, *Nash v. De Freville*, [1900] 2 Q. B. 89.]

A. accepted a bill and gave it to B. (who put his name thereto as drawer) for the purpose of his procuring it to be discounted and handing over the proceeds to him. B. having failed to discount it, returned the bill to A., who tore the bill in half (intending, as the jury found, to cancel it), and threw the two pieces into the street. B. picked them up in A.'s presence, and afterwards pasted the two pieces together, and put the bill in circulation. The tearing of the bill was done in such a way that the appearance of the bill was as consistent with its having been divided for the purpose of safe transmission by the post as with its having been torn for the purpose of destroying it:—Held,—it being reserved for the court to draw inferences of fact, that A. was liable upon the bill at the suit of a bona fide holder without notice. —Whether the act of so reconstructing the bill amounted to forgery, —quære?

This was an action upon a bill of exchange drawn by one Charles Murgatroyd

(a) And see the 143rd section of the 8 & 9 Vict. c. 20, which enacts that "the company shall publish the short particulars of the several offences for which any penalty is imposed by this or the special act, or by any bye-law of the company affecting other persons than the shareholders, officers, or servants of the company, and of the amount of every such penalty, and shall cause such particulars to be [82] painted on a board, or printed on a paper and pasted thereon, and shall cause such board to be hung up or affixed on some conspicuous part of the principal place of business of the company, and, where any such penalties are of local application, shall cause such boards to be affixed in some conspicuous place in the immediate neighbourhood to which such penalties are applicable or have reference: and such particulars shall be renewed as often as the same or any part thereof is obliterated or destroyed; and no such penalty shall be recoverable unless it shall have been published and kept published in the manner hereinbefore required."

upon and accepted by the defendant, and indorsed by Murgatroyd to one King, and by King to the plaintiff.

Plea,—that the defendant accepted the said bill of exchange in the declaration mentioned, and delivered the same to the said Charles Murgatroyd, who took the said bill from the defendant for a special purpose only, to wit, that he might get it discounted for the defendant and pay him over the proceeds, which purpose wholly failed, nor was there ever any value or consideration for the defendant's said acceptance of the said bill, or for the payment by him of any part of the amount thereof, and the said bill was never discounted for the defendant; that, after the said bill had [83] been so accepted by the defendant, and whilst it was held by the said Charles Murgatroyd for the purpose aforesaid, the said bill was with the consent of the defendant and the said Charles Murgatroyd cancelled by the same being torn into two parts for the purpose of cancelling and destroying the said bill, and the purpose for which the defendant had accepted and the said Charles Murgatroyd had held the said bill was then revoked and determined; that the said Charles Murgatroyd afterwards, wrongfully, and without the consent of the defendant, joined the said parts of the said bill, and negotiated the same for his own purpose and in fraud of the defendant, who never authorised the same being indorsed or negotiated; and that the said bill was never indorsed to or held by any person who took the same *bonâ fide* and for value or consideration and without notice of the premises and before the same had become overdue according to its tenor.

Upon this plea the plaintiff joined issue.

The cause was tried before Cockburn, C. J., at the sittings in London after Hilary Term, 1858. The facts which appeared in evidence were as follows:—The defendant accepted the bill declared on, and gave it to Charles Murgatroyd for the purpose of procuring it to be discounted for his use. Murgatroyd tried, but in vain, to get the bill discounted, and returned it to the defendant, who in Murgatroyd's presence tore the paper in half and threw it away in the street. Murgatroyd picked up the bill, observing that it was better not to throw it down in the street: whereupon the defendant said nothing. Murgatroyd afterwards pasted together the two pieces of paper, and passed the bill away to one King, who afterwards indorsed it to the plaintiff.

The jury found that the defendant when he tore the bill in half and threw it away intended to cancel it; [84] that King *bonâ fide* gave 15l. for the bill: but that the transaction between King and the plaintiff was not *bonâ fide*.

The learned judge thereupon directed a verdict to be entered for the defendant, but gave the plaintiff leave to move to enter the verdict for him,—the court to be at liberty to draw inferences of fact.

Cross, in Easter Term, 1858, accordingly obtained a rule nisi. He referred to *Robins v. Viscount Maidstone*, 4 Q. B. 811, Dav. & M. 30.

Pearce, in Trinity Term, shewed cause. The finding of the jury, which was well warranted by the evidence, that the bill was torn by the drawer *animo cancellandi*, and that there was no consideration as between King and the plaintiff, sustains the plea. Further, this instrument altogether ceased to be a bill before it was put in circulation, and therefore the plaintiff could acquire no rights upon it against the acceptor. [Williams, J. That depends upon the meaning of the words "cancelling and destroying" in the plea.] It is submitted that any subsequent issue of the bill after an act done by the acceptor intimating an intention to cancel it, would be an act of forgery.

Cross, in support of his rule. The mere finding of the jury that the acceptor tore the bill in half with the intention of cancelling and destroying it, is not enough to invalidate the bill in the hands of a *bonâ fide* holder. It was owing to the defendant's own laches that an opportunity was given to Murgatroyd to make an improper use of the bill. The circumstance of the bill appearing to have been divided did not call for the exercise of any extraordinary caution on the part of a subsequent indorsee: for, it is not an uncommon thing for bills and notes to be cut in half for the more safe transmission of them through the post.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

This case was argued before the late Lord Chief Justice, my Brothers Willes and Byles, and myself. We are of opinion that the plaintiff is entitled to judgment. It

is, we think, settled law, that, if the defendant had drawn a cheque, and, before he had issued it, he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee (*a*). The reason is, that such negotiable instruments have, by the law-merchant, become part of the mercantile currency of the country: and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency. In the present case, the defendant made the bill in question, and rendered it a negotiable instrument, and then tried in vain to get it discounted. It was then returned to him, and was intended by him to be wholly withdrawn from circulation. But it was, notwithstanding, again put into circulation through the fraud of another man, and reached the hands of the plaintiff, who held it for value, without any notice of the fraud.

If these were all the facts of the case, it appears to [86] be impossible to distinguish it in any material point from the cases already mentioned, of liability when the original circulation has been effected by fraud, without the consent of him who made the instrument.

The question, then, is, whether such liability is precluded by the fact, that, before the instrument was put into circulation for the second time, the defendant had torn it, with the intention of destroying or annulling it.

If an act done with such an intention by the maker of a negotiable instrument does not manifest the intention on the face of the instrument, it can hardly be maintained that the act would be of any efficacy; because the instrument would nevertheless be apparently a part of the mercantile currency; as, for instance, if, in the present case, the defendant had merely crumpled up the bill in his hand and thrown it away, and it had been restored to its original appearance, without leaving any trace of the act which was intended to annul it. But, if, on the other hand, the act be such that the paper bears on the face of it the signs of something having been done to it which is characteristic of an intention to destroy or annul it; as in the case of *Schooley v. Rainsbottom*, 2 Campb. 485, where the drawer of a cheque tore it into four pieces and threw it from him, and the four pieces were afterwards neatly pasted together upon another slip of paper, but the rents were quite visible, and the face of the cheque soiled and dirty;—no holder of an instrument in such a condition could enforce it, because, in truth, no man of ordinary intelligence and caution could fairly regard it as part of the apparent commercial currency.

The case before us, therefore, appears to turn on the question whether the act of tearing the bill into two pieces, being manifest on the face of it, is such an act [87] as *prima facie* ought to have indicated to the plaintiff that it had been withheld or withdrawn from circulation. As we understand the facts, the tearing had been done in such a way that the appearance of the bill when it reached the plaintiff's hands was at least as consistent with its having been divided into two for the purpose of safer transmission by the post, as with its having been torn for the purpose of annulling it. It was, properly, a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose. But the point has been so reserved at the trial that the court is to perform the function of the jury in this respect: and we cannot find enough on the facts of the case, or on an inspection of the bill itself, to justify us in coming to such a conclusion.

But it is argued, on the part of the defendant, that the putting together of the two halves under the circumstances amounted to forgery, just as much as if some signature which he had written for a different purpose had been taken from its proper place, and fraudulently attached as his signature to the bill.

This would be a very narrow ground of decision, inasmuch as it would concede that the bill would be enforceable if the tearing had stopped short of utterly dividing the paper, or if the bill had come to the plaintiff's hands in the halves, by two successive posts, with an intimation that it was so sent to him for the purpose of safer transmission.

(*a*) See the judgment in *Marston v. Allen*, 8 M. & W. 504.

However, it seems to us, that, even assuming that the act of thus re-constructing the bill constituted a forgery (which may admit of grave doubt), yet, on the principle of the decision of *Young v. Grote*, 4 Bingh. 253, 12 J. B. Moore. 484, this would be no answer to the claim of the plaintiff, because the defendant, by [88] abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiff's becoming the holder of it for value, and without having any just cause for supposing that it had been cancelled or annulled.

The rule must therefore be absolute for entering a verdict for the plaintiff for the amount of the bill and interest.

Rule absolute accordingly.

WILLIAM FREDERICK PADWICK, *Appellant* : WILLIAM KING, *Respondent*.
Nov. 18th, 1859.

[S. C. 29 L. J. M. C. 42 ; 6 Jur. N. S. 274.]

One H., the tenant of a farm the right of sporting over which was reserved to the landlord (the tenant also having permission to sport over the farm), authorised one of his labourers to shoot a rabbit for the purpose of giving it to his (the labourer's) wife, who was ill. The justices having decided, upon a complaint under the 1 & 2 W. 4, c. 32, s. 30, for a trespass in pursuit of conies that the labourer was acting by the order of his master,—The court, upon appeal, affirmed their decision.

The following case was stated for the opinion of the court by the justices of the Havant petty sessions, pursuant to the 20 & 21 Vict. c. 43 :—

William King was charged under the 30th section of the 1 & 2 W. 4, c. 32, at the Havant petty sessions held on the 10th of May, 1859, with having on the 30th of April, 1859, at the parish of Hayling South, in the county of Southampton, committed a certain trespass, by entering in the day-time upon certain land there situate, the property of William Padwick, in pursuit of conies, contrary to the form of the statute ; to which he pleaded not guilty.

It appeared in evidence, that, at 7.35 p.m. on the 30th of April, William King, the parish clerk of Hayling South, was in a field, the property of William Padwick, in the occupation of Henry John Hawkins, with a gun in his hand : that the gun was pointing towards a bank beyond which was a hedge-row, beyond which was a road, beyond which was a coppice. The hedge-row and coppice were the property and in the occupa-[89]-tion of William Padwick. The road was an occupation road, and used by Padwick and Hawkins. The road was distant about fourteen yards from where King stood. William Frederick Padwick, who holds a deputation from William Padwick, the lord of the manor, jumped over the hedge into Hawkins's field, went up to King, and said "What are you up to?" King replied, "I'm come to shoot a rabbit : my master (Hawkins) told me I might come and kill a rabbit for my wife, who has been confined."

Loddard, a witness, who accompanied William Frederick Padwick, stated that King said that Hawkins, his master, had asked him if he knew anything about wiring, and that he had replied by saying that he knew nothing of wiring ; and that William Frederick Padwick thereupon called Loddard, who took the gun from King, and handed him over to the custody of the police, by whom he was taken to the Havant station, and locked up for the night upon a charge of night-poaching, -which the justices strongly reprobated.

King stated in defence, that he went into his master's field, with the leave of his master, to kill a rabbit for his wife : and he called Hawkins, his master, who proved that he was the occupier of the field as part of the manor farm, that he had succeeded James Christmas, under an agreement with William Padwick, as tenant upon the terms generally of Christmas's lease, of which there had been no assignment, and that he had constantly killed rabbits on the land in his occupation, and that the terms of the lease, with regard to game, had been varied by the agreement.

The lease between William Padwick and James Christmas, dated the 10th of February, 1846, was put in. It contained the following reservation and covenant :—

"Except and always reserved unto the said William [90] Padwick, his heirs and assigns, and his and their friends, companions, and gamekeepers, free liberty from time

to time and at all times during the term hereby granted, to hawk, hunt, course, shoot, fish, and fowl in and upon the said demised premises, or any part thereof."

"And also that the said James Christmas, his executors and administrators, shall and will use his and their utmost endeavours to preserve the partridges, pheasants, quails, hares, and other game, and also the fish in the ponds, and the spawn and eggs thereof, for the sole use and pleasure of the said William Padwick, his heirs and assigns, on the said demised premises; except, nevertheless, that the said James Christmas shall be at liberty to course hares on the said farm, in case the said William Padwick or William Frederick Padwick shall not keep hounds or greyhounds, but not otherwise."

The agreement between William Padwick of the one part, and Henry John Hawkins of the other part, dated the 6th of October, 1857, was put in, and shewed that Hawkins had agreed to become the tenant of Padwick, "under and subject and upon the same conditions, covenants, clauses, and agreements in every respect (except as to the amount of rent) as in the lease of the said James Christmas severally specified," with an exception in reference to the game, in the words following,—"excepting that the said Henry John Hawkins shall have permission to sport over the said farm and lands."

The justices considered, that, under the circumstances, Hawkins was a quasi-assign of Christmas; that it was doubtful, under the terms of the reservation, whether Christmas and his assigns had not a concurrent right of sporting with Padwick; that rabbits were not mentioned in the reservation; and that the agreement of the 6th of October, 1857, conferred a right of sport-[91]-ing upon Hawkins, which he might lawfully exercise to the extent of killing rabbits by his authorised servant. On these grounds, therefore, and on the authority of *Spicer v. Barnard*, reported in the Justice of the Peace of the 14th of May, 1859, they dismissed the information.

Lush, Q. C., for the appellant. The question turns mainly upon the construction of the 30th section of the 1 & 2 W. 4, c. 32, which,—after reciting, that, "after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers," enacts, "that, if any person whatsoever shall commit any trespass by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay any sum of money not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction; and that, if any persons to the number of five or more together shall commit any trespass, by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, each of such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the said justice shall seem meet, together with the costs of the conviction: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where [92] the landlord, lessor, or other person shall have the right of killing the game upon such land, by virtue of any reservation or otherwise as hereinbefore mentioned; but such landlord, lessor, or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or licence." The 8th section of the act provides, that "nothing in the act contained shall authorise any person seised or possessed of or holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where, by any deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by or given or allowed to any grantor, lessor, landlord, or other person whatsoever." It appears from the statement of the case that Padwick, the landlord, had demised the land in question to Christmas, with an express reservation of the right of sporting, and a covenant by the lessee to use his utmost endeavours to preserve the partridges, pheasants, and other game for the sole use and pleasure of the lessor. And Hawkins, who succeeded him as tenant, was to hold the land upon the same terms as in the lease to Christmas, except that he was to have permission to

sport over the farm: but that exception was a mere personal privilege given to him, and did not authorise him to permit any other person to take game for his own benefit. The case, therefore, clearly falls within the 30th section of the act, and the justices ought to have convicted the respondent.

Powell, for the respondent. The respondent, having the permission of Hawkins to go upon the land and [93] shoot a rabbit, was to all intents and purposes in the same position as Hawkins himself. If he had had a rabbit in his house killed by himself, there can be no doubt that he might have given it to the respondent: and it was equally competent to him to say to the party,—"Go and shoot a rabbit for me, and take it home with you." The case of *Spicer, App., Barnard, Resp.*, 28 Law J., M. C. 176, is precisely in point. There, the tenant of a farm, the right of sporting over which was reserved to the landlord, employed the appellants to kill rabbits upon the farm: they were proceeded against under the 1 & 2 W. 4, c. 32, s. 30, and convicted: and it was held, that the tenant himself could not be so convicted, and that the appellants, having acted by his directions, had the same rights in this respect as he had, and therefore that the conviction was bad. Lord Campbell there says: "The fair inference to be drawn from the facts stated in the case is, that Spicer employed the appellants to kill the rabbits for himself, not that he was giving them a right to have a day's sport upon the land, but to do that which he himself was entitled to do. Under section 12, he was entitled to give them such directions: the legislature intended by that section to give him power to kill rabbits himself: and, if we were to put another construction upon that provision, the act would be most oppressive in its operation. I think, that, having the right, he was justified in employing other people to do that which he himself might do." Erle, J., said,—"I cannot help thinking that that 12th section was intended to be confined to game as defined in the 2nd section of the act, and that section 30 was intended to apply to trespassers coming upon the land, that is, to persons other than the tenant himself. Those persons are to be liable to a penalty, notwithstanding that they have obtained the leave and licence of the occupier of the land trespassed upon: [94] and they are a class distinct from the tenant and persons employed by him, as his servants, to kill the rabbits." And Crompton, J., said, "If the tenant could kill the rabbits himself, he could do it also by his servants, for, it cannot be said that he is bound to do it by his own hand: he would require some one to assist him if he himself went out to kill them: and, if he sends out his servants to do the act, it is just the same as if he did it himself." [Erle, C. J. There, the parties were hired to kill the rabbits for the tenant's benefit.] So, here, King was acting under the direction of Hawkins, the occupying tenant, who had a right of sporting over the land. [Byles, J. He acted by the licence of Hawkins, but for his own benefit.]

Lush, in reply. In the case of *Spicer, App., Barnard, Resp.*, the tenant employed the other parties to kill the rabbits for his benefit. But here King was not acting as the servant or for the benefit of Hawkins. The present case is therefore expressly within the prohibition of the 30th section.

ERLE, C. J. I am of opinion that the decision of the justices in this case was right, and ought to be confirmed. I take it to be entirely within the principle of *Spicer, App., Barnard, Resp.* Hawkins, the tenant, clearly had the right to kill and cause to be killed conies upon the land in his occupation: and there can be no question, that, if he had employed King or anybody else to shoot rabbits there for him, whether to make presents of them, or for his own consumption, that would have been perfectly lawful. The justices have found that King, a labourer in the employ of Hawkins, was killing a rabbit for his master. I cannot say that it was not perfectly lawful for Hawkins, who knew that the wife of one of his labourers was recently [95] confined, to say to the man "Go and shoot a rabbit, and take it to your wife." I think the justices were well warranted in finding that the case came within the principle of *Spicer, App., Barnard, Resp.*, and that their decision ought to be upheld. The case is very different from that of an authority given to a stranger to shoot over the land. Here, the man was a labourer on the farm. There is much worth consideration in the other point, as to whether rabbits were within the reservation of the game. It is not a reservation to the landlord exclusively: it is rather peculiarly worded, and is qualified by the right of the assignee to sport over the land. It is unnecessary, however, to go into that question, because, upon the other ground, I think the decision of the justices was quite right.

CROWDER, J. I also think that the decision of the justices may be sustained upon the ground stated by my Lord. Substantially and in fact the rabbit was killed by the order of Hawkins. It could not be doubted, that, if King had gone to his master and said, "My wife is ill, and I should like to have a rabbit for her," and Hawkins, his master, had said "Go and shoot one," King would have been acting under his master's orders. The only difficulty in the case arises from the statement made by King himself, viz. that his master told him he might go and kill a rabbit for his wife. But I think the justices were warranted in holding that he was substantially acting under the orders and for the benefit of his master, and therefore that the case came within the principle of the case of *Spicer, App., Barnard, Resp.* As to the other point,—the reservation of the right of sporting,—if it were necessary to pronounce any opinion upon it, I should think it deserved a good deal of consideration.

[96] BYLES, J. The justices had before them the case of *Spicer, App., Barnard, Resp.*, where the distinction between a leave and licence to shoot and a command of a master to his servant to kill rabbits is pointedly put. That being so, it is impossible to say that they might not well have found from the evidence before them that King was acting as the servant and by the direction and command of Hawkins. Their decision, therefore, must be confirmed, with costs.

Order affirmed, with costs.

MANLEY v. FIELD. Nov. 4th, 1859.

[S. C. 29 L. J. C. P. 79 ; 6 Jur. N. S. 300.]

To sustain an action for seduction, it is necessary to shew something like the relation of master and servant, however slight the degree.—Where the daughter rented a house, and carried on the business of a milliner at the time of her seduction. Held, that the circumstance of her mother and the younger branches of her family residing with her, and receiving part of their support from the proceeds of her business (the father lodging elsewhere), did not constitute such "services" as to entitle the father to maintain the action.

This was an action for the seduction of the plaintiff's daughter. The declaration, in the usual form, alleged that the person whose seduction was complained of was the daughter and servant of the plaintiff.

The defendant pleaded,—first, not guilty,—secondly, that the daughter was not the servant of the plaintiff, as alleged: upon which pleas issue was joined.

The cause was tried before Blackburn, J., at the last Assizes at Croydon. The evidence was as follows:—The daughter, who at the time of the occurrence complained of was about thirty-two years of age, had always resided with her father and mother as part of their family down to the year 1854. The father then left them and went to lodge elsewhere. The daughter took a house in her own name, in which she carried on the business of a milliner, and thereby helped to main[97]tain her mother and the younger members of her father's family. The seduction took place in 1856, when the daughter was on a temporary visit at the house of her sister, in the neighbourhood of the defendant's residence. The furniture in the house belonged to the father, and he occasionally visited his family there, and contributed something to their support. It appeared that the father was in pecuniary difficulty at the time the house was taken.

On the part of the defendant it was submitted that there was no evidence of service to support the declaration.

The learned judge, being of that opinion, nonsuited the plaintiff, but reserved leave to him to move to set aside the nonsuit and enter a verdict for 40s., if the court should be of opinion that there was any evidence which ought to have been left to the jury.

Lush, Q. C., now moved accordingly. In actions of this kind, the slightest evidence of service is sufficient: per Buller, J., in *Bennett v. Allcott*, 2 T. R. 166. [Crowder, J. What service was there here? The daughter, it seems, took the house for herself.] It was the only home of the family. [Crowder, J. When the daughter is at the time of the seduction living under her father's roof, very slight evidence of service has always been considered sufficient to sustain the action. But here the daughter rented

the house and permitted her mother and the younger branches of the family to reside in it with her, the father living elsewhere.] The daughter is not the less a member of her father's family because circumstances of convenience or necessity induce him to reside elsewhere. [Williams, J. The house was the daughter's house: she might at any time have turned out her mother and the children.]

[98] ERLE, C. J. I think the nonsuit in this case was quite right. There was no evidence whatever of services due or rendered by the daughter to her father at the time the seduction took place. In truth, the daughter was the head of the family, conferring benefits on her mother and the younger children, and not a subordinate member of the household so that she could be said to render even the slight kind of services which suffice to sustain an action of this sort.

WILLIAMS, J. I am of the same opinion. However painful it is to make the maintenance of an action of this kind depend upon services rendered by the daughter to her father, still, as the law is so, we are bound by it.

CROWDER, J. I also am of opinion that the nonsuit was right. There is not the slightest pretence for this motion. It appears that the daughter was thirty-two years of age, and was residing in a house of which she was the tenant, her mother and the younger branches of her family residing with her, and partially supported by the proceeds of her business of a milliner. Very slight services will suffice, where the daughter is residing with her father as a member of his family. But here she was permanently away from her father,—the mistress of an establishment of her own.

BYLES, J., had gone to Chambers.

Rule refused (a).

[99] STEVENS v. GOURLEY. Nov. 3rd, 1859.

[S. C. 29 L. J. C. P. 1; 1 L. T. 33; 6 Jur. N. S. 147; 8 W. R. 85; at Nisi Prius, 1 F. & F. 498. Distinguished. *In re Coltman*, 1881, 19 Ch. D. 71; *Harris v. De Pina*, 1886, 33 Ch. D. 248. See *Hall v. Smallprice*, 1890, 59 L. J. M. C. 98. Referred to, *London County Council v. Pearce*, [1892] 2 Q. B. 113.]

A contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 122, cannot be enforced.—A structure of wood, of considerable size (16 feet by 13), and intended to be permanently used as a shop, is a "building" within the 18 & 19 Vict. c. 122, although not let into the ground, but merely laid upon timbers upon the surface.

This was an action for work and labour, money lent, &c., and money found due upon accounts stated.

The defendant pleaded, amongst other pleas,—thirdly, that the said work was done and the said materials were provided by the plaintiff under an illegal contract between the plaintiff and the defendant, made after the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), came into operation, to wit, on the 5th of December, 1858, for the erection of a certain building within the metropolis as defined by the act passed in the session of parliament held in the 18th and 19th years of Her Majesty's reign, intituled "An act for the better local management of the metropolis" (18 & 19 Vict. c. 120), which building was a new building within the meaning of the said building-act, and was not within any of the exemptions in the said act mentioned, which building it was agreed by and between the plaintiff and the defendant should be inclosed with walls constructed of wood, and not of brick, stone, or any other hard or incombustible substance, contrary to the form of the statute in such case made: That the plaintiff, before and at the time of making the said contract, was a builder, and that the said contract was entered into by the defendant at the suggestion of the plaintiff: and that the plaintiff, before and at the time of making the said contract, represented to the defendant that the said building might be lawfully erected, and was not contrary to the law, and that the defendant, when he entered into the said contract, believed the said representation, and did not know to the contrary thereof, and entered into the said contract, and allowed the said work to be done, and the said materials to be provided, [100] and stated the said accounts, believing the said repre-

(a) See *Griffiths v. Teetgen*, 15 C. B. 344.

sentation to be true: That the said work was illegally done, and materials were illegally provided by the plaintiff in and about constructing the said building, within the limits of the metropolis as aforesaid, with such walls as aforesaid, contrary to the said statute; and the said accounts were stated concerning the money claimed by the plaintiff to be due to him from the defendant under the said illegal contract, and for the said work and materials so illegally done and provided; and the money which the plaintiff alleged was found to be due upon the said accounts was the money so claimed: That, after the said work had been so done, and the said materials had been so provided, and the said accounts had been so stated, the district-surveyor gave the plaintiff's sub-contractor, then being the builder engaged in erecting the said building, due notice to remove the said work within forty-eight hours, that is to say, to pull down the said building: That, the plaintiff and his sub-contractor having failed to comply with the said notice, the said district-surveyor caused complaint to be made before a magistrate of the police-courts of the metropolis, duly authorised in that behalf; and the said sub-contractor was thereupon duly summoned to appear before the said magistrate according to the said act; and the said magistrate thereupon duly ordered and commanded the said sub-contractor to comply with the requisitions of the said notice; and that the plaintiff, or the said sub-contractor, or the said district-surveyor, pulled down the said building, the same being necessary for enforcing the requisitions of the said notice, and for bringing the said building and work into conformity with the rules of the said act: That all conditions precedent, necessary matters and things were done in that behalf to justify and render necessary the pulling down of the said [101] building: And that, by reason of the premises, and of the said work and materials being so done and provided by the plaintiff illegally and contrary to the said statute, the defendant never derived any benefit or advantage whatever from the said work or materials, or any part thereof. Issue thereon.

The cause was tried before Martin, B., at the last Spring Assizes, at Lewes. The facts which appeared in evidence were as follows:—The defendant being desirous of having a shop erected on the fore-court of his premises in Bentinck Terrace, Regent's Park, applied to the plaintiff, a builder, who accordingly made out and sent to him a specification and contract, as follows:—

"Specification of works required to be done at No. 1 Bentinck Terrace, Regent's Park, for D. D. Gourley, Esq.

"Excavator,—To dig out and remove clay to level of pavement, 16 feet back and 14 feet wide, to receive house.

"Bricklayer,—To build three courses of footings and sleeper-walls, bed all quartering in mortar.

"Carpenter,—To erect in wood a house, the dimensions to be 16 feet from front to back, and 13 feet 8 inches frontage; the height to be 13 feet frontage, and 9 feet from floor to floor. To be built of quartering 3 x 2, and weather-boarded on outside, also to be match-boarded all over the inside. Ground-floor joists to be 4½ x 2, on sleepers 2 x 3, with ¾ inch yellow deal flooring, properly laid; also to put ceiling-joists 3 x 2, rough-boarded on top, and match-boarded under, with one sky light in roof; the whole of the roof to be covered with zinc, with proper fall for water; the front to be made with two sashes, with doors in centre, with all pilasters, mouldings, &c., as shewn on plan, with 1¼ inch bead and butt shutters, stall-boards, &c., complete [102] cross-partition, to be framed of 1½ inch yellow deal, with glass in upper part, with 1½ inch framed door in centre; and leave all perfect.

"Zinc-work,—To cover the whole of the roof with No. 9 zinc, properly solder all joints, eaves, &c.

"Smith,—To provide all locks, bars, nails, screws, &c., necessary for the completion of the aforesaid works.

"Painter,—To paint the whole of the works in three oils outside and inside, and leave all perfect.

"I hereby undertake to complete the whole of the aforesaid works, to the satisfaction of Mr. Gourley or his surveyor, as per specification, for the sum of 58*l.* To be completed on the 18th of December, 1858.

"JOHN STEVENS."

Before the work was commenced under the above contract, the plaintiff, with a view to evade the provisions of the Metropolitan Building Act, 18 & 19 Viet. c. 122,

proposed that a wooden foundation should be substituted for brick. This proposal was conveyed to the defendant in the following letter :—

“To D. Gourley, Esq.

“21 Western Terrace, Westbourne Grove.

“Dear Sir,—I have just considered, and found out a new plan for us to work on in reference to the shop in Bentinck Terrace, which is, to build it all in wood : it will be less expense, and answer your purpose just as well, and it will look as well ; and then we shall evade the metropolitan board of works, and the district-surveyor also. It will last quite long enough, and answer all you require. If you consider it over, and write me this evening, I will put it in hand at once.

“JOHN STEVENS.

“P.S.—I think 50l. will pay that.”

[103] On the 10th of November, the defendant again wrote to the plaintiff, as follows :—

“To D. Gourley, Esq.

“21 Western Terrace, Westbourne Grove.

“Dear Sir,—The plan of building the shop will be a fac-simile of what you have : the elevation will be just as I shew you on the plan : the only difference will be, wood instead of brick-work. You would not know the difference in any other way, and the cost of erection will be 55l. I have thoroughly gone into the matter, and therefore assure you it cannot be erected for less.

“JOHN STEVENS.”

The work proceeded in the altered manner suggested, without any brick footings or foundations, but the frame-work merely resting on wooden joists laid upon the earth, without being in any way fixed thereto. The shop being thus erected, Way, a builder who did the work under a sub-contract with the plaintiff, was summoned by the district-surveyor before a police-magistrate under the 45th section of the Metropolitan Building Act for not having given the notice required by that Act, and also for erecting a structure in a manner prohibited by the act. The plaintiff attended before the magistrate with Way at the hearing, and took some objections to the proceedings, which the magistrate overruled : and Way consented to an order being made for the removal of the structure complained of, and for a mitigated penalty of 40s.

In obedience to the order, Way accordingly removed the shop, by merely lifting it off the timber upon which it had rested, and carried it to his own premises.

There being some evidence that the defendant had accepted the building when completed, the jury returned a verdict for the plaintiff for 25l., the balance due according to the contract, 30l. having been previously [104] paid on account ; leave being reserved to the defendant to move to enter a verdict for him on the issue taken on the third plea, if the court should be of opinion that the contract, being in contravention of the Metropolitan Building Act, could not be enforced.

Montagu Chambers, Q. C., in Easter Term last, obtained a rule nisi accordingly.

Barnard now shewed cause. There was no evidence to sustain the third plea. The structure in question was not a “building” within the 18 & 19 Vict. c. 122. It is a mere shell or frame of wood, having no foundations or walls, and in no way fixed to the ground, but merely laid on timbers upon the surface so as to be capable of being lifted off without disturbing anything. There is no definition of “building” in the act, but there is of “new building” in s. 8, which enacts that “a building shall be deemed to be new, whenever the inclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856 : any other building shall be deemed to be an old building.” And art. 1 of the First schedule provides that “every building shall be inclosed with walls constructed with brick, stone, or other hard and incombustible substances, and the foundations shall rest on solid ground, or upon concrete, or upon other solid sub-structure.” [Erle, C. J. I do not see why a structure of wood may not be within the act. There is nothing in the absence of foundations, nor in the portability of the thing. There are many buildings in the neighbourhood of Greenwich, which, from the nature of the soil, are only rested on concrete on the surface. Byles, J. You must contend that a wooden structure as large as Westminster Hall, laid upon the ground, as this was, would not be a “build-

ing." [105] There is no inconsistency in speaking of a "removable building." It is submitted that, to constitute a building within the act, the structure must at least be of a substantial and permanent character. Further, it is submitted that the proceeding before the magistrate was not binding on the plaintiff. He was no party to it, Way, the sub contractor, being the person summoned; consequently he would have no right of appeal under s. 106. [Byles, J. The decision of the magistrate was a sort of compromise; and the plaintiff appears to have assented to it.]

Montagu Chambers, Q. C., and Joyce, in support of the rule. The third plea was clearly proved, assuming this to be a "building" within the act. The description of it in the specification indicates a building. It is clearly within the mischief of the act; and the correspondence shews that it was intended to be permanent. It is perhaps impossible to give an accurate definition of a "building." The 8th section was framed to meet the case of a structure the walls of which had not been carried above the footings before the 1st of January, 1856: any other is to be deemed an "old building." If this structure were of the clear yearly value of 10l. a year might not the occupier have acquired a vote in respect of it, under the 27th section of the Reform Act, 2 W. 4, c. 45? [Crowder, J. Is there any case where a structure like this, which is not in any way attached to the soil, has been held sufficient to give a vote? Would a photographer's travelling van with the wheels off be sufficient? There is no reason why it should not, if it were intended permanently to rest where it is placed. [Erle, C. J. If the erection of such a structure as this is an act prohibited by law, an indictment would lie for it. But I find no direct prohibition in the act against the [106] erection of wooden structures.] Every building is by s. 31, to be subject to the supervision of the district-surveyor; and the 38th section provides that notice shall be given to him two days before "any building" is commenced. [Erle, C. J. The building a structure of wood is quite independent of the notice to the surveyor.] As to the proceedings before the magistrate. The plaintiff was in substance a party to them: the acts of his sub-contractor, Way, were substantially the acts of the plaintiff himself.

ERLE, C. J. I am of opinion that this rule should be made absolute. It appears to me that the ultimate contract which was come to between these parties was for the erection of a building known to the plaintiff to be,—or, whether known to him or not, at all events it was,—in violation of the Metropolitan Building Act, 18 & 19 Viet. c. 122. It would be difficult with accuracy to define what is a "building" within the meaning of the statute: and I do not mean to attempt it (a). But I think the structure in question was a building within the act. The contractor himself in his specification calls it a "house," and in his letters a "shop." The original contract contemplated the erection of a structure upon a permanent brick foundation, such as would probably last as long as the defendant's interest in the house to which it was to be attached: but by the substituted contract it was to have a timber foundation in lieu of the footings of brick-work. It appears from the letters which were put in that the wooden structure so to be raised was clearly intended to answer all the purposes of that which was before [107] called a house or a shop. The structure originally contemplated clearly would have been a building within the act; and the substitution of the wooden joists for the brick foundation was designed to "evade the metropolitan board and the district-surveyor also." I am clearly of opinion that the plaintiff was wrong in that notion, and that a house or shop constructed like this, whether resting on brick foundations or merely upon timber laid upon the ground, is pre-eminent within the mischief the statute was intended to remedy: and I think that the 12th section does command that all walls shall be constructed of such substances, and of such thickness, and in such manner as are mentioned in the 1st schedule. And when we turn to the 1st schedule, we find that "every building shall be inclosed with walls constructed of brick, stone, or other hard and incombustible substances, and the foundations shall rest upon solid ground or upon concrete, or upon other solid sub-structure." That seems to me to be a distinct command to build the walls of incombustible materials, and a prohibition against building them of combustible

(a) Bailey and Johnson define a building to be "a fabric, an edifice;" and Webster, "a fabric or edifice constructed for use or convenience, as, a house, a church, a shop, &c." Richardson has no definition of the word.

materials; and therefore the contract between these parties was a contract for the erection of a structure in a manner prohibited by law. This is a sufficient answer to that part of the argument urged on the part of the plaintiff as to the absence of footings or foundations of brick. A good deal of the argument on the part of the plaintiff also rested upon the fact of the structure having been removed in its entirety, and without displacing anything, which, it was said, proved conclusively that it was not a house. The answer to that, however, appears to me to be, as I before suggested, that the contract was for a house or shop; and that the structure was permanently built and reasonably calculated for the use of man; and though by the application of mechanical power a structure of considerable size may be removed, it does not therefore cease to be a "building" within the meaning of the act. Upon the whole, I think this was a contract for the erection of a fabric or structure in violation of the statute; and that, the parties being in *pari delicto*, *potior est conditio defendentis*. My judgment is given entirely irrespective of the opinion pronounced by the magistrate.

WILLIAMS, J. I am of the same opinion, though I come to this conclusion not without some doubt and hesitation. My doubt is founded upon this. I agree that a structure of this description is within the mischief contemplated by the statute, and therefore, if the act can be construed so as to include it, that it ought to be so construed. But, on the other hand, it is equally clear that we ought not to put this construction upon the statute, however beneficial it may be to the public, if it be apparent from the language they have used that the legislature did not mean to point at such a structure as this. The doubt upon my mind arises thus. The 7th section enacts, that, with certain exemptions before mentioned, the act shall apply to all new buildings; and then s. 8 enacts that a building shall be deemed to be new, whenever the inclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856; and that any other building shall be deemed to be an old building. Suppose this structure had been partially carried into effect on the 1st of January, 1856, could it be said to be a "new building" within the act? That would have to be determined by the application of the parliamentary test, viz. whether the inclosing walls had or had not been carried higher than the footings previously to the 1st of January, 1856. But that test could not be applied, seeing that there are no [109] footings. The contention upon this is, that the legislature only intended that the act should apply to structures raised upon footings, and consequently that this one could not be within it; but I cannot help entertaining some doubt whether the statute was intended to apply to any sort of structure to which the test could not be applied. My Lord and my two learned Brothers entertain a different opinion, and my doubt is not so strong as to induce me to dissent from their judgment. Assuming, then, that this shop was a "building" within the statute, the rest of the case is clear. There has been a plain infringement of the act, and the plaintiff is disentitled to recover, upon the principle laid down in the case of *Foster v. Taylor*, 5 B. & Ad. 887, where it was held that the vendor of butter in firkins not branded as required by the 36 G. 3, c. 86, could not recover the price of it. That case is a distinct authority to shew that the plaintiff cannot be allowed to enforce in a court of justice a contract which has been entered into in violation of the provisions of an act of parliament. The latter part of the plea, which was added *ex abundanti cautela*, becomes immaterial in this view, the earlier part being a good bar. For these reasons, I think the rule must be made absolute.

CROWDER, J. I also am of opinion that this rule must be made absolute, upon the ground alleged in the third plea and established in proof, viz. that the contract declared on was entered into and carried into effect in express violation of the Metropolitan Building Act. I agree with my Brother Williams that the rest of the plea is immaterial. It would, no doubt, have been more satisfactory if the statute had given a definition of a "building." That, however, has not been done; nor has any authority been cited to shew what is a [110] building; neither will I attempt to define it. The question for us to determine is, whether the structure contracted for and erected by the plaintiff for the defendant is such a one as we can pronounce to be a "building" within the meaning of the act. Looking at the facts, and at the specification and the correspondence, it appears to me to be quite clear that the original intention of the parties was that a structure should be erected about which it would be impossible to entertain a doubt. That intention seems from the two letters put in to have been

abandoned, and an endeavour to have been made to evade the provisions of the act. But, notwithstanding that, it appears to me to have been still the intention of the parties to erect a permanent structure: and it is with reference to its being a permanent structure that I come to the conclusion that it is a "building" within the meaning of the statute. The plaintiff writes,—“I have found out a new plan for us to work on in reference to the shop, which is, to build it all in wood: it will be less expense, and answer your purpose just as well, and it will look as well: and then we shall evade the metropolitan board of works, and the district-surveyor also. It will last long enough, and answer all you require.” The structure originally intended was to last a considerable time, and the alteration suggested, viz. to substitute wood for the brick foundation or footings was not with a view to its being a less permanent structure. The difficulty which occurred to my mind during the argument was this: the 1st article of the 1st schedule, which is referred to in s. 12, and which states how the walls of every building shall be constructed, says “the foundations shall rest on the solid ground, or upon concrete, or upon other solid sub-structure,”—thus seeming to assume, that, whatever the structure, to be a “building,” it must be something which has founda-[111]-tions. And the question arises whether this structure has any foundation at all. But, upon the whole, I agree with the Lord Chief Justice that it is enough that there is a foundation of some kind to which the superstructure is to be attached. As to the 8th section, which has been referred to, and which provides that “a building shall be deemed to be new whenever the inclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856,”—it seems to me that that was only intended to bring within the operation of the statute one description of building, viz. a building of which only the footings or foundation had been laid. It is difficult to say that that was meant to be the only definition of an unlawful construction. It could hardly, I apprehend, be contended, that, if the timbers upon which this structure rested had been let into the ground five or six feet, it would not have been a building within the act. Upon the whole, and mainly on the ground that this was a structure of some considerable magnitude, and erected for use as a shop, and substantially put together, and for a permanent purpose, I am clearly of opinion that it is a “building” within the meaning of the act. That it is a structure within “the mischief of the act,” as the phrase is, I think nobody can doubt: and, if we can find language in the act reasonably to include it, I think we are bound to give effect to it. The contract, therefore, being for the erection of a building in violation of the act, the plaintiff is not entitled to enforce it.

BYLES, J. I also am of opinion that the rule to enter a verdict for the defendant in this case must be made absolute. The profound respect I entertain for the opinion of my Brother Williams, and the doubt he has expressed, have alone induced me to hesitate as to the [112] conclusion we ought to arrive at. I agree with my Brother Crowder that the 8th section applies only to buildings of a particular class, and was merely intended to define the stage of progress on a particular day which should mark the distinction between an old and a new building, leaving quite independent the 12th section and schedule there referred to, as to the erection of fabrics of incom-bustible substances. That being so, the question, and the only question, is, whether the subject-matter of this contract was a “building” within the fair meaning and contemplation of the act. And that brings us to the very difficult inquiry, What is a “building”? Now, the verb “to build” is often used in a wider sense than the substantive “building.” Thus, a ship or a barge-builder is said to build a ship or a barge, a coach builder to build a carriage: so, birds are said to build nests: but neither of these when constructed can be called a “building.” It is a well established rule, that the words of an act of parliament, like those of any other instrument, must if possible be construed according to their ordinary grammatical sense. The imperfection of human language renders it not only difficult, but absolutely impossible, to define the word “building” with any approach to accuracy. One may say of this or that structure, this or that is not a building: but no general definition can be given: and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by “a building” is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time. A church, whether constructed of iron or wood, undoubtedly is a building. So, a “cowhouse” or “stable” has been held to be a building the occupation of which as tenant entitles the party to be registered as a

voter under the 27th section of the [113] Reform Act, 2 W. 4, c. 45 (a). On the other hand, it is equally clear that a bird-cage is not a building, neither is a wig-box, or a dog-kennel, or a hen-coop,—the very value of these things being their portability. It seems to me that the structure in question, which was erected for a shop, and is of considerable dimensions, and intended for the use of human creatures, is clearly a “building,” in the common and ordinary understanding of the word. If we look at the object and intention of the act, we find that this construction is the only one which will bear it out. The intention,—the main intention,—was, to prevent the metropolis from being covered with combustible structures. Looking, therefore, at the ordinary meaning of the word, and at the intention of the legislature, I think we are well warranted in coming to the conclusion that this was a “building” within the prohibition of the statute, and consequently that the third plea was proved, and the defendant entitled to judgment upon it.

Rule absolute.

[114] HUCKLE v. REYNOLDS. Nov. 4th, 1859.

The plaintiff brought an action for speaking these words,—“Your house is a bawdy-house, and no respectable people will live in it.” The words proved were addressed to the plaintiff’s wife, and were as follows,—“You are a nuisance to live beside of. You are a bawd: and your house is no better than a bawdy-house:”—Held, that the words were actionable without special damage, and substantially supported the declaration.

This was an action brought by the plaintiff, a painter and glazier, against the defendant, a waiter, for slander. The words charged to have been spoken by the defendant were,—“Your house is a bawdy-house, and no respectable people will live in it.” No special damage was alleged or proved.

The plaintiff’s wife, who was called to prove the speaking of the words, proved that they were addressed to her and not to the plaintiff, and were as follows,—“You are a nuisance to live beside of. You are a bawd: and your house is no better than a bawdy-house.”

On the part of the defendant it was submitted that the words were not proved as laid. But Cockburn, C. J., before whom the cause was tried at the sittings at Westminster after the last Trinity Term, intimated that he would allow the declaration to be amended.

It was then submitted that the words were not actionable, and that the slander being a personal wrong to the wife, she should have been a party to the action.

His lordship, however, overruled the objection: and the jury found a verdict for the plaintiff, damages 40s.

Joyce, pursuant to leave reserved, now moved for a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered. He submitted, that, taking the words spoken to have been those proved by the witness, they were not actionable without proof of special damage: and that, as they merely contained an imputation upon the wife’s personal character for chastity, she ought to have been a party to the action.

[115] ERLE, C. J. The words are clearly actionable without special damage. It is impossible to deny that they charge an indictable offence: and the words proved would impute that to the plaintiff. It was unnecessary, therefore, to make the wife a party to the action. I think there ought to be no rule.

WILLIAMS, J. If the jury thought the words meant to impute to the plaintiff that he kept a bawdy-house, they were clearly actionable: and the evidence warranted the verdict.

CROWDER, J. The substantial meaning of the words as alleged in the declaration was proved. There will be no rule.

Rule refused.

(a) See *Whitmore, App., Wenlock (Town Clerk), Resp.*, 7 Scott, N. R. 489, 5 M. & G. 9, 1 Lutw. Reg. Cas. 10: *Peck, App., Downes, Resp.*, 7 Scott, N. R. 495, 5 M. & G. 13, n.; *Poole, App., Williams, Resp.*, 7 Scott, N. R. 496, 5 M. & G. 13, n.

WALMSLEY AND ANOTHER, Assignees of Thomas Moore, a Bankrupt, v. MILNE.
Nov. 11th, 1859.

[S. C. 29 L. J. C. P. 97; 1 L. T. 62; 8 W. R. 138; 6 Jur. N. S. 125. Applied, *R. v. Lee*, 1866, L. R. 1 Q. B. 251. See *Callwich v. Scrindell*, 1866, L. R. 3 Eq. 255. Approved, *Clinic v. Wood*, 1868-69, L. R. 3 Ex. 261; L. R. 4 Ex. 330. Referred to, *Loughbottom v. Berry*, 1869, L. R. 5 Q. B. 137. Discussed, *Holland v. Holyson*, 1872, L. R. 7 C. P. 338. Adopted, *Cosby v. Shaw*, 1887-88, 19 L. R. Ir. 325; 23 L. R. Ir. 193. See *Gough v. Wood*, [1894] 1 Q. B. 721; *Hobson v. Gorringe*, [1897] 1 Ch. 190; *Reynolds v. Ashby*, [1904] A. C. 473.]

Where the owner of the inheritance annexes thereto fixtures (which would in the ordinary case of landlord and tenant be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold.—A., the owner of land, in 1853 mortgaged it in fee to B., and afterwards erected certain buildings thereon, to which, for the more convenient use of the premises in his business of an innkeeper, brewer, and bath-proprietor, he affixed a steam-engine and boiler, a hay-cutter, a malt-mill or corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on to the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way; and the steam-engine and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or the floors for the purpose of steadying them, but were all capable of being removed without injury either to themselves or to the premises. The engine was used to supply water to the baths and to put the other machines in motion; and the whole were subservient to the business carried on by A. —A. continued in possession until 1858, when he became bankrupt: Held, that his assignees were not entitled to claim these fixtures, but that they passed to the assignee of the mortgagee as part of the freehold.

This was an action of detinue brought by the plaintiffs, as assignees of one Thomas Moore, a bankrupt, to recover a steam-engine and boiler, a hay-cutter, a malt-[116]-mill or corn-crusher, and a pair of grinding-stones, which they claimed as having passed to them as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy.

The defendant pleaded non detinet and not possessed, whereupon issue was joined.

The cause was tried before Byles, J., at the last Spring Assizes at Liverpool. The facts which appeared in evidence were as follows:—The bankrupt, Moore, was the owner of a vacant plot of ground, which he mortgaged in fee in 1853 to one Oswald. On the 20th of August, 1858, Oswald assigned his interest in the mortgaged premises to the defendant. Subsequently to the mortgage, and before the conveyance to the defendant, Moore, who continued in possession, erected various buildings upon the land, where he carried on the business of a brewer and innkeeper and proprietor of baths, and set up therein the articles in question, the steam engine being used for supplying water to the baths, and also for setting in motion the hay-cutter, malt mill, and grinding stones; the hay-cutter and malt mill being fastened to the buildings with screws and nuts, but being capable of being removed without injury to the premises or to themselves; and the lower grinding-stone being boxed on to the floor, and the upper stone attached with running gear in the usual way. The whole were put up for the purpose of Moore's trade.

Moore became bankrupt in September, 1858, and the plaintiffs, as his assignees, claimed the articles in question, insisting that they were not "fixtures," inasmuch as they were not permanently fixed so as to form part of the freehold, or that, if fixtures, they were "trade fixtures," and therefore removable.

The defendant, on the other hand, insisted that, whether fixtures or not, the things passed by the mortgage as part of the freehold.

[117] Under the direction of the learned judge, a verdict was entered for the plaintiffs, leave being reserved to the defendant to move to enter a verdict for him in respect of all or such of the articles as the court should think were not severable from the freehold.

Atherton, Q.C., in Easter Term last obtained a rule nisi accordingly. He referred to *Horn v. Baker*, 9 East, 215, and *Boydell v. McMichael*, 1 C. M. & R. 177.

James Wilde, Q. C., and Milward, on a subsequent day, shewed cause. The articles in question were not fixtures at all, because not permanently attached to the freehold, but were mere movable chattels which passed to the assignees; or, if fixtures, having been put up by the bankrupt for purposes of trade, they were removable by the bankrupt before his bankruptcy, and consequently upon his bankruptcy became the property of the assignees. All the articles were fixed in the same way to the floor or to the walls of the buildings, viz. by means of screw-bolts and nuts, and were severable without injury either to themselves or to the premises upon which they were fixed. The articles in this case clearly come within the test applied by Parke, B., in *Hellawell v. Eastwood*, 6 Exch. 295, 312. The contention there was as to the removability of cotton spinning-machines called mules, which were some of them fixed by screws to the wooden floor of the mill, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into the holes. In delivering the judgment of the court, Parke, B., says: "The question is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations—first, the mode of annexation to the soil or fabric [118] of the house, and the extent to which it is united to them, whether it can easily be removed, *intégrè, salvè, et commodè*, or not, without injury to itself or the fabric of the building, secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causà*, or in that of the Year Book 28 H. 7, 10, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel. Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held, in different cases, to be removable. The machines would have passed to the executor: per Lord Lyndhurst, *Trappes v. Harter*, 2 C. & M. 177. They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of movable chattels." [Byles, J. The question there arose between landlord and tenant.] The steam-engine here was what is called a portable engine. [Byles, J. So as to be removable without being taken to pieces. It was a thing complete in itself, for the purpose of being removable from place to place.] It was attached to the [119] building for the sole purpose of being more conveniently used. The court of Exchequer deal with the question as a general one, and not merely as a question between landlord and tenant. That case was followed by the court of Queen's Bench in *Waterfall v. Penistone*, 6 Ellis & B. 876. There, one Jenkinson mortgaged to Marsh the freehold of a mill, with machinery thereon; and afterwards Jenkinson assigned to the defendant the equity of redemption, and certain machinery which had been fixed in the mill since the first mortgage. Afterwards, by indenture, in consideration of 500l. paid to Jenkinson by the defendant, Jenkinson did bargain, sell assign and set over to the defendant machinery erected since the conveyance of the equity of redemption, subject to redemption on payment of the 500l.; and by the same indenture Jenkinson covenanted that the mill and machinery specified in the previous conveyance of the equity of redemption should be charged with the 500l. as well as the money before secured upon it. The machinery comprised in the last-mentioned indenture was erected for the purpose of carrying on the manufacture in the mill; and for the more conveniently doing so, a part of it was screwed, nailed, and otherwise fastened to the mill. Jenkinson became bankrupt: in anticipation of which the defendant took possession and entered on the mill and the machinery, Jenkinson having been in possession for more than twenty-one days after the making of the indenture, up to the time of such entry. The machinery comprised in the last-mentioned indenture still remaining on the premises, Jenkinson's

assignees claimed it, on the ground that such indenture had not been registered under the statute 17 & 18 Vict. c. 36. It was held that they were entitled to the machinery; the conveyance thereof being void as against them for want of registration; for, that, under the interpretation clause [120] (s. 7), the machinery was personal chattels, as the intention of the parties appeared to be that the machinery should pass separately from the realty, and so it had not become parcel of the freehold by annexation subsequent to the conveyance of the equity of redemption. *Trappes v. Harter*, 2 C. & M. 153, 3 Tyrwh. 604, where the question arose, as here, between the assignees of a bankrupt mortgagor and the mortgagee, is also precisely in point. In January, 1797, several persons carried on business in partnership as calico-printers; and in the same month certain premises on which their works were principally carried on were conveyed to one of the partners in fee. The conveyance mentioned the premises to consist, besides land, of dwelling-houses, machine-house, and other buildings and erections, and stated them to be then in the possession of the partner to whom they were conveyed and another partner. Various buildings and machines were afterwards, from time to time, erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, and stood on that part of the land which was conveyed to one of the partners in 1797, but the part in question could be removed without material injury to the buildings. In the different stock-takings of the firm, the land and buildings were always valued and classed separately from the machinery and fixtures. In the part of the country where the premises were situated, machinery of this description was constantly bought and sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to two of the partners, they, in 1828, mortgaged them to the plaintiff's wife, under the description of all the messuages, dwelling-houses, lands, and buildings therein mentioned, "and also all that and those the steam-engine, mill-gearing, heavy gear to millwright [121] work, fixed machinery, and other matters and things, &c. then standing and being in and upon the thereby demised buildings, works, and premises, which in any manner constituted fixtures and appendages to the freehold of the same or any part thereof." All the machinery, fixtures, &c., appeared to have been in the reputed ownership of the parties, who carried on the works until 1831, when they became bankrupt, and the defendants were appointed their assignees. The plaintiff, who was the husband of the mortgagee, had inspected statements of the affairs of the partners, which treated the machinery as not included in the mortgage, and had made no objections to such statements. In the month of April, 1831, the assignee sold all the machinery and fixtures, with the exception of two steam-engines, two water-wheels, an iron flooring, and other small articles; and the greater part of them were removed by the purchasers. The articles claimed by the mortgagee were all firmly fixed to the freehold, in such a manner, however, that they might easily be removed without material injury to themselves or to the buildings. It was held that the machinery did not belong to the inheritance, but was part of the personal estate of the bankrupts, and that it passed to the assignees; and that the machinery in question was not intended to pass, and did not pass, to the mortgagee under the mortgage deed. [Williams, J. *Trappes v. Harter* seems to have been considered as overruled as to this point: see per Parke, B., in *Minshall v. Lloyd*, 2 M. & W. 456, and per Cresswell, J., in *Wilde v. Waters*, 16 C. B. 617.] *Colegrave v. Dias Santos*, 2 B. & C. 76, 3 D. & R. 255, was not a case of trade-fixtures. [Williams, J., referred to *Hitchman v. Walton*, 4 M. & W. 409. There, a lessee for years mortgaged his lease, and all his estate and interest in the premises, and afterwards became bankrupt: and it was held that the mortgagee might declare [122] in case as reversioner against the assignee of the tenant, for the removal of fixtures from the premises, whereby they were dilapidated and injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage, although there was a covenant in the original lease to the mortgagor to yield up to the lessor, at the determination of the term, "all fixtures and things to the premises belonging or to belong." In *Mather v. Fraser*, 2 Kay & J. 536, which was cited on the part of the defendant at the trial, the Vice-Chancellor (Wood) mainly rests his decision on the circumstance of the property mortgaged being described in the mortgage deed as a mill, which it could not be if the machinery were removed.

Atherton, Q. C., and V. Williams, were held in support of the rule in *Trinity*

Term. As between landlord and tenant, the latter is at liberty to remove trade fixtures at any time during his original term, and such further period of possession by him as he holds the premises under a right still to consider himself as tenant: see *Wickton v. Woodcock*, 7 M. & W. 14, *Leader v. Homewood*, ante, vol. v. p. 546, and the notes to *Elwes v. Mawe* (3 East, 38), 2 Smith's Leading Cases, 4th edit. 147. The present is not, however, a case of landlord and tenant, but of mortgagor and mortgagee, —the mortgagor having continued in possession by the sufferance of the mortgagee. [Crowder, J. You contend that the mortgage could not have removed these articles?] He would have been guilty of waste if he had done so. [Willes, J. You say that whatever the mortgagor adds to the premises for the more convenient and profitable employment of them belongs to the mortgagee, and that the mortgagor has no right to [123] remove it?] Precisely so. Lord Ellenborough, in his judgment in *Elwes v. Mawe*, referring to the case of *Lawton v. Salmon*, 1 H. Bl. 259, n., says,—"In the case of the salt-pans, Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, 'the salt-spring is a valuable inheritance, but no profit arises, from it unless there be a salt-work: which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.' Upon this principle he considered them as belonging to the heir as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade." It is an abuse of terms to say that the articles in question are not fixtures. [Willes, J. The baths would be incomplete, as intended to be used, without the steam-engine. Crowder, J. The stable might very well be used as a stable without the corn-crusher or the hay-cutter.] The mode of fixing by means of bolts and screws was merely to keep them steady. In *Fisher v. Dixon*, 12 Clark & Fin. 312, the owner of land, for the purpose of better using the land, erected upon and affixed to the freehold certain machinery: and it was held, that, in the absence of any disposition by him of this machinery, it would go to the heir as part of the freehold estate: and that, if the corpus of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. [Byles, J. That was the case of a steam-engine and machinery which [124] were essential to keep the mines clear of water. The judgment in that case contains many observations which are favorable to your argument. I observe that both Lord Brougham (p. 325) and Lord Cottenham (p. 329) speak with disapprobation of the cider-mill case, *Lawton v. Lawton*, 3 Atk. 13, which is referred to in *Elwes v. Mawe*.] The rule as between mortgagor and mortgagee is the same as between heir and executor: 2 Smith's Leading Cases, 158, 159. In *Place v. Fagg*, 4 M. & R. 277, it was held that by a mortgage of a mill, the stones, tackling, and implements necessary for the working of the mill pass to the mortgagee. *Longstaff v. Meaque*, 2 Ad. & E. 167, 4 N. & M. 211, is to the same effect. In *Ex parte Broadwood*, *In re Forbes McNeill*, 1 Mont. D. & De G. 631, it was held that an equitable mortgage of leasehold premises will carry all the fixtures, although erected for the purpose of trade, and therefore removable as between landlord and tenant, and although they are not specified in the lease deposited, or the memorandum of deposit. Sir John Cross there says: "In *Ex parte Lloyd*, *In re Ogden*, 3 Deac. & C. 765, this court held that an equitable mortgage of a cotton-mill carried all the fixtures, although they were erected for the purposes of trade, and the mortgagor continued in possession of them at the time of his bankruptcy. It has always seemed to me that the circumstance of fixtures being what are called trade-fixtures, is of importance only in questions depending between landlord and tenant, and does not affect the consideration of those arising between a mortgagor and mortgagee. Much confusion has, in my opinion, been created in the conflicting cases on this subject, by not attending to this distinction." The like was held in *Ex parte Reginald*, *In re Gye and Hughes*, 2 Mont. D. & De G. 443, where Mr. Commissioner Holroyd prefaces a very learned and elaborate [125] review of the authorities by these observations,—“I have always considered that personal chattels fixed to the freehold become parcel of the freehold: but, if fixed by a person having a particular interest in the freehold as a termor, and capable of removal without injuring the freehold, the termor may disunite them. A mortgagor in possession has,

in my opinion, no such interest in the premises as will enable him to exercise this right of a tenant for years. He only holds possession of the land by the permission of the mortgagee, who may by ejectment, without giving any notice, recover against him. In this respect, it is said, the estate of a mortgagor is inferior to that of a tenant at will. Although judges have found it difficult to describe in proper terms the relation of mortgagor in possession and mortgagee, yet I think it clear from all the cases that a mortgagee, who merely receives his interest from the mortgagor in possession, may at any time eject the mortgagor, and that such mortgagor can do nothing to prejudice the mortgagee, without his consent." So, in *Ex parte Bentley, In re West*, 2 Mont. D. & De G. 591, a lessee erected trade fixtures (coke-ovens), firmly attached to the freehold, but removable as between himself and the landlord. He then mortgaged the premises by way of demise, by the same description as that in the lease, and without referring to the new erections, the sum secured being a floating balance, limited to an amount greater than the premises would be worth without the fixtures, and became bankrupt: and it was held that the mortgagee was entitled to the fixtures. Again, in *Ex parte Price, In re Stead*, 2 Mont. D. & De G. 518, a memorandum of deposit accompanying an equitable mortgage stated that the bankrupt had deposited "the deeds and documents under which I hold the steam-mills, cottages, land, buildings, and premises at L.:" and it was held [126] that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including those that were removable as between landlord and tenant. *Ex parte Belcher, In re Maberly*, 2 Mont. & Ayr. 160, is to the same effect. The Chief Judge there says: "All the cases decide, that, where fixtures are attached by the landlord, they become part of the freehold:" *Hubbard v. Bayshaw*, 4 Sim. 326. And see *Ex parte Cotton, In re Nutter*, 2 M. D. & De G. 725 (a). *Mather v. Fraser*, 2 Kay & J. 536, was the case of a mortgage by two described in the deed as copper-roller manufacturers, reciting a conveyance to them of land and mills or factories in a manufacturing town, as tenants in common in fee, and that they were carrying on business at the said mills or factories as copper-roller manufacturers, and in such capacity had lately affixed to or placed upon the land, mills, or factories a steam-engine and boilers, together with a large quantity of mill-gear and millwright work, and granting the land, mills, or factories, and hereditaments comprised in the recited conveyance, to the use of the plaintiffs in fee, subject to a proviso for redemption: and it was held, as between the plaintiffs and the mortgagor's assignees in bankruptcy, that, assuming it possible to distinguish between the case of machinery [127] placed upon land for the purpose of trade or manufacture as collateral to and independent of the use and enjoyment of the land, and that of machinery placed upon land for the purpose of better and more profitably enjoying the land (as to which, quære?), the recitals shewed that this was a case of the latter description; and although the means of the proposed use and enjoyment of the land was manufacture or trade, all articles fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil, and would have descended to the heir along with and as part of the soil itself. In giving judgment, Vice-Chancellor Page Wood, referring to *Fisher v. Dixon*, 12 Clark & Fin. 312, says,— "It is well expressed in that case, that the principle upon which the old rule of law, that fixtures pass with the soil, was relaxed in favor of trade, has no application where, as here, the parties who affixed the machinery were themselves the owners in fee of the soil. According to the old rule of law, if that which would otherwise have been a chattel had been affixed to the soil, whether by nail, screw, or otherwise, it passed along with the soil to which it had been so fixed. In the relation of landlord and tenant, but in that relation alone, the rule of law was relaxed for the encouragement of trade: it being very early perceived that it would be injurious to trade if a tenant

(a) In this case the affidavits stated, that the steam-engine, boiler, and other machinery were fixed to the brick and timber work of the premises merely by bolts and screws, and that they could therefore be easily removed, without any damage to the buildings to which they were affixed. In pronouncing his decision, Sir John Cross is reported to have made use of the following expressions,—"It has been said that the steam-engine is a locomotive piece of machinery, and may be easily removed. But I see no reason why a steam-engine should be more removable on the ground of its locomotion, than a door, or a window, which are also locomotive!"

were told that he must contrive to conduct his trade with property which need not be fixed in any way to the soil, or he would at once be held to have made a present of it to his landlord; and, accordingly, as between landlord and tenant, questions of some difficulty have arisen whether, in particular instances, chattels pass with the freehold of the land. But here,—and it was the case also, as Lord Cottenham observed, in *Fisher v. Dixon*,—no such question can arise. Here, the same [128] parties were owners both of the fee and of the chattels in question. There was no landlord between whom and themselves the question could arise. In the exercise of their own discretion as to the disposition of the property, they fixed certain articles to the soil, and no question of encouragement to trade can arise. Here, therefore, and in all other cases where the owner of the chattel is also the owner of the fee, the court can at once dismiss from its consideration the entire class of cases in which the rule of law has been relaxed in favor of trade, all such cases presuming the existence of the relation of landlord and tenant. This consideration disposes of the decision,—I do not say, of the dictum,—in *Hellawell v. Eastwood*. For the decision in that case there was abundant ground, irrespective of the dictum. The tenant had annexed to the freehold property which, as between him and his landlord, would have been held, on the determination of the lease, to be chattel property which the tenant was entitled to remove. The landlord sought to distrain. There would have been a manifest inconsistency in holding such property exempt from distress, on the ground of its being annexed to the freehold, when, at the expiration of the lease, the court must have held the very same property to belong to the tenant, notwithstanding such annexation. That case, therefore, in common with the numerous other cases upon the question of distress, has no application to the present. And, in fact, the only point for which it was cited was, the dictum of a learned judge, whose opinion is entitled to great weight, Mr. Baron Parke, who there makes this remark,—‘The machines would have passed to the executor; per Lord Lyndhurst, C. B., in *Trappes v. Harter*. They would not have passed by a conveyance or demise of the will.’ He takes those two points. ‘They never ceased to have the character of movable [129] chattels, and were therefore liable to the defendant’s distress.’ That remark, however, is a mere dictum, not necessary to account for the decision, for which there was abundant ground in the circumstances I have mentioned: and I cannot but think that the numerous class of cases, ending with that of *Fisher v. Dixon*, which does not appear to have been cited in *Hellawell v. Eastwood*, could not have been present to the mind of the learned judge to whom that dictum is attributed.” [Willes, J., referred to *Dalton v. Whitem*, 3 Q. B. 961. Crowder, J. *Simpson v. Harcourt*, 4 T. R. 568 (*Simpson v. Harlopp*, Willes, 512), and *Darby v. Harris*, 1 Q. B. 895, are conclusive to shew that fixture which a tenant may sever from the freehold and take away during his term, are not therefore distrainable for rent. That seems to have escaped the Vice-Chancellor when commenting on *Hellawell v. Eastwood*.] The case of *Hellawell v. Eastwood* lays down no new rule of law. The court there came to the conclusion that the things distrained were not fixtures. Parke, B., founds his dictum in *Hellawell v. Eastwood* upon *Trappes v. Harter*; and *Trappes v. Harter* is founded upon *Lawton v. Lawton*, 3 Atk. 13, and *Lord Dudley v. Lord Ward*, Ambler, 113, neither of which are now considered to be law. It is submitted, that, upon principle, as well as upon authority, the articles in question are clearly fixtures, as between the mortgagor and mortgagee, and passed to the latter.

Cur. adv. vult.

CROWDER, J., now delivered the judgment of the court:—

This was an action by the assignees of a bankrupt, to recover from the defendant certain articles alleged to be part of the bankrupt’s estate. It was tried before [130] my Brother Byles at the last Spring Assizes at Liverpool, when a verdict was found for the plaintiff, with liberty to move to enter a verdict for the defendant.

The facts were these:—Moore, the bankrupt, being the owner of a vacant plot of ground, in 1853 mortgaged it in fee to one Oswald, who, in August, 1858, sold to the defendant the mortgaged premises. Moore became bankrupt in September, 1858. Subsequently to the mortgage, and before the sale in 1858, Moore, who had always continued in possession, erected various buildings upon the plot of ground, and set up all the articles sought to be recovered in this action. They consisted of a steam-engine and boiler used for the purpose of supplying with sea-water the baths which had been erected on the premises; also a hay-cutter and malt-mill or corn-crusher, and grinding-stones, all (except the grinding-stones) being screwed with bolts and nuts, or otherwise

firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or to the things themselves. The upper mill-stone lay in the usual way upon the lower grinding-stone. All these fixtures were put up for the purposes of trade.

The rule was argued before my Brothers Willes and Byles and myself: and, in the course of the argument a great many cases were cited, which we desired time to consider before delivering our judgment.

On the part of the plaintiffs it was contended,—first, that the articles in question were not fixtures at all, because not permanently attached to the freehold, but simply movable chattels, which therefore passed to the assignees of the bankrupt,—or, secondly, that, if fixtures, they were trade fixtures, and therefore removable by the bankrupt, and so would pass to his assignees.

The case of *Hellawell v. Eastwood*, 6 Exch. 295, was [131] cited in support of the first proposition. There, cotton-spinning machines called mules had been distrained for rent: and the question was as to the validity of the distress. It appeared that these mules were fixed by means of screws, some into the wooden floor, some into lead which had been poured in a melted state into holes in stone for the purpose of receiving the screws: and it was considered by the court of Exchequer as a question of fact whether the machines so fixed were parcel of the freehold. It was said, that, whether a chattel attached to the soil was a fixture was always a question of fact, depending upon the circumstances of each case, and principally on two considerations,—first, the mode of annexation to the soil or fabric of the building, and whether it could be easily removed, without injury to itself or the building,—and, secondly, the object of the annexation, whether for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, and the more complete enjoyment and use of it as a chattel. The judgment of the court proceeded upon both considerations. They said that the mules never became part of the freehold, as they were only attached slightly, and could be easily removed without any damage; “and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machinery steadier and more capable of convenient use as chattels.”

Now, without expressing any opinion upon that case, it is sufficient on the present occasion to observe, that, assuming it to be well decided, it is no authority for holding that the disputed articles in the case at Bar are not fixtures forming part of the freehold; for, we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the pre-[132]-mises, subject only to a mortgage, which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables, and a coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam-engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable, as an important adjunct to it, and to improve its usefulness as a stable. The malt-mill and grinding-stones were also permanent erections, intended by the owner to add to the value of the premises. They, therefore, resemble in no particular (except being fixed to the building by screws) the “mules” put up by the tenant in the case of *Hellawell v. Eastwood*, 6 Exch. 295.

But, secondly, it was contended on the part of the plaintiffs, that, assuming the articles in question to have been so affixed as not to be removable according to the general rule of law, yet that, as they were trade fixtures, they might be removed, and so would pass to the bankrupt's assignees.

The whole of the plaintiff's argument upon this head was founded upon the well established exception to the general rule, that, where a tenant puts up fixtures for the purpose of trade during his term, he may before its expiration, without the consent of his landlord, disunite them from the freehold. The defendant's counsel were quite ready to admit the validity of the numerous authorities supporting that proposition, and to concede to the plaintiff, that, if the bankrupt had been tenant to the mortgagee for a term, and the bankruptcy had happened before its expiration, the fixtures in question were such as would have passed to the assignees. But they denied that any such tenancy existed in the present case. And this leads us [133] to the consideration of the peculiar relationship existing between a mortgagor in possession and the mortgagee,—which it is really difficult to express in any other legal terms. A mortgagor

in possession has been called sometimes a tenant at will to the mortgagee, or a tenant at sufferance, or like a tenant at will: but he has never been designated as tenant for any term. Lord Ellenborough, in *Thunder d. Weacer v. Belcher*, 3 East, 449, called him a tenant at sufferance; and Lord Tenterden in *Doe d. Robey v. Maissey*, 8 B. & C. 767, 3 M. & R. 107, said,—“The mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee.” He is clearly not a tenant at will, because he may be ejected without any notice or demand of possession, and is not entitled to the growing crops.

All the cases, therefore, which shew, that, where a tenant for years has put up trade-fixtures, he may remove them before his tenancy expires, have no application to the case at Bar. But, two cases of mortgagee and mortgagor in possession were cited by the plaintiffs’ counsel as strongly supporting their clients’ title to the verdict. One was, *Trappes v. Harter*, 2 C. & M. 177, decided by the court of Exchequer, in which Lord Lyndhurst delivered the judgment of the court; and the other was, *Waterfall v. Penningstone*, 6 Ellis & B. 876, in which our present Chief Justice, then Mr. Justice Erle, delivered the judgment of the court of Queen’s Bench.

Trappes v. Harter was a decision in favor of the assignees of a bankrupt mortgagor in possession, upon the ground that the mortgage did not pass the fixtures in question, and was not intended by the parties to pass them. The mortgage enumerated various fixtures, [134] but did not refer to the fixtures in dispute; and this omission, together with other circumstances in the case, induced the court to be of opinion that they were intentionally omitted in the mortgage-deed, and therefore did not pass by it. That case, then, “must be regarded as having been decided on its own peculiar circumstances,” as stated in the note appended to it, and cannot be taken as an authority to govern us in the case before us. The other case, of *Waterfall v. Penningstone*, was also that of a bankrupt mortgagor in possession and a mortgagee, where the question was, whether the bill of sale of the fixed machinery, drawn in the shape of a mortgage, required registration under the 17 & 18 Vict. c. 36. This partly involved the consideration as to whether the fixtures were to be deemed goods and chattels within that act; and *Hellawell v. Eastwood* was cited in the argument, and recognized as a valid authority by the court. But the species of mortgage was of a peculiar description. There had been a prior mortgage of the premises with the fixtures then thereon. Afterwards, for a further consideration, a mortgage was made of the fixtures which had been subsequently annexed, by themselves: and the court was of opinion that they did not pass by the prior mortgage, “because the tenor of the instrument shews that the parties did not so intend: and they held that the separate mortgage of fixtures was within the 17 & 18 Vict. c. 36, requiring the deed to be registered; and, for want of such registration, they decided that the fixtures passed to the assignees. In the present case, however, there do not appear any circumstances tending to shew an intention existing between Moore, the bankrupt, and his mortgagee, that the fixtures annexed subsequently to the date of the mortgage should not become part of the mortgaged estate: and, in the absence of such intention, the current of autho-[135]-rities in the bankruptcy court shews that such an annexation of fixtures would enure to the benefit of the mortgagee.

In *Ex parte Belcher*, 4 Deac. & Ch. 703, which was decided in the court of Review, in 1835, it was held that fixtures annexed to the freehold after the mortgage by the mortgagor in possession, and which, as between landlord and tenant, would have been removable if put up by the tenant, became part of the freehold, and did not pass to the assignees of the bankrupt mortgagor. The Chief Judge (afterwards Mr. Justice Erskine) there says,—after adverting to the relaxation of the general rule of law in favor of trade-fixtures put up by the tenant,—“But that is not the present case. Again, it is said that the property in question did not pass by the mortgage-deed. Now, it always appeared to me, that, where the owner of the inheritance affixes property to it, it becomes a fixture in the general sense of the term, and part of the freehold: and, if the inheritance be afterwards sold or let, it goes with the freehold: and I confess I see no distinction, for this purpose, whether the deed be one of absolute conveyance, lease, or mortgage. A mortgage, therefore, made by the owner of the inheritance, will, without naming them, pass all the fixtures thereon.” And, in another part of his judgment, he says: “Again, it is urged, that, as to those articles which were attached after the execution of the mortgage-deed, they could not pass to the mortgagee. But

there has not been cited any authority, or even dictum, for such a proposition. I confess I know no case which goes so far as to determine, or even to intimate an opinion, that, where a mortgagor in possession alters the premises by addition or otherwise, the mortgagee shall not take the benefit of such alteration. I can find no distinction, therefore, substantially, between [136] those which were affixed before and those affixed after the date of the mortgage deed. In that point of view also, I am of opinion that all the fixtures alike passed to the mortgagee." There is also a very elaborate and learned judgment of Mr. Commissioner Holroyd, reported in 2 Mont. D. & De G. 443 (1841), in which the whole subject is fully considered, and a similar opinion very clearly expressed. To the same purport are the decisions in the court of Review, *Ex parte Broadward*, 1 Mont. D. & De G. 631 (1841), *Ex parte Prier*, 2 Mont. D. & De G. 518 (1842), *Ex parte Bentley*, 2 Mont. D. & De G. 591 (1842), *Ex parte Cotton*, 2 Mont. D. & De G. 725 (1842), and *Ex parte Tagart*, 1 De Gex, 351 (1847).

The effect of annexing fixtures of a similar character to those in the present case by the owner of the inheritance, was much discussed in the House of Lords, in the Scotch case of *Fisher v. Dixon*, 12 Clark & Fin. 312. There, the question was considered as if arising between the heir and executors: and Lords Brougham, Cottenham, and Campbell delivered very decisive opinions in favor of the heir. The subject-matter of the annexation in that case was, steam-engines and machinery for the purpose of working an iron-mine. Lord Cottenham, after having dismissed as wholly inapplicable the cases of landlord and tenant, says: "Then, the case being simply this, the absolute owner of the land having erected upon and affixed to the freehold, and used for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, is there any authority for saying, that, under these circumstances, the personal representative has a right to step in and lay bare the land and take away all the machinery necessary for the enjoyment of the land?" He answers,—“Although machinery is generally in its nature personal property, yet, with regard to machinery or a manufactory erected upon the [137] freehold for the enjoyment of the freehold, nobody can suppose that can be the rule of law: and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself.” In *Mather v. Fraser*, 2 Kay & J. 536, which was a case of bankrupt mortgagor in possession decided by Vice-Chancellor Wood in 1856, *Fisher v. Dixon* was, amongst numerous other cases, cited before the Vice-Chancellor. In giving judgment, the Vice-Chancellor says: “They (the mortgagors) conceived that the most profitable purpose for which they could use the land would be the business of copper-roller manufacturers. I apprehend, therefore, that the case comes clearly within that of machinery affixed to land by the owner of the land for the purpose of better and more beneficially using and enjoying the land of which he is the owner: and, although the means of such use and enjoyment be manufacture or trade, still I am of opinion that all such of the articles in question as are affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, are within the authority of *Fisher v. Dixon*, partake of the nature of the soil, and would have descended to the heir along with and as part of the soil itself. These later decisions are in accordance with the earlier cases of *Wynn v. Ingleby*, 5 B. & Ald. 625, *Colegrave v. Dias Santos*, 2 B. & C. 76, 3 D. & R. 255, and *The King v. The Inhabitants of St. Dunstan's*, 4 B. & C. 686, 7 D. & R. 178, and *Place v. Fagg*, 4 M. & R. 277.

In *Wynn v. Ingleby*, it was held, that certain articles, consisting of set-pots, ovens, and ranges fixed up by the owner of a house, would go to the heir and not to the executor, and could not therefore be seized under a fi. fa. against the owner. In *Colegrave v. Dias Santos*, [138] in which there was a question whether stoves, closets, shelves, brewing vessels, locks, blinds, &c., passed to the purchaser of a house, upon a sale and conveyance of the house, the court said that some of the articles, viz. the stoves, cooking-coppers, mash-tubs, water-tubs, and blinds, might be removable as between landlord and tenant, but would not belong to the executor, but to the heir, and were, as between those persons, parcel of the freehold. In *The King v. The Inhabitants of St. Dunstan's*, Mr. Justice Bayley said that stoves, grates, and cupboards were parcel of the freehold, and though they might be removed by a tenant during his term, yet they would go to the heir, and not to the executor. And in *Place v. Fagg*, the property in question was the stones, tackling, and implements necessary for the working of a mill. There had been a mortgage of the mill; and it was held, that, by

that mortgage, the stones, tackling, and implements necessary to the working of the mill passed to the mortgagee.

And we may observe here, in reference to a point made by one of the learned counsel for the plaintiff, that at all events the verdict must be for the plaintiff for the upper mill-stone, that *Liford's case*, 11 Co. Rep. 50, citing *Wyston's case*, 14 H. 8, fo. 25 b., disposes of that point. The law is correctly stated in Amos on Fixtures, p. 257, where, in speaking of things constructively annexed to the freehold, he mentions a mill-stone, "which, though not annexed to the freehold, is yet essentially parcel of the mill."

We think, therefore, that, when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage-deed in the [139] mortgagee; and that, consequently, the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action.

The verdict, therefore, must be entered for the defendant.

Rule absolute (a).

MORRIS v. BARRETT. Nov. 15th, 1859.

[S. C. 29 L. J. C. P. 102; 1 L. T. 38; 6 Jur. N. S. 609.]

By a judge's order the debt and costs were to be paid by instalments of 2l. on the 25th of each month. The 25th happening to be a Sunday, the instalment was offered on Monday, and refused, and judgment was signed on the following day:—The court set aside the judgment, holding that the defendant had the whole of Monday to pay the money.

This cause having been referred, and 34l. having been found due from the defendant to the plaintiff, on the 25th of May last a judge's order was made in the following terms:—

"Upon hearing the attorneys or agents on both sides, and by consent, I order, that, upon payment of 34l., the debt and costs as agreed, in manner following, viz. 2l. on the 28th of May instant, 2l. on the 25th of June next, and 2l. on the 25th of every succeeding month until the whole is paid, all further proceedings in this cause be stayed: And I further order that, in case default be made in any or either payment as aforesaid, the plaintiff be at liberty to sign final judgment for the said sum of 34l., and issue execution for the amount unpaid, with costs of judgment, execution, &c."

The first and two following instalments were duly paid. The 25th of October, the day on which the fourth instalment became payable, being a Sunday, the defendant called at the office of the plaintiff's attorney on Monday the 26th, and offered to pay it, but was told [140] he was too late, and that judgment had been signed. No judgment, however, was signed until the following morning.

The defendant took out a summons to set aside the judgment, on the ground that under the circumstances he had the whole of Monday to pay the money, and that the judgment signed after the money was offered was irregular. The summons came on before Byles, J., at Chambers, who referred the matter to the court.

Holl now moved accordingly. The offer of the money on the Monday was in sufficient time. The case of money payable under a judge's order differs from the ordinary case of a contract between the parties for the payment of a sum on a given day. There is no case precisely in point: but there are several which shew that an act of the court is not to be intended to be done on the Lord's day. Thus, Sunday being the last of the four days for putting in bail, it was held that an assignment of bail taken on the Monday was premature: *Anonymous*, 1 Stra. 86; *Studley v. Sturt*, 1 Stra. 782; *Bullock v. Lincoln*, 1 Stra. 914. So, where by an award money is ordered to be paid on a Sunday, the party will not be attached if he pays it on the following day: *Hobdell v. Miller*, 6 N. C. 292, 2 Scott, N. R. 163, 165. [Erle, J. Generally, in all matters of procedure, if the last day falls on a Sunday, the party has the whole of

(a) On a subsequent day, it was intimated by the court that Mr. Justice Willes entertained serious doubts as to whether the articles in question were not chattels.

Monday to do the act.] The court will always act upon that general rule in matters relating to its own process. This is not like the case of a bill of exchange, which, by the law of merchants, falling due on the Sunday is payable on Saturday: *Tassel v. Lewis*, 1 Ld. Raym. 743. In *Rowberry v. Morgan*, 9 Exch. 730, where the plaintiff was held to be entitled to sign judgment and issue execution on a specially indorsed writ under the 27th section of the Common [141] Law Procedure Act, 1852 (15 & 16 Vict. c. 76), on Monday, the Sunday being the last day for appearance, the decision turned upon the precise language of the statute. [Crowder, J. Upon the same principle, we lately held in this court in a case of *Peacock, App., The Queen, Resp.*, ante, vol. iv., p. 264, that Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, s. 2, although it be the last day.]

Barnard shewed cause in the first instance. Whenever a person contracts to do an act on a Sunday, the doing of which on that day is not prohibited by any statute, as the exercise of his ordinary calling, or unless it be in a judicial proceeding, such as the service of a writ or other process, or a matter regulated by custom, as the payment of a bill of exchange, he is not excused from the performance of his contract by the accident of the day being Sunday. A contract is not the less a valid contract because it is embodied in a judge's order,—*Hookpayton v. Russell*, 10 Exch. 24; or, as was said by Parke, J., in *Wentworth v. Bullen*, 9 B. & C. 840, 850, "The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a judge." In *Rawlins, App., The Overseers of West Derby, Resp.*, 2 C. B. 72, 1 Lutw. Reg. Cas. 373, it was held, that, when the 20th of July falls on a Sunday, the service of a notice of claim on an overseer, under the 6 & 7 Vict. c. 18, s. 4, by leaving it at his place of abode on that day, is good service. A fair may legally be held on a Sunday (a). So, a contract of hiring made on a [142] Sunday between a farmer and a labourer, for a year, is valid: and a service under it confers a settlement: *The King v. Whitnash*, 7 B. & C. 596, 1 M. & R. 452. And, generally speaking, all contracts which are not within the 29 Car. 2, c. 7, must be performed on the Sunday, if so provided. In *Hobdell v. Miller*, the court might well refuse to grant an attachment for non-payment of money pursuant to an award on Sunday, provided the money was tendered on the Monday, and the party to whom the money was to be paid sustained no damage. [Erle, J. If money be payable on Monday, may not the debtor tender the amount, with nominal damages, on Tuesday? Would not that be a good plea in bar?] There was no regular tender here on the Monday. The judgment is regular, and there is no ground for setting it aside.

Holl, in support of his rule, was stopped by the court.

ERLE, C. J. I am of opinion that this rule must be made absolute. I desire not to be understood as giving any decision as to the rights of parties under a contract: but, in arriving at the conclusion I come to, I seek only to give effect to the duty which the law imposes upon a party who is directed by a judge's order [143] to pay money. Here, the proceedings were stayed on condition of the defendant's paying 2l. on the 25th of every month. The fourth instalment became due on the 25th of October. That day happened to be a Sunday. The defendant was ready and offered to pay it on the Monday; but the plaintiff, conceiving that the offer came too late, declined to receive it, and on the following day signed judgment for the balance due. Confining myself to the judge's order and the remedy and duty thereon, and to what ought to be the fair meaning and understanding of the instrument, I find no authority for saying that the defendant was bound to search for his creditor and pay him the money on the Sunday. The statute of Charles and the cases upon it do not apply. But I think there is abundance of analogy to be found in the provisions of the Common

(a) "By the stat. 27 H. 6, c. 5, a fair or market shall not be held upon principal feasts, Sundays, or Good Friday (four Sundays in harvest excepted), upon forfeiture of all goods sold to the lord of the franchise. And he that has no day for it but only such festival days, shall hold his fair or market within three days before or after, proclamation being first made; and he that has other days sufficient shall hold it the full number of days allotted for his market or fair, such festival days, &c., excepted. But a prescription to hold a fair 29th September is good, though it may be a Sunday; for, a fair upon that day is not void, though the goods then sold shall be forfeited by the stat. 27 H. 6, c. 5: *Comyns v. Boyer*, Cro. Eliz. 485.

Law Procedure Act and in the general practice of the courts, under which, when the last of a given number of days for the doing of an act falls on a Sunday, as a general rule the party has the whole of Monday to do it in. I therefore think that the defendant in the present case well enough performed his duty by being ready to pay the money on the Monday, and consequently that the judgment, which was unauthorized by the order, should be set aside.

CROWDER, J.(a). I am of the same opinion. It seems to me that the reasonable construction of the judge's order is, that the defendant was not bound to pay the instalment on the Sunday. If it had been present to the mind of the learned judge who made the order that the 25th would happen to be a Sunday, he certainly would not have made the order for the payment of it on that day. I think the defendant did all he was bound to do by offering the money on the Monday; and that it [144] was very sharp practice to sign judgment. This is not like the case of an ordinary contract; and I desire not to be understood as at all interfering with any of the cases which have been referred to with reference to contracts. The cases upon the construction of statutes are also founded upon an entirely different consideration. In short, none of the authorities cited by Mr. Barnard in any degree support his argument. It seems to me that the reasonable construction of the judge's order, and that which must have been the intention of the learned judge, is, that, if the day named for making the payment should happen on a Sunday, it should be considered a sufficient compliance with the order if the money was paid on the following day.

BYLES, J. I am entirely of the same opinion. I abstain from expressing any opinion beyond what the necessity of the case calls for. This is not a case in which we are called upon to construe a statute or a mercantile usage, or an ordinary contract. But the question is, what is the reasonable construction of a judge's order for the payment of instalments of money on given days. I think, that, if one of those days falls on a Sunday, there is no rule of law and no principle which calls upon us to hold that it must be paid on that day or on the day before. It follows, therefore, as a necessary consequence, that a payment on the day after is in time.

Holl against costs.

ERLE, C. J. This being entirely *res nova*, I do not think the plaintiff should be visited with costs.

Rule absolute, without costs.

[145] DINGLE v. HARE. Nov. 15th, 1859.

[S. C. 29 L. J. C. P. 143; 1 L. T. 38; 6 Jur. N. S. 679.]

In an action for a breach of warranty on the sale of goods which the buyer has sold again,—Held, that the proper measure of damages was, the difference between the real market value at the time of the sale and the contract price.—Quære, whether the buyer might not have been entitled to recover a sum fairly and reasonably paid by him as compensation to a third person to whom he had upon the faith of the defendant's warranty sold a portion of the goods?

This was an action for a breach of warranty on a sale of goods.

The declaration stated, that, on the 1st of February, 1857, the defendant agreed to sell and sold to the plaintiff, and the plaintiff, at the request of the defendant, bargained for and agreed to buy and bought of the defendant 20 tons of superphosphates, guaranteed by the defendant to contain 30 per cent. of phosphate of lime, at the price of 5l. 5s. per ton, free on board, payment to be made by the plaintiff's acceptance at three months' date, or in cash on delivery, less 1l. 5s. per cent.; and that, although the defendant delivered to the plaintiff certain superphosphates as and being the article so bargained for as aforesaid, yet the said superphosphates did not contain 30 per cent. of phosphate of lime, but only a far smaller proportion thereof, whereby the same was of much less value to the plaintiff than it would otherwise have been: Averment, that the plaintiff, relying on the due fulfilment of the said bargain by the defendant, and not knowing that the said superphosphates did not contain 30 per cent. of phosphate of lime, and believing, and having reason to believe the contrary,

(a) Williams, J., was engaged in the Divorce Court.

re-sold a portion thereof to one Joseph Robins as and being such superphosphates containing 30 per cent. of phosphate of lime, and that, afterwards, and before the commencement of this action, the plaintiff was compelled, by reason of the premises, to compensate the said Joseph Robins for and in respect of the said deficiency of phosphate of lime in the said superphosphates so sold to him as aforesaid.

The defendant pleaded,—that he did not contract [146] with the plaintiff as alleged,—secondly, that the said superphosphates delivered by the defendant to the plaintiff as in the declaration mentioned did contain 30 per cent. of phosphate of lime, according to the said contract. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Easter Term. The facts were as follows:—The plaintiff and defendant were both dealers in artificial manures—the former in Cornwall, the latter in London. In the year 1856, the plaintiff contracted with one Wilson, who was a commission-agent, travelling about the country selling artificial manures, and who acted in that capacity for the defendant and also for a company called “The Blood-Manure Company,” for the purchase of a quantity of blood-manure. Finding the quality of this article not satisfactory, the plaintiff complained to Wilson, and expressed a desire to be released from his contract, whereupon Wilson wrote to him, as follows:—

“Mr. J. H. Dingle.

“February 4th, 1857.

“Dear Sir,—In reply to your favor of the 2nd instant, I can only refer you to my previous letters: but I cannot understand how it is that you are the whole and single exception in complaining of the blood-manure. I am confident there must be some mistake in the matter, or it has not been properly applied. However, as you do not want the manure, leave the matter with me, and I will try to get out of it for you. Will you take 20 tons superphosphates instead! Guarantee 30 per cent. phosphate of best quality, and just the same as I sent you last year. As a matter of course, for my own sake, to secure your orders for another season, I should send you an article inferior to none, and which on trial you should find equal to Lawes's or any other. Now, this is truth. Price per ton 5l. 5s. free on board, three months' acceptance, or [147] cash less one and a quarter. I will, if I can, send you ten tons of bone phosphate to Plymouth, with Mr. Frehane's and Mr. Bishop's cargo: but I cannot promise you, as I said before, having so many parties wanting it, and being almost oversold. I shall try to manage it for you, however. We have no testimonials. I enclose average analysis, as you desire: and, awaiting your favors and commands, &c.

“G. H. WILSON.”

The plaintiff replied to this letter, again desiring to be released from the contract as to the blood-manure, but saying nothing about the superphosphates, whereupon Wilson wrote him again, as follows:—

“J. H. Dingle, Esq.

“February 10th, 1857.

“Dear Sir,—By your letter you seem to entirely mistake me. I cannot release you from the blood-manure but on the terms named, viz. that I send you 20 tons superphosphates instead; and then I must take and pay for the blood-manure myself, and sell it to another party if possible. To finish the matter, I have put you down for 20 tons of superphosphates (and so release you from the blood-manure) at 5l. 5s. per ton, free on board London. The superphosphates will be 30 per cent. of lime, same as the quality Mr. Bishop bought in London. The quality I shewed you, containing 25 per cent. soluble, and 10 per cent. insoluble, was 5l. 10s. per ton free on board, and is now 5l. 15s. per ton free on board; and, if 100 tons were taken, the price would not be a fraction less. If I can, I will send you bone-manure or phosphate, or as much as I can, you may rely on; but, if you do not get any, do not be disappointed. You should secure such goods when you have a chance, in future.

“G. H. WILSON.”

[148] In reply to this letter, the plaintiff wrote to Wilson, accepting his offer: and, on the 16th of February, 1857, Wilson again wrote to him, as follows:—

“J. H. Dingle, Esq.

“February 16th, 1857.

“Dear Sir,—Your favor of the 12th has been forwarded to me, and reached me here; and, in accordance therewith, 20 tons of the superphosphate of lime, from my

friends Messrs. Phillip Hare & Co., 36 Mark Lane, London, shall be sent you in lieu of the blood-manure. Also, all exertions shall be made to ship you 10 tons of the bone-phosphate with the cargo coming to Looe or Plymouth. I shall be happy to receive your promised orders for grease. Awaiting which, I am, &c.

"G. H. WILSON."

The plaintiff again wrote to Wilson asking for an analysis of the manure sent, and accordingly an analysis was forwarded to him: but, as he could not understand it, he wrote for an explanation and for more particularity as to the amount of soluble phosphate the manure would contain. To this demand Wilson replied as follows:—

"J. H. Dingle, Esq.

"March 4th, 1857.

"Dear Sir, —In reply to yours of the 2nd ult., you have the analysis of the superphosphates. The soluble phosphate will be 16 to 17 per cent. I repeat what I before said, I believe a better article was never sold in the county of Cornwall, either manufactured at Plymouth or elsewhere.

"G. H. WILSON."

In order to perform the contract thus made for him by Wilson, the defendant purchased twenty tons of superphosphates in the market unwarranted, and [149] shipped them to the plaintiff, at the same time writing to him as follows:—

"J. H. Dingle, Esq.

"36 Mark Lane, April 24th, 1857.

"Dear Sir, We have at last the pleasure to hand you bill of lading and invoice of the 20 tons superphosphate of lime shipped per 'Ann' and 'Elizabeth,' which sailed this morning. We also inclose draft for acceptance for the amount, which we shall feel obliged by your doing the needful with, and returning in course of post.

"PHILLIP HARE & Co."

The plaintiff accepted and duly paid the draft. On the arrival of the manure, it was found that ten tons of it consisted of a grey mixture, which turned out to be very good, and of ten tons of a black mixture. The plaintiff sold the whole 20 tons to different farmers, realizing a profit upon the sale of 30s. per ton. Of the black mixture he had sold 2 tons to one Robins, who used it on his farm: but finding it to be comparatively worthless, Robins applied to the plaintiff and threatened to sue him for compensation. Samples of the black mixture were found on analysis to contain only 7 or 8 per cent. of phosphate of lime, and to be worth no more than 2l. 2s. a ton. The plaintiff accordingly paid Robins 20l. The purchasers of the other 8 tons of the black mixture made no complaint. A correspondence ensued between the plaintiff and the defendant, in the course of which the latter denied Wilson's authority to warrant the manure.

The plaintiff thereupon brought this action to recover the difference between the value of the 10 tons of the black mixture and the price he had paid for it, and also the 20l. which he had been compelled to refund to Robins.

[150] On the part of the defendant it was insisted that he was not bound by the warranty given by Wilson: and that the transaction was so mixed up with the contract with the Blood-Manure Company that there was no consideration for the warranty as between the plaintiff and defendant, even assuming that Wilson had authority to warrant: and the defendant, who was called, stated that he had expressly desired Wilson not to warrant the article, as it was not warranted to him; and that it was not usual in the market to sell these manures with a warranty. Wilson was not called, nor was any reason assigned for his absence.

The plaintiff's witnesses, on the other hand, swore that it was the invariable practice to warrant the quality of the article, and that no merchant bought manure without a warranty.

In his summing-up the learned judge told the jury, that, if it was Wilson's practice to sell these articles with a warranty, and the defendant knew it, the mere fact of his having on the particular occasion forbidden him to warrant would not relieve him from the consequences. As to the damages, he told them, that, if the defendant knew that the plaintiff was a merchant dealing in these articles and buying for the purpose selling them again, any loss he might sustain upon such re sale, by reason of their

bad quality or of a breach of warranty, might fairly be said to be a damage which was in the contemplation of the parties at the time of making the contract; that, if they thought the settlement of Robins's claim was a fair and reasonable thing, the defendant was bound to make good the loss; and that, as to the 8 tons as to which the purchasers had made no complaint, and possibly might never make any, the plaintiff was yet entitled to claim compensation, and to recover reasonable damages in respect of their not being of a fair merchantable quality and according to the warranty.

[151] In answer to specific questions put to them by the learned judge, the jury found,—first, that there was in fact authority given by the defendant to Wilson to warrant,—secondly, that these manures ordinarily were sold with a warranty,—thirdly that the ten tons of the black mixture did not correspond with the warranty,—fourthly, that they were merchantable, that is, of some value as manure, though not worth 5l. 5s. per ton. And they assessed the damages at 31l. 10s.,—being the difference between the value of those ten tons, viz. 2l. 2s. per ton, and the price paid for them.

O'Malley, Q. C., in Trinity Term last, obtained a rule nisi to enter a verdict for the defendant, or to reduce the damages by 20l., on the grounds that there was no evidence in support of the first issue; that, upon the fair construction of the contract, it ought not to be held that Wilson had no authority to make the contract stated in the declaration; and that the damages were not warranted by the evidence.

Huddleston, Q. C., and Prentice, now shewed cause. The evidence justified the jury in finding that Wilson warranted the article in question, and that he had authority so to do. It was proved that no man will buy this sort of commodity without a warranty or an analysis. In Addison on Contracts, 4th edit., 633, the liability of the principal for a warranty given by his agent is thus stated,—“If the principal sends his horse by the hands of an agent to market to be sold, and the agent warrants the horse to be sound, the principal is liable to an action upon the warranty at the suit of the purchaser, although he gave no express authority to the agent to warrant the horse: *Alexander v. Gibson*, 2 Campb. 555; *Helyear v. Hawke*, 5 Esp. N. P. C. 71. It has been said, that, if the principal gives his agent [152] express orders not to warrant, and he nevertheless does warrant, the principal is not responsible on the warranty, because the agent was not acting within the scope of the authority given him. But it is impossible for the buyer to know whether the agent is or is not exceeding the private instructions of his principal; and it can hardly be contended that a principal is to be allowed to have the benefit of the warranty, and at the same time to say that his agent had no power to make it: Pothier, *Traite des Obligations*, No 79. If, in consequence of the representation or warranty so made, he has obtained the price of a sound horse for an unsound horse: if he has obtained 60l. for an animal which is not worth 10l., is it to be supposed for one moment that he can be permitted to keep the 50l. any more than if he had been the actual seller of the animal himself, and had made the warranty with his own mouth? It was his own fault, as Lord Holt has observed, to repose the trust in unworthy hands, and he shall not be allowed to derive a profit from the misconduct of his own servant, to the prejudice of the innocent purchaser. ‘I very much doubt,’ observes Lord Kenyon, C. J., ‘the case alluded to by the defendant’s counsel, of the servant warranting the horse against the direction of his master (a); to such a case I think the maxim *respondet superior* applies; and the principal has his remedy against his agent for his misconduct.’ *Fenn v. Harrison*, 3 T. R. 757, 760; *Pieker-[153]-ing v. Busk*, 15 East, 38. So, also, observes Lord Abinger (*Cornfoot v. Fowler*, 6 M. & W. 358, 381), ‘in the case of a servant employed to sell a horse, but expressly forbidden to warrant him sound, is it to be contended that the buyer, induced by the warranty to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound is he not entitled to rescind the contract, and recover back the purchase-money from the principal?’ The arrangement between the plaintiff and Wilson as to the return of the blood-manure was totally distinct from the contract now in question. The proposal to rescind that contract might have operated as an

(a) “If a servant selleth a horse with warranty, it is the sale and contract of the master, but it is not the warranty of the master unless the master giveth him authority to warrant it; for, a warranty is void which is not made and annexed to the contract; but there is the warranty of the servant, and the contract of the master. But, if the master do agree with it after, it shall be said that he did agree to it ab initio.” Per Dodderidge, J., in *Seignior & Walmer’s case*, Godb. 360.

inducement to the plaintiff to purchase the superphosphates; but it was no part of the consideration: and if it had been, it would have made no difference: it was not necessary for the plaintiff to shew that the whole consideration was moving from him; it is enough that he has a separate interest in the contract in respect of which he sues, —*Jones v. Robinson*, 1 Exch. 454. As to the damages,—The evidence was that the plaintiff was a dealer in artificial manures, buying for the purpose of selling again: and this was known to the plaintiff: for, there had been previous dealings between the parties through the agency of Wilson. The true rule is that laid down by the court of Exchequer in *Hadley v. Barendale*, 9 Exch. 341, 354,—“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach [154] of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.” Here, the defendant must have reasonably contemplated that the plaintiff would incur damage from the re-sale of the article so warranted to him. The doctrine thus laid down in *Hadley v. Barendale* has been recognised and acted upon in numerous cases: see *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Ford*, 28 Law J., Q. B. 178. [Crowder, J. And *Portman v. Middleton*, ante, vol. iv., p. 322.] The jury were satisfied that the 20l. paid to Robins was a fair and reasonable compensation for the damage he had sustained. They also found that there was a breach of warranty: and, the article delivered being proved to be worth only 2l. 2s. a ton, they might well think the plaintiff entitled to recover the difference between that sum and the price paid for the superphosphates on the faith of their being of the quality represented.

O'Malley, Q. C., and Lewis, in support of the rule. It may be that an agent employed to sell goods has authority to do all that is usually done by agents so employed, even to the extent of warranting the articles he sells. But here there was no evidence that Wilson had any authority express or implied to warrant: the defendant did not know of the contract at all until long after it was entered into; and there never was any communication between him and the plaintiff on the subject. The doctrine in Addison on Contracts as to the liability of a master for an unauthorised warranty of a horse by a servant entrusted to sell it, has been long exploded. The distinction between a general and a particular agent is put by Lord Eldon, C., in *The Bank of Scotland v. Watson*, 1 Dow. P. C. 40, 44,—“If,” says his Lordship, “Justice Buller had a horse to sell, and thought he would be bound by the warranty of his servant, though desired not to warrant, he would have gone to the market himself to see his horse sold. But the judges appeared to have made a distinction between horse-dealers and others. If Tattersall sent his servant to sell, and the servant, contrary to his instructions, warranted, Tattersall might be bound; but another person (not a horse-dealer) would not be bound by the unauthorised warranty of either Tattersall or his servant, or of his own servant, he having only given a particular authority.” The alleged warranty here is of a very special description, and is not one falling within the scope of the ordinary duty of an agent. The contract was not made on behalf of the defendant alone: but it was one in which the Blood-manure Company had an interest. It could not be enforced in its entirety against the defendant, and therefore it cannot be such a contract as Wilson could be supposed to have authority to enter into on behalf of the defendant: and there is nothing to prevent a man from dealing with an agent as a principal, if he so pleases. There was no such recognition of the acts of Wilson as to bring the case within the principle as to subsequent ratification by a principal of the acts of his agent, as laid down by Bayley, J., in *Saunderson v. Griffiths*, 5 B. & C. 909, 912, 8 D. & R. 643, and by Parke, J., in *Vere v. Ashby*, 10 B. & C. 288, 298. Then, as to the damages,—admitting the authority of *Hadley v. Barendale* to the fullest extent: it is submitted that it has no application here. The contract was for 20 tons of superphosphates. A portion, consisting of 10 [156] tons, was admitted to be of unexceptionable quality: and no complaint has yet been made

of 8 tons more. [Byles, J. Possibly the publicity given to this case may stir up other complainants.] Robins, to whom the plaintiff has sold two tons, makes a claim for compensation. There was no proof that the manure was warranted to him: all that was proved is, that Robins complained of the quality, and the plaintiff paid him 20l. Surely that cannot be said to be a damage such as would naturally flow from the defendant's breach of contract, or such as could have been in the contemplation of the parties at the time of making the contract.

ERLE, C. J. I am of opinion that this rule should be discharged. I think the letters of Wilson constituted a contract on behalf of the defendant to supply the 20 tons of superphosphates, and a separate contract on Wilson's own behalf, to take back the blood-manure and to deal with it on his own account. Nothing can be clearer to my mind than that Wilson intended to bind himself personally as to the blood-manure. That being so, the material question to be considered is, whether Wilson had authority from the defendant to guarantee "30 per cent. phosphate of best quality,"—that is, whether he had authority to warrant the superphosphates to contain 30 per cent. of phosphate of lime. The strong presumption is, that, when a principal authorises an agent to sell goods for him, he authorises him to give all such warranties as are usually given in the particular trade or business: and here the jury have found that the warranty was one which was usually given in this particular trade. Besides that there was abundant evidence of authority to warrant to go to the jury. The order having been communicated to the defendant, the latter goes into the market to procure the means of executing it. Some [157] of the terms of the bargain were certainly communicated by Wilson to the defendant,—the terms of payment for instance: and the probability is that all had. And it is not unworthy of remark, that Wilson, who made the contract, was not called. There was abundant evidence for the jury; and I see no ground for quarrelling with the conclusion they came to. As to the damages, the question argued before us was, whether, in estimating the damages the plaintiff was entitled to receive for the defendant's breach of warranty, the jury might take into consideration the compensation paid by the plaintiff to Robins, and the possible future claims of the other persons to whom the plaintiff had sold the inferior article. The general principle is, that a vendee of goods is responsible for the damages resulting as the natural and ordinary consequence of his breach of contract, by supplying an inferior article. The person with whom he contracts, relying upon the thing being as represented, sells it with a like representation, and thereby incurs a liability to his vendee whom he has through the fraud of the original seller misled. And every one knows the injury done to the character of a merchant in the eyes of his customers by a transaction of this sort. If, relying upon Wilson's guarantee that the article in question contained 30 per cent. of phosphate of lime, the plaintiff sold it with a like representation, and it turned out to be false, his customers would undoubtedly have a right to call upon him for compensation; and I think that would be a damage naturally flowing from the defendant's breach of warranty. But it is not necessary to rest our decision upon that ground here. There was evidence that the superphosphates, for which the plaintiff had paid 5l. 5s. per ton upon the faith of Wilson's guarantee, was in reality worth only 2l. 2s. per ton. The jury gave by way of [158] damages the difference between the real value and the price paid for the article: and I think there was abundant evidence to justify their verdict.

CROWDER, J.(a). I also am of opinion that this rule should be discharged. First, as to the contract. That is evidenced by the letters of Wilson, and principally from that of the 4th of February. It is said that this was Wilson's contract. But Wilson made the contract with the plaintiff on behalf of the defendant, and the goods were sent directly from the defendant. The defendant sent an invoice apparently in the usual course, and drew upon the plaintiff for the amount. Wilson clearly made the contract as agent for the defendant. Then it is said, that, assuming that Wilson was the defendant's agent, he had no authority to warrant the quality of the article. There was a conflict of evidence at the trial as to whether it was usual to warrant the quality of these artificial manures: the jury found that it was. That being so, and Wilson being the authorised agent of the defendant to sell for him, the presumption is that he was authorised to do what was usual and necessary: and there is nothing to take this case out of the ordinary rule. I think there was ample evidence to

(a) Williams, J., was engaged in the Divorce Court.

warrant the conclusion at which the jury arrived, more especially because Wilson was not called. As to the damages, it is insisted that the 20l. paid by way of compensation to Robins, to whom two tons of the mixture had been sold, was not the natural and necessary result of the defendant's breach of contract. I do not think it necessary to determine that point, though, if it were, I should feel little hesitation in holding that this was not too remote a damage. But that part of the evidence to which Mr. Prentice referred was enough to satisfy the jury that [159] the value of the manure was less by the amount they have given than the price paid by the plaintiff for it: and upon that ground their verdict may be sustained.

BYLES, J. I am of the same opinion. The fair result of the letters is, that the contract for the rescission of the bargain for the blood-manure (which Wilson had made as agent for the Blood-Manure Company), and that for the sale of the 20 tons of superphosphates, were two distinct and independent contracts. Assuming, however, that it was one contract,—a sort of trilateral contract, still I think the plaintiff might well maintain this action. As to the authority of Wilson: it is contended on the part of the defendant that Wilson was not his agent. He, however, adopted the contract in some of its terms; and it may fairly be presumed that the whole were communicated to him. He stated at the trial that he had expressly forbidden Wilson to warrant; and he swore that Wilson did not communicate the fact of the warranty to him. The jury probably did not believe him: and Wilson was not called. But, when the jury found that it was usual to sell these artificial manures with a warranty, the nice distinctions as to the extent of the agent's authority became quite immaterial. An agent to sell has a general authority to do all that is usual and necessary in the course of such employment. If it was usual, therefore, to warrant the quality of the article in question, even though Wilson had no express authority from the defendant to warrant, if he had a semblance of authority communicated to him by his principal, upon which those who dealt with him had a right to rely, his principal is bound. I think there was abundant evidence of such authority. Then, as to the damages,—I told the jury, in substance, that, if the defendant sold the manure knowing that it was to be [160] re-sold by his customer, he would be responsible for any loss or damage resulting to his vendee from his reliance upon the warranty or upon the quality of the article sold. The jury, however, took another and perhaps a more satisfactory course: for, they gave the plaintiff the difference between the price paid for the 10 tons of inferior manure and the sum proved to be its true market value. The verdict, therefore, is in this respect quite satisfactory.

Rule discharged.

JOSEPH SEWELL, *Appellant*: WALTER TAYLOR, *Respondent*. Nov. 14th, 1859.

[S. C. 29 L. J. M. C. 50; 6 Jur. N. S. 582.]

A private house and garden where a sale by public auction takes place is for the time a "place of public resort," within the 5 G. 4, c. 83, s. 4.

This was a case stated by justices for the opinion of the court, pursuant to the statute 20 & 21 Vict. c. 43:—

On the 4th of April, 1859, Joseph Sewell was brought in the custody of Walter Taylor, a constable for the borough of Congleton, in the county of Chester, before E. H. S. and E. L. M., two of the justices of the said borough, and charged, "for that he, on the 30th day of March, 1859, being a suspected person or reputed thief, did frequent a place of public resort in the said borough, with intent to commit felony, contrary to the provision of the Vagrant Act, 5 G. 4, c. 83, s. 4." The prisoner was remanded twice; and the examination was concluded on the 14th of April, 1859.

The justices found it proved that the prisoner was a suspected person, and that, on the 30th of March, he was at a sale of household furniture, books, pictures, &c., held at a place called Moody Hall, in this borough: that such sale was called by public placards posted in [161] the town and neighbourhood several days previously to its being held; that at least three hundred persons were there congregated: that the sale was by public auction: that it was held, on two consecutive days, in a house and garden adjoining one of the public streets of this borough: and that the prisoner was there with intent to commit a felony.

On behalf of the prisoner, it was contended that private premises, on which a sale by public auction was being held, did not come within the meaning of the term "place of public resort," in the 4th section of the act; and that a place of public resort meant a place to which the public were in the habit of resorting, and not a mere special assemblage or collection of persons for a purpose which might never occur there again.

The justices decided that there was a difference between a place of public resort and a place of common resort; that the above-mentioned place of sale was a place of public resort to all intents and purposes for the time being, for that the public had full and free access thereto, and passed and repassed at will to and from the said sale; and that, as many persons did actually resort thereto, it was such a place as was intended to be protected by the section. They accordingly convicted the prisoner of being a rogue and vagabond within the intent and meaning of the 4th section of the said statute, and ordered him to be committed to the house of correction at Nether Knutsford, in the county of Chester, with hard labour, for two calendar months.

Morgan Lloyd, for the appellant. The question is whether the house and garden mentioned in the case constituted a "place of public resort" within the 4th section of the 5 G. 4, c. 83. That section enacts, amongst other things, that "every suspected person or [162] reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony," "shall be deemed a rogue and vagabond, within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months." It is submitted that a "place of public resort" means a place which is in its nature public,—permanently public and open to resort at all times, and not a place like this, which was a private house, to which the public were merely invited on the special and particular occasion of the sale. Such an accidental circumstance cannot alter the character and legal description of a place. In *Ex parte Brown*, 21 Law J., M. C. 113, Patteson, J., intimated an opinion, contrary to the view of the rest of the court, that the offence under this statute can only be committed by frequenting a street or highway leading to a canal, river, dock, &c., or adjacent to a place of public resort. The court of Exchequer, in *Ex parte Jones*, 21 Law J., M. C. 116, adopted the opinion of Patteson, J., and held that the statute does not render any suspected person or reputed thief who may be found frequenting a street with intent to commit felony liable to be punished as a rogue and vagabond, unless the street leads to some river, canal, &c., or is itself a place of public resort, or is adjacent to a place of public resort; and therefore, where a commitment stated "that A., being a suspected person, did on, &c., [163] at, &c., in the county of M., unlawfully frequent a certain street, to wit, a street called Regent Street, with intent to commit a felony," it was held that she was entitled to be discharged on a writ of habeas corpus. Pollock, C. B., there says: "There is nothing in this commitment to shew that this street called Regent Street is a place of public resort; it may be a private street; and, if it be not a place of public resort, in order to constitute it an offence for a suspected person to frequent it, it must be stated that it leads to that which is meant to be protected, that is to say, a place of public resort. We are bound, when the liberty of the subject is concerned, to take care that the great powers which are intrusted to magistrates by this act are not exceeded." In *Ex parte Daris*, 26 Law J., M. C. 178, a platform of a railway station was held to be a place of public resort within the statute; but that, like a church or a place of public theatrical or musical entertainment, is a place to which the whole public have a right to resort at proper times. In *Duggs, App., Douglas, Resp.* 28 Law J., M. C. 193, a booth used as a theatre by strolling players was held not to be "a house or other place of public resort for the public performance of stage-plays," within the meaning of the statute 6 & 7 Viet. c. 68, s. 2. This house and garden surely cannot be considered more a place of public resort than the booth was there.

M'Intyre, for the respondent, was not called upon.

ERLE, C. J. I am of opinion that there is no ground for this appeal. It seems to me that the magistrates were quite right in their decision, and that, at the time when the appellant was apprehended, the place he was found in was "a place of

public resort" within the meaning of the statute. I see nothing in the language [164] of the act to require that the place shall be a permanent place of resort all the year round. The object of the provision is the protection of large assemblies of persons from the depredations of thieves and pickpockets; and the permanent character of the assembly appears to me to be quite immaterial. The places are made protected places whilst being used for public resort. I take that to be the test. Suppose a race or a cricket-match to take place in a meadow, to which the public were invited to come, would not that be for the time a place of public resort? I think it would, and that the streets immediately adjoining would be "streets, highways, or places adjacent thereto" within the fair meaning of the act, and therefore for the time being protected places. It would, as it seems to me, be a very narrow construction of the act to hold that it is confined to places which are permanently open to the public. If that were the true construction of the act, it might be said that a theatre which is only open to the public at certain hours in the evening, or a church which is only open during divine service, is not a "place of public resort" within it. Nobody would ever venture to suggest that. I think it quite clear that this place was at the time a place of public resort, and therefore that the conviction was right.

CROWDER, J.(a). I am of the same opinion. The words of the statute are very large. A great number of places are enumerated, and the words must be taken to extend to every place where the public do resort, and are not necessarily to be confined to places which are always or generally places of open and public resort.

BYLES, J. It seems to me also that the construction [165] which has been put upon the act by my Lord and my Brother Crowder is clearly the true one. None of the places named in the act are necessarily places of permanent public resort. The place where this person was apprehended was a place which at the time was resorted to by the general public by invitation. It is clearly within the mischief of the act.

Conviction confirmed.

SICKENS AND ANOTHER v. IRVING AND OTHERS. Nov. 4th, 1859.

[S. C. 29 L. J. C. P. 25; 6 Jur. N. S. 200.]

An agent at a foreign port to whom a ship is addressed for loading under a charter-party, has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo.

This was an action for not loading a cargo of salt as per charterparty.

The first count of the declaration stated that the defendants agreed by charter-party that the plaintiffs' ship "Louise Roffelleine," then at the Texel, should with all convenient speed sail and proceed to Mayo (Cape de Verde), having liberty to take cargo to St. Vincent's via Swansea, or so near thereto as she could safely get, and that the defendants' agents should there load her in regular turn as customary with a full and complete cargo of salt in bulk, to be brought to and taken from alongside at merchants' risk and expense, which she should carry to Monte Video for orders to discharge there or at Buenos Ayres: Orders to be given within twenty-four hours after arrival, or so near thereto as she could safely get, and deliver on being paid freight as follows, that is to say, 27s. 6d. per ton of 20 cwt. of salt delivered, in full of all port-charges, dues, and pilotage: the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever [166] during the said voyage always excepted: The freight to be paid on right delivery of cargo, in cash for ship's use, and the balance by good and approved bill on London at sixty days sight: And it was thereby agreed that 20 tons per working day were to be allowed the defendants, if the ship should not be sooner dispatched, for discharging the salt, and ten days on demurrage over and above the said lay days, at 5l. per day: Averment, that the plaintiffs did all things necessary on their part, and all things were done to entitle them to have the agreed cargo loaded on board said ship at Mayo, and that the time for so doing had elapsed: Breach, that the defendants and their agents made default in loading the salt at Mayo according to the terms of the charterparty.

(a) Williams, J., was engaged in the Divorce Court.

The declaration also contained counts for freight, hire, and demurrage of ships, and a count for moneys found due upon accounts stated.

Plea, to the first count, that the said ship did not stay and continue at Mayo until it was her regular turn as customary to be loaded, as in the declaration mentioned ; and, to the residue of the declaration, never indebted.

The plaintiffs took issue upon both pleas. And, for a further replication to the first plea, said that the said ship was ready and willing to stay and continue at Mayo until loaded, pursuant to the charterparty, but that the defendants' agents, before any breach of such charterparty by the plaintiffs, informed the captain of the ship that they had no salt for him, and that they should not be able to load the said ship with salt according to the said charterparty ; that the defendants' agents then discharged and released the said ship and captain from the necessity of staying and continuing at Mayo any longer, and requested him to sail away from Mayo without waiting for the agreed cargo, and [167] to proceed to another port, to wit, the island of Boa Vista, for a cargo of salt, which the said agent promised to ship there ; and that the captain thereupon did sail away accordingly, and did proceed to the said port, and did ship there the said cargo of salt. Upon this replication, the defendants joined issue.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term. The facts were as follows :—

The plaintiffs were ship-owners at Amsterdam : the defendants merchants in London. The action was brought to recover damages for not loading a cargo of salt on board the plaintiffs' vessel the "*Louise Roffelliene*," pursuant to the charterparty declared on, which bore date the 1st of January, 1857. At the time the charterparty was entered into the ship was in the Texel, whence she shortly afterwards sailed for Swansea, arriving there on the 17th of January, and took in her outward cargo. At Swansea the captain received orders from the charterers to proceed to Mayo, one of the Cape de Verde Islands, and address himself to their agents, Messrs. Naure & Pinto, for a cargo of salt, with which he was to proceed to the River Plate, and wait orders for discharge at Monte Video from Messrs. Getting, of Buenos Ayres.

The vessel arrived at Mayo on the 22nd of March, and the captain applied to Naure & Pinto for a cargo of salt, pursuant to his instructions. The substance of what took place at that interview was thus stated in the examination of the captain before one of the masters :—"Mr. Pinto said there was not salt in the island of Mayo for me, and that he should not be able to load my ship in any reasonable time, as there were so many ships (I think about twelve) waiting for salt, whose turn it would be to load before me. He did not ask me to wait, but told me to go off to Boa Vista, another of the [168] Cape de Verde Islands, about eighty or one hundred miles distant, and not in my course from Mayo to Buenos Ayres. I said I did not like to go there unless he gave me security. I again asked for a cargo of salt ; he again said there was no salt there. I did all I could to get salt there, but could not get any. I said I would go to Boa Vista, if he would give me a guarantee : and he gave me this,"—producing it.

The captain accordingly proceeded to Boa Vista, Pinto going with him. He there took on board 350 tons of salt, for which he signed bills of lading, and proceeded therewith to Monte Video, where he received orders from Messrs. Getting to go to Buenos Ayres, at which place he arrived on the 5th of June.

It was proved that Boa Vista salt was a very inferior and almost unsaleable article. The charterers, as soon as the transaction came to their knowledge, repudiated it altogether.

On the part of the plaintiffs it was contended that the replication was proved,—that there was a breach of the charterparty when the charterers' agents, Naure & Pinto, refused to furnish a cargo at Mayo, and that, whether there was or was not an absolute refusal, Naure & Pinto, as agents of the charterers, had an implied authority to substitute Boa Vista as the port of loading for Mayo, or, at all events, the captain was warranted in assuming that they had such authority.

The learned judge ruled that Naure & Pinto had no express authority to vary the contract by substituting a different place of loading, and that none could be implied ; and he left it to the jury to say whether Naure & Pinto had absolutely refused to load a cargo of salt at Mayo, or whether they would not rather imply from the conduct of the parties that there had been a mutual agreement between them and the

cap-[169]-tain to go to Boa Vista rather than wait the ship's turn at Mayo, and so that there had been no breach.

The jury returned a verdict for the defendants.

J. Wilde, Q. C. (with whom was Honynman), now moved for a new trial on the grounds of misdirection and that the verdict was against the evidence. There was a clear breach of the charterparty the moment the charterers' agents informed the captain that they had no cargo for him. The Lord Chief Justice, therefore, was clearly wrong in putting it to the jury in the alternative,—was there a breach or a substituted agreement? [Erle, C. J. I left it to the jury to say whether the charterers' agents had broken the charterparty by an absolute refusal to supply a cargo of salt at Mayo, or whether they and the captain had not agreed to substitute Boa Vista for Mayo.] The learned judge, it is submitted, was wrong in telling the jury that Naure & Pinto had no authority to substitute another loading port for that mentioned in the charterparty. An agent of this sort necessarily must have an implied authority to vary the performance of the contract of an absent principal within reasonable limits. It would be impossible to carry on commercial transactions with any advantage if such an authority did not exist. [Erle, C. J. It must be borne in mind that the substituted port was eighty or a hundred miles distant from that originally stipulated, and that the substituted article was also widely different.] Even if the agents had no authority to deviate from the strict course pointed out by the charterparty, the captain under the circumstances had a right to assume that they had such authority. [Bytes, J. The fact of the captain having asked for an indemnity before he consented to go to Boa Vista affords some evidence that he knew the agents had no authority to direct the de-[170]-viation, or, at all events, that he did not act upon the assumption that they had authority.] Considerable latitude of discretion must in these cases be given to an agent; otherwise great inconvenience and probably serious loss will be many times occasioned by the captain's insisting upon a strict literal compliance with the terms of the charterparty. [Erle, C. J. The contract was in writing. How could I leave it to the jury to say whether the agents had authority to vary it? If they might substitute Boa Vista as the loading port for Mayo, and Boa Vista salt (which was nearly valueless) for Mayo salt, why might they not substitute any other description of cargo?] Of course, the agent's authority must be exercised within reasonable limits; and, as far as the ship-owners were concerned, there was a substantial fulfilment of the contract. [Crowder, J. If that had been put to the jury, I very much doubt that they would have found there had been a substantial fulfilment of the contract.]

WILLIAMS, J. I am of opinion that there ought to be no rule in this case. As to the verdict being against evidence, the Lord Chief Justice intimates that he is not dissatisfied with the verdict, and I see no reason why we should be. As to the supposed misdirection, the learned counsel for the plaintiffs relies upon two branches. In the first place, he says that my Lord was wrong in putting the question as to the breach of the charterparty in the alternative. But that seems to be a mistake. It was not put in the alternative: it was merely put to them as an explanation of the transaction. After adverting to what had taken place between the parties, my Lord put it to the jury whether they thought it amounted to a renunciation of the charterparty, or whether the voyage to Boa Vista was by mutual agreement of the charterers' [171] agents and the captain substituted for the original voyage. It seems to me that the direction was quite unexceptionable. The next objection is as to the authority of Naure & Pinto to vary the contract by substituting Boa Vista as the port of loading for Mayo. This was put in two ways. First, it was said that Naure & Pinto had an implied authority to vary the contract; secondly, that, at all events, the captain had a right to presume that they had such authority. Now, there can be no doubt that an agent appointed to load a cargo at a foreign port has authority to do all acts that are necessary for the performance of the contract, and also to vary the mode of performance if any exigency arises, provided the contract be substantially performed. But there is no ground for contending that he has by law any implied authority to substitute a new contract,—to substitute one sort of commodity for another, sugar for salt, for instance,—or to appoint a different place of loading from that contemplated by the charterparty. It is quite new to me to hear it suggested that he has such authority; and I cannot but think that it would be very mischievous if the agent's authority could be so extended as thus to vary the contract of his principal. Then,

as to the right of the captain to presume that Messrs. Naure & Pinto had this authority. I must confess I see no reason why there should be any such presumption. And, even if such a presumption could be made, there is no evidence here that the captain gave credit to the supposed authority of the agents. If the plaintiffs had intended to rely upon the captain's being justified in assuming this authority, they should have gone on to shew that he did act upon it : whereas here, he appears to have repudiated it ; for, he refused to go to Boa Vista unless indemnified. Upon the whole, I think the real question was left to the jury, and the verdict is justified by the evidence.

[172] CROWDER, J. I am of the same opinion. The Lord Chief Justice being satisfied with the verdict, I see nothing in the evidence to induce me to think the jury have come to a wrong conclusion. As to the alleged misdirection, the objection is two-fold. In the first place, it is said that my Lord, instead of leaving it to the jury to say whether or not there had been an absolute refusal on the part of the charterers' agents, Naure & Pinto, to load a cargo at Mayo, left it to them in the alternative, whether there was a refusal to load or a substituted contract by mutual agreement of the agents and the captain. It seems, however, from my Lord's note that he distinctly left it to the jury to say whether there was an absolute refusal to load. They found there was not. Then, as to the other ground,—it is said that it was a misdirection to tell the jury that Naure & Pinto had no authority to substitute a loading at Boa Vista for a loading at Mayo. It has been contended that the position of the agents necessarily gave them an implied authority to give the order they did, and that the captain was justified in assuming that they had such authority. I see no reason for presuming that the agents had authority to send the ship to a different port, eighty or a hundred miles distant from that originally stipulated, for the purpose of loading a totally different commodity. I see no ground for presuming that an agent can have so extensive an authority as that contended for. We have been much pressed with the great inconvenience which will result from its being held that the captain is bound to follow the precise terms of the charterparty. I do not assent to that argument. Where a contract of this sort is necessarily deviated from in some particular, the question always will be whether or not it has been substantially performed : and that is a question for the jury. Here, however, that question [173] cannot arise ; for, the contract the defendants entered into never was performed at all. They contracted for a cargo of salt to be loaded at Mayo : the supposed performance was, the loading a cargo of a different article, though bearing the same name, at a distant port. I am also disposed to believe that the captain did not think that Messrs. Naure & Pinto had authority thus to vary the contract.

BYLES, J. I am of the same opinion. The direction of the Lord Chief Justice, as I understand it, was this,—Was there an absolute refusal on the part of the charterers' agents to load the ship in due course ? The jury found there was not. So far the direction is admitted to have been right. But the learned counsel for the plaintiff says that the direction was insufficient, and did not embrace all that it ought to have embraced. But he did not suggest anything else which ought to have been left. It was contended that the agents necessarily had an implied authority to deviate from the strict letter of the charterparty : or, in other words, that they had an implied authority to direct the loading of a different article at a distant port. It seems to me, however, that the agents had no such authority in point of law. As well might it be said that an agent having authority to load a cargo of coals at Newcastle, would be justified in sending the vessel round to Swansea or Cardiff for a cargo of Welsh coal. It seems to me that that would be a parallel case. I agree that, if the authority really given to an agent does not go so far as parties dealing with him have a right to expect it does, the principal may still be bound by his acts. But, to entitle them to avail themselves of that presumption of a more extensive authority, the parties must shew that they have been deceived, and have acted under an impression of its existence. [174] In the present case, not only was there no evidence that the agents had any implied authority, or that the captain acted upon the assumption that they had it ; but the fact of his having asked for and obtained an indemnity clearly shews that he did not suppose they had the authority they assumed to have. For these reasons, I concur with my Brothers Williams and Crowder in thinking that there is no ground to find fault with the direction to the jury. And, as to the verdict being against evidence, the Lord Chief Justice has expressed himself satisfied, and I see no ground upon which we can object to it.

ERLE, C. J. I have nothing to add to what has fallen from the rest of the court, except that I think this decision is one of very considerable importance: for, if Mr. Wilde had succeeded in his argument, it might have thrown doubt upon the well-known, and to the mercantile world most important rule that an agent must be strictly limited by his authority. The substitution of a different voyage from that which is stipulated for by the charterparty is a matter which must be regarded as totally beyond the scope of an ordinary agent.

Rule refused.

[175] BARBER v. LESITER. Nov. 11th, 1859.

[S. C. 29 L. J. C. P. 161; 6 Jur. N. S. 654. Referred to, *Bosché v. Matthews*, 1867, L. R. 2 C. P. 688; *Hyde v. Bulmer*, 1868, 18 L. T. 294; *Quinn v. Leatham*, [1901] A. C. 529; *Gildan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 622.]

The declaration stated that the plaintiff was possessed of certain messuages and premises; that the defendant and one S. unlawfully and maliciously conspired to procure possession of a portion of the premises, and to set up and keep private stills thereon; that, in pursuance of such conspiracy, they, by falsely pretending and representing to the plaintiff that S. wanted such portion of the premises for the carrying on therein of a lawful trade, induced the plaintiff to demise them to him; that, in further pursuance of such conspiracy, the defendant and S. entered and took possession of the premises and set up concealed stills therein, and falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who had so set up such stills and was the proprietor thereof: that the defendant and S. worked the stills, and falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who so used the stills; and that by means and in consequence thereof, an excise officer entered, and, finding the plaintiff upon the premises, took him before a magistrate, who convicted him of keeping illicit stills:—Held, that the declaration disclosed no cause of action, the damage to the plaintiff not appearing to have been the natural and proximate consequence of the defendant's act.

The declaration stated that the plaintiff being possessed of certain messuages and premises of him the plaintiff, situate and being in Vine Street, Bedford Street, Gray's Inn Lane, in the county of Middlesex, and within the metropolitan police district, and within the limits of the chief office of inland revenue in London, and on which premises he then and from thenceforth until and at the times of the committing of the grievances thereafter mentioned carried on his trade and business of a skindresser,—the defendant and one William Savage unlawfully and maliciously conspired, combined, confederated, and agreed together to procure possession of a portion of the said messuages and premises, and to set up and keep private and concealed stills in such portion for making and distilling low wines and spirits, and, whilst the said premises and such portion thereof should respectively be and continue a private and unentered place, to manufacture therein, and have and keep therein, manufacturing and in the course of manufacturing, goods and commodities for and in respect whereof duties of excise then were and should from time to time continue to be imposed, and materials and preparations for manufacturing such goods and commodities, contrary to the statutes in that behalf: That thereupon, and in pursuance of such conspiracy, combination, confederacy, and agreement, they the defendant and the said William Savage, then by falsely and fraudulently pretending and representing to the plaintiff that the said William Savage wanted and required such portion of the said premises for the purpose of carrying on therein a lawful and innocent trade and business, to wit, the trade and business of an ink-manufacturer, induced and persuaded the plaintiff to let and demise the same to the said William Savage, and to permit him and the defendant to enter upon and have and take possession thereof: That thereupon, and in further pursuance of such conspiracy, combination, confederacy, and agreement, they the defendant and the said William Savage then accordingly entered into and upon such last-mentioned portion of the said premises, and had and

took possession thereof, and then set up and kept, and became and were and continued to be the proprietors and had the custody of certain private and concealed stills in and upon such last-mentioned portion of the said premises, for making and distilling low wines and spirits, contrary to the statute in that behalf: and then, and in further pursuance as aforesaid, they falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed, that it was the plaintiff who had so set up and so kept such stills, and was the proprietor and had the custody thereof: and also then, and in further pursuance as aforesaid, and whilst the said premises and the said portion thereof respectively were and continued to be a private and unentered place, they the defendant and the said William Savage manufactured and had and kept in and upon such portion of the said premises manufacturing and in the course of manufacturing, goods and commodities for and in respect whereof duties of excise then were and [177] from time to time and during all the time therein mentioned continued to be imposed, and materials and preparations for manufacturing such goods and commodities, contrary to the statute in that behalf: and then, and in further pursuance as aforesaid, falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed, that it was the plaintiff who so manufactured, had, and kept such goods and commodities, materials, and preparations, respectively, in manner aforesaid, and that he was knowingly aiding, assisting, and concerned in the manufacturing of such goods and commodities: whereas, in truth and in fact, the plaintiff during all the time aforesaid was wholly innocent and ignorant of the several offences aforesaid and each and every of them: by means and in consequence of which said grievances one Benjamin Tyler, an officer of excise, found in and upon the said portion of the said premises (the same then being such private and unentered place as aforesaid) manufacturing and in the course of manufacturing, divers of the said goods and commodities for and in respect whereof duties of excise were then imposed as aforesaid, and divers of the said materials and preparations for manufacturing such goods and commodities, to wit, 100 gallons of British spirit, two stills, 200 gallons of molasses-wash, and other articles used in the manufacturing of such spirit, and did at the same time discover in and about such place the plaintiff, who then by reason of the premises aforesaid appeared to be (though in truth and in fact he was not) knowingly aiding, assisting, and concerned in the manufacturing of such last-mentioned goods and commodities: whereupon such officer arrested and detained the plaintiff, and conveyed him before one of the magistrates of the police-courts of the metropolis sitting at the Clerkenwell [178] police-court, in the county of Middlesex, and within the metropolitan police-district, and then and there exhibited and made an information and complaint upon oath before the said magistrate against the plaintiff, that he the said Benjamin Tyler had so found in such private and unentered place manufacturing and in the course of manufacturing the said last-mentioned goods and commodities for and in respect whereof a duty of excise was imposed, and the said materials and preparations for manufacturing such goods and commodities, and that he did at the same time discover in and about such private and unentered place the plaintiff knowingly aiding, assisting, and concerned in the manufacturing of such goods and commodities, contrary to the form of the statute in that behalf: and thereupon (the plaintiff being by reason of the said devices of the defendant and the said William Savage unable to make manifest or prove his innocence in the premises,) such magistrate adjudged that the plaintiff should for such alleged offence forfeit and lose the sum of 30*l.*, to be immediately paid into the hands of the said Benjamin Tyler, and that, if the said sum should not be so paid, the plaintiff should be imprisoned in the House of Correction at Cold Bath Fields, and there kept to hard labour for the space of three calendar months, unless the said sum should be sooner paid: and, the plaintiff not being able to pay the said sum, the said magistrate thereupon by warrant under his hand and seal committed the plaintiff to such House of Correction accordingly: by virtue of which warrant the plaintiff was accordingly taken to and imprisoned in such House of Correction, and kept to hard labour there for the space of time last aforesaid: That, after the expiration of such space of time, and by reason and in consequence of the said acts and devices of the defendant and the said William Savage, John Latten and [179] William Jones, two other officers of excise, having found and discovered two of the said private and concealed stills for making and distilling low wines and spirits in the said portion of the said premises, and having seized the same, and the plaintiff

then, by reason of the said devices of the defendant and the said William Savage, appearing to be (though in truth and in fact he was not) the proprietor of the same, and to have the custody thereof, one James Nash, another officer of excise, then went and appeared before one of the metropolitan police-magistrates sitting at the metropolitan police-court at Bow Street, in the county aforesaid, and then and there exhibited and made an information and complaint upon oath before such last-mentioned magistrate against the plaintiff, that he the plaintiff was the proprietor of such private and concealed stills, and that the said John Latten and William Jones had found and discovered the same in his custody, contrary to the statute in that behalf, whereby he had forfeited certain penalties (which last-mentioned information and complaint was afterwards duly determined): By means of which premises the plaintiff not only had been greatly harassed and put to great expense in and about defending and endeavouring to defend himself against the said charges, and otherwise, but, by reason of the said prosecutions and imprisonment and hard labour occasioned as aforesaid, and the anxiety and distress of mind thereby caused, he was prevented and disabled from attending to his business and affairs, and brought into discredit with and amongst his business connexions, friends, and neighbours and acquaintances, who had believed and still believed him to be guilty of the offences aforesaid; and by reason thereof his trade had been wholly destroyed, and he was utterly ruined, and his bodily health had been and was greatly impaired, &c.

[180] To this declaration the defendant demurred,—the grounds of demurrer stated in the margin being,—“that it does not appear that the conspiracy was for the purpose of injuring the plaintiff, or that he sustained any legal damage or injury thereby: and, as it appears that the plaintiff was convicted, no action lies in respect of such conviction: and it does not appear whether or not the plaintiff was convicted or acquitted on the information last mentioned in the declaration, or how such information was determined:” and “that an action does not lie for causing or procuring legal proceedings to be taken against a party, where he is convicted.”

The plaintiff joined in demurrer.

Shaw, in support of the demurrer (a). This is either an action for a malicious prosecution, or it is an action founded upon the commission by the defendant of an unlawful act from which damage has resulted to the plaintiff. If the former, the declaration is bad for not shewing that the plaintiff was acquitted or the charge dismissed. [Joyce, for the plaintiff, denied that this was an action for a malicious prosecution.] Neither [181] can the action be sustained on the second ground, inasmuch as the declaration shews no damage resulting to the plaintiff from the defendant's act. In the notes to *Skinner v. Guntton*, 1 Wms. Saund. 229 b., it is said: “A writ of conspiracy, properly so called, did not lie at the common law in any case but where the conspiracy was to indict the party either of treason or felony, by which his life was in danger, and he had been acquitted of the indictment by verdict; and such writ, it is true, could only have been brought against two persons at least: F. N. B. 114 D., 116 K., *Saville v. Roberts*, Carth. 417. But all the other cases of conspiracy, called in the old books writs of conspiracy, are in truth nothing else but action upon the case, and not properly writs of conspiracy; though in most, if not all of them, it was usual to insert the words *per conspirationem inter eos habitum*; and these actions, it was always held, might be brought against one person only: F. N. B. 114 D., 116 A. K., *Saville v. Roberts*. They seem either to have been first given by, or at least to have been first introduced after, the statute of 21st (commonly called 33rd)

(a) The points marked for argument on the part of the defendant were as follows:—

“That the declaration shews no cause of action against the defendant: That it does not appear that the conspiracy was for the purpose of injuring the plaintiff: That it does not appear that the plaintiff has sustained any such damage or injury from the conspiracy complained of as will enable him to maintain this action: That, as the plaintiff was convicted, no action lies in respect of the grievances complained of; but that, if the conviction was wrong, it should have been appealed against or otherwise quashed: That it does not appear how the information last mentioned in the declaration was determined,—whether the plaintiff was convicted or not thereon: And that an action does not lie for causing legal proceedings to be taken against a party, where he is convicted.”

of Edw. 1, which gives the form of the writ in these actions, 'ad respondendum, &c. de placito conspirationis et transgressionis:' 11 H. 7, fo. 26 a. In the present case, there seems to be no doubt that it is only an action upon the case in the nature of a conspiracy; for, the damage sustained by the plaintiff is the ground of the action, and not the conspiracy: *Saville v. Roberts*, Bul. N. P. 14." Here, the plaintiff shews no legal damage at all resulting from any act of the defendant. That which is alleged as damage, is the act of the law which works no wrong to any man. In Sedgwick on damages, 2nd edit. p. 30, it is said: "In addition to the great class of moral rights and duties which the law does not attempt to protect or enforce, there are [182] many more sufferings inflicted by human agency, where the immediate instruments of the injury are free from fault, or the act beyond their control. In these cases the law does not seek to interfere. It is only legal injury that sets its machinery in motion: and this is meant by the maxim that 'damnum absque injuria' gives no cause of action. 'If the defendants have only pursued the path presented for them by the laws from which they derive their existence, they have committed no wrongful act. Though the plaintiff may have sustained damage, it is damnum absque injuria, for, the act of the law, like the act of God, works no injury to any one (a)¹. There must, too, not only be loss, but it must be injuriously brought about by a violation of the legal rights of others.' 'No one, legally speaking,' says the supreme court of New York, 'is injured or damnified, unless some right is infringed'" (b). [Williams, J. Suppose two men conspire to make it appear that a third person has been guilty of a felony, by placing stolen goods upon his premises, and he is in consequence convicted,—would an action lie?] If the conspiracy was, to procure the conviction of the third party by means of perjury. Here, that which is alleged for damage does not arise from the unlawful conspiracy, but from the plaintiff's being found upon that part of the premises where the still was, and the officer making a false charge against him upon oath. That clearly is too remote: defendant is not responsible for that. [Williams, J. The plaintiff will probably rely upon the allegation that the defendant falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who [183] had so set up and so kept such stills, and was the proprietor and had the custody thereof.] That would be shifting it to an action for malicious prosecution. [Bytes, J. The only ground of damage is the plaintiff's being legally convicted.] Just so. [Crowder, J. The defendant's act of conspiring merely caused him to get possession of the premises.] That is not the damage alleged.

Joyce, contra (a)². The declaration is good in sub-[184]-stance; not as a declaration for a malicious prosecution, the conviction being conclusive, on grounds of public policy: *Floyd v. Barker*, 12 Co. Rep. 23. But the declaration discloses a wrongful

(a)¹ *First Baptist Church v. Sch'y Troy*, R. R. Co. 5 Barb. S. C. R. 79.

(b) *Mahon v. Brown*, 13 Wend. 261.

(a)² The points marked for argument on the part of the plaintiff, were as follows:—

"1. That it appears from the declaration that the defendant was guilty of an indictable conspiracy, and that, in carrying the same into effect, damage resulted to the plaintiff, and that such damage is a ground of action:

"2. That it is immaterial whether the conspiracy, or the acts done in furtherance thereof, were for the purpose of injuring the plaintiff, such injury being their natural result:

"3. That it also appears from the declaration that the defendant obtained possession of the plaintiff's premises by false and fraudulent and deceitful representations for illegal purposes, and also fraudulently and maliciously represented and made it appear that he was the keeper of the stills, &c., and that damage resulted from the false representations intended by the defendant to be, and which were thus acted on by the plaintiff, and the other fraudulent and malicious acts and representations of the defendant, which damage is a ground of action:

"4. That the plaintiff has sustained damage by the wrong of the defendant, and is consequently entitled to reparation:

"5. That, the plaintiff's conviction having been brought about by the conspiracy and fraud and malice of the defendant, an action lies in respect of the same and the damage thereby occasioned:

"6. That the action not being for malicious prosecution, but for conspiracy and

act on the part of the defendant and another, whereby the plaintiff has sustained damage. The case is not to be distinguished from *Blewitt v. Hill*, 13 East, 13, where the owner of a ship was held to be entitled to maintain an action against the captain (who was in command under the lords of the Admiralty) for causing the forfeiture of the vessel by having smuggled goods on board. [Erle, C. J. There, the damage was the necessary and immediate consequence of the defendant's illegal act. Suppose the plaintiff had been apprehended and convicted as a receiver of stolen goods,—have you any authority for saying that an action could be maintained against the defendant because he brought the goods upon the premises?] In Comyns's Digest, Action upon the Case (A.), it is laid down, that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." "So, if A. brings rude persons into a vintner's house, and procures them and the mob to cry 'a hawdy house,' by which the mob threw stones and broke the windows, action upon the case lies, for, this made the vintner liable to a prosecution for a disorderly house; for, this would have been evidence of it. [185] *Plunket v. Gilmore*, Fortescue, 211" (a). [Erle, C. J. There could be no damages for the contingency of a prosecution which might never take place.] This declaration discloses a wrongful act by the defendant, in falsely and maliciously representing to the plaintiff that he wanted the premises for a lawful purpose, and by false and fraudulent means and devices making it appear and be believed that it was the plaintiff who set up and kept the stills thereon, and so causing him to be apprehended and convicted. The conviction is only conclusive where it operates in rem. It is said that this is a novel action: but it is no objection to an action that it is new in the instance, if it be not new in its principle: per Ashhurst, J., in *Pasley v. Freeman*, 3 T. R. 63; per Lord Ellenborough, in *Chamberlain v. Williamson*, 2 M. & Selw. 415. *Lumley v. Gye*, 2 Ellis & B. 216, was an action of a novel character, and yet it was held to be maintainable.

Shaw, in reply. The damage which the plaintiff sustained did not result immediately and as a legal consequence from the erection of the stills by the defendant, but from the accidental circumstance of the plaintiff being upon that part of the premises which he had demised to the defendant and Savage at the time the officer came to search them. [Williams, J. The only part of the declaration which discloses the semblance of a cause of action, is that which alleges that the defendant and Savage falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who had so set up and so kept the stills, and was the proprietor and had the custody thereof and that by means and in consequence thereof the plaintiff was apprehended and convicted.] If that part of the declaration be material, it amounts in substance to a charge of malicious prosecution. [Williams, J. The meaning of a malicious prosecution is, that a party from malicious motives, and without reasonable or probable cause, sets the law in motion against another: but here the charge is, not that the defendant set the law in motion, but that he, from some malicious motive, so acted as to make it appear that the plaintiff was the guilty party. What is the foundation of the rule that a declaration for a malicious prosecution must allege that the plaintiff was acquitted or the prosecution abandoned?] In *Vanderbergh v. Blake*, Hardres, 194, Lord Hale says,—“If such an action should be allowed, the judgment would be blown off by a side-wind: and so in other actions, as if a man be convicted of perjury, an action upon the case lies not, though the prosecution were malicious.” And see *Parker v. Langly*, 10 Mod. 210, *Kennedy v. Reynolds*, 1 Wils. 232, and *Cotterell v. Jones*, 11 C. B. 713.

fraud committed in violation of the statute-law, the fact of the plaintiff's conviction is no bar, but rather matter going in aggravation of damages:

“7. That the defendant was not the prosecutor, and, for ought that appears, did not desire to procure the conviction of the plaintiff, but rather the contrary: and, the action being thus in its nature essentially different from an action for malicious prosecution, any rule (supposing it to exist) that a person who has been convicted by means of a conspiracy and false evidence is without redress for the damages sustained, does not apply to the present case:

“8. That in actions for malicious prosecutions, no such rule exists as that just alluded to.”

(a) This latter passage is not found in the later editions of Comyns's Digest.

ERLE, C. J. I am of opinion that our judgment upon this demurrer ought to be for the defendant. The declaration is framed as if this were an action upon the case in the nature of conspiracy. That form of action lies, not for the conspiracy, but for the damage sustained by the plaintiff therefrom. Now, it is clear upon this declaration that the conspiracy was not the proximate cause of the damage: nor was damage to the plaintiff in the contemplation of the parties. The defendant and Savage conspired to take the premises for the purpose of working a still and doing other overt acts. But it clearly was no part of the intention of the parties that the plaintiff should be charged with the illegal acts contemplated by them. I have looked [187] carefully at the declaration to see if I could discover if the declaration could be supported as alleging a damage resulting to the plaintiff from a violation of any legal right of the plaintiff: but I can find nothing of the sort. The only part of the declaration which at all approaches to such an allegation is, the statement that the defendant and Savage falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who had so set up and so kept such stills, and was the proprietor and had the custody thereof: and that, in further pursuance of the conspiracy, they falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who so manufactured, had, and kept such goods and commodities, materials and preparations respectively in manner aforesaid. I am not aware that that discloses any direct violation of any legal right of the plaintiff. There is no statement of the person to whom the alleged representations were made, or to connect them with the coming of the officer upon the premises and finding the plaintiff there, and so procuring a conviction. The declaration is partly for conspiracy and partly for overt acts, amongst which there might possibly be some which might indirectly have led to the charge against the plaintiff. If the declaration did amount to a charge that the defendant did some act which directly caused the plaintiff to be prosecuted for illicit distillation, it would fall within the rule applicable to malicious prosecutions, as charging that the defendant and Savage used the excise-officer as an instrument in their hands for the prosecution they planned; and then, the plaintiff having been convicted, he could not maintain the action. It has been decided [188] that no action lies against a witness for uttering false statements in the course of a judicial proceeding, even though it is alleged to have been done falsely and maliciously and without any reasonable or probable cause, and damage results therefrom to the plaintiff,—the proper course being a prosecution for perjury; which is probably what was meant by Lord Hale in *Vanderbergh v. Blake*, when he says, that, to allow the action while the judgment was in force, would be to blow the judgment off by a side-wind. If the declaration had intended to charge a conspiracy and damage resulting therefrom to the plaintiff, it should have directly alleged it. But the whole tenor of this declaration is, that the defendant and Savage by their acts and conduct caused a semblance of guilt to affix on the plaintiff, whereby his conviction was procured. There is no precedent of such a declaration, and no principle upon which in my judgment it can be sustained; and I can see many substantial reasons why it should not be. I therefore think the defendant is entitled to judgment.

WILLIAMS, J. I also am of opinion that this declaration cannot be supported, inasmuch as the damage alleged was not the legal consequence of the acts which are imputed to the defendant. Probably, if the declaration had been so framed as to shew that the damage alleged was the legitimate consequence of the defendant's acts, it would in substance have been a declaration for a malicious prosecution. In order to avoid that, the declaration has been put in its present form. The consequence is, that it fails to shew upon the face of it that the damage complained of was the legal consequence of the acts attributed to the defendant.

CROWDER, J. I am of the same opinion. The de[189]-claration clearly cannot be supported as a declaration for a malicious prosecution. Nor is it a declaration alleging a conspiracy by the defendant and others to place the plaintiff in such a position as to cause him to be convicted of keeping and using illicit stills. The averment relied on by the plaintiff is that which alleges that the defendant and Savage falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who so set up and so kept such stills, and was the proprietor and had the custody thereof,—by

means whereof the plaintiff, who was found upon the premises, being suspected of being the proprietor of the stills, was arrested and convicted. That, as it seems to me, is a very unintelligible averment: it is not alleged to whom the representation was made: there is no averment that it was made to the officer, or that anything was said or done by the defendant to point suspicion to the plaintiff. It can hardly be said that the defendant is responsible for the accident of the plaintiff being upon the premises when the officer came there. When fairly looked at, none of the averments shew a damage naturally and as a legal consequence resulting from the acts of the defendant. The arrest and conviction of the plaintiff seem to have been the result of a combination of circumstances for which the defendant is not in law responsible.

BYLES, J. I am of the same opinion. The declaration carries on the face of it an air of suspicion, because it is quite novel. Mr. Joyce concedes that it cannot be sustained as a declaration charging a malicious prosecution. As a declaration of that sort, it wants two essential ingredients: in the first place, the defendant was not the promoter of the prosecution complained of: [190] and, in the next place, the termination of the prosecution is not shewn, as it must be, to have been in favor of the plaintiff. That the latter should be shewn, is necessary upon two grounds,—first, that there may be no conflict between the civil and the criminal law,—secondly, because the fact of a conviction having taken place affords some evidence of reasonable and probable cause. The next question is, whether the action can be sustained as an action in the nature of conspiracy. Clearly it cannot without shewing a damage to the plaintiff legally resulting from the conspiracy alleged. There are two facts alleged from which the damage is said to have flowed: the first is, that the defendant and Savage obtained possession of the premises by means of a false and fraudulent representation and pretence; but no damage is alleged as the consequence of that. The only other fact is, that the plaintiff, being upon the premises when the excise officer visited them, and being suspected of being concerned in the working of the stills, was apprehended and convicted. The conviction, however, was not the act, or the necessary consequence of an act, of the defendant: it was the act of the law; and *Actus legis nemini facit injuriam*. It must be assumed, for the purpose of this action, that the plaintiff was properly convicted. That being so, the conviction was for that which for the purposes of this action must be taken to have been the plaintiff's own act. The proximate cause of the plaintiff's conviction was, that he happened to be upon that part of the premises which he had demised to Savage. It was a result which it cannot be supposed was contemplated by the defendant. Upon neither ground, therefore, as it seems to me, can this declaration be supported.

Judgment for the defendants (a).

[191] STEWART v. GROMETT. Nov. 11th, 1859.

[S. C. 29 L. J. C. P. 170; 6 Jur. N. S. 776.]

In an action for maliciously and without reasonable or probable cause going before a magistrate and procuring the plaintiff to be held to bail to keep the peace, it is not necessary,—as in the ordinary case of an action for a malicious prosecution,—to aver that the proceeding before the magistrate was determined in favor of the plaintiff; such a proceeding being *ex parte*, and the truth of the statement made by the applicant to the magistrate not being controvertible.

This was an action for maliciously and without reasonable or probable cause procuring the plaintiff to be held to bail to keep the peace.

The declaration stated that the defendant falsely and maliciously, and without any reasonable or probable cause, made information upon oath before John Richardson Fryer, Esq., one of Her Majesty's justices of the peace in and for the county of Norfolk, that the plaintiff had made use of the following threats towards the defendant,—“If I could have happened of Gromett on the fair day, I would have given him such a beating as he never had before; and the first time I happen of him anywhere, I'll give him a good beating;” and that for the said threats the defendant was afraid that the plaintiff would do him some grievous bodily harm: and the defendant,

(a) See the next case.

upon such charge, falsely and maliciously, and without any reasonable or probable cause, caused the plaintiff to be brought and to appear before the said justice and John Mareon, another of Her Majesty's justices of the peace in and for the said county, to answer the said complaint, and falsely and maliciously, and without any reasonable or probable cause, caused the said justices to order and adjudge that the plaintiff should enter into his own recognizance in the sum of 40l., with two sufficient sureties in the sum of 20l., to keep the peace towards Her Majesty and all her liege subjects, and particularly towards the defendant, for the term of six calendar months: That the defendant then falsely and maliciously, and without any reasonable or probable cause, caused the said justices to make and grant their warrant to convey the plaintiff to the castle at Swaffham, [192] in the said county, and to deliver him to the keeper thereof, and for the said keeper to receive the plaintiff into his custody in the said gaol, and him there safely keep for six calendar months, unless the plaintiff in the meantime should enter into such recognizance with such sureties as aforesaid to keep the peace in the manner and for the time aforesaid: That the defendant under the said warrant wrongfully and maliciously, and without any reasonable or probable cause, procured the plaintiff to be conveyed in custody to the said gaol, and there to be imprisoned for a long time, to wit, for six calendar months; and no indictment hath been preferred or prosecution commenced against the plaintiff for the said supposed threats and breaches of the peace in the said information mentioned, or for any or either of them: And that the said prosecution was and is wholly ended and determined as aforesaid: By means of which premises the plaintiff was imprisoned for the term aforesaid, and injured in health, and suffered great anxiety, and was put to expense in defending himself from the said prosecution and otherwise in relation to the premises, and was interrupted in and prevented from attending to his necessary affairs and business, and from earning his livelihood, and was and is otherwise injured. Claim, 500l.

The defendant pleaded,—secondly, that the said prosecution was not instituted with the view of indicting the plaintiff, the matter charged against the plaintiff not being an indictable offence, but merely for the purpose of procuring the plaintiff to be bound over to keep the peace, or to be detained in custody if he could not find sufficient sureties to keep the peace, for such time as one of Her Majesty's justices of the peace in and for the said county should think fit; that he the defendant entirely succeeded in such prosecution; and that the plaintiff was detained in custody for six [193] calendar months, being the time which the said justices in the declaration secondly mentioned thought fit, during the whole of which time the plaintiff was unable to find sufficient sureties to keep the peace, which was the imprisonment in the declaration mentioned; and that the said prosecution ended and determined by reason of the expiration of six calendar months, and not otherwise.

The plaintiff demurred to this plea, the ground of demurrer stated in the margin being "that the defendant's success in his application for surety of the peace does not shew that his proceeding was not malicious and without probable cause, nor bars the plaintiff's right of action under such wrongful proceeding." Joinder.

David Keane, in support of the demurrer. The plea is clearly bad. The fact of the defendant's application to the magistrate being granted does not shew that his proceeding was not malicious and without reasonable or probable cause; for, if the articles or information laid before him are sufficient in themselves, and the applicant pledges his oath to the truth of the statements therein, the magistrate has no discretion. A precedent for a declaration of this sort is to be found in 2 Chitty on Pleading, 7th edit., by Greening, p. 444. In general, to support an action for a malicious prosecution, it must be shewn that the charge was false, and made maliciously and without reasonable or probable cause, and that the plaintiff thereby sustained injury, and, further, that the prosecution terminated in favor of the plaintiff, or that it was abandoned. But this last is only necessary where the proceeding is of such a nature that the party had an opportunity of defending himself against it: the rule does not apply where the proceeding is *ex parte*. The earliest authority for [194] an action of this sort is to be found in Rolle's Abridgment, Action sur Case (C.), "En Courts of Justice," pl. 1, where it is said: "Si A. exhibit faux articles al un Master del Chancerie vers B. sur que B. est lie al good behaviour, B. avera action sur le case vers A. pur cest deceit et vexacion. Pasch. 17 Jac. B., enter *Allen & son Feme, Plaintiffs, and Gomersall, Defendant*, adjudge per totam curiam: Mich. 17 Jac. B.,

enter *Bradley and Jones*, adjudge" (a). The Writ de Securitate Pacis [195] "lieth when a man is in fear or doubt that another will beat or assault him, and lieth properly where one man doth threaten another man to kill, beat, or assault him; then may he come into the Chancery, and pray to have such a writ unto the sheriff." Fitz. N. B. 79, where the forms of the writ and attachment are given. [Erle, C. J. An action lies for maliciously holding a man to bail. There is no judgment of any tribunal there; and therefore an action lies if the party falsely swears that which enables him to arrest the plaintiff. The statute 34 Edw. 3, c. 1, creating justices of the peace, constitutes them a judicial tribunal.] In cases of this sort they do not judge of the truth of the matters alleged before them. In an action for maliciously holding the plaintiff to bail, before the statute 1 & 2 Vict. c. 110, the record would shew whether or not there was probable cause for the arrest: but, since that statute, the record furnishes no means of ascertaining whether or not the party was in such a position as to warrant the application for the judge's order. In *Daniels v. Fielding*, 16 M. & W. 200, 206, Rolfe, B., says: "The foundation on which such an action must now rest is, that the party obtaining the *capias* has imposed on the judge by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him, not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to quit the country. But, how will it be, if, without any such fraud or falsehood, a plaintiff, upon an affidavit fairly stating the [196] facts, succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a *capias* to arrest the defendant, even though he may not himself believe that the defendant does intend to leave the country? If, indeed, the party arrested had not such intention, he has the power, under s. 6, of making a substantive application to a judge or to the court, praying to be discharged out of custody; and this will be done as a matter of course, if the party arrested succeeds in satisfying the judge or court that he has not nor ever had the intention imputed to him. But such discharge affords no ground of action against the party at whose instance the party discharged has been held to bail, provided only that the original order of the judge has been fairly obtained. It is essential, under the present statute, that the plaintiff in an action for a malicious arrest should allege falsehood or fraud in obtaining the original order. The action is in its character similar to an action for a malicious prosecution on a criminal charge, and the declaration ought therefore, in analogy to the course of pleading in such

(a) Translated, Viner's Abridgment, Actions [for Words], (C. a.), pl. 1; in the margin of which reference is made to the case of *Bradley v. Jones* in Godbolt, 240. "In an action upon the case, the case was that the defendant did exhibit articles against the plaintiff in the Chancery before Dr. Cary, and there swore the articles; and afterwards he sued in the King's Bench, and had process out of that court upon the articles sworn in Chancery; and for this an action upon the case was brought, and it was adjudged that the action would lie. The articles exhibited in the Chancery were, that the plaintiff, being an attorney at law was a maintainer of juries and causes, and a barretor; and the defendant prayed the peace against him in the King's Bench. And in this case it was resolved, —1. That a man might pray the peace or good behaviour of any other man in any of the King's courts; but then it must be done in due form of law; and, if he do it so, no action upon the case will lie, as it was resolved 27 Eliz., in *Cutler & Dixon's case*, in the King's Bench. But it was agreed, that, if a man sueth in a court which hath not jurisdiction of the cause, an action upon the case will lie, but not where the court hath jurisdiction of the cause. 2. It was resolved that the action did lie in the case at Bar, because he did exhibit the articles in Chancery, and did not pursue them there: for, when he had sworn the articles in the Chancery, he could not have a supplicavit out of the King's Bench: and the oath and affidavit in the Chancery doth remain as a scandal upon record. 3. It was resolved, that, when a thing doth concern the commonwealth, the same doth concern every one in particular. And so it is lawful for any man to require the good behaviour of another, for the public good: Interest etenim reipublice ut malificia puniantur. 4. It was resolved that the action did lie, because the defendant made the articles in Chancery but a colour of the good behaviour: and, although that the King's Bench might grant the good behaviour without any articles preferred, yet, when first they begin in another court, they ought to follow the cause there."

actions, to state what the false charge or statement was by which the judge has been misled." But, in a proceeding of this nature, the magistrate can go into no inquiry as to the truth of the allegations made before him: no examination or explanation is admissible, unless the threats are ambiguous in their character. The subject is discussed at length in Dalton's Country Justice, c. 116, p. 267, and also in Burn's Justice, title Surety of the Peace. In Dalton, p. 269, it is said: "If the justice of the peace shall perceive that this surety for the peace is demanded merely of malice, or for vexation only, without any just cause of fear, he may safely deny it. As in common experience we find it, that, where A. shall upon just cause come before the justice, B. likewise will crave the peace [197] against A. (and will perhaps surmise some cause), but yet will nevertheless be content to surcease his suit and demand against A., so as A. will relinquish to have the peace against him: here the justice shall do well (as I think) not to be too forward in granting the peace thus required by B., but to persuade him, and to shew him the danger of his oath which he is to take; but yet, if B. will not be persuaded, but will take his oath that he is in fear (where indeed he neither doth fear nor hath cause to fear), this oath shall discharge the justice, and the fault shall remain upon such complainant." A binding to the good behaviour is not by way of punishment, but it is to shew that, when one has broke the good behaviour, he is not to be trusted: per Holt, C. J., Trin. 1 Anna, B. R. Farr. 29, in the case of *The Queen v. Rogers*, Vin. Abr. Good Behaviour (A.). That a person against whom articles of the peace are exhibited, is not entitled to controvert that which is sworn against him, is clear from *Lord Fane's case*, 13 East, 171, n., *The King v. Doherty*, 13 East, 171, *The Queen v. Tregarthen*, 5 B. & Ad. 678, *The Queen v. Dunn*, 12 Ad. & E. 599, 4 P. & D. 415, and *The Queen v. Mallinson*, 16 Q. B. 367 (a)¹. In *Venafra v. Johnson*, 10 Bingh. 301, 3 M. & Scott, 847, which was an action against the defendant for taking the plaintiff to a police-office, and causing him to be imprisoned without reasonable or probable cause, on a charge that he had uttered menaces against the defendant's life,—a new trial was directed, on the ground that it was not for the judge alone to determine whether the menaces justified the charge, but that it should have been left to the jury to determine whether the defendant believed the menaces, before the judge decided whether or not there was [198] reasonable and probable cause for the charge: but it was never doubted that the action would lie: and, on the second trial, the plaintiff obtained a verdict with 100l. damages: see 6 Car. & P. 50.

Couch, contra (a)². This action is really without precedent. *Venafra v. Johnson*, which is the only authority that at all approaches the present case, was the ordinary case of an action for maliciously preferring a false charge against the plaintiff, which the defendant failed to appear at the sessions to substantiate. That clearly is no authority for the maintenance of an action like this. So, in the case put in Rolle's Abridgment, it does not appear that the falsity of the articles had not been ascertained by indictment for perjury. In Comyns's Digest, Action upon the Case for Misesance (A. 6), it is said that an action upon the case lies for any malicious act to the damage of another, —as, "if a man malitiose take a false oath before a committee, whereby the plaintiff is damaged: but, whether it lies before a conviction for this, dub. *Broad v. Hancock*, 1 Sid. 50." In *Eyres v. Sedgewicke*, Cro. Jac. 601, which was an action on the case for that the defendant made a false affidavit in Chancery that the plaintiff made a rescue, by reason of which false oath the plaintiff was imprisoned and put to great expense, it was moved in arrest of judgment, "that this action lies not: for, when any one takes an oath in a court, the court always presumes it to be true until his oath is disproved, and he be convicted of perjury by indictment, or censure in the star-chamber, or other- [199]wise, and not in an action upon the case: for, it would be mischievous if the truth or falsehood of an oath should be tried by action upon the case. And as to that point was cited 21 Ass., that action upon the case lies not against an indictor, for that he did it upon his oath: and the case of *Damport v. Symson*, in the Common Pleas (Cro. Eliz. 520), where it was resolved, that, where an action upon the case was

(a)¹ See *The King v. Parnell*, 2 Burr. 806.

(a)² The points marked for argument on the part of the defendant, were, "That the declaration is bad for not shewing that the plaintiff is entitled to sue; and that, as appears from the plea, the proceeding complained of in the declaration did not terminate in the plaintiff's favor."

brought against the defendant, supposing that he gave false testimony concerning the value of a jewel, judgment was that the action lay not, for then every one should be drawn in question by actions upon the case, which would be inconvenient." The court assented to that argument, and held that the action would not lie (a). In *Reynolds v. Kennedy*, 1 Wils. 232, it was held that, if the condemnation of goods for not entering and paying duty, by sub-commissioners, be reversed by the commissioners of appeal in Ireland, an action for a malicious prosecution does not lie against the informer; for, the judgment of the sub-commissioner shews there was a foundation for the information and prosecution. In *Whitworth v. Hall*, 2 B. & Ad. 695, where it was held, that, in an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action, Parke, J., says,—"It seems to be involved in the proposition that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced; for, the very existence of the commission would be some [200] evidence of probable cause." So, in *Mellor v. Baddeley*, 2 C. & M. 675, 4 Tyrwh. 962, where, in an action on the case against a party for maliciously and without probable cause causing an information to be laid against the plaintiff for trespassing on land in pursuit of game, in the day-time, under stat. 1 & 2 W. 4, c. 32, and thereby causing him to be convicted and imprisoned by a justice of the peace, the plaintiff did not appeal against the conviction pursuant to the 44th section of that statute, but suffered the imprisonment under the conviction, and the conviction was still subsisting,—it was held that the action was not maintainable. In giving judgment, the court say,—"We are of opinion, that, to support this action, it was necessary that there should have been proof of a prosecution which had been discharged and put an end to, and also of want of probable cause, and a damage sustained in consequence of the prosecution." [Erle, C. J. If you shew that the magistrates here acted judicially, deciding between the parties, you advance your argument a long way.] In Buller's *Nisi Prius*, 12, it is said, that, "If a man sue me in a proper court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have cause against him for the undue vexation and damage that he putteth me unto by his ill practice. But two cautions are to be observed to maintain actions in these cases,—1. The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust: *Farel v. Nun*, B. R., T. 5 G. 3; *Lewis v. Farrel*, 1 Stra. 114—2. That there must be not only a thing done amiss, but also a damage either already fallen upon the party, or else inevitable; and therefore, if a man forge a bond in my name, I can have no action till I am sued upon it." In *Morgan v. Hughes*, 2 T. R. 225, 231, Buller, J., says: "The [201] grounds of a malicious prosecution are,—first, that it was done maliciously,—and, secondly, without probable cause. The want of probable cause is the gist of the action: but that is not stated here: for, it should have been shewn on the face of the record that the prosecution was at an end. Saying that the plaintiff was 'discharged' is not sufficient: it is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, viz. by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment, without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shewn a legal end to the prosecution. Neither is there any distinction between a malicious commitment and a malicious prosecution. The present is more like the case of an action for maliciously holding to bail than any other; in which case it must be shewn that there is an end to the suit." *Norrish v. Richards*, 3 Ad. & E. 733, 5 Nev. & M. 268, is an authority to the same effect. It was there held that proof that a plaintiff had not declared in an action removed by habeas corpus within two terms, is not sufficient evidence of a determination of the suit to support an action for malicious arrest. [Williams, J. I observe in that case, that, upon *Wilkinson v. Howel*, M. & M. 495, being cited, where it was held, that, to support an action for a malicious arrest, it must appear from the mode in which the first suit terminated that it had no founda-

(a) Montague, C. J., and Doderidge and Chamberlain, JJ.; but Houghton, J., held the contrary,—“for, being averred to be false, the action is well maintainable, for he is damnified by that false oath; and there is not any reason he should be without remedy.”

tion,—Patteson, J., says: “A stet processus, by which the suit was ended in *Wilkinson v. Howel*, would not only be no evidence that the suit was without foundation, but would be *prima facie* evidence the other way, the suit being thus concluded by consent of the parties.”] There is a manifest distinction between [202] a proceeding of this kind, where the party merely goes before the magistrate and makes a complaint *viva voce*, and the more formal proceeding of exhibiting articles of the peace. All the cases cited are of proceedings of the latter description. [Erle, C. J. In *Burn's Justice, Surety of the Peace*, § iv., it is said that “A person demanding sureties of the peace (whether it be in the first instance before a single justice for immediate security, or by exhibiting articles before the justices in session,) swears only to his own apprehensions, of which no other person can form an adequate judgment; from which it has been deduced by the judges, in many cases, as a general rule, that articles of the peace cannot be resisted on any ground, except by shewing direct evidence of express malice; such as, declarations to that effect; but not inferred malice, collected from general reasoning or collateral circumstances: and, moreover, that, whenever particular facts of violence are stated by the complainant, it is not permitted for the defendant to controvert them; for, they must be taken to be true, till negatived through the medium of an appropriate prosecution.” And for this are cited *The Queen v. Dunn*, 12 Ad. & E. 599, 4 P. & D. 415, and *The King v. Standhope*, 12 Ad. & E. 620, n. If the matter is controvertible, Mr. Keane's argument fails. Is it clear that the magistrate could hear the plaintiff when brought before him?] The passage cited from Dalton's *Justice* shews that the magistrate has some discretion. [Erle, C. J. The case of *Venafra v. Johnson*, 10 Bingh. 301, 3 M. & Scott, 847, seems to me to be precisely in point.] It is submitted that the action is not maintainable, unless it can be brought within the rule as to actions for malicious prosecutions, which is, that the plaintiff must allege and prove such a termination of the proceeding as to shew that it was brought maliciously and [203] without reasonable or probable cause. [Crowder, J. Have you any authority for saying that there is a difference between a summary application of this sort and the more formal proceeding by articles?] No case has been found: but the two modes of proceeding are not analogous: if the magistrate declines to interfere, the party may still go to the sessions.

Keane was not heard in reply.

ERLE, C. J. I am of opinion that our judgment in this case must be for the plaintiff. It is an action against the defendant for falsely and maliciously, and without reasonable or probable cause, making information on oath before a magistrate that the plaintiff had used threatening language to him, whereby he went in fear of bodily harm, and so procuring a warrant under which the plaintiff was incarcerated in the castle at Swaffham, for want of sureties, for a period of six months. It is admitted on the pleadings that the defendant did falsely and maliciously, and without reasonable or probable cause, procure that wrong to be done to the plaintiff; and the question is whether the declaration shews enough to entitle the plaintiff to maintain an action for that wrong. This is in some sort an action for a malicious prosecution: and it has been contended by Mr. Couch, for the defendant, that the case falls within the ordinary rule applicable to such actions, that the plaintiff must shew that the proceeding terminated in his favor, and that no action lies where they are shewn to have terminated against the accused. But I am of opinion that the distinction taken by Mr. Keane removes that objection, and shews that that rule does not apply to this case, because the proceeding before the magistrate being founded upon a statement which the party charged is not at liberty to con-[204]trovert, is an *ex parte* proceeding, and, although it attains the result which is sought, it is not a judgment, but is in the nature of a writ or process. It is not like the case of an application to a magistrate upon a matter on which he is to exercise his discretion: there, the injury sustained by the party is the act of the law, and therefore no action lies unless the person who sets the magistrate in motion is actuated by malice. But here the law was directly put in motion by the defendant against the plaintiff, and, it must be assumed, falsely and maliciously and without reasonable or probable cause. If a party goes before a judge, under the 1 & 2 Vict. c. 110, with an affidavit of debt for the purpose of procuring a *capias* to arrest his debtor, upon a suggestion that he is going abroad, and that is done falsely and maliciously, and without reasonable or probable cause, an action lies. So, if a party go to the court of Queen's Bench, and maliciously exhibit articles of the peace against another, supported by a false oath that

such other had used threats against him, his statement being incontrovertible, it is clear to my mind that an action would lie. Can it make any difference that here the proceeding took place before a magistrate? It seems to me that the two proceedings are quite analogous: the same remedy is sought, only by a different mode. As in the one case the truth of the articles cannot be controverted, so in the other the statement made before the magistrate upon oath cannot be contradicted by the accused. There is not the least sign of authority to shew that the magistrate had any discretion, so that the plaintiff might have had a decision in his favor. In Burn's Justice, sureties of the peace are treated as being subject to precisely the same rule as articles of the peace at the sessions or in the court of Queen's Bench, in respect of their truth being incontrovertible. And there is strong [205] reason for assuming that to be the true state of the law; the fact of there being no authority exactly in point as to sureties of the peace, may well be accounted for by supposing that no one has entertained doubt enough upon it to take the opinion of any court. But as far as authority goes, *The King v. Doherty*, 13 East, 171, and *Tenafra v. Johnson*, 10 Bingh. 301, 3 M. & Scott, 847, are in favor of the plaintiff. In the latter case, Johnson made precisely the same application to the justices as was made here, and they exercised a precisely analogous jurisdiction, the only difference being that there the magistrates held the plaintiff to bail for his appearance at the sessions, whereas here the magistrate at once committed the plaintiff to gaol until he should find the required sureties: and it was there decided by implication that the proceeding before the magistrate was incontrovertible; for, the court held that the judge was wrong in not leaving it to the jury to say whether or not the defendant believed the menaces when he put the law in motion against the plaintiff. If Mr. Couch's argument to-day is right, the counsel and the court in that case were all wrong. Upon principle, therefore, and upon authority, it seems to me that the argument for the plaintiff in this case ought to prevail.

WILLIAMS, J. I am of the same opinion. This is an action for maliciously and without reasonable or probable cause procuring certain magistrates to commit the plaintiff to gaol until he found sureties of the peace. It is not and could not be contended that the action was not maintainable provided the plaintiff duly complied with the rule as stated in the notes to *Stennal v. Hogg*, 1 Wms. Saund. 228 a. n. (f), and by Parke, J., in *Whitworth v. Hall*, 2 B. & Ad. 695, and by the court of Exchequer in *Mellor v. Baddeley*, 2 [206] C. & M. 675, 4 Tyrwh. 962, by alleging that the proceeding which he alleges to have been maliciously taken terminated in his favor. The question is whether that rule applies to a case of this sort. In the case of the exhibiting of articles of the peace, which it seems to me is strictly analogous to the less formal proceeding before the magistrates out of sessions,—the authorities shew that the matter could not terminate in favor of the plaintiff, because he is not at liberty to controvert the statement made against him; and therefore it is impossible to say that the existence of the proceedings, and the fact that they have not terminated favorably to the plaintiff, is any evidence that there was reasonable or probable cause for instituting them. The authorities shew that the magistrates are bound to act upon the statement made to them, and do not exercise any judicial functions at all. And there seems to be no distinction in this respect between a proceeding to obtain sureties for good behaviour and the more formal proceeding by exhibiting articles of the peace at the sessions. That being so, it is clear that the rule to which I have adverted is not applicable on the present occasion, but that this action may be maintained without shewing a termination of the proceedings before the magistrates favorable to the plaintiff.

CROWDER, J. I am of the same opinion. The main question to be considered is, whether the charge, which is alleged to have been made maliciously and without reasonable or probable cause, was one which might have been controverted before the magistrates; for, if it could be controverted, the authorities shew that the plaintiff must allege and prove that the proceeding terminated in his favor. In order to make that rule applicable, the defendant was bound to make out that the plaintiff had an opportunity of contesting the matter before the magistrates, and so getting a [207] determination in his favor. It appears to me that the defendant has failed in this. If this had been the case of articles of the peace exhibited against the plaintiff at the sessions, the authorities shew beyond a doubt that the accused would not be allowed to say anything in his defence. In that case, it clearly could not be necessary to

allege that the proceeding terminated in the plaintiff's favor, because it necessarily must terminate either in the accused finding sureties or going to prison. Is there, then, any distinction, as far as concerns this question, between an application for sureties of the peace or recognizances for good behaviour, and articles of the peace? No authority has been cited to shew that there is; and, if any had existed, the industry of the learned counsel for the defendant would doubtless have discovered it. The absence of any distinct authority induces me to think that there is no distinction: and this notion is fortified by the passage which my Lord cited from Burn's Justice, which treats the two proceedings as analogous. That being so, I think it was quite unnecessary for the plaintiff to allege in his declaration that the proceedings before the magistrates terminated in his favor. I therefore think the action is maintainable, and that the plaintiff is entitled to judgment.

BYLES, J. I am of the same opinion. The only objection which has been urged against the maintenance of this action is, that the inquiry before the magistrates appears to have terminated unfavorably for the plaintiff. Whether the proceeding was of a judicial nature or not depends upon whether or not the plaintiff had an opportunity of being heard before the magistrates in answer to the charge. No direct authority has been cited to shew that he had; but two faint traces of authority in support of the affirmative have [208] been shewn,—one, the assertion made by Mr. Marryatt in *The King v. Doherty*, 13 East, 171, which does not seem to be warranted by the authorities cited, and the passage in Dalton's Justice, c. 116, to the effect that the magistrate has a discretion in the matter. There certainly seems to be no good reason why the magistrate should not receive information from the defendant as well as from the plaintiff. But the question is whether the plaintiff had a right to be heard to controvert the statement made against him upon oath. Upon the authorities, it seems clear that he had not. It was an ex parte proceeding: but I am not disposed to admit that the action would not have been maintainable even if the plaintiff had an opportunity of defending himself, and of controverting that which was alleged against him. Under the statute 1 & 2 Vict. c. 110, the judge does not allow a *capias* as a matter of course; and yet it has been held that an action lies against a party for maliciously and without reasonable and probable cause procuring a *capias* to be issued against the plaintiff, although he has a right to come before the judge to shew cause why the writ should not issue. It is unnecessary, however, to express any opinion on that. There are two authorities in this court, viz. the passage in Rolle's Abridgment (translated in Viner), and the case of *Venafra v. Johnson*, which are precisely in point. I quite agree with my Lord that the case of *Venafra v. Johnson* is not distinguishable in principle from this case. The proceeding in question is of a very summary nature, and is often adopted in the absence of the party accused. There is some check against false swearing in the liability of the accused to be indicted for perjury: but his oath before the magistrate is incontrovertible. On principle, therefore, as well as on authority, it seems to me that the action is maintainable.

Judgment for the plaintiff.

[209] DUNNICLIFF AND BAGLEY v. MALLET. DUNNICLIFF AND BAGLEY v. BIRKIN AND ANOTHER. Nov. 14th, 1859.

[S. C. 29 L. J. C. P. 70; 6 Jur. N. S. 252.]

It is competent to the assignee of a separate and distinct portion of a patent to sue for an infringement of that part, without joining one who has an interest in another part, the damages to be recovered in the action accruing to the former alone.

These were actions brought by the plaintiffs for alleged infringements by the defendants of a patent for "Improvements in lace and other weavings."

The declaration in the first action stated that the plaintiffs were the first and true inventors of a certain new manufacture, that is to say, of certain improvements in lace and other weavings: and thereupon Her Majesty Queen Victoria, by letters patent duly sealed in that behalf, to wit, under the Great Seal of the United Kingdom of Great Britain and Ireland, granted to the said plaintiffs, their executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years from the 11th of June, 1850, subject to a

condition that the said plaintiffs should within six calendar months next after the date of the said letters-patent cause to be enrolled in the high court of Chancery an instrument in writing under their hands and seals particularly describing and ascertaining the nature of their said invention and in what manner the same was to be performed: That the plaintiffs did within the term prescribed fulfil the said condition: That afterwards, and before the committing of the infringements thereafter complained of, by an indenture, dated the 27th of March, 1851, and made between John Woodhouse Bagley of the one part, and John Dearman Dunnicliff of the other part, the said John Woodhouse Bagley did grant, bargain, sell, assign, transfer, and set over unto the said John Dearman Dunnicliff, his executors, administrators, and assigns, All the share and interest of him the said John Wood-[210]house Bagley of and in the said letters-patent so far as the same related to the invention of manufacturing warp fabrics, with all the powers, privileges, and authorities granted or secured by the said letters-patent in respect of the same: and also so much of the said invention as applied to warp fabrics, and all benefit and advantage to be had or derived therefrom, with all the right, title, interest, property, claim, and demand whatsoever of him the said John Woodhouse Bagley of, in, to, or in respect of the same: and by the same indenture the said John Dearman Dunnicliff did grant, bargain, sell, assign, transfer, and set over unto the said John Woodhouse Bagley, his executors, administrators, and assigns, All the share and interest of him the said John Dearman Dunnicliff of and in the said letters-patent so far as the same related to the manufacturing of the fabrics known as purles, with all the powers, privileges, and authorities granted or secured by the said letters-patent in respect of the same; and also so much of the said invention as applied to the manufacturing of the said fabrics called purles as aforesaid, and all benefit and advantage to be had or derived therefrom, with all the right, title, interest, property, claim, and demand whatsoever of him the said John Dearman Dunnicliff of, in, to, or in respect of the same, or to any part thereof: That, afterwards, and after the execution of the said indenture, and before the committing of the infringements thereafter complained of, by another indenture, dated the 22nd of August, 1851, between the said John Dearman Dunnicliff of the one part, and Thomas Ball, John Ball, William Ball, and the said John Dearman Dunnicliff, of the other part, the said John Dearman Dunnicliff did grant, bargain, sell, assign, transfer, and set over unto the said Thomas Ball, John Ball, William Ball, and John Dearman Dunnicliff (being the firm of Ball, Dunnicliff, & [211] Co.), All and singular the share and interest of him the said John Dearman Dunnicliff of and in the said letters patent so granted to the said John Dearman Dunnicliff and John Woodhouse Bagley, their executors, administrators, and assigns, as aforesaid; and also all and singular the share and interest of him the said John Dearman Dunnicliff of and in the aforesaid invention, with all and singular the powers, privileges, and authorities granted or secured by the said letters-patent and the said indenture of the 27th of March, 1851, thereinbefore stated, together with every right, title, interest, advantage, claim, and demand of him the said John Dearman Dunnicliff to be had or derived under the said letters-patent or the said indenture of the 27th of March, 1851, thereinbefore stated, or both or either of them: That, afterwards, and after the execution of the said last-mentioned indenture, and before the committing of the infringements thereafter complained of, by another indenture, dated the 16th of May, 1853, between the said John Dearman Dunnicliff of the one part, and the said Thomas Ball, John Ball, and William Ball, of the other part, the said John Dearman Dunnicliff did assign, transfer, and set over unto the said Thomas Ball, John Ball, and William Ball, their executors, administrators, and assigns, All that and all those the rights, shares and interest of him the said John Dearman Dunnicliff of and in the said letters-patent, and all and singular the powers, authorities, liberties, privileges, profits, emoluments, and advantages whatsoever appertaining or belonging thereto, or in anywise to be had or made therefrom, and all the estate, right, title, interest, term and terms of years, benefit, property, claim, and demand whatsoever, at law or in equity, of him the said John Dearman Dunnicliff of, in, to, out of, or upon the said premises thereby assigned or expressed or intended so to be, [212] and every part thereof: That, afterwards, and after the execution of the last-mentioned indenture, and before the committing of the infringements thereafter complained of, by another indenture, dated the 24th of December, 1858, and made between the said John Ball of the one part, and the said Thomas Ball and William Ball of the other part, the said John Ball did (amongst other things)

assign unto the said Thomas Ball and William Ball, their executors, administrators, and assigns, All the share and interest of him the said John Ball of and in the said letters-patent and invention so granted as aforesaid : That, afterwards, and after the execution of the said last-mentioned indenture, and before the committing of the infringements thereafter complained of, by another indenture, dated the 30th of December, 1858, and made between the said Thomas Ball and William Ball of the first part, the said John Woodhouse Bagley of the second part, and the said John Dearman Dunnicliff of the third part, the said Thomas Ball and William Ball, with the privity and approbation of the said John Woodhouse Bagley (testified by his being a party to and executing the now stating indenture), did, and each of them did, grant, assign, and transfer unto the said John Dearman Dunnicliff, his executors, administrators, and assigns, All and singular the share and interest of them the said Thomas Ball and William Ball of and in so much of the said letters-patent and invention so far as the same related to or concerned the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purple edges of lace, and other weavings in twist lace machines as described in the sixth part of the specification duly inrolled or filed of the said invention for which the said letters-patent had been granted as aforesaid, with all [213] and singular the rights, privileges, and authorities, emoluments, benefits, and advantages granted or secured by the letters-patent in respect of the same, or to be derived therefrom, with the like benefit of any renewed letters-patent to be obtained for or in respect of so much of the said invention as was thereby assigned, and all the right, title, interest, term and terms of years, benefit, property, advantage, claim, and demand whatsoever of the said Thomas Ball and William Ball, or either of them, in, to, of, or upon so much of the said invention and letters-patent and premises as was thereby assigned, —all of which several assignments that are dated after the 1st of October, 1852, were duly entered in the book intituled "The Register of Proprietors," according to and as required by the act of parliament made in the session holden in the fifteenth and sixteenth years of the reign of Her said Majesty intituled "An act for amending the law for granting patents for inventions (15 & 16 Vict. c. 83) ;" and the others of the said assignments were made before the passing of that act : That, by virtue of the several premises, the said patent right, so far as it related or relates to or concerned or concerns certain matters, viz. the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purple edges of lace, and other weavings in twist lace machines, as described in the sixth part of the said specification, before the committing of the infringements thereafter complained of vested in the plaintiffs, —the matters aforesaid being matters which the said patent right did and does relate to and concern : Yet that the defendant during the said term, and after the execution of the said last-mentioned indenture, and while the said patent right, so far as aforesaid, was vested in the plaintiffs as aforesaid, did infringe the [214] said patent right of the plaintiffs so far as the same related or relates to or concerned or concerns the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purple edges of lace, and other weavings in twist lace machines as described in the sixth part of the said specification. And the plaintiffs claimed 1000*l.*, as also a writ of injunction to restrain the defendant from the repetition and continuance of the said injury and the committal of any injury of the like kind by the defendant relating to the said patent right : and the plaintiffs also prayed that an account might be kept and taken of all profits which had been or which during the pendency of the suit might be made or obtained by the defendant by the infringement of the said patent right, and that the defendant might be by the court here ordered and compelled to pay the amount of all such profits to the plaintiffs.

The defendant pleaded that the said supposed invention in the declaration mentioned consists of and comprises, and the said supposed letters patent and sole privilege relate to, the making, using, exercising, and vending, as well the said warp fabrics, and the said fabrics known as purles, and improvements in the manufacture of close weavings in lace, and twisted purple edges of lace, and other weavings in twist lace machines, in the declaration mentioned, as also the manufacture of double lace and other weavings in twist lace machines, described in the said supposed specification, and the sole privilege of making, using, exercising, and vending of which was not comprised in or assigned by the said supposed indenture in the declaration firstly men-

tioned, and was not comprised in or assigned by the said supposed indenture in the declaration lastly mentioned : And that each of them the said Thomas Ball and William Ball, at the time of the com-[215]mencement of this suit, was and still is living ; And this the defendant was ready to verify ; wherefore, because the said Thomas Ball and William Ball had not and were not, nor had nor was either of them, joined in the said writ and declaration, the defendant prayed judgment of the said writ and declaration, and that the same might be quashed, &c.

The plaintiffs demurred to this plea : the grounds of demurrer stated in the margin being, "that the plea does not shew that the Balls are interested in that part of the patent the infringement of which is complained of in the declaration ; that the plea does not shew an interest in the Balls at the time of the infringement ; and that the Balls might have assigned to a stranger before the infringement, and then the plea would be true, although the Balls ought not to be joined."

Joinder in demurrer.

In the second action of *Dunnicliff v. Birkin*, the declaration was the same as in the action against Mallet. The plea also was the same, with the addition of an averment "that, at the time of the said supposed infringements by the defendants of the said supposed patent right of the plaintiffs in the declaration mentioned, they the said Thomas Ball and William Ball were and continued to be entitled unto the said parts, shares, rights, and interests of and in the said letters-patent and patent right to them assigned as in the declaration mentioned."

The plaintiffs joined issue on so much of the above plea as alleged that at the time of the said supposed infringement by the defendants of the said supposed right of the plaintiffs in the declaration mentioned, they the said Thomas Ball and William Ball were and continued to be entitled unto the said parts, shares, rights, and interests of and in the said letters-patent right to them assigned as in the declaration mentioned. [216] To this replication the defendants demurred, the ground stated in the margin being, that "the replication takes issue upon an immaterial averment in the plea, and admits allegations sufficient to entitle the defendants to judgment." Joinder.

Hayes, Serjt. (with whom was Mellish), for the plaintiff (*a*). The declaration alleges a grant to the plaintiffs of a patent for certain improvements in lace and other weavings. It then states that Bagley, by indenture of the 27th of March, 1851, assigned to Dunnicliff all his share in the patent so far as the same related to the invention of manufacturing warp fabrics ; that, by indenture of the 22nd of August, 1851, Dunnicliff assigned all his share and interest in the patent, as well under the original grant as under the assignment of the 27th of March, 1851, to Thomas Ball, John [217] Ball, William Ball, and himself (being the firm of Ball, Dunnicliff, & Co.) ; that, by indenture of the 16th of May, 1853, Dunnicliff assigned to the Balls all his share and interest in the patent ; that, by indenture of the 24th of December, 1858, John Ball assigned to Thomas and William Ball all his interest in the patent ; and that, by indenture of the 30th of December, 1858, between Thomas and William Ball of the first part, Bagley of the second part, and Dunnicliff of the third part, the two Balls, with the privity and approbation of Bagley, assigned to Dunnicliff all their

(*a*) The points marked for argument on the part of the plaintiffs in *Dunnicliff v. Mallet* were as follows :—

"The plea does not shew that the Balls had any interest in that part of the invention which was infringed : and, where an invention is divided into distinct parts, and one party is solely interested in one part, and another in another, if the part of the former is infringed, it is not necessary that the latter, who has no interest in it, should join :

"The plea does not shew with certainty that the Balls had any interest in any part of the invention at the time of the infringement :

"A traverse of the plea would not raise the question as to who were interested in the patent at the time of the infringement :

"The plea is true, if the Balls never executed the last-mentioned indenture at all, and upon a traverse would be supported by proof of that fact ; therefore, it leaves it uncertain whether Dunnicliff should or should not be joined in the new writ, if the present writ is quashed :

"The plea is altogether too vague for a plea in abatement, which requires great certainty."

share and interest "of and in so much of the said letters-patent and invention as related to or concerned the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purple edges of lace, and other weavings in twist lace machines, as described in the sixth part of the specification." The declaration then proceeds to allege, that, by virtue of the premises, "the said patent right, so far as it related or relates to or concerned or concerns certain matters, viz. the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purple edges of lace, and other weavings in twist lace machines, as described in the sixth part of the said specification, before the committing of the infringements thereafter complained of, vested in the plaintiffs." And then it alleges that the defendants, after the execution of the last-mentioned indenture, and while the said patent right so far as aforesaid was vested in the plaintiffs as aforesaid, infringed the said patent right of the plaintiffs "so far as the same related or relates to, or concerned or concerns, the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in [218] lace, and of twisted purple edges of lace, and other weavings in twist lace machines, as described in the sixth part of the said specification." To this declaration the defendants plead in abatement the non-joinder of Thomas and William Ball. Now, as there was no joint damage to the plaintiffs and the two Balls from the infringements here complained of, there can be no reason for joining them in the action. That a patent is a divisible thing, and assignable, seems to be admitted by the plea. Originally, there was no limitation of the number of persons to whom a patent might be assigned. A limit was subsequently imposed of five, ultimately increased to twelve: and that limit was repealed by the 36th section of the 15 & 16 Vict. c. 83. [Byles, J. Are they joint tenants?] The original patentees would be joint tenants: but the assignees would be tenants in common. There is no authority to shew that a patent which is per se capable of being divided may not be assigned in parts. Lord Coke, treating of what inheritances are divisible, says,—Co. Litt. 164 b.,—"It is to be considered of what inheritances daughters shall be co-parceners, and how and in what manner partition shall be made between them. Wherein it is to be observed, that, of inheritances, some be entire and some be several; again, of entire, some be divisible, and some be indivisible. And here it appeareth by Littleton, that parceners take their appellation, because they are compelled to make partition by writ of *partitio facienda*; where, note that Littleton alloweth well to find out the true derivation of words, as often hath been and shall be observed. If a villeine descend to two co-parceners, this is an entire inheritance: and, albeit the villeine himself cannot be divided, yet the profit of him may be divided: one co-parcener may have the service one day, one week, &c., and the other another day or week, &c. [219] And for the same reason a woman shall be endowed of a villeine, as before it appeareth in the chapter of Dower. Likewise, an advowson is an entire inheritance; and yet in effect the same may be divided between co-parceners, for they may divide it to present by turns. A rent charge is entire, and against common right; yet it may be divided between co-parceners, and by act in law the tenant of the land is subject to several distresses, and partition may be made before seisin of the rent. Entire inheritances not divisible we find divers in our books; and some inheritances that are divisible, and yet shall not be parted or divided between co-parceners, as hereafter shall appear. If a man have reasonable estovers, as housebote, heybote, &c. appendant to his freehold, they are so entire as they shall not be divided between co-parceners. So, if a corody incertaine be granted to a man and his heirs, and he hath issue divers daughters, this corodie shall not be divided between them: but of a corodie certaine partition may be made. Homage and fealty cannot be divided between co-parceners. So, a piscary incertaine, or a common sans nombre, cannot be divided between co-parceners, for that would be a charge to the tenant of the soil. The Lord Mountjoy, seised of the manor of Canford in fee, did by deed indented and inrolled bargain and sell the same to Browne in fee, in which indenture this clause was contained,—Provided alwayes, and the said Browne did covenant and grant to and with the said Lord Mountjoy, his heirs and assignes, that the Lord Mountjoy, his heirs and assignes, might dig for ore in the lands (which were great wastes) parcell of the said manor, and to dig turfe also for the making of allome. And in this case three points were resolved by all the judges, first, that this did amount to a grant of

an interest and inheritance to the Lord Mountjoy to dig, &c.,—secondly, that, notwithstanding this [220] grant, Browne, his heires and assignes, might dig also, and like to the case of common sans nombre,—thirdly, that the Lord Mountjoy might assign his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke: neither could the Lord Mountjoy, &c., assign his interest in any part of the wast to one or more, for that might work a prejudice and a surcharge to the tenant of the land; and therefore, if such an incertaine inheritance descendeth to two co-parceners, it cannot be divided between them.” Thus it appears that inheritances in general may be divided, unless there be some reason of prejudice to others to prevent it. There can be no good reason why a patent for an invention in itself susceptible of division, should not be divided: for instance, suppose a patent were granted for an anchor and a windlass, why should not the patentee assign his interest in the patent so far as regards the anchor, retaining it as regards the windlass? Where the damage is joint, the action must be joint. Tenants in common cannot join in ejectment, but they may join in an action for mesne profits. Littleton, § 315, says: “As to actions personals, tenants in common may have such actions personals joyntly in all their names, as of trespass, or of offences which concerne their tenements in common, as for breaking their houses, breaking their closes, feeding, wasting, and defowling their grasse, cutting their woods, for fishing in their piscary, and such like. In this case, tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the realtie.” “For,” says Lord Coke, “the trespass and damage done to them was joynt.” All the authorities upon the subject are collected in the notes to *Coryton v. Lithebye*, 2 Wms. [221] Saund. 115; amongst others, the celebrated case of the Tunbridge Wells dippers, *Weller v. Baker*, 2 Wils. 423. “That case was, that of these dippers there were only twelve in number, all women, who were chosen by the freeholders of the manor within which the wells lay, and approved of by the lord of the manor; and that the business of a dipper was, to attend the wells, and deliver the water to the company who resorted there, and the employment was attended with profits which arose merely from the voluntary contributions of the company: and the defendant having acted as a dipper without a proper appointment, the dippers joined in an action against her for the disturbance, which was thought by the court to be well brought, because, although the dippers were severally entitled to receive for their own several use such voluntary gratuities as the company were pleased to give them respectively, yet, with regard to a stranger’s disturbing them in their employment, they were all jointly concerned in point of interest; and that was a hurt done to them all.” In *Smith v. The London and North Western Railway Company*, 2 Ellis & B. 69, the court applied the same rule to patents as is applied to other matters, holding, that, where A. and B. are tenants in common of a patent assigned to them, if B. dies, actions for infringements committed in B.’s life-time survive to A., who is entitled at law to recover the whole damages. Here, only one part of the patent has been infringed, viz. that which is described as the sixth part of the specification. Thomas and William Ball have assigned all their interest in that part to the plaintiffs; they therefore sustain no damage from the infringement. In *Wilkinson v. Hall*, 1 N. C. 713, 1 Scott, 675, it was held, that tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. The plea does not give the plaintiffs a better [222] writ. It is wanting in certainty, inasmuch as it does not aver that the interest of the Balls continues: they may have assigned it away.

Hindmarch, for the defendant Mallet (a). The subject matter in contest is the

(a) The points marked for argument on the part of the defendants in *Dunnicliff v. Mallet*, were as follows:—

“That the plea is good, and the defendant is entitled to judgment for the following, amongst other, reasons,—

“That the declaration and plea shew that Thomas Ball and William Ball were entitled unto some parts, shares, or interests in the letters-patent and privilege mentioned, and that the plaintiff cannot therefore sue alone for any infringement of the patent, and that Thomas Ball and William Ball ought to have joined in bringing the action:

“That, if the supposed infringement mentioned in the declaration has been com-

sole right of making, using, and vending a certain invention. It is a sort of incorporeal right in the nature of a franchise granted to one or more persons. The thing granted is a prohibitory right,—to prohibit all persons except the grantees from using the invention. Now, a franchise is clearly an indivisible thing: it cannot be the subject of partition; nor can it be divided so as to vest a separate and distinct part of the privilege in one or more [223] persons. Tenants in common in all real and mixed actions must sever; in personal actions they must join. This is an action relating to personalty. It appears from the pleadings that the patent relates to two different species of manufacture,—the one, the manufacture of warp fabrics; the other, the manufacture of close weavings in lace and of twisted purple edges of lace and other weavings in twist lace machines, as described in the sixth part of the specification. The plea also establishes this, that a portion of the invention consists also of the manufacture of double lace and other weavings in twist lace machines described in the specification, the sole privilege of making, using, exercising, and vending of which was not comprised in or assigned by the indenture in the declaration firstly mentioned (27th March, 1851), and was not comprised in or assigned by the indenture in the declaration lastly mentioned (30th December, 1858). By the first deed, Bagley assigns to Dunnicliff all that relates to warp fabrics. Dunnicliff thus became solely entitled to the invention so far as it related to warp manufactures, and jointly entitled with him in the rest of the patent. By the indentures of the 16th of May, 1853, and 24th of December, 1858, Thomas and William Ball were placed exactly in Dunnicliff's shoes. And by the indenture of the 30th of December, 1858, Thomas and William Ball assign to Dunnicliff all their interest in so much of the patent and invention as related to or concerned the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purple edges of lace and other weavings in twist lace machines, as described in the sixth part of the specification." As to a portion of the invention, therefore, there is a community of interest between Thomas and William Ball and the plaintiffs. And, if the declaration [224]-tion leaves the matter in doubt, it is clearly bad. It would be an intolerable hardship on the public, if patent rights could be severed and assigned in severalty to different persons in the way suggested. The only case at all bearing upon the subject is that of *Smith v. The London and North Western Railway Company*, 2 Ellis & B. 69; and there the declaration alleged the assignment to have been to the plaintiff and Willey as tenants in common. The defendant has a right to have all the parties interested in the patent before the court. He might otherwise be prejudiced in a variety of ways,—as, by being precluded from giving evidence that the patent is void in part, or from setting up a release by an assignee of part, or by reason of the provision in the 5 & 6 W. 4, c. 83, s. 3, as to treble costs, inasmuch as he might be subjected to a multiplicity of actions.

Hayes, Serjt., in reply. No doubt joint-tenants of personalty must always join: per Littledale, J., in *Doe v. Errington*, 1 Ad. & E. 755, 3 N. & M. 646. But the question does not depend upon the thing being personalty: the question is, who has sustained the damage. Suppose one who is possessed of an interest in a moiety of a patent is about to assign, and a third person slanders his title by saying that his deed is invalid, and so he loses the sale; could it be contended that the owner of the other moiety of the patent, who has sustained no damage, must join in the action? The argument that a patent is one and indivisible is in opposition to reason and common sense. There may be many part owners of a patent, as there may be of a ship or a horse. And, if the patent embraces two distinct and separate inventions, there can be no reason why the two should not be held in severalty.

mitted, it was a violation of a privilege entire in its nature, for which all the parties entitled unto the privilege must sue:

"That the patent privilege mentioned in the declaration could not be partitioned or divided into shares, so as to entitle part-owners to hold in severalty, or sue for a supposed infringement of a part only of the patent right.

"That, if the validity of the patent be put in issue, the validity or invalidity must be decided not only with reference to the part or parts of the invention to the sole use of which the plaintiffs make claim, but also with reference to the part or parts of the invention the use of which Thomas Ball and William Ball are entitled unto."

Manisty, Q. C., in support of the demurrer in *Dunnicliff* v. *Birkin* (a)¹. Thomas and William Ball, being parties interested in the patent, ought to have been before the court. If they could join they must join. It [226] may be, that, for the invasion of the patent right by the user of a part, substantial damages might be due to the owner of one part, and nominal damages only to the owner of the other part: but still all must join. If the two Balls had been made parties to this action, the defendants might have given in evidence admissions by them.

Hayes, Serjt., contra (a)². The plea in the second action contains an additional allegation "that, at the time of the supposed infringement by the defendants of the said supposed patent right of the plaintiffs in the declaration mentioned, they the said Thomas Ball and William Ball were and continued to be entitled unto the said parts, shares, rights, and interests of and in the said letters-patent and patent right to them assigned, as in the declaration mentioned." The plaintiffs take issue upon that allegation: and the defendants demur on the ground that that allegation is immaterial. It is not competent, however, to the defendants to reject that allegation: for, without it the plea would be a plea in bar and not a plea in abatement, whereas the non-joinder of parties can only be taken advantage of by plea in abatement: *Addison v. Overend*, 6 T. R. 766.

Manisty, in reply. Assuming the replication to be [227] good, the question still remains on the declaration and the plea. Rejecting the allegation upon which the replication takes issue, the plea remains a perfectly good plea in abatement. There would still be a non-joinder.

ERLE, C. J. I am of opinion that the plaintiffs are entitled to judgment on these demurrers. The main question which has been argued before us arises apparently for

(a)¹ The points marked for argument in *Dunnicliff* v. *Birkin*, were as follows:—

"That the plea is good, and the plaintiffs' replication is insufficient for the following, amongst other, reasons,—

"1. That the declaration and plea together shew that Thomas Ball and William Ball were entitled unto some parts, shares, or interests in the declaration mentioned; and neither the declaration nor the replication shews that those parts, shares, or interests were before the accruing of the causes of action assigned to or vested in the plaintiffs:

"2. That the declaration is bad, because it does not shew that the plaintiffs were entitled to the whole patent right at the time when the supposed causes of action accrued:

"3. That the plaintiffs, not being entitled, or exclusively entitled, to the whole of the patent right, cannot sue alone for any infringement of the patent; and that Thomas Ball and William Ball, or other the person or persons entitled to the residue of the patent right, ought to have joined in bringing the action:

"4. That, if the supposed infringement mentioned in the declaration has been committed, it was a violation of a privilege entire in its nature, for which all the persons entitled unto the privilege must sue:

"5. That such a privilege could not be partitioned or divided into shares, so as to entitle part owners to hold in severalty, or sue for an infringement of a part only of the patent right:

"6. That, if the validity of the patent be put in issue, the validity or invalidity must be decided not only with reference to the part or parts of the invention to the sole use of which the plaintiffs make claim, but also with reference to the part or parts of the invention the use of which Thomas Ball and William Ball, or some other person or persons, was or were entitled unto, and ought to have been made plaintiff or plaintiffs:

"7. That the replication takes issue upon an immaterial allegation in the plea; and the replication is bad because it does not shew that the parts, shares, rights, and interests which had been vested in Thomas Ball and William Ball had before the accruing of the causes of action been assigned to or otherwise vested in the plaintiffs."

(a)² The points marked for argument on the part of the plaintiffs in *Dunnicliff* v. *Birkin*, were as follows:—"The traverse is good. Without the matter traversed, the plea would be bad. Even if the plea without that matter would be good, yet the matter in itself is pertinent and destructive to the plaintiffs' action, and therefore it cannot be rejected."

the first time ; therefore we must decide it according to general principles of law, no authority having been cited which bears any very close analogy. That question is, whether an assignment of part of a patent is valid. I incline to think that it is. It is every day's practice, for the sake of economy, to include in one patent several things which are in their nature perfectly distinct and severable. It is also every day's practice by disclaimer to get rid of part of a patent which turns out to be old. Being, therefore, inclined to think that a patent severable in its nature may be severed by the assignment of a part, I see no reason for holding that the assignee of a separate part which is the subject of infringement may not maintain an action. Then, are the assignees bringing an action for an injury done solely to them by an infringement of that part of the patent which is thus vested in them alone, liable to be defeated because they have not joined the assignees of other parts of the patent, who have no manner of interest in the damages sought to be recovered in such action ? I see no reason why the action should be defeated on any such ground. I see no reason why the plaintiffs should be put to the trouble and expense of applying for leave to use the names of the other parties, or of compelling them by means of a judge's order to permit their names to be used upon an indemnity, where no practical advantage [228] whatever is to be gained by it,—the injury being to the assignees of part only, and the damages to be recovered being theirs only. It is said that the defendants may possibly be prejudiced by the non-joinder of the other parties, inasmuch as they might thereby be deprived of the advantage of any admissions which might have been made by them. I cannot think that is a tenable ground of objection, because, if those parties were joined, any admissions by them would not be binding on the now plaintiffs, unless made in and for the purpose of the suit. Then, as to the alleged inconvenience of the matter being brought in question several times,—I must confess I do not feel the force of the argument. In the ordinary case of a patentee trying the validity of the patent against several infringers, the power given to the judge to certify under the 5 & 6 W. 4, c. 83, s. 3, is only a provision in favor of the patentee, to entitle him to treble costs where the validity of the patent has already been established. I am not aware of any authority or of any principle which precludes the assignee of part of a patent from suing for an infringement of that part : nor do I think it would lead to any multiplying of actions to permit it. I am therefore of opinion that our judgment should be for the plaintiffs upon both these demurrers.

CROWDER, J.(a). I am of the same opinion. I see no reason to doubt that an assignment of a separate and distinct part of a patent is valid. No authority has been cited to the contrary : and in practice these assignments are common. Assuming, then, that the plaintiffs are legally assignees of a part of this patent, the question is whether it is competent to them to sue alone in respect of an infringement of that part. I am [229] of opinion that it is, and that it was not necessary that the assignees of other distinct parts of the patent, who have no community of interest in the subject matter with them, should join in the action. No authority for this has been brought before us. But, looking at it upon general principles, and by analogy to other cases, I can only see two possible grounds of objection to the maintenance of the action by the plaintiffs alone, viz. that the non-joinder of the other parties is the result of fraud, or may occasion some damage either to the defendant or the Balls. Fraud is not suggested : and I cannot discover any damage that could possibly accrue to the defendants from the non-joinder of the Balls. The action is brought in respect of the infringement of one particular part of the patent, which is vested solely and exclusively in the plaintiffs. No doubt another action might be brought against the defendants for an infringement of that part of the patent which remains in the Balls. But I do not see that the defendants can be in the slightest degree prejudiced by that : for, they might equally have been liable to another action, if the whole of the patent right had been vested in the plaintiffs. Then it is said that the Balls are prejudiced by not being made parties to the action. But it does not appear to me that there is any foundation for that. The only suggestion which has any air of plausibility is that as to the certificate for treble costs under the 5 & 6 W. 4, c. 83, s. 3 : but, upon consideration, I think that fails : for, the certificate under that statute would be in favor of the Balls, and not to their prejudice. As the damages are several, and sustained solely by the

(a) Williams, J., was engaged in the Divorce Court.

plaintiffs by reason of the infringement of the part of the patent vested in them, I see no reason why the action should not be brought by them alone.

BYLES, J. I am of the same opinion. Having no [230] precedent to guide us in this case, we are compelled to have recourse to the general rules of law. There can be no doubt that an assignment of a patent to several persons in undivided shares is good. My brother Hayes says the assignees would in that case take as tenants in common. If so, there can be no reason why they should not take different portions, —one, one tenth; another, nine tenths. Then, supposing the patent to be granted for two inventions which are separate and distinct in their nature, why should not one be assigned to one person and the other to another? I do not see why upon principle it should not be so. If that be so, the assignee of part of a patent would be more like a person to whom lands have been assigned in severalty than in common, and so would be severally entitled to damages for an invasion of his right. Mr. Serjt. Williams, in his notes to the case of *Coryton v. Lutheby*, 2 Wms. Saund. 117, says, "It has been laid down as a general rule that parties cannot join in an action for damages, unless the damages when recovered would accrue to them jointly." Now, here the damages which accrued in respect of the infringement of the portion of the patent which is complained of in this action, would belong exclusively to the owners of that part, and they alone could sue in respect of it. Whether a patent can be divided in this way or not, is an immaterial question: if it may be, the plaintiffs clearly may sue alone for the infringement of that part of the patent which is vested in them: if it may not, then all that can be said is, that the distribution of the patent in the way disclosed by the declaration has been erroneously done, and the plaintiffs are entitled to maintain this action in respect of the right vested in them by the original grant. It is not enough for Mr. Hindmarch to make out that the breach assigned in the declaration is for an infringement of that part of the [231] patent which is vested in the Balls, if it appears that there has also been an infringement of that part which is vested in the plaintiffs alone, for that infringement would give them a cause of action. The breach assigned is for an infringement of the patent "so far as the same relates to or concerns the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in twist lace machines, as described in the sixth part of the said specification." The infringement of that part of the patent which is vested exclusively in the plaintiffs at all events is comprehended in the breach. The damage for this accrues to them alone. Upon these grounds, it seems to me that the plaintiffs and they alone are entitled to maintain this action.

Judgment for the plaintiffs.

RALPH ROBINSON AND JOHN ROBINSON, Executors of Lydia Robinson, Deceased,
v. LORD VERNON. Nov. 18th, 1859.

[S. C. 29 L. J. C. P. 135, 310; 6 Jur. N. S. 610; 1 L. T. 67.]

An action was brought in a county-court in the names of A. and B., as executors of C., in respect of a claim accruing to the testatrix. B. executed a release the day before the trial. The counsel for the plaintiffs (upon whom the release came by surprise) proposed to call B. and to examine him as to the circumstances under which he had executed the release, for the purpose, as he said, of eliciting from him whether or not it had been fraudulently obtained, but without alleging the existence of fraud in fact. The judge refused to permit B. to be examined for that purpose, and the plaintiffs were nonsuited. This court, on appeal, set aside the nonsuit, with costs.—An objection to the admissibility of a document for the want or insufficiency of the stamp, must be taken at the time it is tendered in evidence.

This was an appeal from a decision of the county-court of Macclesfield.

The plaintiffs were the sons and executors of Lydia Robinson, deceased, under whose will they were also beneficially entitled to two thirds of any sum which [232] might be recovered in this action; and they sought to recover a sum of 50l. from the defendant for compensation for alleged permanent improvements made by the testatrix upon a farm at Poynton belonging to the defendant, whilst she was tenant of the same.

The plaintiffs' case was, that there was a certain custom of the country prevailing in the district within which the farm was situate, for outgoing tenants to receive from the landlord the value of permanent improvements made by tenants on their farms. The testatrix had resided for a very long period on the farm in question, and continued to do so at the time of her decease. Shortly after this occurred, viz. in the Autumn of 1856, the defendant's agent gave notice to the plaintiffs to quit the premises in the following Spring. The plaintiffs thereupon caused a valuation to be made of the improvements in respect of which they claimed compensation under the alleged custom, and called upon the defendant to pay them the amount. The defendant rejected the claim altogether; and, as the plaintiffs refused to give up possession at the expiration of the notice, they were ultimately removed by ejectment.

At the time of the commencement of this action, and of the trial, the plaintiff John was and had been for some time a tenant of the defendant; and it was in evidence that these proceedings had been instituted and were maintained in the names of both plaintiffs by Ralph alone, without the consent of or any communication with his co-plaintiff, John.

John, who had in his possession the probate of the testatrix's will, was subpoenaed by his co-plaintiff Ralph, and appeared accordingly; but, having before the trial handed that document to the defendant's attorney, who produced it when called for by the plaintiffs' counsel, he was not sworn or examined.

[233] The plaintiffs' case was closed without any question having been put on cross-examination as to any release by the plaintiffs of this claim; but the holding over, the ejectment, and the fact of the action having been brought without John's concurrence, were so elicited.

The defendant rested his case upon the following release, executed in the course of the day before the trial:—

"To all to whom these presents shall come, I, John Robinson, of Poynton, in the county of Chester, farmer, for divers good causes and considerations me hereunto moving, do hereby, for myself, my heirs, executors, and administrators, remise, release, acquit, and discharge the Right Honorable George John Warren, Baron Vernon, his heirs, executors, and administrators, and all his and their estates and effects whatsoever and wheresoever, of and from all sums of money, accounts, reckonings, actions, suits, claims, and demands whatsoever which I and Ralph Robinson, either as executors named and appointed in and by the last will and testament of Lydia Robinson, late of Poynton aforesaid, widow, deceased, dated on or about the 16th day of July, 1852, and proved in the consistory court of the diocese of Chester on or about the 2nd of July, 1856, or otherwise howsoever, now have or claim, or can, shall, or may have or claim of, from, or against the said George John Warren, Baron Vernon, his heirs, executors, or administrators, up to and inclusive of the day of the date of these presents. In witness, &c."

It did not appear that the agent of the plaintiff Ralph had been asked, or that he had been consulted with reference to this document.

The plaintiffs' counsel then contended that the release being of the whole cause of action by one only of two joint plaintiffs, it was no defence. The [234] judge, however, ruled otherwise, and intimated, that, as the case then stood, he should direct the jury to find for the defendant.

Upon this, the plaintiffs' counsel, admitting that the defence had taken him by surprise, proposed to call the plaintiff John and examine him as to the circumstances under which he had executed the document in question, —for the purpose, as he said, of eliciting from him whether it had been fraudulently obtained, but without alleging the existence of fraud in fact.

The judge refused under the circumstances and for that purpose to permit the plaintiff John to be then examined; and therefore the plaintiffs' counsel elected to be nonsuited.

The question for the opinion of this court is, whether the judge was right in so refusing to allow the plaintiff John Robinson to be called and examined on behalf of the plaintiffs, for the purpose stated by their counsel.

Wheeler, for the appellant. It clearly was competent to the plaintiffs' counsel to call John Robinson for the purpose suggested. If this had occurred in a superior court, the release would have been pleaded *puis darrein continuance*, to which the

plaintiffs might have replied by denying the release or alleging that its execution was obtained by means of fraud and misrepresentation. The absence of pleadings in the county-court does not alter the rights of the parties in this respect.

Powell, for the respondent. The plaintiffs are co-executors. The action is brought with reference to the administration of the estate of their testatrix. The defendant puts in a release executed by one of the plaintiffs; and the question is whether he can be permitted to get into the witness-box and deny his deed, or allege that he was induced by fraud to execute it. [235] [Crowder, J. It may be that the execution of the release by John Robinson was induced by some imposition practised upon him. Erle, C. J. He may have been purposely made intoxicated, and may have signed the deed without knowing what he did.] There is no plea or suggestion of fraud on the part of the defendant. [Byles, J. I do not see why the defendant should be in a better situation than he would have been in if there had been a plea *puis darrein continuance*.] The question is whether the plaintiffs' counsel ought to have been permitted to call one of the plaintiffs, and to enter into a fishing inquiry as to the circumstances under which he executed the release and the motives which induced him to execute it.

Per Curiam. We think there has been a miscarriage on the part of the judge. There must therefore be a new trial, the respondent paying the costs of the appeal.

Judgment accordingly.

June 21, 1860.—The case again came on for trial before the same learned judge on the 5th of January, 1860, and the following case was stated by way of appeal against his ruling:—

The plaintiffs, as the executors of Lydia Robinson, deceased, sought to recover 50l. (part of a sum of 60l. 16s. 2d.) as the value of certain alleged permanent improvements made by her in her life-time on a farm at Poynton, of which the defendant was owner, and of which the testatrix had for many years before her death been tenant. The claim was made on an alleged custom, the existence of which the defendant denied.

The first witness called was the plaintiff Ralph [236] Robinson; and, on his being sworn, the probate of the will (which was in the possession of and was produced by the defendant's attorney) was called for by the plaintiffs' counsel, and he handed it to Ralph, who identified it, and proved that he and the co-plaintiff were the executors therein named. It was then put in and read, without any objection being taken or question raised as to its admissibility. It bore a 5l. stamp, being the proper stamp for a value not exceeding 300l. The plaintiffs' counsel then examined Ralph in support of the plaintiffs' claim.

The defendant's attorney commenced his cross-examination by producing and putting into Ralph's hands the residuary account of Ralph and the other plaintiff made to the stamp-office for payment of duty; and Ralph identified it, and proved his signature thereto. It shewed the amount of 281l. 17s. 4d., exclusive of the 50l. sought to be recovered; whereupon the defendant's attorney applied for a nonsuit, on the ground that, as the 50l. and the 281l. 17s. 4d. together amounted to a greater sum than was covered by the stamp, the probate was inadmissible in evidence, and consequently there was no proof of the plaintiffs' title as executors.

The judge directed the trial to proceed.

At the close of the plaintiffs' case, the defendant's attorney again applied for a nonsuit, on the same ground. The judge thereupon held in favor of the objection, and directed a nonsuit.

The question for the opinion of this court is, whether the judge acted properly in nonsuiting the plaintiff.

Wheeler, for the appellant. All that was denied on the part of the defendant was the existence of the custom: the representative character of the plaintiffs was admitted. The probate, too, was admitted with [237]—out objection. [Williams, J. The only question is, whether the objection to the sufficiency of the stamp was taken in time.] An objection of this sort must be taken at once when the document is offered in evidence, if available at all. In *White v. Rose*, 3 Q. B. 493, 499, Lord Abinger, C. B., in the course of the argument, says: "I recollect once objecting to a probate on the ground that the stamp was not sufficient for the amount of the property; but Lord Kenyon would not listen to the objection." In *Carr v. Roberts*, 2 B. & Ad. 905, there was no stamp at all: and there was, amongst others, a plea

that the plaintiff was not administratrix. On proving a will, the executor need not, in the amount for which probate duty is paid, include debts due to the testator which are either desperate or doubtful; and he has a right to exercise his judgment fairly and bona fide whether a debt is doubtful or bad: *Moses v. Crofters*, 4 C. & P. 524. There is no case where this collateral issue has been allowed to be raised for the purpose of proving, that, by something which has been or may be received, the probate stamp is or may be insufficient.

Welsby, for the respondent. The objection to the stamp was duly taken. The probate was an essential part of the plaintiffs' case. In *Hunt v. Steens*, 3 Taunt. 113, it was held, that, if an administrator shews that he sues for a greater value than is covered by the ad valorem stamp of his letters of administration, he shews his administration to be void, and cannot recover: and that is confirmed by *Carr v. Roberts*, 2 B. & Ad. 905. That case is cited in 1 Williams on Executors, 5th edit. 542, where it is said: "A very important regulation, as to the consequences of not obtaining the requisite stamp, which was contained in the former stamp acts, and re-enacted by s. 8 of the [238] 55 G. 3, c. 184, is, that no instrument not properly stamped shall be given in evidence. Hence, where an executor or administrator brings an action in which it is necessary for him at the trial to prove his representative character, if his case shews that he sues for a greater value than is covered by the stamp of his probate or letters of administration, he cannot recover: for, the instrument, not being properly stamped, cannot be given in evidence; and he is therefore excluded from the only means of shewing the fact of his being executor or administrator. Nor will it make any difference that he is suing for a doubtful claim." That the objection is a valid one is therefore clear. The only question is whether it was taken in time. Now, at the time it was put in, there was nothing upon which to found the objection: that arose only when the residuary account was produced. In *Field v. Wood*, 7 Ad. & E. 114, 2 N. & P. 117, 6 Dowl. P. C. 23, 8 Car. & P. 52, it is laid down, that, where a document produced on a trial would, from some defect, be inadmissible, if objected to, the practice in general is, that, if such document has been put in and read, the objection cannot afterwards be taken: but, where the defect requires extrinsic evidence to shew it, as, when a cheque has been post-dated, the instrument is to be read, and the ground of objection afterwards proved as part of the defendant's case. [Willes, J. Was not that case somewhat shaken by the second case of *Boyle v. Wiseman*?] It is conceived not.

Wheeler, in reply. The objection to the admissibility of an instrument for the want or insufficiency of the stamp, must be taken at the time it is tendered in evidence: *Doe d. Phillip v. Benjamin*, 9 Ad. & E. 644. There, a paper had only an agreement stamp. On the trial of an ejectment, it was given in evidence as an [239] agreement. The counsel producing it were afterwards obliged, during the trial, to rely upon it as a lease. No objection was then or previously taken to the stamp. On argument in banc as to the operation of the document, the want of a proper stamp was urged. It was held that the objection came too late, and should have been taken at that period of the trial when counsel first stated that they should rely upon the instrument as a lease. [Williams, J. That is so where the stamp depends on that which appears upon the face of the document: but the rule may be different where its sufficiency depends upon a fact dehors the document. The point is of general importance, and therefore we will take time to look into the cases.]

Cur. adv. vult.

BYLES, J., now delivered the judgment of the court:—

It appears to us that this case is not concluded by the decision of the court of Queen's Bench in *Field v. Wood*, 7 Ad. & E. 114.

There, the objection was stated at the time when the document was tendered in evidence, and the proof of those facts which rendered the stamp necessary was reserved without objection until the defendant's case. The judgment of Littledale, J., explains that to have been the state of facts upon which the judgment proceeded.

The principle to be collected from all the cases appears to be, that the objection for want of a stamp ought to be taken at the earliest possible moment, so that the time of the court shall not be wasted by protracting an inquiry which may at any time be rendered futile by such objection.

Applying that principle to the present case, it appears to us that the objection came too late, and [240] that the nonsuit ought to be set aside, and a new trial had.

And we must order the defendant to pay the costs of the appeal : otherwise the redress thereby given would be fruitless.

Judgment for the appellant, with costs.

ROOK, *Appellant* ; THE MAYOR, ALDERMEN, AND BURGESSES OF LIVERPOOL,
Respondents. Nov. 20th, 1859.

[See *Sheffield Waterworks Company v. Bennett*, 1872-73, L. R. 7 Ex. 409 ;
L. R. 8 Ex. 196.]

By the Liverpool Corporation Waterworks Act, 1847, 10 & 11 Vict. c. cclxi., the rates at which water is to be supplied for domestic purposes, are to be assessed upon the "annual value" of the premises : and by the 18th section of the Liverpool Corporation Water Works (Amendment) Act, 1850, 13 & 14 Vict. c. lxxx., it is enacted, that, if the owner of any dwelling-house the yearly rent or value whereof shall not amount to 13l., or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants, or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the council may compound with such owner for the payment of the water-rents payable by virtue of the acts in respect of such dwelling-house at any sum not less than three fourths of the annual water-rent for the same ; and all such compositions shall be entered in the books of the council, and shall be recoverable in like manner as the rents and charges authorized by the act are by law recoverable.—By a composition-paper, the appellant, as the owner of certain dwelling-houses let to weekly tenants, agreed with the corporation to compound for the water-rates, and in a schedule thereto stated the rental to be 4s. 6d. per week and 3s. 6d. per week respectively. The composition-paper contained a stipulation, that, "if at any time it should be ascertained that the rental of such houses was not truly and correctly set forth in the schedule, the corporation might be at liberty to amend the same by inserting therein the true and correct amounts of such rental," and might recover against the appellant the additional water-rents due in respect thereof.—The rents of the houses were in point of fact 6d. per week respectively more than the sums stated in the schedule,—the appellant claiming to deduct that sum in respect of poor and other rates which by agreement with the tenants were paid by him :—Held, that the appellant was not entitled to make such deduction, but that the corporation were entitled under the agreement to receive the composition upon the amount of rent paid by the tenants.—Held, also, that the production of the composition-paper, and proof that no demand of water-rates had been made upon the tenants, was sufficient evidence that the composition had been made, without shewing that any entry thereof had been made in the books of the council.

This case was stated for the opinion of the court of Common Pleas under the 20 & 21 Vict. c. 43, by John Smith Mansfield, one of Her Majesty's justices of the peace in and for the borough of Liverpool.

[241] The appellant Henry Rook was summoned before me upon information and complaint laid by John Allison, a collector of water-rates for and on behalf of and duly authorized by the said mayor, aldermen, and burgesses of the borough of Liverpool, the respondents, to recover certain sums of money alleged to be due from him to them in respect of water supplied by them to premises belonging to him, under the following circumstances :—

By an act passed in the 10th & 11th years of the reign of Her present Majesty, "The Liverpool Corporation Water Works Act, 1847," the said mayor, aldermen, and burgesses are authorized and impowered to supply the inhabitants of the said borough with water, and to make certain charges in respect thereof.

The corporation do not derive any profit from such charges, and any surplus arising is directed to be applied in the reduction of rates.

"The Water Works Clauses Act, 1847," is incorporated with and directed to be

taken as part of such last-mentioned act : and in and by such Water Works Clauses Act it is directed that the owners of all tenements the annual value of which shall not exceed 10l., shall be liable to the payment of the water-rate payable in respect of such tenements, instead of the occupier thereof.

By the "Liverpool Corporation Water Works Amendment Act, 1850" (13 & 14 Viet. clxxx.), s. 18, it is enacted, that, if the owner of any dwelling-house within the limits of said Liverpool Corporation Water Works Act, 1847 (10 & 11 Viet. c. cclxi.), the yearly rent or value whereof shall not amount to 13l., or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the said [242] council may compound with such owner for the payment of the water-rent and charges payable by virtue of the said act and this act in respect of such dwelling-house, at any sum not less than three fourths of the annual water-rent or charge for the same : and all such compositions shall be entered in the books of the council, and shall be recoverable in like manner as the rents and charges authorized by the said act are by law recoverable.

And by the last-mentioned act it is also enacted, that, if any person who shall be liable to payment in respect of a supply of water under the act first above named, or the last-named act, shall neglect or refuse to pay the amount due in respect of such supply for fourteen days after demand, any justice having jurisdiction where such person shall then reside, or where the water shall have been supplied, may issue his summons against such person, and payment may be enforced by warrant of distress.

On the 26th of December, 1856, the said Henry Rook, being the owner of several small tenements within the said borough, delivered to the respondents, and they then received from him, a composition-paper in the words and figures following, that is to say :—

"No. 2464.

"I, Henry Rook, being the owner of the houses mentioned in the schedule here unto annexed, being respectively dwelling-houses let to weekly or monthly tenants or in separate apartments, or at a yearly rental under 13l., as respectively described in such schedule, do hereby, in accordance with the provisions of the Liverpool Corporation Water Works (Amendment) Act, 1850, and subject thereto, compound with the mayor, aldermen, and burgesses of the borough of Liverpool for the water-rents and charges payable in respect of such houses respectively ; and, in consideration of re-[243]-ceiving a discount of 25 per cent. upon the water-rents and charges payable in respect of such dwelling-houses respectively, and of the said mayor, aldermen, and burgesses not requiring payment of such water-rents and charges from the tenants of such houses respectively (as are above the annual value of 10l.), do hereby agree with the said mayor, aldermen, and burgesses, to pay to them, on or before the 24th day of March next ensuing, the water-rents and charges in respect of such houses respectively, whether occupied or not, for the whole of the year 1857 : and I consent, in case default shall be made by me in payment of such composition at the time before mentioned, that the full amount of such water-rents respectively from the 25th day of December, 1856, to the 24th day of December, 1857, and without any discount thereon, shall be a debt due from me to the said mayor, aldermen, and burgesses, and may be recovered as water-rents are by the Liverpool Corporation Water Works Act, 1847, and the Liverpool Corporation Water Works (Amendment) Act, 1850, authorized to be recovered, or by action at law in any court of competent jurisdiction : and I also consent, if at any time it shall be ascertained that the rental of such houses respectively is not truly and correctly set forth in the said schedule, then the said mayor, aldermen, and burgesses may be at liberty to amend the same by inserting therein the true and correct amounts of such rental, and may in the manner before mentioned recover against me the additional water-rents and charges due in respect thereof : And I also consent, that, in case of the non-payment of all or any part of the before-mentioned water-rents and charges at the time hereinbefore provided for payment thereof, the said mayor, aldermen, and burgesses may stop the water from flowing into all or any of the said houses, by cutting off the pipe to such houses, or by [244] such means as they shall think fit, and the expenses of cutting off the water may be recovered against me in the same manner as the said water rents and charges

are made recoverable by the said acts or by this composition. Dated this 26th day of December, 1856. "HENRY ROOK."

THE SCHEDULE ABOVE REFERRED TO.

Name of Tenant.	No. of House.	Street or Situation.	Rentals of Property let at		
			Per Week.	Per Month.	Per year, under 13l.
	6 } 8 } 10 } 12 }	Smithdown Lane			£ 19 s. 0 d.
5		Ditto			15 0 0
1	60	Date Street, at	4s.		
1	62	Myrtle Street			25 0 0
5		Ditto (a)			30 0 0
		Berwick Place, 3	4s. 6d.		
		Brownlow St., 2	3s. 6d.		
	9	Chesnut Street			20 0 0
	11	Ditto			12 0 0

"N.B. —Parties intending to compound for payment of the water-rents for the year 1857, must leave the schedules of agreement either with the collector of the district in which the property is situate, or at the public offices (treasurer's department), No. 2 Cornwallis Street, on or before Saturday, the 27th day of December, 1856, and not later than six o'clock in the evening of that day; as none can be admitted after that time, by the express directions of the water committee."

The respondents did not make any alteration in the said composition-paper or in the schedule thereof; and, [245] on the 24th of January, 1857, the respondents rendered the appellant a bill charging him upon the rent actually paid by the tenants to him, and being the amounts presently mentioned.

The appellant objected to pay, and did not pay, the amount demanded in the bill so rendered to him by the respondents; but he tendered the amount he admitted to be due by the schedule to the composition-paper rendered by him, but the respondents claimed the larger amount as stated in the bill rendered to the appellant, and refused his tender, and treated the nonpayment of the sum claimed as a default; and thereupon the following information was laid against the appellant in respect thereof:—

"O. S. : Composition.

"Borough of Liverpool, to wit.

"Be it remembered, that, on the 8th day of October, 1857, at the borough of Liverpool aforesaid, John Allison of Liverpool, aforesaid, cometh before me, John Crosthwaite, Esq., one of Her Majesty's justices of the peace in and for the said borough, and, for and on behalf of, and being duly authorized in that behalf by, the council of the borough of Liverpool aforesaid, informeth me the said justice, and complaineth, that, on the several days and times mentioned and set forth in the fifth column of the schedule hereafter written and referred to, and therein set opposite to the names of the several persons mentioned and contained in the said schedule, the said several persons whose names are contained and mentioned in the second column of the said schedule were severally and respectively the owners of certain dwelling-houses situate in the respective streets and places within the said borough, and within the limits of the Liverpool Corporation Water Works Act, 1847, which are also named in and placed opposite to their several and respective names in the third [246] column of the said schedule, and which said dwelling-houses were then and there respectively supplied with water by the said mayor, aldermen, and burgesses for the domestic

(a) The premises respecting which the dispute arises are the five houses in Date Street and the five houses in Berwick Place and Brownlow Street: no question arises in this case as to the other premises in the schedule.

uses and purposes of the respective occupiers thereof, the yearly rent or value of which said dwelling-houses did not then respectively amount to 13l., parts of which said dwelling-houses were then respectively occupied as separate tenements, which said dwelling-houses were then respectively let to weekly or monthly tenants; and that the said several persons whose names are contained in the said second column of the said schedule, being desirous of paying a reduced water-rent by the year for the same houses, whether they should be occupied or not, the said mayor, aldermen, and burgesses did, on the said several days and times mentioned and set forth in the said fifth column of the said schedule, at and within the borough aforesaid, under and by virtue of the provisions of the Liverpool Corporation Water Works (Amendment) Act, 1850, enter into contracts, partly printed and partly written, with the said several persons whose names are contained and mentioned in the said second column of the said schedule, in and by which they did then and there compound with the said several persons for the payment of the water-rents and charges payable under and by virtue of the provisions of the said Liverpool Corporation Water Works Act, 1847, and the said Liverpool Corporation Water Works (Amendment) Act, 1850, in respect of the said dwelling-houses, at and for the several sums of money specified and set forth in and by the said several contracts, such said sums not being less than three-fourths of the annual water-rent and charges for the same: And the said mayor, aldermen, and burgesses, in pursuance of the said several contracts, to wit, on the said several days and times mentioned and set forth in the said fifth column of the [247] said schedule, and on divers other days and times between those days and times and the making of this complaint, at and within the borough aforesaid, did supply the occupiers of the said houses for the time being with water for the uses and purposes aforesaid; and that, under the said several contracts, the several sums of money set opposite to their respective names in the seventh column of the said schedule became and are now due and owing from the said several persons whose names are contained and mentioned in the said second column of the said schedule to the said mayor, aldermen, and burgesses of the borough of Liverpool aforesaid in respect of such several compositions, which said several and respective compositions were and now are entered in the books of the council of the said borough of Liverpool; and that the said several persons, being such owners, and having compounded as aforesaid, have neglected and still do neglect to pay the said several sums of money so due and owing from them as aforesaid, although the same hath been duly demanded of them, and more than fourteen days have elapsed since the same hath been demanded of them respectively: Whereupon the said John Allison, on such behalf as aforesaid, prayeth the advice of me the said justice in the premises, and that the said several persons may be forthwith summoned before one of Her Majesty's justices of the peace in and for the said borough, to answer the said premises, and to shew cause why the said sums so demanded should not be paid.

"Exhibited to and taken and made before
me the said justice, at Liverpool, in the
borough of Liverpool aforesaid, the day } JOHN ALLISON."
and year first above written.

"JOHN CROSTHWAITHE.

[248] THE SCHEDULE BEFORE REFERRED TO.

First Column.	Second Column.	Third Column.	Fourth Column.	Fifth Column.	Sixth Column.	Seventh Column.	Total.
No.	Names.	Street or Place.	Premises.	Date of Contract.	Supplied to	Amount due.	
666, 7						(a)	
643, 5	Henry Rook	Brownlow Street	5 houses	June	Dec.	1 10 0	2s. 1 12 0
557, 8	Ditto	Chesnut Street	2 ditto	...	...	0 15 4	2s. 0 17 4
1114, 18	Ditto	Date Street	5 ditto	...	...	1 9 2	2s. 1 11 2
2512, 13	Ditto	Myrtle Street	2 ditto	...	...	1 4 9	2s. 1 6 9

(a) These amounts are the full moiety of the water-rent not allowing the 25 per

Whereupon the following summons was served upon the appellant:—

“O. S. : composition.

“Borough of Liverpool, to wit.

“To Mr. Henry Rook.

“Whereas, complaint hath this day been made by John Allison, of the borough of Liverpool, in the county of Lancaster, for and on behalf of, and being duly authorized by, the council of the said borough of Liverpool, in the borough aforesaid, before me, the undersigned, one of Her Majesty's justices of the peace in and for the borough of Liverpool aforesaid, for that you the said Henry Rook, on the 26th day of December, 1856, were the owner of certain houses situate in Brownlow Street, Chesnut Street, Date Street, and Myrtle Street, in the borough aforesaid, and within the limits of the Liverpool Corporation Waterworks Act, 1847, and which houses were then and there supplied with water by the said mayor, aldermen, and burgesses for the domestic uses and purposes of the occupiers thereof, which said houses were then let to weekly or monthly tenants: [249] and that you then being desirous of paying a reduced water-rent by the year for the same houses, whether they should be occupied or not, the mayor, aldermen, and burgesses of the said borough did, on the day and year aforesaid, to wit, on the 26th day of December, 1856, at and within the borough aforesaid, under and by virtue of the provisions of the Liverpool Corporation Waterworks (Amendment) Act, 1850, enter into a contract, partly printed and partly written, with you, in and by which they did then and there compound with you for the payment of the water-rents and charges payable under and by virtue of the provisions of the Liverpool Corporation Waterworks Act, 1847, and the said Liverpool Corporation Waterworks (Amendment) Act, 1850, in respect of the said dwelling-houses at and for the sums of money specified and set forth in and by the said contract, such said sums not being less than three fourths of the annual water-rents and charges for the same: and that the said mayor, aldermen, and burgesses, in pursuance of the said contract, did afterwards, to wit, on the said 26th day of December, 1856, and on divers other days and times between that day and the making of this complaint, at and within the borough aforesaid, supply the occupiers of the said dwelling-houses for the time being with water for the uses and purposes aforesaid: and that under the said contract a certain sum of money, to wit, the sum of 4l. 19s. 3d. (a) became and is now due and owing from you the said Henry Rook to the said mayor, aldermen, and burgesses of the borough of Liverpool aforesaid in respect of such composition, which said composition was and now is entered in the books of the council of the said borough of Liverpool, and that you do neglect to pay the said sum of [250] 4l. 19s. 3d. so due and owing from you to the said mayor, aldermen, and burgesses as aforesaid, although the same hath been duly demanded of you more than fourteen days before the making of the said complaint: These are, therefore, to command you, in Her Majesty's name, to be and appear on the 15th day of October, at eleven o'clock in the forenoon, at the Sessions House, Chapel Street, Liverpool, within the said borough, before such one of Her Majesty's justices of the peace in and for the said borough as shall be then and there present, to shew cause why you neglect to pay the said sum of 4l. 19s. 3d. so due and demanded as aforesaid, and to be further dealt with according to law.

“Given under my hand and seal, this 9th day of October, 1857, at Liverpool, in the borough of Liverpool aforesaid.

“JOHN CROSTHWAITE.”

L. S.

On the 16th of July last, such summons, after several adjournments, was heard before me: and, having fully considered the matter, I made an order against the appellant for the full sum claimed by the respondents, whereupon he demanded a case for the opinion of court; and this case is stated accordingly.

cent. The sums now in dispute are those in the first and third items relating to Brownlow Street and Date Street. The other sums are not in question.

(a) This sum includes the water-rent for the premises in question and other premises not in dispute in the present case.

In addition to the above facts, which I state as part of the case, I find that the rent of the three houses in Berwick Place, Brownlow Street, stated in the said schedule to be 4s. 6d. per week each, was really 5s. per week each; the rent of the two houses in the same street stated in the schedule to be 3s. 6d. per week each, was really 4s. per week; and the rent of the five houses in Date Street, stated in the schedule to be 4s. per week each, was really 4s. 6d. per week each. The amount of composition which the appellant offered to pay in respect of such premises was the amount due [251] for the year on the annual value as stated in the said schedule: the amount which the respondents demanded was the amount on the rental actually received from the tenant: and the summonses heard before me related to the larger sum.

The evidence given by the respondents of the composition consisted of the agreement hereinbefore set forth, the bill so rendered as aforesaid by the respondents to the appellant, and the facts that the respondents did not deliver bills to the tenants of the premises or make any demands against them for water-rent, which they would have done but for such composition.

It was thereupon contended by the appellant that there was no sufficient evidence before me of any composition whatever having been made between the parties, and further that I had no jurisdiction given to me by virtue of the alleged agreement; whereupon I decided and determined that the said composition-paper and bill and the other proceedings of the respondents as aforesaid did afford sufficient evidence of composition, and that I had jurisdiction.

It was further contended before me by the appellant, that the respondents could only recover on the rental stated in the schedule, and that I had no power to deal with any other rental; whereupon I decided and determined, that, if the amount of rent inserted in the said schedule by the appellant was not the true and correct rent received from the tenant, then that the respondents were under the terms of the composition entitled to charge the appellant on the full rent received by him, without any deductions. And I thereupon proceeded to inquire into the facts of that part of the case: and I find that the said appellant receives from the occupiers of the houses in question the several rents hereinbefore stated, and that he compounds [252] for the parish rate, the sanitary rate, and the water-rate for the said houses, and that part of the conditions of the letting, and part of the consideration for the payment by the said occupiers of the said rents, is, that the tenants are to be free from such taxes. And I find that the sum paid by the appellant in respect of such composition amounts in the whole to 6d. a week for each house.

The appellant contended, that, in compounding for the payment of water-rate, he had a right to consider the annual value of such houses was to be calculated on a rental of 4s. 6d. and 3s. 6d. a week respectively, and not on 5s. and 4s. a week respectively, as aforesaid; and that therefore the rental or annual value was truly and correctly set forth in the said schedule so delivered by him. I was of opinion, however, that it was the meaning of the acts of parliament under which the said rates were levied, that the composition should be made on the actual rent of the premises received by the appellant, and that he was not entitled to deduct the said sums therefrom on account of the parish and other rates paid by him: and I therefore decided and determined that the rent of the said premises was not truly and correctly stated in the said schedule by the appellant, and that he was liable to pay the remaining moiety of the sum charged by the respondents, and I therefore made an order for payment of such last-mentioned sum.

The said Henry Rook being dissatisfied with my determination, and having applied to me in writing within three days after such determination to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of the court of Common Pleas, and having duly entered into the recognizance, and performed all the preliminaries [253] required by the statute 20 & 21 Vict. c. 43, I hereby state such case, in compliance with such application, and request the opinion of the court thereupon, and that the said court will make such order and take such steps thereon as to the said court may seem right.

The questions on which the appellant wishes to ask the opinion of the court are as follows,—1. Whether the evidence given was sufficient evidence of a composition having been entered into between the parties,—2. Whether, in stating in the schedule to the composition paper the annual value of the premises, for the purpose of the said composition, the appellant had a right to deduct from the amount received by him

from the tenants the sum of 6d. per week in respect of the parish and other rates paid by him, amounting to such sum of 6d. a week.

Aspinall, for the appellant (*a*). The conviction is bad. There was no evidence of any composition having been entered into between the parties. The provision under which the composition was supposed to have been made, is contained in the 18th section of the Liverpool Corporation Waterworks (Amendment) Act, 1850, 13 & 14 Vict. c. lxxx., which enacts, "that, if the owner of any dwelling-house within the limits of [254] the said Liverpool Corporation Waterworks Act, 1847, the yearly rent or value whereof shall not amount to 13l., or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the said council may compound with such owner for the payment of the water-rents and charges payable by virtue of the said act and this act in respect of such dwelling-house, at any sum not less than three fourths of the annual water-rent or charge for the same; and all such compositions shall be entered in the books of the council, and shall be recoverable in like manner as the rents and charges authorized by the said act are by law recoverable." The case before the magistrate was rested upon the composition-paper of the 26th of December, 1856, and the schedule thereto. There was no evidence of any composition but that upon the basis set forth in that schedule: and it did not appear that any composition whatever was entered in the books of the council, as required by that section.

The next question is, whether the composition-paper has not stated everything that is necessary to be stated. The 111th section of the Liverpool Corporation Waterworks Act, 1847, 10 & 11 Vict. c. cclxi., which prescribes the rates at which water is to be supplied for domestic purposes, fixes the rate upon the annual value of the premises. The question is, whether the appellant had not a right to deduct from the rental the sums paid by him in respect of poor and other rates. The case of *Moorhouse, App., Gilbertson, Resp.*, 14 C. B. 70, 2 Lutw. Reg. Cas. 260, has some bearing upon this question. It was there held, that one who has a freehold interest in property of the value of 40s., but subject to an agreement to pay thereout a poor-rate charged upon [255] his tenant in respect of the premises, has not a freehold estate of the "clear yearly value of 40s.," so as to entitle him to a vote for the county. Jervis, C. J., there says: "The rent in this case is to be taken as the yearly value; and the yearly value to the voter is 40s. clear, if he is entitled to add the amount of the rate which he pays, but which is properly payable by the tenant. I am of opinion, however, that the rate is to be deducted, and therefore that the yearly value to the landlord is, as the revising-barrister has found, 40s., less the amount of the rate. The 6th section of the 18 G. 2, c. 18, means that the amount received by the landlord shall not be reduced by any rates or taxes chargeable upon him in respect of the premises. But here the landlord does not receive 40s. per annum. To entitle him to a vote, he must have 40s. before any question arises as to any deduction." And Maule, J., says: "It was not a question of deduction of charges, but whether the value of the premises amounted to 40s. I think it clearly does not, upon the statement submitted to us. The interest which the voter has in the premises is, 40s. a year, subject to his agreement with the tenant to pay a charge which the tenant alone was liable to pay, viz. the poor-rate. With that stipulation, the interest of the voter is worth less than 40s. per annum. He does not get 40s. out of the land, but 40s. subject to the payment of a rate for which he has no equivalent." Upon that principle, the proper sums upon which the rate was to be assessed were 4s. 6d. and 3s. 6d. respectively, and not 5s. and 4s. [Willes, J. Is it a question of value or rental?] Of value: "Annual value" alone is mentioned in the rating clause of the 10 & 11 Vict. c. cclxi. [Erle, C. J. The 18th section of the act of 1850, speaks of

(*a*) The points marked for argument on the part of the appellant were as follows:—

"1. That it does not appear from the case as stated, that any composition was ever entered into between the parties. 2. That no composition was ever entered into, except upon the basis of the annual value of the premises stated in the schedule to the composition-paper. 3. That the annual value of the premises was properly and duly stated in the said composition-paper; and that the value so stated was the proper and legal basis of composition within the meaning of the acts of parliament mentioned in the case."

the "yearly rent or value.") In *Hamilton, App., Bass, Resp.*, 12 C. B. 631, 2 Lutw. Reg. Cas. 213, A. was registered as a [256] county voter in respect of an undivided thirtieth share of certain freehold property which was let at a gross yearly rent of 75l. 15s., with an agreement that the landlords should pay all rates and taxes. These reduced the annual value to 63l. 3s. 7d., and there was a further charge of 1l. 6s. for expenses of collection (*a*). The average annual expenses of repairs, which were done by the landlords, and which the revising-barrister found were necessary to enable them to obtain the net rent of 63l. 3s. 7d., had for the preceding six years been 4l. per annum. The revising-barrister decided that the costs of repairs must be deducted from the rent, for the purpose of ascertaining the yearly value, and consequently that A.'s interest was less than the value of 40s. by the year, and he expunged his name from the list. And the court held that he had decided correctly. Jervis, C. J., there says,—"The question is, what is the property worth? And the proper way to decide that is, to ascertain what a tenant would give if he himself expended 4l. a year in repairs." *Cobrell, App., Wood, Resp.*, 2 C. B. 210, 1 Lutw. Reg. Cas. 483, is to the same effect. [Erle, C. J. The rule, to be gathered from the cases, seems to be, that landlord's charges are not to be deducted, but that tenant's charges are.]

Milward, for the respondents (*b*). This is a question [257] of fact and not of law, and therefore not properly the subject of an appeal under this statute. By the 111th section of the 10 & 11 Vict. c. cclxi. the rate is to be assessed upon the annual value of the premises: and, in case of a composition under the 13 & 14 Vict. c. lxxx., s. 18, the owner is to be liable, and not the occupiers. The criterion of value is the rent, whatever the owner may choose to do with it. The question before the magistrate was, as to what was the rental. [Erle, C. J. You say the written contract between the parties is on the rental, and with a view to that alone: and that, for aught that appears, the council would not have entered into it upon any other footing.] Precisely so. Value is altogether rejected, and rent substituted. [Willes, J. The words "rent or value" in the 18th section of the 13 & 14 Vict. c. lxxx. would seem to apply to rent where the premises are occupied by a tenant, and to value when they are occupied by the owner.] If the bargain is upon the footing of rental, that was a question of fact, and not of law. And, the magistrate having found that the rental was as the corporation contend for, this court cannot interfere with his decision.

Aspinall, in reply. The corporation have not chosen to exercise the power given them under the contract to amend the statement of the rental. [Erle, C. J. We should not feel disposed to send the case back on that ground. It was competent to the corporation to compound on the rental. Value being [258] often the subject of dispute, it is not unreasonable that they should substitute rental.] Under the 18th section of the 13 & 14 Vict. c. lxxx. the composition is to be upon the charges imposed by the 10 & 11 Vict. c. cclxi., s. 111, which are to be assessed upon the annual value, and not upon the rental.

ERLE, C. J. I am of opinion that our judgment must be for the respondents upon both points. In the first place, I think there was sufficient evidence of a composition. The parties clearly intended to compound under the provisions of the statute: and I think there was evidence enough before the magistrate to shew that a binding composition was entered into. The second point made by Mr. Aspinall was not precisely the point that was urged before the magistrate. The question before him, and which he puts to us, is, whether, in stating in the schedule to the composition paper the annual value of the premises for the purpose of the composition, the appellant had a

(a) See *Sherlock, App., Steward, Resp.*, ante, p. 21.

(b) The points marked for argument on the part of the respondents, were, —

"That the decision of the magistrate is correct: That an appeal under the statute 20 & 21 Vict. c. 43 does not lie in this case, the question being one of fact, viz. the real rental and not one of law: That, by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68, and the Liverpool Corporation Waterworks (Amendment) Act, 1850, s. 23, the magistrate is the proper person to settle and determine the question of amount to be recovered, and that his decision is conclusive thereon: And that the decision of the magistrate, whether in law or fact, was correct, and the respondents were entitled under the terms of the composition to recover in respect of the actual rentals received by the landlord from the tenants, without taking into consideration how such rental was to be disposed of."

right to deduct from the amount received by him from the tenants the sum of 6d. per week in respect of the parish and other rates paid by him. Taking the composition-paper to be the agreement of the parties, I see no reason why the appellant should claim that right. By the 18th section of the 13 & 14 Viet. c. lxxx. the composition is to be not less than three fourths of the annual water-rent or charge upon the "yearly rent or value" of the premises. But all through the composition-paper, the rental is assumed to indicate the value. The question of actual value is often complicated and difficult to get at: but the rental can always be ascertained beyond doubt. And I conceive that to be the basis of the contract between the parties. My judgment is founded upon the terms of the composition-paper, which is before us.

[259] WILLIAMS, J. I am of the same opinion. As to the first question, I think there was sufficient evidence of a composition having been entered into. As to the rest, I think the composition-paper, which states the yearly rental, is a valid contract, and that the rental cannot be varied by the circumstance of the agreement between the landlord and the tenant for a deduction from the rent of 6d. per week on account of the poor and other rates.

CROWDER, J. I also think our judgment should be for the respondents. I think there was ample evidence that there was a composition. As to the second question, it seems to me to be difficult to give a precise answer to it. Looking at the schedule to the composition-paper, I see nothing about annual value. It refers to rental only. The real question to be decided is, whether the parties had a right to do as they have done. I think they had. It seems to me that the more convenient mode of entering into a composition is upon the rental. But it must be stated properly according to the fact. Here, 4s. 6d. and 3s. 6d. per week are put down, instead of 5s. and 4s.

WILLES, J. I am of the same opinion. It seems to have been agreed on both sides that the rent should be taken to represent the value.

ERLE, C. J. This being a fair and proper question for argument, there will be no costs.

Appeal dismissed, without costs.

[260] BEHN AND ANOTHER v. KEMBLE AND OTHERS. Nov. 18th, 1859.

No action will lie for a false representation, unless the party making it knows it to be untrue, and makes it with the intention of inducing the plaintiff to act upon it, and the latter does so act upon it and sustains damage in consequence.

This was an action in the nature of deceit.

The first count of the declaration stated, that, before and at the several times thereafter mentioned, the plaintiffs were the owners of certain goods and merchandize, to wit, of the value of 2000l., and the defendants were the owners of certain other goods and merchandizes, to wit, of the value of 2000l.; and that, before and up to the time of the loss thereafter mentioned, the said goods and merchandizes of the plaintiffs and defendants respectively were being conveyed on board a ship called the "Eliza Warwick," then proceeding on a voyage, to wit, from Singapore towards London: and that the said ship, whilst she was proceeding on her said voyage with the said goods and merchandizes on board thereof, was by storms and tempests, perils and dangers of the sea, brought into great distress, and was greatly damaged, and in danger of perishing and being lost and destroyed in the sea, wherefore the master of the said ship and the mariners thereof, for the general safety and preservation of the said ship, and of the said goods and merchandize of the defendants, and of the rest of the goods and merchandize on board the same, were necessarily obliged to and did then cast into and leave in the sea, among other goods and merchandize, a portion of the said goods and merchandize of the plaintiffs, and the same thereby became and were and still are wholly lost to the plaintiffs, whereby the plaintiffs had incurred great loss, to wit, to the amount of 1200l., and that the said goods and merchandize of the defendants were thereby saved and preserved from loss and damage, and afterwards were safely and securely delivered to the de-[261]-fendants,—of all which premises the defendants afterwards had notice; and, by reason of the premises, and of the defendants being owners of the said goods and merchan-

dizes during the said voyage, and at the time when the said ship or vessel was so damaged and endangered as aforesaid, and being thereby benefited as aforesaid, they the defendants then became liable to contribute to the said loss so occasioned to the plaintiffs, in a general average, a large sum of money, to wit, 516l. 17s. 2d., when they the defendants should be thereunto requested, whereof the defendants afterwards and before the commencement of this action had notice; yet the defendants, although requested, had not paid the said money, or any part thereof, to the plaintiffs.

The second count stated that the plaintiffs and defendants being respectively the owners of the goods and merchandizes respectively on board of the ship, as in the preceding count mentioned, and the other facts and circumstances having occurred, and the said loss having been sustained by the plaintiffs as in that count mentioned, and the defendants as such owners being liable to contribute to the said loss of the plaintiffs in a general average as therein also mentioned, thereupon, in consideration of the premises, the plaintiffs, by certain persons their agents in that behalf, the defendants, and the several other persons who were respectively owners of or interested in the goods and merchandizes on board the said ship at the time of the happening of the said damage, then entered into and subscribed an agreement, which said agreement was and is as follows: "Whereas the barque or vessel 'Eliza Warwick,' of 626 tons, whereof Edward Halliday is master, now in the port of London, in the prosecution of her late voyage from Singapore to London with a cargo of pepper, hides, and other merchandize, met a [262] great deal of bad and tempestuous weather, whereby she received damage and was obliged to throw a great part of the cargo overboard for the preservation of the said ship, and an average has arisen thereby on the said barque or vessel, her cargo, and freight: Now know ye that we the underwritten consignees or claimants of the cargo of the said barque do hereby agree, and bind and oblige ourselves, our heirs, executors, and administrators, respectively, to give him the true value of our respective interests in the said cargo, and to settle and pay the said Edward Halliday or his assigns our respective proportion of all such average as shall or may be hereafter adjusted on the said ship and her cargo and freight, agreeably to the customary mode of adjusting similar averages in London: And we do likewise agree to and with the said Edward Halliday, his executors and administrators, if required, to enter into and execute bonds or obligation in a sufficient penalty for referring the adjustment of the aforesaid average to the award or determination of proper and competent persons in London:" Averment, that, after the making of the said agreement, the defendants, in pursuance thereof, did give in the value of their interest in the said cargo, that is to say, of the said goods and merchandize on board the said ship whereof the defendants were the owners aforesaid, and the said average was adjusted on the said ship and her cargo and freight agreeably to the customary mode of adjusting similar averages in London, and that, upon such adjustment, it appeared, among other things, that the defendants were liable and ought to pay for behoof of the plaintiffs, in respect of such loss as aforesaid, the sum of 516l. 17s. 2d., of which the defendants had notice and were thereupon requested to pay the said sum to the plaintiffs or the said Edward Halliday for them; yet the defendants had not paid the said sum [263] of 516l. 17s. 2d., or any part thereof, to the plaintiffs or the said Edward Halliday.

The third count stated that the plaintiffs were the owners of certain goods and merchandizes, to wit, of the value of 10,000l. on board a certain ship or vessel called the "Eliza Warwick," and that all things having happened and been done to the said ship and cargo as in the first count mentioned, and a general average having arisen upon the said vessel and cargo and freight as therein mentioned, the defendants assumed and represented themselves to be the owners of certain goods and merchandizes, to wit, of the value of 2000l., on board the said vessel, and did, as such assumed owners as aforesaid, enter into and subscribe their names to the said agreement in the last count mentioned and set forth, and, in pursuance of the said agreement, and as such assumed owners, gave in the value of their assumed interest in the said cargo, and the said average was adjusted on the said ship and her cargo on the faith of and in accordance with the aforesaid representation of the defendants, and of their being the owners of the said goods and merchandize; and thereupon it appeared that the defendants as such owners were liable and ought to pay for behoof of the plaintiffs, in respect of such loss as aforesaid, the said sum of 516l. 17s. 2d., of which the defendants had notice, and were thereupon requested to pay the said sum to the plaintiffs or the said Edward Halliday in the said agreement mentioned; yet the defendants

had not paid the said sum of 516l. 17s. 2d., or any part thereof, to the plaintiffs or the said Edward Halliday: Averment, that, in truth, the defendants were not the owners of the said goods and merchandizes; and that they falsely and deceitfully assumed and represented themselves to be such owners as aforesaid: and that, by reason of the premises, they the plaintiffs [264] had relied upon and acted in the belief of such representation of the defendants, and that they were the owners of the said goods and merchandizes, and the persons who by law would be chargeable with the payment of any contribution which might be payable by the owners of the said goods and merchandizes, and having dealt with the owners of other goods included in the said adjusted average upon such belief, had lost and been deprived of the means of recovering by law from the real owners of the said goods and merchandizes whereof the defendants assumed to be the owners as aforesaid, the contribution which would have been payable by such real owners to the plaintiffs in respect of such loss and average as aforesaid, and had been and were otherwise dammified. Claim, 1000l.

The defendants demurred to the third count, the ground of demurrer stated in the margin being, "that the count neither discloses any representation made by the defendants wilfully or under such circumstances as could reasonably be expected to induce the plaintiffs to alter their position, nor any alteration in the plaintiffs' position in consequence of the representations alleged." Joinder.

Mellish, in support of the demurrer. The third count is bad. It does not aver that the alleged representation was falsely and fraudulently made, or that it was made to the plaintiffs, or that they were induced to act upon it. In *Thom v. Bigland*, 8 Exch. 725, the declaration stated that the defendants falsely and fraudulently deceived the plaintiff in this, that the defendants, as brokers of the plaintiff employed by him to purchase certain oil, falsely represented to him that they had purchased for him 25 tons of palm-oil, to arrive by the "Cemla," at the price of 30l. per ton; by [265] reason of which false representation, the plaintiff believing that the said 25 tons of palm-oil had been so bought, and would be delivered to him in accordance with the terms aforesaid, entered into certain contracts, &c., whereas the defendants had not purchased the said quantity of palm-oil, or any palm-oil by the "Cemla," on the terms aforesaid, but on different terms, viz. that the said 25 tons were sold and would be delivered to the plaintiff after and subject to the prior delivery of 800 tons of palm-oil from the said vessel. The declaration then proceeded to state, that, by reason of the vessel not having more than 800 tons of the said palm-oil on board, no part of the said 25 tons could be delivered to the plaintiff, whereby he was obliged to purchase a like quantity of palm-oil at other places at a higher price. And it was held that, as the declaration was founded upon deceit, in the absence of fraud the action could not be sustained. Parke, B., in giving judgment, says: "The law upon this point is now perfectly well settled, that, if the words 'falsely and fraudulently' can be struck out of a declaration, so as to leave a good cause of action, that may be done. The present case is, however, distinguishable: for, we cannot reject the averment that the defendants 'falsely and fraudulently' deceived the plaintiff, without striking out the whole cause of action. It is settled law, that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position, to his damage." In the notes to *Chaudelov v. Lopins* (Cro. Jac. 2), in 1 Smith's Leading Cases, 4th edit. 142, the result of the authorities is thus summed up,—“With respect to actions upon the case for a false representation, although the declaration always imputes to the defendant fraud and an intent to deceive the plaintiff, and although it is expressly [266] laid down that 'fraud and falsehood must concur to sustain this action,' per Gibbs, C. J., *Ashlin v. White*, Holt, 387, still, in order to prove such fraud as the law considers sufficient to sustain the action, it is only necessary to shew that what the defendant asserted was false within his own knowledge, or asserted recklessly without any knowledge upon the subject, - per Maule, J., *Evans v. Edmunds*, 13 C. B. 775, *semble* (see *Pulsford v. Richards*, 17 Beavan, 87),—and with an intention to induce another to act on the faith of it, and alter his position to his damage: *Thom v. Bigland*, 8 Exch. 725, where the report of the judgment of Parke, B., at p. 731, fourth line from the bottom, should be corrected by changing 'or' into 'and,' and striking out the word 'fraudulent'), and that it occasioned damage to the plaintiff: *Foster v. Charles*, 6 Bingh. 396, 7 Bingh. 108, 4 M. & P. 61, 741; *Corbet v. Brown*, 8 Bingh. 433, 1 M. & Scott, 85. For which purpose it must appear that the plaintiff

relied upon it: see *Attwood v. Small*, 6 Clark & Fin. 232; *Vigers v. Pike*, 8 Clark & Fin. 562; *Shrewsbury v. Blount*, 2 Scott, N. R. 588, 2 M. & G. 475; though it should seem that the fact of a misrepresentation having been made, and a course pursued into which that misrepresentation was calculated to mislead, is *prima facie* evidence that the plaintiff was misled by it: *Watson v. Earl of Charlemont*, 12 Q. B. 856." This declaration does not allege, neither can it be inferred, that the defendants were guilty of any improper act. They are alleged to have signed a document in which they are described as "consignees or claimants" of the cargo of the barque "Eliza Warwick": but it is not alleged that they are not consignees.

Cleasby, contra. The third count is a good count in an action of deceit. By the agreement set out in the second count, the defendants bound themselves to pay [267] their proportion of general average adjusted in the way mentioned in respect of goods of which they gave in their names as owners; and that agreement was broken by their failure to pay the amount on demand. The agreement is not in such a form as to enable the now plaintiffs to sue upon it. [Erle, C. J. The plaintiffs, who are no parties to the agreement, want to avail themselves of it under colour of a charge of fraud and deceit. The attempt is an entirely new one.] The question is, whether the representation contained in the agreement was not made for the purpose of inducing the plaintiffs to act upon it. The decision of the court of Exchequer in *Langridge v. Levy*, 2 M. & W. 519, was affirmed in the Exchequer Chamber (4 M. & W. 337) upon the ground upon which the plaintiffs rely here. The person who was injured by the bursting of the gun, and who sought to recover compensation for the injury he thereby sustained, was no party to the contract; yet he was held entitled to maintain the action, on the ground that it was contemplated at the time of the making of the contract that the warranty should be acted upon by him. [Crowder, J. The ground of the decision was that the gun was expressly bought for the son to use.] The word "fraudulently" does not hold so high a place in pleading as it formerly did.

ERLE, C. J. I am of opinion that the third count is bad, and that the defendants are entitled to judgment upon this demurrer. That count does not allege any fraudulent representation by the defendants, nor any scienter: nor does it aver that the representation was made to the plaintiffs. It clearly will not do.

The rest of the court concurring,
Judgment for the defendants.

[268] HATTON v. KEAN. Nov. 7th, 1859.

[S. C. 29 L. J. C. P. 20; 1 L. T. 10; 6 Jur. N. S. 226; 8 W. R. 7. Approved, *Wallerstein v. Herbert*, 1867, 16 L. T. 453. See *Eaton v. Lake*, 1888, 20 Q. B. D. 385; *Tate v. Fullbrook*, [1908] 1 K. B. 825.]

The plaintiff declared that, after the passing of the 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, he had and still retained the sole liberty of representing and performing a certain musical composition composed by him for the purpose of being performed at and during and as part of the representation of Shakespeare's play of *Much ado about Nothing*, and that the defendant without his consent caused the said musical composition to be performed and represented at his theatre, &c.—Plea, that the alleged musical composition was part of a dramatic piece, to wit, &c., adapted to the stage by the defendant with the aid of scenery, dresses, the alleged composition, and other music and accompaniments, the general design of which representation was formed by the defendant, and that the defendant employed the plaintiff for reward to compose the said musical composition as part of the said representation and dramatic piece, and as a mere accessory thereto, on the terms, that, in consideration of such reward, the said musical composition should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, &c. the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof; and that the alleged musical composition was composed by the plaintiff under and by virtue of the said employment, and upon the terms and for the purpose aforesaid:—Held, on demurrer, that the plea was a good

answer to the declaration : for that, under the circumstances, the defendant was to be considered as the author or proprietor of the whole entertainment.

The first count of the declaration stated that, after the passing of the statutes 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, and before and at the time of the representation and performance by the defendant thereafter mentioned, the plaintiff had and still has the sole liberty of representing and performing at any place or places of dramatic entertainment in Great Britain, a certain musical composition composed by him for the purpose of being performed at and during and as part of the representation of Shakespeare's play of "Much ado about Nothing;" nevertheless, after the passing of the said acts, and within twelve calendar months next before the commencement of this suit, while the plaintiff had such sole liberty as aforesaid, the defendant, on divers, to wit, four occasions, without the consent in writing of the plaintiff first had and obtained, caused the said musical composition to be performed and represented at a certain place of dramatic entertainment in England, to wit, at the Princess's Theatre, in Oxford Street, in the county of Middlesex, contrary to the said statutes, and to the great damage of the plaintiff; whereby and by force of the statutes in such case made and provided the de-[269]fendant had forfeited and become liable to pay to the plaintiff the sum of 40s. in respect of each and every such performance by the defendant.

The second count stated that also after the passing of the said statutes, and before and at the time of the representation by the defendant thereafter mentioned, the plaintiff had and still has the sole liberty of representing and performing at any place or places of dramatic entertainment in Great Britain, a certain musical composition composed by him for the purpose of being performed at and during and as part of the representation of Shakespeare's play of "Macbeth;" nevertheless, after the passing of the said acts, and within twelve calendar months next before the commencement of this suit, and while the plaintiff had such sole liberty as aforesaid, the defendant, on divers, to wit, two occasions, without the consent in writing of the plaintiff first had and obtained, caused the said last mentioned musical composition to be performed and represented at a certain place of dramatic entertainment in England, to wit, the said Princess's Theatre, contrary to the said statutes, and to the great damage of the plaintiff; whereby and by force of the statute in such case made and provided the defendant had forfeited and become liable to pay to the plaintiff the sum of 40s. in respect of each of the said performances by the defendant.

The third count charged a like infringement of the plaintiff's copyright in respect of a certain musical composition composed by the plaintiff for the purpose of being performed at and during and as part of the representation of Shakespeare's play of "The Merchant of Venice."

Third plea,—as to the first count,—that the alleged musical composition was part of a dramatic piece, to wit, Shakespeare's play of "Much ado about Nothing," [270] adapted to the stage by the defendant, with the aid of scenery, dresses, the alleged composition, and other music and accompaniments, the general design of which representation was formed by the defendant, and that the defendant employed the plaintiff for reward paid to him by the defendant in that behalf to compose the said musical composition as part of the said representation and dramatic piece, and as a mere accessory to the said dramatic piece, on the terms, that, in consideration of such reward, the said musical composition should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, and causing and permitting to be represented and performed, the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof: and that the alleged musical composition was composed by the plaintiff under and by virtue of the said employment and upon the terms and for the purpose aforesaid: and that the alleged representations and performances were representations and performances by the defendant of the said dramatic piece so designed and adapted as aforesaid with the aid of the said scenery, dresses, and the said musical composition, and other music and accompaniments.

There were similar pleas to the second and third counts.

To each of these pleas the plaintiff demurred, the ground of demurrer stated in the margin being, "that the plea does not state any consent in writing given by the plaintiff to the defendant to perform the said musical composition." Joinder.

The following notice of objections was delivered with the pleas:—

[271] “1. That the alleged musical compositions were not musical compositions within the meaning of the Copyright Act, in which the plaintiff had no right of representation:

“2. That each of them were mere accessories to and parts of certain dramatic pieces respectively of which the plaintiff was not the author, to wit, the composition mentioned in the first count was an accessory to and part of ‘Much ado about Nothing,’ the composition in the second count an accessory to and part of ‘Macbeth,’ the composition in the third count an accessory to and part of ‘The Merchant of Venice.’

“3. That they were composed by the plaintiff as and for such accessories and parts; and that he was employed and paid by the defendant for such composition; and the plaintiff cannot separate them from such plays, and prevent the defendant from representing them as parts of such plays:

“4. That the said plaintiff composed them, namely, as the assistant and servant of the defendant in the bringing out of such plays; and that the defendant was the author and designer of the particular representations of the said plays combined with the said musical compositions:

“5. That the defendant was and is the author and has the right of representation of the said several musical compositions; and that the musical composition in the first count was first published on the 20th of November, 1858, at the Princess’s Theatre, and that in the second count on the 14th of February, 1853, at the said theatre, and that in the third count on the 12th of June, 1858, at the said theatre.”

R. E. Turner, in support of the demurrer (*a*). The [272] questions in this case are,—first, whether musical compositions are within the copyright acts, —secondly, whether this production of the plaintiff’s is, under the circumstances of its composition, within the protection of those acts. The 1st section of the 3 & 4 W. 4, c. 15, secures to the author or his assignee the sole liberty of representing or causing it to be represented at any place of dramatic entertainment: and the 2nd section enacts, that, “if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act or right of the author or his assigns, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment (within the limits mentioned in s. 1), any such production, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s., or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater [273] damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act.” The provisions of that statute were by the 20th section of the 5 & 6 Vict. c. 45, extended to musical compositions, and the period of protection made co-extensive with that afforded to other literary productions. The pleas here are designed to raise the question which was left undecided in *Russell v. Smith*, 12 Q. B. 217, viz. whether the protection given by the above-mentioned statutes to the author of any “dramatic piece or musical composition”

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

“That the third, fourth, and fifth pleas do not shew any right in the defendant to represent the musical compositions of the plaintiff mentioned respectively in those pleas without the written consent of the plaintiff:

“That the pleas state no such written consent, and no assignment to the defendant of the right of performing the said compositions:

“That one man cannot have the right of performing the musical compositions of another without such written consent or assignment:

“That the alleged terms on which the pleas state that the plaintiff composed the said music for the defendant could only be carried out by a written consent or assignment:

“And that, although the musical compositions were intended to be part of a dramatic piece, the defendant could not acquire a right to perform them as part of that dramatic piece until he had obtained the written consent of the plaintiff.”

against piracy by unauthorised performance, extends to musical compositions if they be not dramatic in their nature, or performed at a place of dramatic entertainment (a)¹. [Huddleston, Q. C., intimated that he should confine his argument to the other point, viz. that the plaintiff was not an author within the contemplation of the acts.] If the plaintiff is not the author of the composition in question, who is? Clearly not the defendant, any more than a publisher would be who employed an author to write a book for him. Dr. Johnson defines an author to be "he that effects or produces anything; the first writer of anything." Bailey describes him as "the composer or writer of a book, as contradistinguished from a compiler or a translator." And Webster says the term author "is appropriately applied to one who composes or writes a book or original work, and, in a more general sense, to one whose occupation is to compose and write books." In *Shepherd v. Conquest*, 17 C. B. 427, the proprietors of a theatre employed an author to compose for them a dramatic piece, paying him a weekly salary and travelling expenses. There was no contract in writing, nor any assignment or registry of the copyright; but a mere verbal understanding that [274] the plaintiffs were to have the sole right of representing the piece in London: and it was held that the plaintiffs were not assignees of the copyright, nor had they such a right or interest therein as to entitle them to maintain an action for penalties under the 3 & 4 W. 4, c. 15, s. 2. In delivering the judgment of the court, Jervis, C. J., there says: "We do not think it necessary in the present case to express any opinion whether under any circumstances, the copyright in a literary work, or the right of representation, can become vested ab initio in an employer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say, that, in such a case, the employer is the author of a work to which his mind has not contributed an idea: and it is upon the author in the first instance that the right is conferred by the statute which creates it. We cannot bring our minds to any other conclusion than that Courtney, the person who actually made the adaptation, though at the suggestion of the plaintiffs, acquired for himself, as the author of the adaptation, and, so far as that adaptation gives any new character to the work, the statutory right of representing it: and that, inasmuch as the plaintiffs have no assignment in writing of that right, they cannot sue for an infringement of it. The 18th section of the 5 & 6 Vict. c. 45, is an express provision for vesting in the projector the copyright in articles contributed to encyclopædias, periodicals, and works published in a series, reviews, or magazines. The case of a patentee availing himself [275] of the suggestions of a workman, which may be relied on by the other side, has little or no analogy to the case of copyright. [Byles, J. The law upon that subject, as laid down by the present Chief Justice, in *Allen v. Rawson*, 1 C. B. 551, has always been approved of. "I take the law to be," says his Lordship, "that, if a person has discovered an improved principle, and employs engineers, or agents, or other persons, to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent: and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle" (a)². The inventor retains the services and the brains of another.] In *Lee v. Simpson*, 3 C. B. 871, an introduction to a pantomime,—that is, the only written part of the entertainment,—was held to be within the protection of the 3 & 4 W. 4, c. 15, s. 2. [Crowder, J. The musical composition here was merged in and became part of the entertainment designed and adapted by the defendant. Erle, C. J. It was not a thing that could be withdrawn from the general plan of the entertainment.] Could it be said that Mendelssohn's celebrated march in the *Midsummer Night's Dream* was not the subject of copyright?

(a)¹ And see *Russell v. Bryant*, 8 C. B. 836.

(a)² See Mr. Norman's very valuable little work on Patents, pp. 46, 47.

Huddleston, Q. C., *contra* (b). The pleas afford a [276] complete answer to the charges contained in the declaration. The substance of the defence is this,—that the defendant, who had arranged certain of Shakespeare's plays, with adjuncts of scenery, music, dancing, &c., employed artists and authors to aid him in carrying his design into effect; and, amongst others, the plaintiff was employed to compose and arrange the orchestral accompaniments: and the question is whether the property in the entire entertainment is not vested in the defendant as the author and designer of [277] it. In *Leader v. Purday*, 7 C. B. 4, it was held that one who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as the proprietor of the copyright in the whole composition. In giving judgment in *Shepherd v. Conquest*, advertent to the right of an employer to adopt and incorporate into his design the suggestions of servants, without detracting from the originality necessary to sustain a patent for the entire invention, Jervis, C. J., says: "To these might be added the case of *Harfield v. Nicholson*, 2 Law Journ. Ch. 90, 102, 2 Sim. & Stu. 1, in which Sir John Leach suggested the application of a similar principle to copyright, in the following words,—'I am of opinion, that, under the statute [8 Anne, c. 19], the person who forms the plan, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own particular acquirements,—that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally.' Also, it may be added, that, in the extract from *Merlin*, tit. *Contrefaçon*, § xi., the words 'author' and 'inventor' are said to be synonymous. And, indeed, it has been contended that the productions of an author are to be dealt with in the same manner as the inventions of a workman, and that the former, like the latter, may become the property of an employer who hires the author's labour, and, as it was said, 'buys his brains.'" In *Sweet v. Benning*, 16 C. B. 459, the plaintiffs were the proprietors of a weekly paper called [278] *The Jurist*, which consisted principally of reports of decisions in the various superior courts of law and equity, supplied by barristers employed by the plaintiffs for that purpose under a verbal arrangement to the effect that they should furnish reports of such cases as they thought desirable for publication in *The Jurist*, upon the terms of being paid a given price per sheet, —the reporters

(b) The points marked for argument on the part of the defendant were as follows:—

"1. The Copyright Act does not give the exclusive right of representation to the composer of a musical composition which is a mere accessory to a dramatic piece by another author, composed as such, and not intended for representation by itself. Such a composition is not a musical composition within the act:

"2. The Copyright Act does not give the right of representation to a person employed and paid to compose a piece of music as a mere detail and accessory to the general design of another. Such a person is not an author within the meaning of the act:

"3. An accessory follows the nature of its principal: and, the defendant being the author of the general design of representing Shakespeare's plays with particular illustrations and accessories, and the compositions mentioned in the declaration being merely some of those illustrations and accessories, composed by the plaintiff for the defendant in carrying out the defendant's design, the defendant is the author of the particular representation of the plays designed and produced by him, and has the right of representing the plays with such compositions as parts thereof:

"4. Under the circumstances disclosed in the pleas, the representations by the defendant were not contrary to the intent of the acts 3 & 4 W. 4, c. 15, 3 & 4 W. 4, c. 27, s. 2, and 5 & 6 Vict. c. 45, or the right of the author, and therefore a consent in writing of the plaintiff was not necessary:

"5. That the notice delivered with the pleas pursuant to the statute must be deemed and taken to form part of and to be read with the pleas, and that the matters therein set forth shew that the pleas are good, and that the plaintiff has no cause of action against the defendant."

making no express reservation of a right to publish the cases themselves, and there being no express stipulation that the copyright should belong to the plaintiffs,—nothing, in fact, being said upon the subject: and it was held that the plaintiffs had a copyright in the reports so furnished to *The Jurist*. In the course of the argument (p. 468), Maule, J., says, “One might almost infer, without the aid of an act of parliament, that one who employs another to write an article, or to make anything else for him, is the owner or proprietor.” And, in giving judgment, the same learned judge says: “I think, that, where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer, subject, of course, to the limitation pointed out in the 18th section of the act.” It is difficult, as was said in *Shepherd v. Conquest*, 17 C. B. 434, to see why a different rule should prevail in the case of copyright from that which obtains in the case of patents for inventions. The 20th section of the 5 & 6 Vict. c. 45 enacts that “the provisions thereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical [279] composition, as if the same were therein expressly re-enacted and applied thereto.” Now, substituting the right of representing for the right of publishing in s. 18, that section is exactly applicable to this case. Taking a fair and common sense view of the matter, it is obvious that the defendant and he alone can be considered the author of the entire entertainment; and that those who assist in the preparation of the accessories can no more acquire a separate and independent property in the portions severally contributed by them than the contributors to serials or newspapers can.

Turner, in reply. It is assumed that Mr. Kean is the author of the whole of the entertainment: the argument must go the length of saying that that would be so, if, instead of one of Shakespeare's plays, the production of a modern author had been selected. As to the 18th section of the 4 & 5 Vict. c. 45, it would be a very forced construction to apply it to a production of this sort. That section was meant to provide for the case of periodicals which are published as part of a general scheme, and at intervals. [Byles, J. The exception in s. 18 is not immaterial, —“save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book.”] The point is quite a new one, and it is one of very great importance to the members of the musical world.

ERLE, C. J. I am of opinion that our judgment in this case must be for the defendant. I found my opinion entirely upon the facts stated in the plea, which are admitted by the demurrer. It is conceded that there has been no decision upon the precise point. It appears to me, upon the facts thus admitted upon [280] the record, that the defendant was the author and designer of an entire dramatic representation or entertainment, with respect to part of which, a small accessory, viz. the music, he employed the plaintiff upon the terms set out in the plea,—that, in consideration of certain reward paid by the defendant to the plaintiff, the music should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, and causing and permitting to be represented and performed, the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof. I am of opinion that the music so composed by the direction and under the superintendence of the defendant, and as part of the general plan of the spectacle, must, as between him and the plaintiff, become the property of the defendant; and that, consequently, the defendant has violated no right of the plaintiff in causing it to be represented in the manner alleged. One cannot but perceive, that, if the plaintiff were right in his contention, the labour and skill and capital bestowed by the defendant upon the preparation of the entertainment might all be thrown away, and the entire object of it frustrated, and the speculation defeated, by any one contributor withdrawing his portion. As between these parties, and under the circumstances, it seems to me very clearly that the musical composition in question became the property of the defendant, and that the plaintiff never was within the language of the statute the owner or proprietor thereof.

WILLIAMS, J., concurred.

CROWDER, J. I am entirely of the same opinion. The whole of the entertainment in question was [281] designed by Mr. Kean: and, in order to get up the details, it was necessary for him to get the assistance of the plaintiff and other persons to supply the numerous adjuncts necessary for the completion of the entire thing. The music in question having been composed by the plaintiff under an express engagement with the defendant, and for the defendant, and having been paid for by the defendant, the plaintiff never had any separate property therein, and consequently he could have no right to prevent the representation of it by the defendant.

BYLES, J. I am of the same opinion. All I desire to add is, that, in coming to this conclusion, we decide nothing that is inconsistent with the decision of this court in *Shepherd v. Conquest*, 17 C. B. 427, inasmuch as this case falls within the class as to which the court there expressly disclaimed giving any opinion.

Judgment for the defendant.

[282] LAW v. PARNELL. Nov. 2nd, 1859.

[S. C. 29 L. J. C. P. 17; 1 L. T. 32; 6 Jur. N. S. 172; 8 W. R. 6.]

Where a bill is indorsed in blank, it is competent to the holder to hand it over to a third person to sue upon it on his behalf.—The manager of an association established under the 7 & 8 Vict. c. 110, and also carrying on the business of a deposit and discount bank, *bonâ fide* received from a customer a bill of exchange indorsed in blank:—Held, that it was competent to him to sue upon it in his own name only, without the indorsement of the bank, although he was a partner and shareholder in the concern,—it appearing that it was a part of his duty as manager to keep possession of and to realize the securities which came to his hands in that character.

This was an action by the indorsee against the acceptor of a bill of exchange.

The declaration stated that one Thomas Burton, on the 17th of December, 1858, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him the said Thomas Burton, or to his order, 40l. 10s. three months after date, and the defendant accepted the same, and the said Thomas Burton indorsed the same to the plaintiff, but the defendant did not pay the same.

Pleas,—first, a traverse of the acceptance,—secondly, a traverse of the indorsement to the plaintiff,—thirdly, that the defendant accepted the said bill and delivered it to Burton, who took and received it from the defendant and always held it for a special purpose only, to wit, that he might get it discounted for the defendant and pay over to him the proceeds thereof on such discounting: that Burton did not get the bill discounted for the defendant, or pay over to him any of the proceeds thereof: that, except as aforesaid, there never was any consideration or value for the said acceptance; that there never was any consideration for the said indorsement of the said bill to the plaintiff; and that the plaintiff always held and now holds the said bill without value, and with full knowledge and notice of the premises. Issue.

The cause was tried before Crowder, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiff was the manager and a shareholder in an association called the Life Assurance Treasury, which carried on the business of a deposit and discount bank. Burton, who [283] had an account with the bank, indorsed the bill in question, and handed it over to them to cover advances made to him. The plaintiff, whose duty it was as manager to hold bills and other securities on behalf of the bank, brought this action by authority of the directors.

On the part of the defendant, it was submitted, that, the bill having been delivered to the plaintiff as manager to hold for the bank, he alone had no right to sue, but all the other shareholders should have joined in the action.

The learned judge, reserving leave to move, left the case to the jury, who returned a verdict for the plaintiff.

Laxton now moved accordingly. The plaintiff is not in a position to maintain this action. He was not indorsee of the bill. To constitute a valid indorsement, there must be a delivery of the bill with the intention to vest the property in it. [Byles, J. In somebody.] Here, the bill was delivered to the plaintiff, not for the

purpose of vesting the property in him, but in the bank, whose agent he was, and without whose indorsement he could not properly sue upon it. [Erle, C. J. It was indorsed and delivered to the plaintiff as manager of the bank, to do with it as was customary as such manager.] It was delivered to him for a collateral purpose. In *Lloyd v. Howard*, 15 Q. B. 995, Lord Campbell says: "An indorsement requires that there shall be a delivery of the bill with an intent to make the person to whom it is indorsed the owner of the bill, a party to the bill, and transferee of the property in it. There is no indorsement, if the owner merely writes on the bill a direction to pay it to another person, and the other person gets possession without the holder's consent. Nor is there any indorsement, [284] though the holder give that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to make him transferee of the property in the bill." That is fully borne out by the authority of *Marston v. Allen*, 8 M. & W. 494, and numerous other cases. [Williams, J. In *Marston v. Allen*, it was a pure question of pleading.] In *Bell v. Lord Ingestrie*, 12 Q. B. 317, it was held that evidence that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee, for the express purpose of retiring other bills, and on the express condition that they should be retired forthwith, and that such condition had not been complied with, was admissible to support a plea traversing the indorsement. [Crowder, J. There, as in all the other cases you cite, the bill had been obtained by fraud. Here, the bill came properly to the hands of the plaintiff as manager of the bank.] In *Emmet v. Tottenham*, 8 Exch. 884, W., being the representative of a deceased holder of a bill of exchange accepted by the defendant, requested R., who had guaranteed the payment, to see it paid. R. employed the plaintiff to sue upon it in his own name, and informed W. of the fact, saying that he required the bill to deliver to the plaintiff for that purpose. W. thereupon gave the bill to R., who, after making a copy, in his presence, gave it back, saying it would be safer in the hands of W. until it was wanted. The copy was then delivered to the plaintiff, who commenced the action. W. shortly afterwards delivered the bill to his own attorney, to take such steps as he might judge necessary, and get the money; and the bill was subsequently given to the plaintiff. The defendant pleaded a denial of the indorsement, and that the plaintiff was not the holder of the bill at the commencement of the suit. It was held, that, as the plaintiff had no interest in the bill, nor actual possession of [285] it, nor any constructive possession, inasmuch as neither R. nor W. was his agent, the defendant was entitled to a verdict upon both pleas. This was a company established under the 7 & 8 Vict. c. 110, from the operation of which banking companies are by s. 2 expressly excepted: consequently all the partners ought to have joined, or the plaintiff should have shewn an indorsement according to the provisions of the 7 & 8 Vict. c. 113, s. 22 (a). [Byles, J. That was not necessary here, the indorsement by Burton being a blank indorsement. Where a bill is indorsed in blank, any bonâ fide holder may sue upon it.]

ERLE, C. J. I am of opinion that there ought to be no rule in this case. It is clear upon the facts stated to us that the bank gave value for the bill, and that it was indorsed and delivered to their manager by the indorser with the intention of passing the property from the indorser to the indorsees. The bill being indorsed in blank, the bank had a right to hand it over to a third person to sue upon it, without indorsing it: and therefore the plaintiff, if he was the lawful holder of the bill, and had authority from the bank to do so, had a perfect right to sue upon it. And the evidence shewed that he had such authority. As to the cases cited, there is no doubt, that, if the party has obtained the bill by fraud, or if it has come to his hands with a conditional right only, and he perverts it from the purpose for which he received [286] it, the delivery of the bill to him with such conditional right does not constitute a valid transfer, so as to make him an indorsee. In the case of *Emmet v. Tottenham*, 8 Exch. 884, the plaintiff was not indorsee, neither had he possession of the bill. He had no interest in the bill: the owner of the bill never parted with it until after the commencement of the action. In *Bell v. Lord Ingestrie*, 12 Q. B. 317, the indorsement was in the

(a) Which enacts "that all bills of exchange or promissory notes made, accepted, or indorsed on behalf of the company, may be made, accepted, or indorsed (as the case may be) in any manner provided by the deed of partnership, so that they be signed by one of the managers or directors of the company, and be by him expressed to be so made, accepted, or indorsed by him on behalf of such company," &c.

nature of a conditional indorsement: the bill was handed over for the express purpose of retiring other bills. As between the plaintiff and the defendant, therefore, there was no absolute indorsement, and therefore the plaintiff had no right to sue. As to the objection that the rest of the shareholders should have been joined, or the bill specially indorsed to the plaintiff by the bank, I think that point also fails, because the blank indorsement by Burton gave the bank power to authorize their manager to sue upon the bill; and there was ample evidence that they had done so.

WILLIAMS, J. I am of the same opinion. It is plain that the bill was indorsed by a person who intended thereby to pass the property therein from himself to the bank; and that the property accordingly vested in them. Then, the bank, being the holders of a bill indorsed to them in blank, might lawfully constitute any third person the holder for the purpose of suing upon it: and the evidence shewed that they did authorize the present plaintiff, their manager, to sue upon the bill on their behalf.

CROWDER, J. I am of the same opinion. There clearly was evidence from which the jury were warranted in concluding that the plaintiff had authority from the persons to whom the bill was indorsed to sue upon it. There was no fraud or suspicion of fraud on [287] the part of the bank, or that they were not the *bonâ fide* holders for value; and they might well authorize their manager to sue.

BYLES, J. I am of the same opinion. To whomsoever the bill was intended to be indorsed, it clearly was perfectly indorsed. It could only have been intended to be indorsed to the plaintiff or to his principals, the bank. If it was intended to be indorsed to the plaintiff, *cadit questio*: if to the bank, inasmuch as the indorsement was in blank, it was competent to them to hand over the bill to their agent or manager for the purpose of suing upon it on their behalf.

Rule refused.

SINGLETON v. THE EASTERN COUNTIES RAILWAY COMPANY. Nov. 4th, 1859.

A child three years and a half old strayed upon a railway and had its leg cut off by a passing train:—Held, that, in the absence of any evidence to shew that the child got there through some neglect or default on the part of the company, they were not responsible for the injury.

This was an action against the Eastern Counties Railway Company, to recover damages for an injury sustained by the plaintiff, an infant of the age of three years and a half, through the alleged negligence of the company.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term. The facts which appeared in evidence were as follows:—The plaintiff, with her brother, who was about five and a half years old, had by some means got upon the North Woolwich branch of the defendants' railway, and were sitting upon the parapet of a small wooden bridge on the railway, when a train came up and in passing cut off one of the plaintiff's legs. It appeared that the [288] train was coming up an incline, and that the driver saw the dangerous position of the children, but made no attempt to stop the engine, contenting himself with merely turning on his whistle. There was no evidence to shew how the two children got to the place where they were, but it was supposed that they got through the fence at a place where a rail was off.

On the part of the defendants it was submitted that there was no evidence of negligence on the part of the driver, and that the child herself was contributory to the accident by being where she ought not to have been.

His Lordship nonsuited the plaintiff, reserving leave to move, if the court should be of opinion that there was evidence of negligence on the part of the company which ought to have been left to the jury.

Littler now moved accordingly. There was negligence on the part of the driver of the engine in not stopping when he might have done so: and also negligence on the part of the company for allowing the rail to be off. A child of such tender age cannot be said to be contributory to an accident of this sort. In *Lynch v. Nurdin*, 1 Q. B. 29, 4 P. & D. 672, the defendant negligently left his horse and cart unattended in the street: the plaintiff, a child seven years old, got upon the cart in play: another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt: and it was held, that the defendant was liable in an action

on the case, though the plaintiff was a trespasser, and contributed to the mischief by his own act; and that it was properly left to the jury whether the defendant's conduct was negligent, and the negligence caused the injury. Speaking of that case in *Lugo v. Newbold*, 9 Exch. 302, 305, Parke, B., [289] says: "The decision in *Lynch v. Nordin* proceeded wholly upon the ground that the plaintiff had taken as much care as could be expected from a child of tender years,—in short, that the plaintiff was blameless, and consequently that the act of the plaintiff did not affect the question."

ERLE, C. J. The plaintiff was wrongfully upon the railway: and, without saying anything to detract from the authority of the cases cited, I must confess I was wholly unable to discover any evidence of negligence on the part of the servants of the company.

WILLIAMS, J. I also think there was no negligence made out on the part of the company. There was nothing to shew how the children got on to the railway. All was mere conjecture and surmise.

The rest of the court concurring,
Rule refused.

[290] GREEN v. THE LONDON GENERAL OMNIBUS COMPANY (LIMITED).
Nov. 18th, 1859.

[S. C. 29 L. J. C. P. 13; 2 L. T. 95; 6 Jur. N. S. 228; 8 W. R. 88. See *Edwards v. Midland Railway*, 1880, 6 Q. B. D. 289. Referred to, *Allen v. Flood*, [1898] A. C. 27.]

A corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation.—Therefore, in an action against a company established for conveying passengers by omnibuses in the streets of London, charging that the company by its servants wrongfully, vexatiously, and maliciously did certain acts (describing them) with a view to, and which in the result did, obstruct and annoy the plaintiff in the conduct of a similar trade:—Held, that, as the acts complained of were connected with the object and purpose for which the company was incorporated the company was responsible.

This was an action against the defendants for wrongfully and maliciously obstructing the plaintiff in his business of an omnibus proprietor.

The declaration stated, that, before and at the time of the committing the grievances thereafter mentioned, the plaintiff carried on the trade and business of a carrier of passengers for hire in certain public streets, roads, and highways, to wit, &c., by means of certain omnibuses of the plaintiff drawn by horses and driven and conducted by the servants of the plaintiff, for the profit and benefit of the plaintiff, and which said omnibuses of the plaintiff had full liberty and right to run respectively from, &c., to, &c. and to stop for a reasonable time at all points and places on and along the said public streets, roads, and highways, for the purpose of taking up and putting down passengers, and at certain points and places in the said streets, roads, and highways where numerous passengers were accustomed to enter the omnibuses passing such points and places, the said omnibuses of the plaintiff and all other omnibuses passing that way were, by the police-regulations then lawfully enforceable and enforced, permitted to wait for a certain space of time, to wit, for the space of four minutes, to look for passengers, unless by their so doing any actual obstruction to the thoroughfares or nuisance to the inhabitants near the places was caused thereby: Yet the defendants, well knowing the premises, but contriving and intending to injure, impoverish, and ruin the plaintiff, and to prevent him from carrying on his said business, at divers [291] times before this suit, wrongfully, vexatiously, and maliciously placed and drove in the public streets, roads, and highways aforesaid, certain other omnibuses and carriages just before and just behind the said omnibuses of the plaintiff, whilst the same, with the plaintiff's horses drawing the same, were plying for passengers for hire in the public streets, roads, and highways as aforesaid, and with which the plaintiff was then carrying on his said business, in such a manner as to hinder and prevent, frighten, and deter great numbers of persons from entering the plaintiff's said omnibuses and becoming passengers therein for hire, as they otherwise

might and would have done, and so as to hinder and prevent the plaintiff from having the free use of the said streets, roads, and highways with his said omnibuses and horses in so large and ample a manner as he otherwise might and would have done, and so as to retard, delay, and stop the said omnibuses of the plaintiff, and so as greatly to obstruct and incumber the said highways, to the nuisance of the Queen's subjects then lawfully using the same: And further the plaintiff said that the defendants wrongfully, vexatiously, and maliciously drove and placed in the public streets, roads, and highways aforesaid, certain other carriages and omnibuses upon and against the said omnibuses and horses of the plaintiff, and upon and against the servants of the plaintiff then conducting the same, while the said omnibuses, with the plaintiff's horses harnessed to the same, and the plaintiff's said servants conducting the same, were plying and waiting for passengers for hire in the public streets, roads, and highways aforesaid, and with which the plaintiff was then carrying on his said business as aforesaid, in such a manner as thereby to bruise, damage, and injure the said omnibuses and horses of the plaintiff, and to prevent the doors of the said [292] omnibuses from being opened, and to obstruct and block up the access of passengers into the said omnibuses of the plaintiff, and to hinder and disable the said servants of the plaintiff from freely and fully performing their duties to the plaintiff in the conduct and management of the said omnibuses of the plaintiff, and whereby they were so hindered and disabled as aforesaid accordingly: And the plaintiff further said that the defendants also, contriving and intending as aforesaid, at the several times aforesaid also wrongfully, vexatiously, and maliciously, in the said public streets, roads, and highways, thrust and pushed themselves, and caused their servants to and they did thrust, push, and place themselves between the said omnibuses of the plaintiff while plying and waiting for passengers as aforesaid in the way of the plaintiff's said business, and divers persons who were desirous to enter and get into and on to the same as passengers for hire, so as thereby to obstruct the entrance and access of such passengers into and upon the said omnibuses of the plaintiff, and to hinder, deter, and prevent them from entering the same or becoming passengers therein: And further, in continuation of this count, the plaintiff said that the defendants also contriving and intending as aforesaid, at the several times aforesaid, wrongfully, vexatiously, and maliciously insulted, hissed and assaulted, beat, and ill-used the plaintiff's servants in the said public streets, roads, and highways, while they were employed in driving, conducting, and managing the said omnibuses in the way of the plaintiff's said business, and were plying and waiting for passengers therewith in the said public streets, roads, and highways: And in continuation of that count the plaintiff further said that the defendants, well knowing the points and places in the said respective roads at which the plaintiff's omnibuses, by the said police-regulation in the introductory part of [293] that count mentioned, were permitted to remain for a certain space of time, to wit, for the space of four minutes as aforesaid, wrongfully, maliciously, and vexatiously, and for the express purpose of annoying the plaintiff and causing such an obstruction of the thoroughfares at the said points and places in the said public streets and roads as aforesaid as would induce and oblige the police there stationed to order off the omnibuses of the plaintiff from the said points and places before the said omnibuses had remained at the said points and places for the said space of time which by the police-regulations aforesaid they were permitted to remain, and thereby to prevent passengers who, if the plaintiff's omnibuses had so remained, would have come and entered into and mounted upon the plaintiff's said omnibuses, from so doing, caused one or more of their, the defendants', omnibuses, drawn by their horses, and driven and conducted by their drivers and conductors, to precede and follow each omnibus of the plaintiff as such omnibus approached near to and arrived at each or any of the said points and places in the said public streets, roads, and highways, in such a manner as to cause such an obstruction to the thoroughfares at such points and places, and such a nuisance to the inhabitants near the said points and places, as would induce and oblige, and which did induce and oblige, the police there stationed to order and command that the plaintiff's omnibuses should move off from the said points and places in the said public streets, roads, and highways, before they had remained there for that space of time which but for the defendants' wrongful contrivance and conduct they otherwise might and would have done, and thereby they the defendants prevented numerous passengers from entering and riding upon the plaintiff's said omnibuses for hire, as they otherwise might and would have done: by reason of which said several

[294] grievances in that count respectively mentioned, great numbers of persons were on the several days and times aforesaid hindered, deterred, and prevented from becoming passengers for hire by the plaintiff's said omnibuses, as they otherwise would have done, and the plaintiff's omnibuses and horses were greatly injured, &c., and the plaintiff was greatly damaged, hindered, and obstructed in carrying on his said business, &c. &c.

To this declaration the defendants demurred: and the plaintiff joined in demurrer.

Giffard (with whom was Paterson), in support of the demurrer. The declaration alleges a variety of malicious acts done by the company with the intention of obstructing and injuring the plaintiff in carrying on his trade. Now, the gist of the action is the malicious intention: and a corporation cannot as such be actuated by malice. A corporation, according to Lord Coke, — *Sutton's Hospital case*, 10 Co. Rep. 32 b., — "cannot treason, nor be outlawed, nor excommunicate, for they have no souls: neither can they appear in person, but by attorney: 33 H. 8, Br. Fealty. A corporation aggregate of many cannot do fealty, for, an invisible body can neither be in person, nor swear: Plowd. Comm. 213, and *The Lord Berkeley's case*, 245: it is not subject to imbecilities, death of the natural body, and divers other cases." The question is how far the old rule of law in this respect is modified by the recent decisions upon the subject. The most recent authority on the point is that of *Whitfield v. The South Eastern Railway Company*, 1 Ellis, B. & E. 115, where it was held that a count against a railway company, being a corporation aggregate, for a malicious libel, is good on demurrer: for that a corporation aggregate may well, in its corporate capacity, [295] cause the publication of a defamatory statement under such circumstances as would imply malice in law sufficient to support the action. But there the judgment proceeded upon the ground that the occasion did not justify the publication, and therefore the law would infer malice. The judgment of the Exchequer Chamber in *The Eastern Counties Railway Company v. Broom*, 6 Exch. 314, lays down the law in a way which distinguishes it from the present case. Patteson, J., there says: "Whatever may be the effect of the authorities in the Year Books, it has been expressly held, in modern times, that trespass will lie against a corporation aggregate for breaking and entering a close, and for seizing goods. This has been decided by several recent cases. Then the question is, whether trespass for assault and battery may lie against a corporation: and it has been contended that it cannot: for, it is said that it can neither beat nor be beaten. No doubt that proposition is true of it as respects its corporate capacity. But it does not therefore follow, that, if a corporation, by authority under seal, direct a servant to apprehend and imprison a particular person, an action for assault and battery cannot be maintained against the corporation. The learned counsel who appears for the plaintiffs in error must contend, in order to shew that this declaration cannot be supported, that no such action would lie. But we are all clearly of opinion that it is not so, and that an action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act to be done, and it is done by their authority." All the acts that are here attributed to the company are acts which are necessarily malicious. The plaintiff must shew that he has been injured by the defendants' placing their omnibuses before and behind his maliciously. Apart from malice, there is no cause of action. The [296] company in its corporate capacity could not authorize acts which are necessarily unlawful and malicious. The mere obstruction by the defendants of the plaintiff's enjoyment of a public way gives no ground of action: he must shew a private and particular damage from an act of the defendants which is intentionally malicious or unlawful: *Hubert v. Groves*, 1 Esp. N. P. C. 148; *Rose v. Miles*, 4 M. & Selw. 101; *Wilks v. The Hungerford Market Company*, 2 N. C. 281, 2 Scott, 446. Here, the plaintiff has suffered no grievance which is peculiar to himself. [Byles, J. What is the meaning of maliciously? Erle, C. J. A wilful violation of the law producing damage to an individual, must be presumed to be malicious.] To sustain this declaration, the plaintiff must shew some wilful and unlawful and unauthorized interference by the defendants with some private right. [Grant, Amicus Curie, referred to the Quo warranto in *Re v. The City of London*, 8 Howell's State Trials, 1039, 1305, 1309, where the subject of malice in a corporation is much discussed. Crowder, J. Would this declaration be bad without the allegation of malice? Does the allegation mean anything more than wilful?] It is submitted that the whole gist of the action is the malice. The defendants could not justify the specific acts charged without

justifying the malicious intention: *Gregory v. The Duke of Brunswick*, 6 M. & G. 205, 6 Scott, N. R. 809.

F. Edwards, *contra*. The old doctrine as to corporations is no longer tenable. In the time of Lord Coke, there were only three different sorts of corporations,—viz. municipal corporations, ecclesiastical or spiritual corporations, and eleemosynary or charitable corporations. The exigencies of modern times, however, have called into existence a new description of corporation for trading purposes; and to these the old [297] law is altogether inapplicable; for acts done by them in furtherance of the purposes for which they are created, they are clearly liable, whether for a breach of contract or a tort. It has been expressly decided in very many modern cases that a corporation aggregate can be guilty of malice. In *Farborough v. The Bank of England*, 16 East, 6, Lord Ellenborough says: “In this case, the only question was whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort. As a corporation they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others: they cannot as a corporation be subject to a *capias* or exigent (the process in trespass), because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But, wherever they can competently do or order any act to be done on their behalf, which, as by their common seal, they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others. A corporation having the return of writs, or to which any writ, or a mandamus, for instance, is directed, is liable eventually to an action for a false return. The case of *Agent v. The Dean and Chapter of St. Paul's*, in this court about the year 1781, was an action for a false return to a mandamus respecting an election to a vergers’ place in that cathedral; and no objection was made that the action would not lie. Vidian’s Entries, p. 1, is an action for a false return against the mayor and commonalty of the city of Canterbury for a false return to a writ of mandamus to restore an alderman to his precedence of place, &c. It states the mayor and corporation as attached to answer, and the return as falsely and maliciously made. The instances of actions against corporations for false [298] returns to writs of mandamus, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries.” It was expressly decided in *The Eastern Counties Railway Company v. Broom*, 6 Exch. 314, that trespass lies against a corporation aggregate for an assault committed by their servant authorized by them to do the act. [Crowder, J., referred to *Chilton v. The London and Croydon Railway Company*, 16 M. & W. 212, where an action was brought against the company for assault and false imprisonment, and it was held to be sustainable.] In *The Queen v. The Birmingham and Gloucester Railway Company*, 3 Q. B. 223, 2 Gale & D. 236, 9 C. & P. 478, it was held that a corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute. If they may be indicted for a nonfeasance, surely an action will lie against a corporation for a wilful and malicious act. In *The Queen v. The Great North of England Railway Company*, 9 Q. B. 315, it was held that a corporation aggregate may be indicted for a misfeasance. [Erle, C. J. The company is incorporated for certain purposes, viz. the constructing and working of a railway: it therefore becomes liable to actions for acts of nonfeasance or misfeasance within the scope of its incorporation. So, the assaulting a passenger for the purpose of enforcing obedience to a bye-law or payment of a fare, might be said to be a matter within the scope of the company’s incorporation. But the question here is, whether the acts of obstruction by means of the omnibuses of these defendants can be said to be acts done within the scope and object of the company’s incorporation.] That, it is submitted, would be a question for the jury. Lord Campbell in delivering the judgment of the court in *Whitfield v. The South Eastern [299] Railway Company*, 1 Ellis, B. & E. 121, says,—“Considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation. The authorities are collected and commented upon in *Regina v. Great North of England Railway Company*, in which it was held that a corporation aggregate may be indicted for cutting through and obstructing a public

highway; and again in *Eastern Counties Railway Company v. Broom*, in which it was held, in error, that an action of trespass may be maintained against a corporation aggregate for an assault committed by their servant authorized by them to do the act. The cases to the contrary will be found to turn upon the defective evidence to prove the authority of the corporation to do the act complained of. Instances might easily be suggested where great injustice would be suffered by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed." So, in *Maunder v. The Monmouthshire Canal Company*, 4 M. & G. 452, 5 Scott, N. R. 457, 2 Dowl. N. S. 113, Car. & M. 606, it was held that trespass lay against the company, a corporation aggregate, for the seizure by their agent of certain barges and coal for tolls alleged to be due to the company. [Crowder, J. There, the agent was clearly acting within the scope of the authority given him by the corporation.] It is scarcely possible to overrate the mischief which would result from holding companies of this sort inaccessible to the control of the law in respect of acts such as are here charged. The complaint against these defendants is [300] not to be distinguished from that of the assault by the servant of the company in *The Eastern Counties Railway Company v. Broom*, or that of maliciously publishing the libel in *Whitfield v. The South Eastern Railway Company*. In *Lawson v. The Bank of London*, 18 C. B. 84, it seems to have been assumed that a corporation aggregate may be sued for a wilful and malicious wrong. In *Scott v. The Mayor, &c., of Manchester*, 1 Hurlst. & N. 59, 2 Hurlst. & N. 204, the defendants were held responsible for the negligent doing of an act in the course of his duty by a servant of the corporation. It is difficult to see upon what principle a corporation can be held to be liable for negligence, and yet not liable where the act is done wilfully and maliciously. "Maliciously" and "unlawfully" mean the same thing; and the declaration would have been equally good if the word "maliciously" had been omitted: for, it means no more than that the act is done with intention to do some injury to the person against whom the malice is directed. In the ordinary case of master and servant, the master is liable for the negligent or tortious acts of his servant in the execution of an authority conferred upon him. In *Saunders on Pleading and Evidence*, 748, 2nd edit., it is said: "A principal or master is in general liable for the tortious acts of his servants in all matters done by them in the exercise of the authority that he has given them, whether such servants be immediately retained by himself or by those whom he has employed; and, however remote the sub-agent may be whose unskilfulness or negligence, &c., was the cause of the injury, the liability may always be traced to the principal, from whom the authority moved: *Bush v. Stearnman*, 1 B. & P. 404, 5 B. & C. 547; *Morley v. Gaisford*, 2 H. Bl. 442, 3 Wils. 317. So, for the negligent driving of a carriage, or navigating a ship, even [301] whilst the servant was driving out of the direct road, and for his own purpose: *Jock v. Morrison*, 6 C. & P. 501." [Byles, J., referred to *Mitchell v. Crassweller*, 13 C. B. 237 (a).]

Giffard, in reply. The whole declaration here charges a wilful and intentional annoyance and obstruction of the plaintiff. Lord Ellenborough, in *Yarborough v. The Bank of England*, 16 East, 7, points to the very distinction now contended for. Wherever corporations, he says, "can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others." [Crowder, J. The defendants are incorporated for certain purposes. The question is whether they are not liable for acts which are done in abuse of their powers.] It would be hard to hold the shareholders liable for the wrongful acts of individuals who ought to be held personally responsible for giving unlawful orders.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

We are of opinion that our judgment in this case ought to be for the plaintiff. This is an action against the defendants for wrongfully, vexatiously, and maliciously interfering with the plaintiff's rights, by causing their vehicles to be driven in such a manner as to obstruct and molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground of the demurrer [302] is that the declaration charges a wilful and inten-

tional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles; and, the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation. Unless the acts charged were wrongfully done, the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies: and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of *Yarborough v. The Bank of England*, 16 East, 6, down to *Whitfield v. The South Eastern Railway Company*, 1 Ellis, Bl. & E. 115,—which was in reality an action against the Electric Telegraph Company, shews that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. Giffard,—that a corporation, having no soul, cannot be actuated by a malicious intention,—is more quaint than substantial. In coming to the conclusion we arrive at, we have no intention in the smallest degree to interfere with any of the decided cases; but, on the contrary, we found our judgment upon the numerous class of cases of which *Yarborough v. The Bank of England*,—where there is a most learned and elaborate argument of Lord Ellenborough, going fully into all the previous authorities,—is by no means the first, and which afford abundant examples of the application of the principle we now rely on. We may add that we dwell the less upon the grounds which have been urged by Mr. Giffard against the [303] maintenance of the action, by reason of the extreme mischief and inconvenience which would follow from our holding that these companies incorporated for the purpose of carrying on trade were exempt from liability for intentional acts of wrong. We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party. For these reasons, we are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

EX PARTE ELIZABETH MARIA WALLIS AND ANN JULIET HAY. Nov. 23rd, 1859.

A certificate of acknowledgment of a deed by a married woman under the 3 & 4 W. 4, c. 74, was allowed to be filed, where, in lieu of the form given in s. 84, the commissioners merely certified that the lady was, as they believed, of full age, &c.

Hannen moved that the certificate of the acknowledgment of a deed by Mrs. Wallis and Mrs. Hay, two married women, taken at Toronto, Upper Canada, under the 3 & 4 W. 4, c. 74, might be received and filed.

The certificate did not follow the form given in the 84th section of the statute, which requires the commissioners taking the acknowledgment to certify that the party “was at the time of her acknowledging the said deed, of full age and competent understanding;” but used the following words,—“And we do hereby certify that each of them the said Elizabeth Maria and Ann Juliet was, as we the said commissioners believe, at [304] the time of her acknowledging the said deed, of full age and competent understanding.”

The affidavit verifying the certificate, which was made by one of the commissioners, in like manner pledged the belief of the deponent that each of the persons making the acknowledgment was at the time of full age, &c.

There was, however, in addition, an affidavit by a gentleman residing at Toronto, deposing to his knowledge of Mrs. Wallis and Mrs. Hay, and stating that, “at the time of making such acknowledgment, each of them the said Elizabeth Maria Wallis and Ann Juliet Hay was of full age and competent understanding.”

The learned counsel submitted that the 84th section did not require that the form therein given should be implicitly followed, but that it might be to the like effect, and that it was “subject to any alteration which might from time to time be directed by the court of Common Pleas.” [Crowder, J. That means, not that the form may

be departed from in each case at pleasure; but that the court may from time to time by general rule vary it.) In the case of *In re Luke*, 1 Scott, 80, 1 N. C. 265, 3 Dowl. P. C. 112, the court allowed the form to be departed from, by omitting the words "of full age," the lady being at the time an infant.

BYLES, J. The utmost the commissioners could certify would be as to their belief of the fact. If the certificate be ever so positive in its language, it in reality amounts to no more than a certificate that the party is, according to the belief of the certifying party, of full age. I must confess I do not see why this should not be held a sufficient compliance with the statute.

The rest of the court concurring,

Fiat.

[305] MUMFORD AND ANOTHER v. GETHING. Nov. 17th, 1859.

[S. C. 29 L. J. C. P. 105; 1 L. T. 64; 6 Jur. N. S. 428; 8 W. R. 187. Adopted, *Mills v. Denham*, [1891] 1 Ch. 589. Referred to, *Maxim-Nordenfjelt Guns and Ammunition Company v. Nordenfjelt*, [1893] 1 Ch. 656; *Haynes v. Doman*, [1899] 2 Ch. 18; *Krell v. Henry*, [1903] 2 K. B. 753.]

The plaintiffs, lace-merchants, carrying on business by means of travellers over certain districts in England, verbally agreed with the defendant, who was already in their service in another capacity, to travel for them over one of the districts, which they designated the "midland district," it being at the time understood that the terms of the engagement were to be reduced into writing. A few weeks after the defendant had started on the journey, the following agreement was sent to him, and he signed and returned it:—"To H. & W. Mumford.—In consideration of my entering upon your employ at a salary to commence with at 50l., a year, I herewith agree to do so, with the understanding, that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50l.:"—Held, that extrinsic evidence was properly admitted to explain the nature of the employment and what was intended by the expression "the same ground;" that, such evidence being admitted (or, per Erle, C. J., and Crowder, J.,—Byles, J., dubitante,—without it,) the contract was not void as an unreasonable restraint of trade; that, even without the evidence to explain the contract, there was ample consideration for the defendant's promise; and that a forfeiture of the 50l. was incurred by the defendant's travelling for another house in the same line "over the same ground," after he had left the service of the plaintiffs.

This was an action for the breach of a contract of service. The declaration stated that, in consideration that the plaintiffs, at the request of the defendant, would employ the defendant as their traveller in their trade of lace and sewed-muslin merchants, at a certain salary, the defendant agreed with the plaintiffs, amongst other things, that, if the defendant should travel for any other person or persons in the said trade on any part of the same ground over which the defendant should travel in the course of the said employment by the plaintiffs, the defendant would pay to the plaintiffs the sum of 50l.: Averment, that the plaintiffs did so employ the defendant as traveller as aforesaid, who, whilst and in the course of the said employment travelled over certain ground; that, before the commencement of the suit, all things had happened and occurred, and all times had elapsed which it was necessary should occur, happen, and elapse to entitle the plaintiffs to sue in this action for the defendant's breach herein-after mentioned of the said promise; and that the plaintiffs had always been ready and willing to do all things which it ever was necessary they should be ready and willing to do to entitle them to sue the defendant in this action for the said breach of promise: Breach, that the defendant did, after the making of the said [306] agreement, travel for a certain other person in the said trade on and over a certain part of the said ground over which the defendant travelled in the course of the said employment by the plaintiffs, yet that the defendant had not in pursuance of his said promise paid to the plaintiffs the said sum of 50l., or any part thereof, whereby the plaintiffs were much injured and damaged, &c.

Pleas,—first, that the defendant did not agree as alleged—secondly, that the defendant did not, after the making of the said agreement, travel for any other person in

the said trade on any part of the same ground over which the defendant travelled in the course of the said employment by the plaintiffs,—thirdly, that, at the time of making the said agreement, the defendant was a traveller in the said trade of a lace and sewed-muslin merchant, and had no other means of earning his living, and that he was employed by the plaintiffs as their traveller in the said trade, to travel all over the kingdom: and that the said agreement was an unreasonable and general restraint of the defendant's trade, and entirely prohibited and restrained the defendant from exercising the said trade after the defendant ceased to be employed by the plaintiffs; and that the plaintiffs were not by the said agreement bound, nor did they agree, to employ the defendant during his life: and that they had ceased to employ the defendant before he travelled for the said other person as in the declaration mentioned. Issue thereon.

The cause was tried before Crowder, J., at the second sitting in London in Trinity Term last, when the following facts appeared in evidence:—The plaintiffs, who were lace-merchants carrying on business in Milk-Street, Cheapside, and were in the habit of sending travellers to various parts of England to procure orders, assigning to each a particular circuit or district, in [307] March, 1858, appointed the defendant, who was already in their employ as a clerk or assistant in the warehouse in London, to go what was called the Midland journey, at a yearly salary of 50l., with an allowance of 8l. 15s. per week for expenses. The engagement was at first a verbal one, but it was understood at the time that it was to be reduced into writing; and, accordingly, after the defendant had been a short time gone on his first journey, the following memorandum was sent to him for his signature, accompanied by a list of the several towns to which he was to go, and the names of the plaintiffs' customers at those respective places:—

“To H. & W. Mumford.

“April 30th, 1858.

“Gentlemen,—In consideration of my entering upon your employ at a salary to commence with at 50l. a year, I herewith agree to do so; with the understanding that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50l.”

This document was returned to the plaintiffs duly signed by the defendant; and he continued in their employ as traveller until the early part of 1859, when he engaged himself as traveller for another house in the trade over the same district. The plaintiffs thereupon brought this action to recover the stipulated sum of 50l.

On the part of the defendant it was submitted,—first, that the agreement was without consideration, the defendant being already in the plaintiffs' employ, and the custom of the trade requiring a month's notice to put an end to a contract of service,—secondly, that there had been no breach, the latter part of the agreement being limited to the time during which the defendant might continue in the plaintiffs' employ,—[308] thirdly, that, if the agreement operated beyond the period of the defendant's service, it was illegal and void as being an unreasonable restraint of trade, unlimited both as to time and space,—fourthly, that parol evidence was inadmissible to shew that the agreement was confined to the “midland journey,” and that, if the agreement could be so construed, there was a variance.

The learned judge offered to leave it to the jury to say whether or not the agreement had reference specially to the midland journey, but the counsel for the defendant declined to avail himself of that offer; and a verdict was taken for the plaintiff for the damages claimed, leave being reserved to the defendant to move for a non-suit upon the grounds urged by him; and leave also being reserved to the plaintiffs to amend the declaration if necessary.

O'Malley, Q. C., having accordingly obtained a rule nisi,

Hawkins, Q. C., and Prentice now shewed cause. There was ample consideration for this agreement. It is true, the defendant was already in the plaintiff's service in another capacity; but they might have dismissed him on a month's notice if he had declined to enter into the new arrangement. A somewhat similar objection was urged in *Norton v. Powell*, 4 M. & Gr. 42, 47, where it was said *arguendo*, “the consideration is not truly stated; it is alleged in the declaration that the consideration was, that the plaintiff ‘would then engage’ Tarrant, whereas in fact he had been previously engaged by him, and the real consideration was, that he would continue him in his

service, and should have been so stated." But Cresswell, J., disposed of the objection by saying, "The plaintiff avers that he [309] did afterwards engage Tarrand in his service: why did not the defendant traverse that allegation if it was incorrect? By not doing so, he has admitted it." Here, the allegation of employment is not traversed.

Then it is said that the agreement is limited to restraining the defendant from travelling for any other house whilst he travelled for the plaintiffs. That, however, is not the fair and natural construction of the agreement. It would be idle to limit it to the time during which the defendant should be in the plaintiffs' employ; he was already bound to occupy the whole of his time in their service so long as the engagement lasted. It clearly was intended to be unlimited in point of time.

The parol evidence was offered and received, not for the purpose of adding to or varying or in any way qualifying the terms of the agreement, but merely for the purpose of shewing to what state of things the agreement was intended to be applied. It is necessary to give parol evidence in almost every case in order to shew what it is that the parties are contracting about. In *Macdonald v. Longbottom*, 28 Law J., Q. B. 293, the defendant, by a contract in writing, purchased of the plaintiffs, who were farmers, a quantity of wool, which was described in the contract simply as "your wool." Some time previously a conversation had taken place, in which the plaintiffs stated that they had a quantity of wool, consisting partly of their own clip, and partly of wool which they had contracted to buy of other farmers, and that altogether it amounted to "2300 stones, 100 stones more or less." The quantity ultimately tendered was 2700 stones, and the defendant refused to receive it. In an action for not accepting the wool, it was held by Lord Campbell and Erle, J., that the conversation was admissible in evidence for the purpose of explaining what the parties meant by [310] the term "your wool;" but that the quantity expressed by the plaintiffs formed no part of the contract, which was complete on the face of the writing,—by Wightman, J., that the conversation was admissible in evidence, and that the quantity of wool therein described became part of the contract, so that the defendant was not bound to receive the larger quantity tendered. Nearly all the authorities were there cited: and Erle, J., in giving judgment, says: "I assume that the plaintiffs must prove a written contract, and that that contract must contain all the material terms. Here I think that it is most explicit: the defendant says by the letter of the 5th of September, 'I will buy your wool at 16s per stone,' &c. Then, by the practice of the courts, which has been invariably followed, evidence must be admitted to identify the subject-matter of the contract. It is the duty of the judge to construe the writing, and he cannot have judicial knowledge of the subject-matter of the contract. Suppose that I sell "all my wool which I have on Dale Farm," evidence must always be admissible to shew that the wool which was delivered was the wool on Dale Farm. In cases of that kind, evidence to explain must always be admissible." In *Taylor on Evidence*, § 1082, it is said: "It may be laid down as a broad and distinct rule of law, that extrinsic evidence of every material fact, which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received. Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With [311] this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument." The rule is laid down thus in the opinion of the judges delivered by Tindal, C. J., in *Shore v. Wilson*, 9 Clark & F. 566,—"The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for, both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party."

If the parol evidence was properly admitted, the contract clearly was not an

unreasonable restraint of trade. A covenant restraining trade within particular limits is lawful,—per Lord Eldon, in *Morris v. Coleman*, 18 Ves. 438; provided it be not unreasonable or larger than the fair security of the covenantee calls for: see the cases collected in *Avery v. Langford*, 1 Kay, 663. The law on the subject is well expounded by Parke, B., in *Mullan v. May*, 11 M. & W. 653, 665. “The rule,” he says, “as laid down by Lord Macclesfield and Lord Chief Justice Willes, in *Master, &c., of Gunmakers v. Fell*, Willes, 388,—is, that total restraints of trade, which the law so much favors, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad; but, if the circumstances are set forth, that presumption may be excluded, and the court are to judge of those cir-^[312]cumstances, and determine whether the contract be valid or not: *Mitchell v. Reynolds*, 1 P. Wms. 496. ‘Contracts in restraints of trade are, in themselves, if nothing shews them to be reasonable, bad in the eye of the law,’—per Tindal, C. J., in *Horner v. Graves*, 7 Bingh. 744, 5 M. & P. 768. Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments shewing circumstances which rendered such a contract reasonable, the instrument is void. Such are the cases cited in *Prugnell v. Gosse*, Aleyn, 67, and the case of *The Tailors of Exeter v. Clark*, 2 Show. 350, and *Claygate v. Batchelor*, Owen, 143; Year Book, 3 H. 5, fo. 5. But, if there are circumstances recited in the instrument (or probably if they appear by averment), it is for the court to determine whether the contract be a fair and reasonable one or not: and the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a goodwill, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry: *Prugnell v. Gosse*, Aleyn, 67; *Broad v. Jollyffe*, ^[313]Cro. Jac. 596; *Jelliet v. Broad*, Noy, 98. And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits: *Chesnut v. Nainby*, 2 Ld. Raym. 1456, 2 Stra. 739. In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instructions in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business. It is justly observed by Lord Wynford, in giving the judgment of the court in *Homer v. Ashford*, 3 Bingh. 326, 11 J. B. Moore, 91, that “it may often happen that individual interest and general convenience render engagements not to carry on trade or act in a profession in a particular place, proper: that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of such contracts is, to encourage rather than cramp the employment of capital in trade, and the promotion of industry.” The real question in all these cases is, what is reasonable for the employer’s protection. Here, the restraint is limited to the plaintiffs’ trade on the midland journey. In *Bunn v. Guy*, 4 East, 190, the party, an attorney, covenanted to abstain from the exercise of his profession during his whole life in London or within 150 miles thereof, and yet that was held not to be unreasonable.

As to the alleged variance, if the parol evidence was properly admitted, it would be idle to argue that point, there being leave reserved to amend.

^[314] O’Malley and Grant, in support of the rule. There was no consideration for the agreement declared on. The defendant was already in the employ of the plaintiffs, and his service could only be legally determined by a month’s notice. The second contract, therefore, gave the defendant no greater advantage than he enjoyed under the first. If the real consideration was, that the plaintiffs would continue the defendant in their employ, the declaration should have so stated.

If the court think the parol evidence was admissible, it may be that the restraint was not unreasonable, so as to make the contract void. But the contract was, to restrain the defendant from travelling for any other house in the same trade during the time he continued in the employ of the plaintiffs. There was therefore no breach.

As to the restraint of trade,—there are three classes of cases where covenants in partial restraint of trade have been permitted,—one, in the case of a purchase of a goodwill, because it would be unjust and unreasonable to permit the vendor to set up the same trade within a competing distance of his vendee,—the second, that of a retiring partner, who may reasonably contract not to carry on the trade so as to interfere with the interests of the continuing partner,—the third is the ordinary case of master and servant. All restraints of trade are *prima facie* void. In the case of *The Tailors of Ipswich v. Sheringe*, 11 Co. Rep. 53 a., it was resolved that “at common law, no man could be prohibited from working at any lawful trade.” The cases of *The Master, &c., of Gunmakers v. Fell*, Willes, 388, *Hornor v. Graves*, 7 Bingh. 735, 5 M. & P. 768, and *Mullan v. May*, 11 M. & W. 653, also shew that general restraints of trade are discountenanced by the law. In *Warde v. Byrne*, 5 M. & W. 548, a covenant not to [315] follow or be employed in the business of a coal-merchant whilst in the plaintiff’s employ, or within nine months after, without limit as to space, was held to be void. Here, there is no limit as to time; the defendant would be bound for life, even though the plaintiffs should die or discontinue business; and, unless the parol evidence was properly received, there is no limit as to space. [Erle, C. J. The objection that the restraint was not put an end to by the plaintiff’s death or retirement from business was unsuccessfully urged by me in *Hitchcock v. Coker*, 6 Ad. & E. 438, 1 N. & P. 796, in the Exchequer Chamber. In giving the judgment of the court in that case, Tindal, C. J., says: “Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But, with respect to the duration of the restriction, the case is different. The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such goodwill considered in those various points of view is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the [316] master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative: that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant’s setting up or entering into the trade or business within the given limit co-extensive with the servant’s life.” (Crowder, J. In *Mullan v. May*, the restriction was during the life-time of the covenantor (a).] The restraint, therefore, is infinitely larger than any fair requirement of the plaintiffs will

(a) As also in *Bunn v. Guy*, 4 East, 190, *Wickens v. Evans*, 3 Y. & J. 318, *Hitchcock v. Coker*, 6 Ad. & E. 438, 1 N. & P. 796, *Nicholls v. Stretton*, 10 Q. B. 346, 7 Beavan, 42, *Saintier v. Ferguson*, 7 C. B. 716, *Atkyns v. Kinnier*, 4 Exch. 776, and *Tallis v. Tallis*, 1 Ellis & B. 391.

In *Gale v. Reed*, 8 East, 80, *Williams v. Williams*, 2 Swanst. 253, *Wallis v. Day*, 2 M. & W. 273, *Rolfe v. Rolfe*, 15 Simons, 88, *Price v. Green*, 16 M. & W. 346, *Pemberton v. Taughan*, 10 Q. B. 87, *Elves v. Crofts*, 10 C. B. 241, *Turner v. Evans*, 2 De Gex, M. & G. 740, and *Hornor v. Graves*, 7 Bingh. 735, 5 M. & P. 768, the restriction was during the life of the vendor.

justify. [Crowder, J. The restraint was very large in *Bunn v. Guy*, 4 East, 190,—for the life-time of the covenantor, and the limit, London and 150 miles from thence, —and yet it was held not to be unreasonable.] In *Horne v. Graves*, Tindal, C. J., says: “Whatever restraint is larger than [317] the necessary protection of the party with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public, on the ground of public policy.” So, in *Tallis v. Tallis*, 1 Ellis & B. 391, 410, Lord Campbell says, — “According to the tenor of the later decisions, the contract is valid, unless some restriction is imposed beyond what the interest of the plaintiff requires.” In *Ward v. Byrne*, Parke, B., in delivering judgment, says: “Where a limit as to space is imposed, the public on the one hand do not lose altogether the services of the party in the particular trade: he will carry it on in the same way elsewhere: nor within the limited space will they be deprived of the trade being carried on, because the party with whom the contract is made will most probably within those limits exercise it himself. But, when a general restriction, limited only as to time, is imposed, the public are altogether losers for that time of the services of the individual, and do not derive any benefit whatever in return: and, looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a total restriction of trade limited only as to time.” [Byles, J. Do you find any case shewing that the absence of a limitation in point of time would make the agreement bad, where the restraint is not too large in point of space? Crowder, J., referred to *Wickens v. Evans*, 3 Y. & J. 318.]

Then, as to the admissibility of the parol evidence, — It is a clear and indisputable proposition of law, that parol evidence is not admissible to control or contradict or extend the meaning of a written contract. The opinion of Tindal, C. J., in *Shore v. Wilson*, 9 Clark & F. 566, 567, shews clearly the limit of the rule as to the reception of parol evidence. [Byles, J. The case of *Macdonald v. Loughbottom*, 28 Law J., Q. B. 293, comes very near to the present.] In *Sotlichos v. Kemp*, 3 [318] Exch. 105, in an action for refusing to accept a cargo of linseed which the plaintiff had sold to the defendant, and which was expected to arrive by a certain vessel, “fourteen days to be allowed for the delivery of the said seed from the time of the ship’s being ready to discharge after its arrival,” evidence was offered to shew what the parties intended by the period assigned for the delivery of the cargo: and it was held, that, in the absence of any usage or evidence to raise an ambiguity as to the terms of the contract, such evidence was properly rejected. *Gorissen v. Perrin*, ante, vol. ii. p. 681, shews the limit of the admissibility of evidence of this sort. Here, the only use of the parol evidence was, to vary the terms of the contract: it was not offered to shew that words were used in a particular sense, or to explain a mercantile usage, or a term of art or science.

ERLE, C. J. I am of opinion that this rule should be discharged. The first question is, whether there was any consideration for the defendant’s entering into the agreement upon which the action is brought. The words are, — “In consideration of my entering into your employ at a salary to commence with at 50l. a year, I herewith agree to do so, with the understanding that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50l.” The circumstances under which the agreement was entered into shew a good consideration for making the agreement. The defendant, being already in the plaintiffs’ employ in one capacity, agreed to enter into it in another capacity, viz. that of traveller. The agreement for this was at first a verbal one, but with an understanding that it was afterwards to be reduced into writing. When that was done, and the agreement [319] signed, the employment in the new capacity became complete. The defendant having entered upon his new duties as traveller, and started upon a journey, the agreement was, pursuant to the original understanding, reduced into writing, and sent down to him, and he signed it. The employment as traveller was at first only inchoate, and became perfected when the agreement was so signed. If, when the agreement was tendered to him, the defendant had declined to sign it, the plaintiffs might have refused to continue him in their employ, it being part of the original stipulation that the contract should be put into writing. I therefore think the objection as to the want of consideration for the contract fails.

Then it is said that the contract is void as being in restraint of trade. I am of opinion, that, if the case had been presented altogether without parol evidence, the contract would have been perfectly valid, the engagement being limited in point of

space, which prevents it from being void on the ground of public policy. The plaintiffs were at liberty to send the defendant into any part of England, which for the convenience of their trade they had divided into districts. I entirely dissent from the notion thrown out by the defendant's counsel that agreements of this sort are to be discouraged as being contrary to public policy. On the contrary, I think that contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties; for, if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity, seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers and their mode of conducting business, and then transferring their services to a rival trader. It appears to me to be highly important that persons like [320] this defendant should be able to enter into contracts of this sort, which will afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice. I think the doctrine laid down by Parke, B., in *Mallan v. May*, 11 M. & W. 665, is a correct exposition of the law upon this subject. "The public," he says, "derives an advantage in the unrestrained choice which such contracts give to the employer of able assistants, and the security they afford that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business." And the learned Baron afterwards adds: "It is justly observed by Lord Winford, in giving the judgment of the court in *Homer v. Ashford*, 3 Bingh. 326, 11 J. B. Moore, 91, that it may often happen that individual interest and general convenience render engagements not to carry on trade or act in a profession in a particular place proper; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of such contracts is, to encourage rather than cramp the employment of capital in trade, and the promotion of industry." I take it that a person in the position of this defendant is perfectly competent to judge whether or not it will be to his interest to enter into such a contract; for, we find that very soon after he has entered into it he transfers his services to another employer in the same business, and solicits orders for him over the very same ground over which he had been engaged to travel for the plaintiffs. I therefore think there is abundant ground, without the introduction of parol evidence, for holding that this contract was sufficiently limited in point of space to [321] make it a valid contract, and to exclude it from the decisions which have held such contracts bad as being an undue and unreasonable restraint of trade.

But I am further clearly of opinion that the parol evidence which was objected to was admissible to apply the contract. It was not offered for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it naturally bore, but for the purpose of shewing the circumstances under which such wide words were used, and of applying them according to the intention of the parties. The agreement begins,—“In consideration of my entering upon your employ.” These words are perfectly vague and unintelligible, until explained by the parol evidence, which shewed that the parties at the time of making the agreement contemplated that the defendant was to enter into the service of the plaintiffs in the capacity of traveller in the lace business on one of the six circuits or journeys into which they had thought fit to divide the counties over which their travellers solicited orders for them, viz. on the midland journey, and that the written contract was the result of previous conversation and arrangement between the parties to that effect, to which conversation and arrangement it clearly has reference. This view is entirely in accordance with *Macdonald v. Longbottom*, 28 Law J., Q. B. 293, which,—if I may venture to say so of a case in which I took part,—is a perfectly sound decision. There, one party said to the other “I will buy of you all your wool,” and extrinsic evidence was held admissible for the purpose of shewing what the parties were contracting about,—it being uncertain and ambiguous upon the face of the contract whether “your wool” meant the wool of the seller's own clip, or partly that and partly wool which he had acquired by purchase from other [322] persons. I think that was properly decided: and I am perfectly certain that it prevented the buyer, under the shelter of a supposed rule of law, from making falsehood successful, and relieving himself from his bargain.

Then the parol evidence being admitted, the contract appears to have been a contract under which the defendant was to enter into the service of the plaintiffs as their

traveller on the midland journey : and, in consideration of their so employing him, he agrees, that, in the event of his travelling, —that is, soliciting orders, —for any other house in the same trade, on any part of the same ground, he will pay the plaintiffs 50*l*. I think that is a valid contract within numerous cases, and not obnoxious to the objection that it is an undue and unreasonable restraint of trade.

For these reasons I am of opinion that the plaintiffs are entitled to the judgment of the court on all these points. And, with reference to another point which was shortly adverted to in the argument, —that this engagement on the defendant's part not to travel for any other house in the same trade, was applicable only to the time during which the defendant was retained as traveller for the plaintiffs, I think the whole surrounding circumstances shew that that was not the meaning of the parties. The plaintiffs contract for the entire services of the defendant as their traveller. The stipulation that he should not travel for another house in the same trade during his service with the plaintiffs would be altogether repugnant and inconsistent. Travellers on commission, who take orders for several different houses, are a well-known class of persons. But this is the case of a traveller hired exclusively to solicit orders for the plaintiffs. The rule to enter a nonsuit must therefore be discharged.

[323] BYLES, J. (*a*). I also am of opinion that this rule must be discharged. The first objection is, that there was no consideration apparent on the face of the written agreement. But the facts are, that the defendant entered into the service of the plaintiffs as traveller late in March, or in the beginning of April, upon an understanding that there was to be a formal written contract between them, and a list of the places he was to go to and of the customers he was to call on, sent to him. Accordingly the list was sent, and the written contract, which the defendant executed and returned. The consideration is thus expressed, —“In consideration of my entering upon your employ at a salary to commence with at 50*l*. a year, I herewith agree to do so.” Looking at all the circumstances, it seems to me that there is no pretence for saying that there was not a solid consideration for the agreement, and that the consideration abundantly appears upon the face of the document.

Then it is said that there has been no breach : for that the contract contemplates the defendant's being precluded from travelling for any other house in the same trade only whilst he should continue in the service of the plaintiffs ; and there was no evidence of his having done so. The words of this part of the contract are, —“with the understanding, that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l*.” It seems to me that the defendant would have been grossly deserting his duty, and indeed abjuring his employment in the service of the plaintiffs, if he had engaged to travel for another house in the same trade whilst his whole time and talents were stipulated to be devoted to the plaintiffs' service. The plain meaning of the agreement, [324] as I read it, is, that the defendant shall not travel for any other person in the same trade over any part of the same ground after he shall have left the plaintiffs' employ, upon pain of forfeiting 50*l*. The object of this is manifest. There is, therefore, no ground for saying that there was no breach of the agreement.

As to the evidence, — it strikes me not only that parol evidence was properly received here, but that, if it had been rejected, great difficulty would have arisen which has been prevented by the course taken by the learned judge. Upon the face of the written agreement, there is nothing to shew either the nature of the employment or the meaning of the same ground. Parol evidence was absolutely necessary to apply the contract to some certain subject matter. Indeed, this is just the case for parol or extrinsic evidence. The evidence, when admitted, shewed that the contemplated “employment” was as traveller, and that the “ground” was that part of England which was familiarly known and understood by the parties by the description of “the midland journey.” Evidence of this sort is admitted every day in construing wills. The moment it appeared here that the duty to be performed by the defendant was that of traveller, and that that duty was to be performed on the midland journey, the matter to which the contract related was identified and made manifest. There was another species of parol evidence also given in this case, *viz.*, that the vacancy amongst the travellers in the plaintiffs' establishment occurred on the journey known as the “midland journey,” and that that fact was communicated to the defendant

(*a*) Williams, J., was engaged in the Divorce Court.

while the contract was in the course of arrangement. That evidence could not be excluded. Precisely these two descriptions of evidence were given in *Macdonald v. Longbottom*, 28 Law J., Q. B. 293. I on that occasion entertained very great [325] doubt whether the communication of the fact was admissible, and nonsuited the plaintiffs: but the court of Queen's Bench held distinctly that both species of evidence were admissible; and Erle, J., said,—“If the plaintiffs had informed the defendants that they had the wool partly from their own farm and partly from their neighbour's, it would not vary the contract, nor would it add to it; it is not only the meaning of the plaintiffs, but also of the defendants. The statement is admissible as having been communicated to the defendants, but not as having been embodied in the contract.” That case is a distinct authority to shew that the course adopted on this occasion was perfectly correct.

The next question is, whether upon the agreement alone, without the light thrown upon it by the parol evidence, this would not have been a void contract, as being an unreasonable restraint of trade. On the face of the agreement, I think that would have been a very doubtful question. In a case in this court, a prohibition extending to a radius of one hundred miles from York was held to be unreasonable (a). As the law stands, therefore, but for the parol evidence, a serious question might have arisen whether the restraint here, being limited in point of space, was not so unreasonable as to render the contract void. It is a popular, but in my judgment a mistaken, notion that parties ought to be at liberty to enter into contracts after their [326] own fashion. The legislature has not thought this expedient; for, it has in numerous instances interfered in the way of limitation or prohibition,—as, for instance, in the disposition of property by will. There are many cases in which it is expedient for the law to interpose for the protection of the ignorant or of those who would otherwise be subjected to undue influence or pressure. But, when the evidence is looked at here, it becomes manifest that the restraint it imposed, which at first appeared to be unlimited as to space as well as time, was in truth limited to a particular district. So explained, it seems to me that the restraint imposed is not unreasonable or injurious to the public, but that it was necessary and proper for the fair protection of the plaintiffs' trade.

CROWDER, J. I am of the same opinion. The rule was to enter a nonsuit upon several grounds reserved at the trial (which are inserted in the rule), and also for a new trial upon the further ground that parol evidence was improperly admitted. I thought at the time, and I still think, that the points taken were not supported. The case has been fully argued, and I entirely agree with my Lord and my Brother Byles that the rule is answered upon all points.

The first ground urged was, that there was no consideration for the defendant's promise. I thought, and still think, that the language of the agreement necessarily imported consideration; and the circumstances under which the agreement was entered into shew that there was substantially no agreement entered into until the written contract was drawn up and signed. It had been previously proposed that the defendant should enter into the employ of the plaintiffs as a traveller on the midland journey upon certain terms to be afterwards reduced into writing. But, before that [327] had been done, the defendant had started on the journey; and, the agreement being sent down to him to sign, he signed and returned it, and so the agreement become complete. It is said that because three or four weeks had intervened between the time of the defendant's starting on his journey and the signature of the agreement, there was a want of consideration. But, if that argument be worth anything, it might equally have been urged if the agreement had been sent down to the defendant by the next post. Until the written document was signed, the agreement was inchoate, or, rather, it was a proposal only, not perfected until the agreement was signed.

The next point made, was, that, assuming there was an agreement upon sufficient consideration, there was no breach, for that the prohibition against the defendant's travelling for any other house in the same trade was intended to apply only during the time of his remaining in the employ of the plaintiffs. It appeared to me at the

(a) See *Horne v. Graves*, 7 Bingh. 735, 5 M. & P. 768. In delivering the judgment of the court in that case, Tindal, C. J., says: “Whatever restraint is larger than the necessary protection of the party can be of no benefit to either: it can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.”

trial that there was nothing at all in that point; and I retain that opinion now. It appeared that the defendant was engaged as one of six travellers for the plaintiffs, to each of whom a certain district was assigned. It was obviously the intention of the parties to preclude the defendant from the opportunity, when he should have left the plaintiffs' service, of giving another employer in the same trade the benefit of the knowledge of their customers in the locality which he should have acquired while in their service. It clearly was intended to apply not during the service, but after its discontinuance.

Then it is said that the plea was proved. To establish that proposition, the defendant must shew that the parol evidence received at the trial was improperly admitted; because, if that evidence was rightly admitted, there can be no pretence for saying that the [328] agreement was bad as an unreasonable and undue restraint of trade. The note which I made at the time of the object and purpose for which the evidence in question was admitted, was this,—“I admit this evidence to shew to what the agreement referred.” It seemed to me that the language of the agreement was so vague and wide that it was impossible to understand to what it applied, without letting in evidence to shew in what capacity the defendant was to be employed, and to identify the ground over which he was to travel.

Assuming the parol evidence to have been properly received, the consideration for the agreement was sufficient, and the restriction imposed upon the defendant thereby not an unreasonable one. I agree with my Lord, and also with the suggestion thrown out by Parke, B., in *Mallan v. May*, 11 M. & W. 665, that, so far from being injurious to the public, it is greatly to the benefit of trade that these restricted contracts should be entered into. I think there is no pretence for saying that the third plea was proved. When looked at, it seems to me to be impossible to say that on the agreement alone could the plea be proved. The plea is that, at the time of making the agreement, the defendant was a traveller in the trade of a lace and sewed muslin merchant, and had no other means of earning his living, and that he was employed by the plaintiffs as their traveller in the said trade, to travel all over the kingdom; and that the said agreement was an unreasonable and general restraint of the defendant's trade, and entirely prohibited and restrained the defendant from exercising the said trade after the defendant ceased to be employed by the plaintiffs, and that the plaintiffs were not by the said agreement bound, nor did they agree to employ the defendant during his life; and that they had ceased to [329] employ the defendant before he travelled for the said other person as in the declaration mentioned. There is nothing in the agreement to warrant the allegation in the plea that the defendant was employed “to travel all over England” for the plaintiff. The parol evidence shews that the engagement was limited to travelling over the midland district. The objection, therefore, that the agreement was an unreasonable restraint of trade cannot arise. The plea is consequently disproved, whether the written agreement only is looked at, or we have recourse to the parol evidence. For these reasons it appears to me that the evidence was properly admitted, and that the rule must be discharged.

Rule discharged.

HOLMES v. BELLINGHAM. June 24th, 1859.

[S. C. 29 L. J. C. P. 132; 7 Jur. N. S. 531.]

The presumption that the soil of a road usque ad medium filum via belongs to the owners of the adjoining lands, applies equally to a private as to a public road.

The declaration stated that the defendant, on divers days, entered a yard, the property of the plaintiff, at Melton Mowbray, in the county of Leicester, and broke open gates in the said yard, and broke and damaged a lock, the property of the plaintiff. Claim, 10l.

Pleas, first, not guilty, secondly, a traverse of the possession of the plaintiff, —thirdly, that the yard was the property of one Joseph Firbank, and that the defendant was acting as his servant and by his command, —fourthly, user of the yard by the defendant for twenty years as a way to his premises, that the plain-[330] tiff obstructed his right of way by locking the gate, and that he broke it open, doing no unnecessary damage, —fifthly, user for forty years by the defendant and the occupiers of his dwelling

house, for horses, cattle, carts, and carriages, and that because the plaintiff erected the gates aforesaid, therefore the defendant committed the trespasses alleged,—sixthly, setting out the title of Joseph Firbank, and a demise by him to the defendant,—seventhly, a right of way for all the liege subjects of the Queen, with horses, carriages, and carts, and on foot, at all times of the year, and as such liege subject the defendant entered, and broke, &c. Issue thereon.

The cause was tried before Erle, J., at the Leicester Spring Assizes, 1859, when the facts which appeared in evidence were in substance as follows:—The plaintiff was the occupier of a house and premises at Melton Mowbray, as tenant to one Firmin, between which and certain other premises occupied by the defendant as tenant to one Joseph Firbank (formerly Mrs. Raven's) was a road or lane leading from the public street to a brewhouse and garden, part of the plaintiff's premises. Down to the year 1828 this lane was open to the street; but in that year gates were put up by the then owner of the plaintiff's premises, with the consent of Lord Harborough, the owner of the adjoining premises, the key being kept by the former, and lent to the tenant of the latter when he wanted to unload hay and straw into a loft, the door of which (about ten feet from the ground) formed the only opening from that side into the lane.

On the part of the plaintiff it was proved that he and the former occupiers of his premises had always kept the lane in repair, and had also repaired and renewed the gates when necessary, and that they had used the part of the lane adjoining the brewhouse as a [331] place for keeping and drying their brewing-utensils; that there never had been any entrance into the lane from the defendant's premises, except the loft-door before mentioned, until the year 1859, when the defendant opened a passage into it a little lower down than the loft: and that neither the defendant nor any other occupier of his premises had ever exercised or claimed to exercise any right of way along the lane except for the purpose of taking hay and straw to the loft as before mentioned, which right was conceded.

The conveyance from Norman, the former owner of the plaintiff's premises, to Firmin, and which professed to convey the premises as delineated in a plan in the margin which included the lane in question, was tendered and (after objection) admitted to shew the title, though, as the learned judge observed, it proved nothing without shewing acts of ownership.

The trespass complained of was committed in assertion of a right by the defendant to use the newly opened passage from his premises into the lane.

The defendant, having failed to establish a right of way to the extent necessary to justify the trespass, rested his defence upon the third plea, insisting that the soil of the lane usque ad medium filum viæ was in Firbank, his landlord.

The way in which the question was presented to the jury was reported by the learned judge as follows:—

“As to the plea of public way, I presume there is no question; and, as to the plea justifying under a private right of way from Mrs. Raven's premises into the lane, I held, that, as Mrs. Raven's premises had no communication with the lane, the user of those claiming under Lord Harborough in respect of the Black Swan and other premises, was no evidence of a right for Mrs. Raven's premises.

“With respect to the plea of not possessed, it was [332] argued by the counsel on both sides that the plaintiff claimed the entirety of the lane; and, if he was not entitled to the entirety, the issue should be found for the defendant.

“I then left the question whether the soil *ad medium filum viæ* did not belong to the proprietors on each side, drawing attention to the evidence of permission for putting up the gates, and to the evidence indicating an occupation way to the respective premises abutting on the lane, and to the presumption that the soil, subject to the way, was in the owners of the adjoining land.

“The jury retired, and after a time asked whether the first issue relating to property was connected with a right of way, or exclusively a right to the soil.

“I told them the question related solely to property in the soil,—is the whole in Mr. Norman, or half in him and half in the owner of the adjoining property? The jury found on this issue for the defendant.”

A verdict having accordingly been entered for the defendant on the second and third issues,

Hayes, Serjt., in Easter Term last, obtained a rule nisi to set aside that verdict, and for a new trial, on the grounds,—first, that the learned judge misdirected the

jury in applying to the present case the presumption that the ownership of the soil belonged to the plaintiff's and defendant's landlords in equal moieties, and leaving the question to the jury on that footing, secondly, that the verdict was against evidence. He submitted that the presumption of ownership in equal moieties, in the absence of evidence to the contrary, though reasonable in the case of public roads or rivers, could not with equal propriety be applied to private ways, the circumstances of their creation and user being so infinitely various. [Cockburn, C. J. In the [333] case of a private way, in the absence of evidence to shew that it is the soil of either party, the presumption ought to be that each of the adjoining owners is entitled *usque ad medium filum viae*. But, if the evidence shews that one only has exercised dominion over it, if it be not matter of arrangement, the natural presumption would be that the right was in him, and that the other had merely an easement.] The evidence here shewed that the only person who had ever exercised any act of ownership over this lane was the plaintiff's landlord. It is true that the gates were put up with the consent of Lord Harborough: but the putting up of gates was necessarily matter of arrangement, seeing that the easement had before been unobstructed.

Mellor, Q. C., and Beasley shewed cause. There was no misdirection. The rule of law as to the presumption of the soil of a public way belonging in equal moieties to the owners of the land on either side, is equally applicable to the case of a private way. It is a rule introduced for convenience, that there may not be perpetual disputes about trifles: it is akin to the rule as to boundary or party-walls, that the user in common affords *prima facie* evidence that the wall and the land upon which it stands belong in common to the owners of the adjoining premises: *Cubitt v. Porter*, 8 B. & C. 257, 2 M. & R. 267. The same rule is said by Lord Mansfield, in *Carter v. Murcot*, 4 Burr. 2162, to apply to rivers. "The rule," he says, "is uniform. In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad filum medium aque*." There can be no good reason why the rule should not be applied to the case of a private way. Assuming the presumption of equal ownership to apply to a private [334] way, there was nothing in the evidence here to rebut that presumption. The acts of ownership were as consistent with the one view as with the other; and the fact of the gates having been put up with the permission of the owner of the defendant's premises, well warranted the jury in coming to the conclusion they did.

Hayes, Serjt., and W. G. Harrison, in support of the rule. There is no pretence for saying that the presumption of joint-ownership arises in the case of a private as it does in that of a public road. The learned judge, therefore, ought to have left the case to the jury simply upon the acts of ownership. The reason for the presumption in the case of a public road is explained in the judgment in *Doe d. Pring v. Pearsey*, 7 B. & C. 304, 9 D. & R. 908. Bayley, J., there says: "It is a *prima facie* presumption that waste land on the sides, and the soil to the middle of a highway, belong to the owner of the adjoining freehold land. The rule is founded on a supposition that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road." And Littledale, J., says: "We do not know the origin of these rights. In all probability the rule that the presumption is to be in favor of the owner of the adjoining land has arisen from its being a matter of convenience to the owners of adjoining land, and to prevent disputes as to the precise boundaries of property." There may be very good reasons for applying this rule of presumption to the case of public roads: but those reasons are wholly inapplicable to private roads, the circumstances attending the formation of which are so infinitely various. *Cubitt v. Porter* is rather an authority to shew that the rule is [335] not applicable to a private way. All notion of presumption is at all events rebutted by the evidence of repeated acts of ownership by the plaintiff and those whom he represented. The gates were put up more than thirty years ago. [Cockburn, C. J. By permission of Lord Harborough.] It was conceded that Lord Harborough and his tenants had a right to use the way for the purpose of having access to the loft. But it was proved that the gates and the road itself had always been repaired by the plaintiff's landlord. The rule upon the subject of party fences is thus stated in Selwyn's *Nisi Prius*, 12th edit. 1297,—"Where two adjacent fields are separated by a hedge and ditch, the hedge *prima facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership.

The common user of a wall separating adjoining lands belonging to different owners, is *prima facie* evidence that the wall and the land on which it stands belong to the owners of the adjoining lands in equal moieties as tenants in common. The rule about ditching is this: a person making a ditch cannot cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out upon his own land, and often, if he likes, he plants a hedge on the top of it." A joint user of a way will not make the parties tenants in common, any more than adjoining owners by the joint use of a party-wall become tenants in common of the wall: *Matts v. Hawkins*, 5 Taunt. 20. "Under the circumstances," says Sir J. Mansfield, in that case, "each has a right to the use of this wall: but the wall stands part on the ground of each, and therefore is not the property of them as tenants in common: and each party for any injury done to the part which stands on his own land, [336] must have the ordinary remedy." [Williams, J. Suppose there was a road passing between two fields, one belonging to A., the other to B., and leading to land belonging to C., with evidence of user only by C.,—in whom would be the ownership of the soil of the road?] In C., no doubt. The user of it by him would be some evidence of ownership; and there would be nothing whereon to found a presumption in favor either of A. or B.

COCKBURN, C. J. I have considered this case very attentively, and the conclusion I have come to is, that the rule should be discharged. I think, upon the whole, there is no ground for saying that there was any misdirection. The direction complained of is that the learned judge told the jury that there was a presumption, in the case of a private way or occupation road between two properties, that the soil of the road belongs *usque ad medium filum viæ* to the owners of the adjoining property on either side. That proposition, subject to the qualification which I shall presently mention, and which I take it was necessarily involved in what afterwards fell from the learned judge, is in my opinion a correct one. The same principle which applies in the case of a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road. That presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property: and it is based upon this supposition,—which may be more or less founded in fact, but which at all events has been adopted,—that, when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose. I think that is an equally convenient and reasonable principle whether [337] applied to a public or to a private road: but, in the latter case, it must of course be taken with this qualification, that the user of it has been *quæ* road and not in the exercise of a claim of ownership. If the learned judge had told the jury that the presumption was to prevail against evidence of acts of ownership, I should have said that his direction was not correct. But I do not understand that he so put it to them. He merely stated that the same presumption which arises in the case of a public way arose also in the case of a private way. But he went through the evidence as to the acts of ownership upon which the plaintiff relied as rebutting the presumption. I therefore think there is no ground for saying that there has been any substantial misdirection. This brings us to the second question, viz. whether the verdict was against evidence. Now, there was strong evidence on both sides; and the learned judge reports to us that he was not dissatisfied with the verdict. That being so, I think we should be departing from the rule upon which we are in the habit of acting in these cases, if, not seeing clearly that there has been a failure of justice, we were to disturb the conclusion to which the jury have come.

WILLIAMS, J. I also am of opinion that this rule should be discharged. The learned judge reports to us that he told the jury that the presumption which arises in the case of a public road applies also to the case of a private road running between two adjoining properties, viz. that the soil of it *usque ad medium filum viæ* belongs to the owner on either side; but that he did not leave the question to them simply and exclusively in that way, but pointed their attention to the history of the premises, and to the evidence of acts of user on the one side and on the other. Now, as to the proposition that the presumption which is esta-[338]-blished in the case of a public road, prevails also in the case of a private road, I think that is not inaccurate, provided the proposition is confined to the simple case of a private road bare of all other circumstances. If nothing else appears than the existence of a private way running between the lands of two adjoining proprietors, I do not quarrel with the proposition;

for, there being nothing else to guide them to a conclusion, I think the jury may very well presume that the soil of the road belongs half to the one and half to the other. That, like all other presumptions, may be rebutted by evidence of acts of ownership: and I do not understand the learned judge to have left it in that naked way; but he seems to have called the attention of the jury to all the evidence in the case. I feel, however, bound to say that, in my judgment, the learned judge did not adopt the strictly accurate course. He ought, I think, to have told the jury that, if nothing more appeared than the fact of the existence of the way and its user by the tenants of both properties, they might reasonably presume that the property in the soil was in each of the adjoining owners *usque ad medium filum viæ*; but that they must look at all the other evidence in the case, shewing the exercise of acts of ownership on the one side, and the user of the road as an occupation way on the other, which must be presumed to have been done rightfully by reason of their having been owners *usque ad medium filum viæ*, or joint owners or tenants in common of the road. This last proposition was not put to the jury: but the defendant is the only person who could complain of that, the plaintiff claiming the exclusive right to the whole road. As to that part of the rule which asks for a new trial on the ground that the verdict was against evidence, the learned judge having reported to us that he is not dissatisfied, and as [339] I do not see that the jury necessarily came to a wrong conclusion, I see no ground for disturbing the verdict.

CROWDER, J. I also am of opinion that there was no misdirection in this case of which the plaintiff could complain, nor any ground for setting aside the verdict as being against evidence. As to the alleged misdirection, as I understand it, the learned judge stated it to the jury as a simple proposition of law, that the rule as to the soil being presumptively vested in the respective owners of the adjoining lands *usque ad medium filum viæ*, was the same in the case of a private road as in that of a public road,—independently of circumstances, such as the exercise of acts of ownership, by which that inference or presumption might be rebutted. If the learned judge had left the case to the jury simply upon the presumption of law, apart from the evidence of acts of ownership, I think that would have been an inaccurate direction. But I do not understand him to have done that. I understand him substantially to have said, that, assuming that there was no evidence of acts of ownership on the one side or on the other, there was no difference as to the presumption of ownership, between a public and a private way. There clearly was no misdirection in that. As to the other part of the rule, although undoubtedly a good many acts of ownership were proved on the part of the plaintiff, I am not disposed to quarrel with the verdict.

WILLES, J., said nothing.

Rule discharged.

Hayes, Serjt., on behalf of the plaintiff, asked leave to appeal.

[340] COCKBURN, C. J. None of us entertain any doubt: and the value of the property is too small to make it worth while.

Hayes, Serjt. Though the value be small, the question involved is of considerable importance.

Per Curiam. We do not think this is a case in which we ought to do anything to facilitate an appeal.

Leave to appeal refused.

WILLIS AND OTHERS v. PALMER AND OTHERS. June 28th, 1859.

[S. C. 29 L. J. C. P. 194; 6 Jur. N. S. 732; 8 W. R. 295.]

The owners of a ship gave a power of attorney authorizing their agent to do many acts for them, and, among others, "to sign any bottomry-bond or instrument of hypothecation on the vessel or her cargo, and to sell and dispose of, either absolutely or by way of mortgage or otherwise as he should think proper, the said vessel, or any share thereof, and to execute all instruments, and to do all acts which should be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all acts about the business and affairs aforesaid which the owner, if present, could have done." Under this power, the agent, by deed, — reciting a mortgage of the ship, and the necessity for further advance to enable the

ship to set sail, and the advance of 4000*l.* for that purpose by the plaintiffs, assigned all the freight, hire, and passage-money, and earnings of the said ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within ten days after arrival the 4000*l.* should be repaid. The ship sailed, and arrived at Liverpool; but the 4000*l.* was not paid. After the ship had sailed, the agent of the owners received the passage-money of certain passengers by bills on England payable at sight, which bills were remitted to the owners in England, and the amounts received by them before the arrival of the ship:—Held, that the power of attorney authorized the assignment of the passage-money, and gave the mortgagees an immediate right to it before they took possession of the ship; and consequently that they were entitled to recover back the amount so received.

This was an action for money received by the defendants for the plaintiffs' use, for interest, and for money due on accounts stated, with a count in trover for bills of exchange.

The defendants pleaded to the count in trover, not guilty, and not the property of the plaintiffs; and, to the residue of the declaration, never indebted.

[341] The facts were by consent of the parties, and by a judge's order, stated for the opinion of the court.

The plaintiffs constitute the firm of Willis, Merry, and Co., merchants at Melbourne.

In 1853, Mr. Edmund Thompson was the sole registered owner of a screw steamer called the "Antelope," belonging to the port of Liverpool. Though the vessel was registered solely in his name, she was purchased and sailed on account of the firm of Millers & Thompson, merchants at Liverpool, of which firm Mr. Edmund Thompson was a member. The plaintiffs were correspondents of the firm of Millers & Thompson.

In March, 1853, the vessel was sent out to Melbourne with a supercargo of the name of Crawford Maine on board. Mr. Edmund Thompson on the 5th March, 1853, executed a power of attorney to Mr. Crawford Maine and the plaintiffs, of which the following is a copy:—

"Know all men by these presents, that I, Edmund Thompson, of Liverpool, in the county of Lancaster, in the united kingdom of Great Britain and Ireland, merchant and ship-broker, send greeting: Whereas, I am the sole registered owner of the screw steamer called the 'Antelope,' of Liverpool, now about to proceed on a voyage to Australia, and I have determined to appoint Crawford Maine, of Liverpool aforesaid, merchant, who is about to proceed in the same vessel as supercargo thereof, and Joseph Scaife Willis, of Sydney, merchant, William Lucas Merry, of Melbourne, merchant, and David Smith, presently of Liverpool, merchant, but about to proceed to Australia, my attorneys for the purposes hereinafter expressed, to act for me in all matters relating to the said vessel: Now, therefore, these presents witness, that I, the said Edmund Thompson, do hereby nominate, constitute, and appoint the said Crawford Maine, Joseph Scaife Willis, William [342] Lucas Merry, and David Smith, jointly, and each of them separately, to be my true and lawful attorneys and attorney, for me and in my name, or in their or his own names or name, or otherwise as may be expedient, to act in and conduct and manage all and every the affairs, transactions, matters, and things of or relating to the said vessel, or the freight and earnings, or the employment, charter, or hire thereof: and, for that purpose, I do by these presents authorize and empower them my said attorneys, and each of them, in my name, and on my part and behalf, or in their or his own names or name, or otherwise as to them or him may seem expedient, to sail, navigate, and employ, or negotiate for the charter, freight, or hire, and employment of the said vessel for such spaces of time, for such voyages, and on such terms as they or he may think advisable, and for that purpose to make, sign, and execute all such charterparties, bills of lading, and other documents, as may be by them or him deemed proper: And also for me and in my name, and for my use, to demand and receive, and, if necessary, to sue for and recover by all lawful ways and means, of and from the charterers of the said vessel and all other persons whom it shall or may concern, all and every sum and sums of money which shall or may at any time or times hereafter be or become due, owing, and payable by and from them, any or either of them, as freight or otherwise for or in respect of any goods or merchandize shipped on board of the said vessel by virtue of any charterparty or engagement now or hereafter to be entered into, and, upon receipt of all or any such sums and sum of money, to give sufficient receipts and discharges for the same: and

also for me and in my name to sign and give any bottomry bond or instrument of hypothecation on the said vessel or her cargo; and also for me and in my name to sell [343] and dispose of, either absolutely or by way of mortgage, or otherwise as they or he shall think proper, the said vessel, or any share or shares thereof, with the appurtenances, and, for these purposes, for me and in my name or otherwise to make, sign, seal, execute, deliver, and perfect all and every such contracts, agreements, assurances, transfers, assignments, or other instruments of sale as may be effectual for conveying and assigning the said vessel, and every or any share or shares thereof, with the appurtenances, to the respective purchasers or mortgagees thereof, and to do all other acts, deeds, matters, and things which shall be requisite and necessary for completing such sales, transfers, and mortgages, or any of them; and also for me and in my name, or otherwise, from time to time to purchase as cargo for the said vessel any goods or merchandize, and to make any consignments or dispositions thereof, or any part thereof, and to transact all other affairs and business relating thereto as to my said attorneys or any or either of them may seem expedient; and also for me and in my name, or in their or his own names or name, to draw, accept, or indorse any bills of exchange or promissory notes in payment and satisfaction of the said cargo or cargos, or any part thereof, or on account of any debt or claim due or payable to or from me in respect of the said vessel; and also for me and in my name to remove the present or any future master of the said vessel, or any engineer, officer, or seaman, or other person on board the same, and from time to time to appoint any other master, engineer, or officer thereto, or to engage any other seamen or other persons for service on board the said vessel, upon such terms and conditions as they or he shall think proper; and also to compound with any person or persons for or in respect of any debts or sums of money, claims, or demands whatsoever which now are, or which shall at [344] any time hereafter be or become due or payable to me in respect of the said vessel, or the freight or earnings thereof, or in anywise relating thereto, and to take or receive any composition or dividend thereof or thereupon, and give receipts, releases, or other discharges for the whole of the same debts, sums, or demands, or to submit to arbitration all and every or any such debts or demands, and all and every other claims, rights, disputes, and things due to or concerning me, as my said attorneys or attorney shall think most advisable for my benefit and advantage, and for that purpose, in my name, or in their or his own names or name, as they or he may think proper, to enter into, make, sign, execute, and deliver such bonds, agreements, and submissions to reference as may be necessary; and also for me to appear and my person to represent in all courts and before all magistrates or officers in law or equity whatsoever as by them or him shall be thought advisable, or as they or he shall think fit, and to sue, arrest, disclaim upon, imprison, and out of prison again to liberate, release, acquit, and discharge all and every or any person or persons whomsoever now indebted or who shall or may at any time hereafter become indebted to me, or upon whom I now have or hereafter shall or may have any lawful claim or demand; and also for me and in my name or otherwise to commence any action, attachment, suit, or other proceedings, in any court of law or equity for the recovery of any debt, sum of money, certificate of registry, or other document, right, title, interest, property, matter, or thing whatsoever now or hereafter to become due, payable, or deliverable, or in anywise belonging to me by means or on account of the said vessel and premises, or otherwise howsoever, and the same at pleasure to revoke and discontinue or become nonsuit, and another or others again to commence and prosecute [345]; and also for me and in my name to use and take all such other lawful ways and means for the recovering, receiving, obtaining, or getting in any such sums of money or other things whatsoever which is, are, or shall be, or which shall by my said attorneys and attorney be conceived or thought to be, due, owing, belonging, deliverable, or payable unto me in respect of the said vessel, or otherwise howsoever, by any person or persons whomsoever, as to my said attorneys or attorney shall seem proper or expedient; and also, if they or he shall think advisable, to appear to and defend all actions, suits, or other proceedings which may be brought against the said vessel, or against myself in respect thereof or otherwise; and also to appoint any attorney or solicitor, and to give and sign any warrant to prosecute and defend in the premises aforesaid, or any of them, as occasion shall require; and generally to do all and every or any other acts, deeds, matters, and things whatsoever in and about my said business and affairs, as amply and effectually to all intents and purposes as I could do if personally present, I binding

myself to ratify and confirm and allow whatsoever shall be lawfully done by virtue hereof: And I do further give to my said attorneys and each of them and every of them full power one or more attorney or attorneys under them or him from time to time to substitute and appoint for all or any of the purposes aforesaid (with or without power for such substitute or substitutes one or more attorneys under him or them again to appoint), and such appointment at pleasure to revoke, and another or others again to appoint. In witness, &c."

On the 5th of August, 1854, at Sydney, in New South Wales, Mr. Crawford Maine executed in the name of Edmund Thompson a deed of mortgage of the "Antelope." By this deed, which purported to be made [346] between Edmund Thompson, of Liverpool, sole and duly registered owner of the steam ship "Antelope," of the one part, and the plaintiffs, merchants of Sydney, in New South Wales, and co-partners, of the other part,—reciting such ownership and the certificate of registry, and that the plaintiffs had at the request of the said Edmund Thompson paid and advanced and become liable for divers sums of money for him, and for disbursements and expenses of the said ship, amounting to 10,500*l.*, upon condition that the re-payment thereof and of future advances and liabilities should be secured by his covenant, and by the assignment of the said ship, her freight, passage-money, earnings, and policies of insurance, the said Edmund Thompson, in consideration of the said sum of 10,500*l.* then due from him to them, granted, bargained, sold, assigned, transferred, and set over to them the said steam ship, with all masts, &c., and all freights, passage-money, earnings, gains, &c., for or on account of the said ship, to have, hold, receive, take, and enjoy the same for their own use and benefit, and as their own proper goods, chattels, moneys, and securities, thenceforth for ever,—subject to a proviso for re-conveyance on payment by him to them on the 5th of February, 1855, of the said sum of 10,500*l.* and all other sums lent, paid, or become liable for, with interest. The deed also contains covenants by him with them for payment of the said sums and interest, a power of attorney to proceed in his name for recovery of moneys, a power of sale in case of default in payment, a declaration that their receipts should effectually discharge, and the usual covenants for title. This deed was duly registered at Liverpool on the 17th of November, 1854: and all things necessary according to the acts in force concerning merchant shipping, for rendering the same effectual for the purposes therein mentioned, have been duly done.

[347] The vessel was put up as a general ship for goods and passengers on a voyage to Liverpool. The plaintiffs made further advances for the purposes of this voyage: and, with a view to give them security for those advances, Alexander Price French, who was the master of the ship, appointed at Rio de Janeiro by Mr. Crawford Maine on the outward passage to Melbourne, and the said Mr. Crawford Maine, the supercargo, as attorney for Edmund Thompson, on the 30th of November, 1854, executed a deed of that date, a copy of which accompanied the case, and was to be referred to by either party as part of it.

This deed purported to be executed by Crawford Maine as attorney for Edmund Thompson, in the name of Edmund Thompson: it purported to be made between Alexander Price French, master of the said ship, then at Port Jackson, in New South Wales, as such master, and the said Edmund Thompson, as owner of the said ship, of the one part, and the plaintiffs of the other part, reciting that the said ship was bound for a voyage to Liverpool, and that, with a view to such voyage, it had become absolutely necessary that she should be extensively repaired, and that a considerable sum of money should be laid out in so repairing her, and in making her in all respects fit and safe for such voyage, and that the said Alexander Price French and Edmund Thompson had found it absolutely necessary to raise the sum thereafter mentioned, in manner and on the terms therein set forth, for the purpose of effecting such repairs and providing for the other necessary disbursements and expenses, so as to enable the said ship to proceed to sea on her said intended voyage; and that the plaintiffs had been requested and had agreed to lend and advance to them the sum of 4000*l.* for the aforesaid purposes, upon their entering into and executing the same deed for the purpose of collaterally [348] securing the re-payment of the said sum of 4000*l.* with interest,—the said Alexander Price French, as such master, and the said Edmund Thompson, in consideration of 4000*l.* to them then paid by the plaintiffs, bargained, sold, assigned, transferred, and set over to plaintiffs all and singular the freight, hire, passage-money, and earnings of the said ship on her said intended voyage to Liverpool,

and all sum and sums of money to be recovered and received by virtue or in respect of the same, and the several bills of lading of the goods, wares, and merchandize shipped or to be shipped on board of the said ship, in respect of which the said freight, hire, and earnings were or should be payable, and all benefit and advantage thereof, and all the right and title of the said Alexander Price French and Edmund Thompson, and each of them, by way of lien or otherwise under, in, to, or out of the said goods, and all powers and authorities in respect thereof, and all the right, title, interest, benefit, claim, and demand whatsoever, at law and in equity, of them the said Alexander Price French and Edmund Thompson, of, in, to, out of, or upon the said freight, hire, passage-money, earnings, sum and sums of money, and premises thereby assigned : To have, hold, receive, take, and enjoy the same to the plaintiffs absolutely, as and for their own absolute estate, property, moneys, and effects.

The deed also contained powers of attorney to the plaintiffs to recover and receive the said freight, hire, passage-money, earnings, moneys, and premises ; to take possession of, and, if necessary, to sell the goods, and to receive the proceeds ; to bring actions and suits, and to give effectual receipts ; also a covenant by the said Alexander Price French and Edmund Thompson with the plaintiffs to pay them the said sum of 4000*l.*, with interest at 8 per cent. per annum from the [349] date of the said deed up to the time of payment, at or before the expiration of ten days after the safe arrival of the said ship at Liverpool ; also a declaration that the plaintiffs should stand possessed of all moneys and premises coming to their hands by virtue of that deed, in trust, first, to pay and retain all expenses, next to pay and retain to themselves the said sum of 4000*l.* with the said interest at the rate aforesaid up to the day of payment, and lastly to pay and deliver the surplus, if any, to the said Alexander Price French and Edmund Thompson, or as they should direct ; also a proviso, that, on payment to the plaintiffs of the said sum of 4000*l.* with interest as aforesaid, at or before the expiration of ten days after the safe arrival of the said ship at the port of Liverpool, that deed should be cancelled and made void.

The ship continued put up for the voyage to Liverpool after the execution of those deeds. The greater part of the freight and passage-money was made payable after the arrival of the ship in Liverpool ; and, as to that portion of the freight and passage-money, no question arises in this case ; but three passengers paid for their respective passages by bills of exchange drawn by them on parties in England, which give rise to the question for the court.

These bills were one dated the 13th of December, 1854, for 20*l.*, payable in England, at sight, to the order of Crawford Maine, one dated the 14th of December, 1854, for 44*l.* 2*s.*, payable in England, at sight, to the order of Crawford Maine, and one dated the 7th of December, 1854, for 42*l.*, payable in England, three days after sight, to the order of Crawford Maine. These bills were delivered by the parties to Mr. Crawford Maine, who indorsed them to Millers & Thompson, and on the 5th of January, 1855, remitted them by post to Millers & Thompson at Liverpool, though, [350] owing to the circumstances after mentioned, the letter was not received by that firm.

It is to be taken, for the purposes of this case (but not for any other purpose), that the sums of 10,500*l.* and 4000*l.* mentioned in the two deeds before mentioned were disbursed by the plaintiffs for the ship's purposes in Australia.

The "Antelope" sailed for Liverpool on the 2nd of December, 1854, and arrived at Liverpool on the 16th of April, 1855.

While the ship was on her voyage to Liverpool, that is to say, on the 9th of February, 1855, by deed of that date, made between George Spurstow Miller, the said Edmund Thompson, and William Charles Miller, merchants and co-partners, of the first part, the defendants of the second part, and the several persons whose names and seals were subscribed and affixed in the schedule thereunder written, being respectively creditors of the said George Spurstow Miller, Edmund Thompson, and William Charles Miller, or one of them, of the third part, — reciting that the said parties of the first part, by reason of great losses in business, had been compelled to suspend their payments, they the said parties of the first part, and each of them, granted, conveyed, assigned, and transferred unto the defendants, all and singular the lands, tenements, messuages, hereditaments, goods, wares, merchandize, stock-in-trade, ships and vessels, and parts of ships and vessels, debts, contracts, sum and sums of money, or damages and compensation due thereon, bonds, bills, and securities for money, and all other the joint and separate real and personal estate and effects whatsoever and wheresoever

belonging, due, or owing to them the said parties of the first part, or either of them, in anywise, and all deeds, evidences, books of account, accounts, vouchers, letters, writings, and documents relating to [351] the said estate, and every part thereof, and all the estate, right, title, interest, property, claim, and demand, both at law and in equity, of them the said parties of the first part, and of each of them, in, to, or out of the same respectively, to have, hold, receive, and take the same unto the defendants upon the trusts thereafter declared.

This deed contained powers of attorney to the defendants to ask, demand, sue for, recover, and receive of and from all and every person or persons indebted or liable, the goods, merchandize, debts, contracts, damages or compensations, sum and sums of money, and effects then due and owing or receivable and belonging to them the said parties of the first part, or either of them, and to give effectual receipts and discharges. The trusts of the deed were therein declared to be, the converting into money all and singular the joint and separate goods and chattels, stock, property, estate, and effects, real and personal, of the said parties of the first part intended to be thereby conveyed, and of each of them, and the application of the proceeds in the payment of all expenses, and, after payment thereof, the division of the said joint and separate estates unto and among the joint and separate creditors of the said parties of the first part, by an equal pound rate according to their several rights upon the said respective estates, in like manner as in bankruptcy. The plaintiffs executed this deed, a copy whereof was to be referred to by either party upon the argument.

Upon the arrival of the "Antelope" at the port of Liverpool, the plaintiffs took possession of her and received the freight and passage-money (other than the passage-money which is the subject of this action) in respect of the said voyage, and sold the ship, with all her stores, &c., and received the price thereof. The [352] said sum of 4000*l.* was not, nor was any part thereof, paid or tendered to them within ten days after the safe arrival of the ship at the port of Liverpool: and they have not been paid or satisfied the money intended to be secured by the said deeds of the 5th of August and 30th of November, 1854, except as to the sums received by them as aforesaid for freight, passage-money, and sale of the ship and stores, &c. After giving all due credits, there remains due to the plaintiffs in respect of the moneys secured by the first of these deeds, a sum far exceeding the claim in this action: and also, in respect of the moneys secured by the second of these deeds, a sum far exceeding the claim in this action.

The letter inclosing the bills of exchange before mentioned, addressed to Millers & Thompson, arrived in Liverpool on or about the 20th of March, 1855, after the assignment for the benefit of creditors.

The defendants obtained possession of those bills, and afterwards received the amounts thereof, that is to say, 106*l.* 2*s.*, and have hitherto refused to pay over any part thereof to the plaintiffs.

The question for the opinion of the court was, whether the plaintiffs are entitled to recover from the defendants the value or amount of the said bills.

If the court should be of opinion in the affirmative thereof, then judgment was to be entered against the defendants for 106*l.* 2*s.*, with interest thereon from the 27th of March, 1855, and costs, to be taxed.

If the court should be of a contrary opinion, then judgment of nonsuit was to be entered, with costs, to be taxed.

John Henderson, for the plaintiffs (*a*). By the mort-[353]-gage of a ship, accruing freight passes to the mortgagee, notwithstanding the requisites of the ship's registry acts have not been complied with: *Dean v. M'Ghie*, 4 Bingh. 45, 12 J. B. Moore, 185; *Kerswill v. Bishop*, 2 C. & J. 529. [Crowder, J. Here, the bills were paid before the mortgagees took possession of the ship.] The circumstance of bills having been given for the passage-money cannot vary the rights of the parties; neither can the accidental circumstance of the bills having arrived and been paid before the ship reached England make any difference. In *Gardner v. Cox*, *nov.*, 1 Hurlst. & N. 423, which will probably be relied upon by the other side, the mortgagee had never taken possession of the ship:

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"That the plaintiffs are entitled to the passage-money in question as incident to the ship of which they have taken possession under the deed of the 5th of August, 1854, or as transferred thereby in the words, all freight, passage-money, &c., or as conveyed by the deed of the 30th of November, 1854."

and the bill of sale made no mention of freight or passage-money. Here, however, they are specifically mentioned. It is submitted, therefore, that the plaintiffs, as mortgagees in possession of the ship, were entitled to the freight and passage-money,—that the deed of the 30th of November, 1854, conveyed the freight and passage-money to them, irrespectively of the title to the ship,—and that, without reference to the power of attorney, the master had authority to hypothecate the ship and her earnings for the re-payment of the 4000*l.* advanced for necessary repairs.

Mellish, for the defendants (*b*). The plaintiffs, as [354] mortgagees of the ship, were not entitled to recover passage-money received by the owners before they (the mortgagees) took possession of the ship. [Williams, J. Upon what principle is it that the taking possession of the ship makes the difference?] If the mortgagors are allowed to be in possession, the contracts for freight are made with them. By abstaining from taking possession, the inference is that the mortgagees intend that the mortgagors shall be liable for the expenses of repairing and working the ship. In *Garthner v. Cazenove*, the Lord Chief Baron says: "It is established by the authorities that an owner is entitled to freight from the time that the ceremonies have been gone through which are necessary to transfer to him the title, so that he would have a right to all the freight which the ship was then earning. On the other hand, a mortgagee, though for many purposes an owner, is not entitled to the freight until he has taken possession." The circumstance of the money being passage money for the voyage, and not freight, makes no difference. If the mortgagee allows the mortgagor to receive it, there is an end of his security *pro tanto*. Pre-payment of passage-money is usual. In *Denn v. McGhie* and *Kerswill v. Bishop*, the money had not been paid at the time possession was taken of the ship. The next question is, whether the mention of freight and passage-money in the deed of the 30th of November, 1854, makes any difference. The power of attor-[355]-ney only gave authority to mortgage the ship, not the freight and passage-money separate and distinct from the ship herself: and the plaintiffs had full notice of the terms of the power, for it was addressed to them as well as to Maine. Then, reliance is placed upon the assignment executed by the captain, who it is said had power to raise money upon the security of the ship. But, although the master has power to hypothecate the ship for advances for necessary repairs, he has no power at the same time and by the same instrument to pledge the personal credit of his owners for such advances: *Stainbank v. Fenning*, 11 C. B. 51, affirmed by the Exchequer Chamber, *Stainbank v. Shepard*, 13 C. B. 418, Erle, J., dissenting. Assuming that the mortgagee of a ship ordinarily has no interest in freight or passage-money until he has taken possession of the ship, does it make any difference that this is a specific mortgage of the freight and passage-money? No notice having been given by the mortgagees, the passage-money was paid. Can a mortgagee or assignee of a chose in action under such circumstances say that the mortgagor had no power to receive the money? [Crowder, J. The trustees under the deed of the 9th of February, 1855, cannot be in a better position than the mortgagors themselves. If the mortgagors had no right to receive the money in question except as trustees for the mortgagees, what right could the defendants have? Erle, C. J. Suppose a ship is mortgaged, and on her arrival with passengers,—the passage-money being payable on arrival, the mortgagor goes on board and receives money from a passenger, would not money had and received lie against him at the suit of the mortgagee?] To be consistent, it must be contended that it would not. But that is a very different case from the present, where the money had been actually paid before the arrival of the ship, and consequently before the [356] mortgagees had done any act indicating an intention to take possession of the ship.

(*b*) The points marked for argument on the part of the defendants were as follows:—

"1. That the plaintiffs were at most mortgagees who had not taken possession of the ship till after the money in question was paid; and that mortgagees have no claim either at law or in equity to freight or other profits of the thing mortgaged which have been received whilst the mortgagor is in possession:

"2. That the power of attorney did not give authority to execute any assignment having any greater effect on the freight than that of a mortgage of the ship: and that, if the deed of the 30th of November, 1854, was such as would have had any greater effect, it is not binding."

Henderson, in reply. All the authorities shew that a mortgagee taking possession of a ship becomes entitled to all her earnings. As a general rule, that is conceded here. If, therefore, these bills had not been taken for the passage money, the plaintiffs would unquestionably have been entitled to receive the amount on the ship's arrival in Liverpool. The terms of the power of attorney were large enough to authorize a mortgage of the ship and also of the freight and passage-money; and the right to the earnings of the voyage followed the beneficial interest.

Cur. adv. vult

ERLE, C. J., now delivered the judgment of the court:—

In this case the plaintiffs claim the passage-money of certain passengers carried from Australia to Liverpool in the "Antelope." The defendants are assignees of the effects of the owners of the ship, and stand in the place of the owners for the purpose of this action. The plaintiffs' claim was rested, first, on the ground that they were mortgagees of the ship; but, inasmuch as the passage-money in question was an earning of the ship received by the mortgagors before the mortgagees took possession, we think that ground fails: *Gardner v. Cazenove*, 1 Hurlst. & N. 423.

Secondly, the claim was rested on the ground of an assignment of the passage-money in question; and, as to this, two questions arise,—first, whether the power of attorney from the owners gave authority to assign the passage-money, and, secondly, whether the instrument relied on did operate to assign it.

[357] The material facts are that the owners gave a power of attorney authorizing their agents to do many acts for the owners, and, among others, "to sign any bottomry-bond or instrument of hypothecation on said vessel or her cargo, and to sell and dispose of, either absolutely or by way of mortgage, or otherwise, as he shall think proper, the said vessel, or any share thereof, and to execute all instruments, and to do all acts which shall be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all acts about the business and affairs aforesaid which the owners if present could have done." Under this power, the agent, by deed, reciting a mortgage of the ship, and the necessity for further advance to enable the ship to set sail, and the advance of 4000l. for that purpose by the plaintiffs, assigned all the freight, hire and passage-money, and earnings of the said ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within ten days after arrival the 4000l. should be repaid. The ship sailed and arrived at Liverpool. After the ship had sailed, the agent of the owners received on behalf of the passage-money of some passengers, which had been so assigned, bills on England, which were paid, and the money received by the defendants, before the ship arrived; and the amount of these bills is the claim in this action.

Then, did the power of attorney authorize the assignment of the passage-money in question? The defendants contend that the power to mortgage authorizes only the usual mortgage of the ship itself, with the usual incident that the earnings should belong to the mortgagor till the mortgagee should take possession; and that therefore a mortgage of the passage-money, which is the same for this purpose as the freight, creating an immediate right thereto, was beyond the power, and void.

[358] But it appears to us that the power is not restricted in the manner so contended for. The context shews an intention to empower an attorney to do all the acts which the owner could do in respect of selling or mortgaging or hypothecating, according as need should require; and the words relating to mortgage or sale are absolute and in the amplest form. If it is objected that a power to mortgage the ship does not extend to mortgage the freight, the answer is, that the freight is for many purposes part of the ship inseparably appurtenant thereto, and therefore that such a power as this to mortgage the ship extends to the freight. Thus, an assignment of the ship passes the right to the freight then in progress of being earned to the assignee of the ship, so that a subsequent assignee of the freight takes nothing, because the freight appertains to the ship: *Morrison v. Parsons*, 2 Taunt. 406. Also, in case of separate insurance on ship and freight, and separate abandonments, if the ship arrives and earns freight, the abandonee of the ship takes the freight as part of the ship, and the abandonee of freight takes nothing: *Care v. Davidson*, 5 M. & Selw. 79.

If it is objected that this power to mortgage must be restricted to a mortgage leaving the earnings to belong to the mortgagor till his possession is changed, the answer is, that a mortgage of a ship in the usual terms is construed to have that effect, because all mortgages are presumed to be made with that intention unless the

contrary is expressed. For, if the mortgagor bears the expense, it is thought reasonable that he should have the profits till the mortgagee intervenes: and this is put as the ground of the rule in all the cases from *Chinnery v. Blackburne*, 1 H. Bl. 117, n., 3 Dougl. 391, *Gardner v. Cazenove*, above cited.

But it is clear also that the need of the ship may require a mortgage of the freight and other earnings to [359] accrue in the course of the voyage, as well as of the ship itself, not only from the facts of the present case, but also from those of many reported cases. In *Gardner v. Cazenove*, 1 Hurlst. & N. 423, it is said in the judgment, that, if an instrument expressed a clear intention to mortgage the accruing freight, effect would be given to that intention. But the instrument there was construed not to have that effect, where the ship had been mortgaged and also the freight, and the freight had been received by the mortgagor. The question was raised whether the mortgagee was liable for necessities supplied, as if he had been owner from the beginning of the voyage, and answered in the negative: *Jackson v. Vernon*, 1 H. B. 114. In *Mestree v. Gillespie*, 11 Ves. 621, the ship and freight were mortgaged by the same instrument, and the mortgagor objected that the instrument was null, because there was no registry: but Lord Eldon, p. 629, declares that the mortgage of the freight was clearly valid, and was a well-known security; and he granted the injunction prayed for by the mortgagee. These cases shew that a mortgage may create a right to the ship, leaving some right to the freight in the mortgagor; or it may create an immediate right to the freight in the mortgagee, if the parties so intend: and that the mortgage of the ship and freight may be in the same or a separate instrument.

It is evident that the need of the ship may be such that the voyage would be lost unless an advance could be obtained on the freight: and there is, therefore, ground to presume that the owner, giving a power to mortgage in ample words, would intend to authorize a form of mortgage well known to be often needed. The words were understood in this sense by the parties who respectively advanced and received money upon the faith of such understanding. If the words are [360] capable of the meaning so attached to them, we ought to give that effect to them which will make the instrument valid. And, on these grounds, we consider that the power of attorney did authorize the instrument in question.

Then, the question remains, whether the instrument operated to pass an immediate right to the passage-money before the mortgagees took possession of the ship. We think it did.

The words express an intention to create an immediate assignment, and the circumstances indicate that the words were used in that sense; for, it is a further charge beyond the mortgage of the ship, to secure a further advance; and, unless it is construed to give an immediate right to the passage-money before taking possession of the ship, it has no operation, and gives no further security. Unless it is construed to give a right to the passage-money so as to prevent the owner or his agent from receiving that passage-money, he would have the option of rendering the security a nullity by receiving all for himself. If he assigned a right to the money, and afterwards received it, to defeat the operation of his own assignment, we think the money so received would be received to the use of the assignee; and, as the present defendants have the same rights and liabilities as the owners in respect of the plaintiffs' claim, we think that, for the reasons above mentioned, they are liable to the plaintiffs for the passage money which they have received on behalf of the owners. *Stainbank v. Shepard* decided that the master could not hypothecate the ship and freight and charge the owner personally in the same instrument; and that decision binds here, so as to prevent any effect from the master joining in the instrument hypothecating the freight. But the decision goes no further: it does not decide that the owner could not hypothecate [361] the ship and freight, and bind himself personally; and here the owners have authorized their attorney to bind them by any instrument of hypothecation by which they could be bound themselves.

Judgment for the plaintiffs.

HOLMES v. MITCHELL. July 9th, 1859.

[S. C. 28 L. J. C. P. 301 ; 6 Jur. N. S. 73. Applied, *Sheers v. Thimbleby*, 1897, 76 L. T. 710.]

Since the 19 & 20 Vict. c. 19, s. 3, though parol evidence may supply the consideration for a guarantee, it cannot be admitted to explain the promise. In a letter written by the defendant to the plaintiff, relating to a proposed mortgage, the following words are not a sufficient guarantee within the 4th section of the Statute of Frauds,—“I will take any responsibility myself respecting it, should there be any.”

This was an action upon a guarantee.

The first count of the declaration stated that theretofore, in consideration that the plaintiff, at the request of the defendant, would advance and lend the sum of 400l. to one Hook Spooner and one William Cubitt, on interest, on mortgage of certain houses and land then belonging to the said Hook Spooner and William Cubitt, the defendant undertook and promised the plaintiff to take on himself any responsibility by the said Hook Spooner and William Cubitt incurred by the plaintiff by reason of the said loan on mortgage, and to indemnify and protect the plaintiff from and against all loss, costs, and expenses incurred or sustained by the plaintiff by reason of the said loan on mortgage: Averment, that the plaintiff, relying on the said undertaking and promise of the defendant, did advance the said sum to the said Hook Spooner and William Cubitt, at interest, on the security of a mortgage of the said houses and land, and that afterwards, and before the commencement of this suit, the said principal sum and a large amount of interest thereon became due and payable by reason of the said loan and mortgage from the said Hook Spooner and William [362] Cubitt to the plaintiff, and the said Hook Spooner and William Cubitt made default in payment thereof, and that the plaintiff had been necessarily put to heavy and great costs and expenses in trying to obtain payment of the said principal and interest so due and payable as aforesaid, by endeavouring to sell the said houses and land according to the provisions of the said mortgage, and otherwise, and that the said houses and land were of much less value than the said principal sum so lent as aforesaid, and altogether insufficient to indemnify the plaintiff from and against the loss, charges, and expenses of and relating to the said loan: Breach, that the defendant, although often requested so to do, and although all conditions precedent had been fulfilled, and everything had happened to enable the plaintiff to maintain this action, did not nor would discharge the said responsibility of the said Hook Spooner and William Cubitt to the plaintiff in respect of the said loan on mortgage, and did not nor would indemnify and protect the plaintiff against the loss, costs, and expenses incurred or sustained by him by reason of the said loan, and did not nor would pay to the plaintiff the said principal and interest and the said costs and expenses incurred and sustained by the plaintiff as aforesaid, or any part thereof, but wholly neglected and refused so to do, and the same were still due and payable to the plaintiff.

The second count was substantially the same as the first, but stated the consideration for the defendant's promise to be a transfer of 400l. stock by the plaintiff to the said Hook Spooner and William Cubitt: and the third count alleged the consideration to be the loan of money generally to Spooner and Cubitt.

The defendant, amongst other pleas, pleaded a denial of the alleged promise: whereupon issue was joined.

[363] The cause was tried before Channell, B., at the Bristol Summer Assizes, 1858, when the following facts appeared in evidence:—The plaintiff having a sum of 400l. in the funds, was advised by the defendant to lend it on mortgage to two persons named Hook Spooner and William Cubitt, who carried on business as builders, upon the security of certain leasehold premises belonging to them; the defendant assuring the plaintiff that he would incur no risk, as the security was good for 600l., and telling him that, if Spooner and Cubitt would not take less than 600l., he, the defendant, would himself advance 200l. to make up the required amount. The defendant further promised to see his solicitor, Mr. Lyne, upon the matter: and shortly afterwards he addressed the following letter to the plaintiff:—

“Enfield Highway, October 21, 1856.

“Dear Charles,—I saw Mr. Lyne this morning, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. I will take any responsibility myself respecting it, should there be any.

“W. MITCHELL.”

Shortly after the receipt of this letter, Mr. Lyne called on the plaintiff and told him that Spooner and Cubitt would be content to take the 400l., and the plaintiff consented to lend it. Accordingly, he sold out the 400l. stock, and advanced the proceeds to Spooner and Cubitt upon the security before mentioned at 6l. per cent. interest,—solely upon the faith of the defendant's letter of the 21st of October, 1856.

The interest was not paid when it became due, and the security turned out to be very inadequate, and the plaintiff sustained a considerable loss, to recoup himself which he brought this action against the defendant.

[364] It was objected on the part of the defendant that the evidence did not sustain the declaration; and the learned Baron, being of this opinion, nonsuited the plaintiff,—reserving him leave to move to enter a verdict (for such sum as should be assessed by an arbitrator to be chosen between the parties), if the court should be of opinion that there was evidence to support the contract alleged in either count of the declaration; the court to be at liberty to draw such inferences from the facts as a jury might have drawn.

Edwards, accordingly, in Michaelmas Term last, obtained a rule nisi, against which Karlake (with whom was Collier, Q. C.), in Easter Term shewed cause. There was no consideration for the defendant's promise. The 3rd section of the 19 & 20 Vict. c. 97 (*a*), although it dispenses with the necessity of shewing a consideration upon the face of the document, does not dispense with the existence of a good consideration. There was no request by the defendant to the plaintiff to advance the 400l.; but merely a recommendation to him to see Mr. Lyne and endeavour to get 6l. per cent. for his money. The letter is a mere offer to become responsible: there was no acceptance of the guarantee by the plaintiff. In this respect the case is almost identical with *M'Ivor* [365] v. *Richardson*, 1 M. & Selw. 557. There, a paper writing was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone) to this effect,—“I understand A. & Co. have given you an order for rigging, &c. I can assure you, from what I know of A.'s honor and probity you will be perfectly safe in crediting them to that amount: indeed, I have no objection to guarantee you against any loss from giving them this credit.” This paper was handed over by A. to the plaintiffs, together with a guarantee from another house, which they required in addition, and the goods were thereupon furnished. It was held that the paper did not amount to a guarantee, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guarantee. Lord Ellenborough, in delivering the judgment of the court, says: “We do not know on what kind of previous application the defendant signed it, nor is there any subsequent circumstance stated in the case from which it can be collected. The paper, therefore, must be construed according to the plain natural import of its terms. The import is, that the party signing it understood that Anderson & Co. had given an order for goods amounting to about 4000l.: that this order remained unexecuted; and then, as if a question had been put to the defendant respecting the honor and probity of Anderson & Co., the defendant says, —I can assure you, from what I know of Anderson, you will be perfectly safe in crediting them to that amount: and then he adds, —indeed, I have no objection to guarantee you against any loss from giving them this credit; which words import, that, if application were made, he would guarantee: but no subsequent application was made; indeed, it appears that a guarantee was obtained

(a) Which enacts that “no special promise to be made by any person after the passing of this act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.”

from [366] another house. A considerable period elapsed, and it was not made known to the defendant until the failure of Anderson & Co. that his paper had ever been communicated to the plaintiffs. Considering this a mere overture to guarantee, it appears to us that the defendant ought to have had notice that it was so regarded, and meant to be accepted, or that there should have been a subsequent consent on his part to convert it into a conclusive guarantee." So, in *Mosley v. Tinkler*, 1 C. M. & R. 692, a guarantee was given in the following form,—“T. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50l.: for my reference, apply to B.” signed “G. T.” This memorandum was forwarded to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on the guarantee, it was held that the plaintiffs, not having proved any notice of acceptance to the defendant, were not entitled to recover. Lord Abinger says: “The case of *McTeer v. Richardson* is not so strong as the present to shew that there was intended to be a suspension until something further should be done. That case has never been impugned, and the present comes clearly within the principle there established. The transaction cannot be tortured into a consummate and perfect contract. The contract was not complete till notice.” [Willes, J., referred to *Andreas v. Garratt*, ante, vol. vi., p. 262.] In *Gaunt v. Hill*, 1 Stark. N. P. C. 10, it was held that a written proposal to pay a moiety of the debt of another, if the creditor would at a specified time of meeting accept the proposal and discharge the debtor, is not binding unless the creditor accede to the terms in writing. So, in *Symmons v. Want*, 2 Stark. N. P. C. 371, in an action on a guarantee, the plaintiff gave in evidence a letter in the handwriting of the defendant, but without date, in which the latter stated, —“I have no objection to guarantee the pay-[367]-ment of the rent, as far as that of each quarter, during Mr. T. Want’s continuance in possession:” he also proved that T. Want rented certain premises from him: and it was held, on the authority of *McTeer v. Richardson*, that this was not sufficient, without shewing that the plaintiff accepted the defendant’s offer.

Edwards and Holl, in support of the rule. Before the statute 19 & 20 Vict. c. 97, to establish a guarantee, the plaintiff was bound to prove both the consideration and the promise by written evidence: now, however, the consideration may be proved by parol, though the promise must still be evidenced by writing. [Byles, J. The whole of the promise must still appear in writing.] No doubt. Here, the whole promise is in writing. [Willes, J. Does it not come to this, that the memorandum which would before have satisfied the 17th section of the Statute of Frauds, will now satisfy the 4th section?] Yes. [Byles, J. The 3rd section of the 19 & 20 Vict. c. 97, does not make a promise good which was not good before. Can the verbal consideration be imported into the promise?] The consideration may be attached to the promise by parol. [Byles, J. You want to incorporate the parol consideration into the written promise. This you cannot do.] Here is a clear and distinct promise. The writing is only a part of the contract: to make it complete, it is necessary to prove consideration. That may be done by parol. [Byles, J. Formerly, the consideration in writing might be looked at, not only to support, but to explain the promise. But the parol consideration cannot be looked at to explain the promise.] If that be the true construction of the 3rd section of the 19 & 20 Vict. c. 97, the benefit it confers is shadowy indeed. [Cockburn, C. J. The statute intended to exclude parol testimony as to the terms of the promise itself. The con-[368]-struction you contend for would raise a conflict of parol testimony as to the limit of the guarantee, which would be getting on the debateable ground from which the statute intended to exclude you. Is not the Statute of Frauds inexorable in that?] The court will fail to carry out the intention of the legislature, if less effect be given to the parol evidence of the consideration than was given before when the evidence of the consideration and of the promise were both in writing. In Chitty on Contracts, 6th edit. p. 446, it is said: “A guarantee will be good, although it may be doubtful whether it referred to a past or a future credit, —provided it appear from all the circumstances of the transaction that the parties contemplated the latter. And, in such cases, evidence is admissible to shew what the transaction really was,”—citing *Colbourn v. Dawson*, 10 C. B. 765; *Steele v. Hoe*, 14 Q. B. 431, *Edwards v. Jerons*, 8 C. B. 436, *Goldshede v. Swan*, 1 Exch. 154, *Broom v. Batchelor*, 1 Hurlst. & N. 255, *Butcher v. Stewart*, 11 M. & W. 857, and *Haigh v. Brooks*, 10 Ad. & E. 309. In *Wilson v. Hart*, 7 Taunt. 295, 1 J. B. Moore, 45, it was held that the Statute of Frauds does not exclude parol evidence that a written

contract for the sale of goods, purporting to be made between A., the seller, and B., the buyer, was on B.'s part made by him only as agent for C. In the case of a deed, you may shew a consideration, although none appears upon the face of the deed: *Mildmay's case*, 1 Co. Rep. 175 a. [Willes, J. Where one consideration is recited, you may shew another which is not inconsistent with the deed. Thus, in *Tull v. Parlett*, M. & M. 472, where a deed purported to be made "in consideration of esteem for A. T., and for divers other good considerations," it was held that evidence was admissible to shew that it was made in consideration of an intended marriage with A. T. A deed is not within the Statute of Frauds. [369] That statute only applies to instruments which were binding by reason of the consideration appearing in writing.] The cases upon the subject of the admissibility of extrinsic evidence to explain a will are alluded to in the judgment of Tindal, C. J., in *Miller v. Travers*, 8 Bingham 244, 1 M. & Scott, 342. In *Shortrede v. Cheek*, 1 Ad. & E. 57, 3 N. & M. 866, the plaintiffs brought assumpsit on the following guarantee,—“You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45l.” A promissory note for 35l., made by the defendant's son, and payable to the plaintiff, was proved at the trial; but not the memorandum. The guarantee was proved, and a subsequent admission by the defendant that he had to pay the plaintiff 45l. due from his son. It was held,—first, that the plaintiff was not bound to produce the memorandum,—secondly, that the consideration, viz. the withdrawing of the note, was sufficiently stated to satisfy the Statute of Frauds, though the amount and maker's name were not specified; there being no evidence of any other note to which the agreement could apply. Parke, J., in the course of the argument there says,—“A guarantee is to receive its application from the state of facts as shewn in evidence.” [Crowder, J. *Bateman v. Phillips*, 15 East, 272, is stronger in your favor than *Shortrede v. Cheek*.

Cur. adv. vult.

WILLIAMS, J., delivered the judgment of the court:—

The question in this case is whether in a letter written by the defendant to the plaintiff relating to a proposed mortgage, the following words are a sufficient guarantee within the 4th section of the Statute of Frauds,—“I will take any responsibility myself respecting it should there be any.”

[370] It will be observed, that, at the time the letter was written, no mortgage existed. The letter is silent as to the sum to be advanced, as to the rate of interest, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter, if read by itself without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning; it evidently refers to previous conversations in which these particulars were supplied. The whole promise, therefore, is not in writing, as the statute requires that it should be. It cannot be made out without reference to previous conversations. In *Shortrede v. Cheek*, 1 Ad. & E. 57, 3 N. & M. 866, and in *Bateman v. Phillips*, 15 East, 472, an existing document or an existing debt was referred to in the writing, so that evidence of oral statements was not necessary to explain the promise.

The recent statute 19 & 20 Vict. c. 97, s. 3, it is true, abrogates the rule laid down in *Hann v. Warters*, 5 East, 17, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration expressed in writing formerly discharged two offices, it sustained the promise and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further, and explain the promise.

We therefore think the ruling of the learned judge at the trial was correct, and the rule must be discharged.

Rule discharged (a).

(a) See the remarks of Williams, J., upon the case in *The North Staffordshire Railway Company v. Peke*, 1 Ellis, B. & E. 1002.

[371] POLLEN AND WIFE v. BREWER, Clerk. May 26th, 1859.

[S. C. 1 L. T. 9; 6 Jur. N. S. 509. Considered, *Beddall v. Maitland*, 1881, 17 Ch. D. 174.]

Pending a negotiation for an assignment of a lease, A. was (as the jury found) let into possession of the premises as tenant of some kind. The negotiation going off, B (the landlord) demanded the key, and wrote to A. telling him that he never intended to let him into possession at all, and, A. refusing to go out, B. entered and forcibly expelled him and his family, in the doing of which the plaintiff and his wife were assaulted:—Held, that, although the plaintiff was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion,—his tenancy being at the most a tenancy at will, and that having been properly determined.

The first count of the declaration charged an assault on the female plaintiff, the second (which was abandoned at the trial) the like with an allegation of loss of service, &c., the third an assault upon the male plaintiff, the fourth breaking and entering the plaintiff's dwelling-house and forcibly expelling him and his wife and family, and the fifth was trover.

The defendant pleaded not guilty.

The cause was tried before Williams, J., at the sittings at Westminster after last Term. The plaintiff swore, that, in May, 1858, he entered into a negotiation with the defendant for an assignment of a lease of certain premises which the defendant held, that the defendant agreed to let him into possession, and gave him the key, and that shortly afterwards the defendant went to the premises with two men, and assaulted the plaintiff and his wife, and turned them and their children and furniture into the street.

The defendant denied that he had ever agreed to let the premises to the plaintiff, but stated that he gave him the key for the purpose of enabling his agent to inspect the premises. He also denied the alleged assaults, and proved that, the plaintiff having refused to re-deliver possession of the premises to him on demand, he entered and expelled him.

The jury, however, found that there was a tenancy of some sort, and that the alleged assaults were committed; and they found for the plaintiffs on the first count 20s. damages, on the third count 40s., and on the fourth count 25l. The learned judge reserved leave to the defendant to move to reduce the damages by the last-mentioned sum, if the court should think [372] there was any evidence of a determination of the tenancy.

J. Jones, in Trinity Term last, moved for a new trial, on the ground that the verdict was against evidence; or to reduce the verdict by the 25l. given for the expulsion, on the ground that the plaintiff was a trespasser after the demand of possession. He submitted, that, at the most, the plaintiff was tenant at will, no terms having been concluded; and that, upon his refusal to re-deliver possession on demand, he became a trespasser and might lawfully be expelled. [Williams, J. It was not pretended that Pollen had any estate. I do not, however, think we can disturb the verdict upon the evidence; but you may take a rule to reduce the damages.]

Milward now shewed cause. The object of this rule is, to question the propriety of the decision in the case of *Newton v. Harland*, 1 M. & G. 644, 1 Scott, N. R. 474, where it was held by a majority of this court, that, where a tenant remains in possession after the expiration of his term, his landlord is not justified in expelling him by force, in order to regain possession. That case has never been overruled; and this court will not now overrule it, but leave that to be done by a court of error. Here there might be a question whether the plaintiff was not tenant at will when he was expelled. There was no formal determination of the will. All that was proved was, that the keys had been sent for by the defendant, but the plaintiff refused to give them up. [Byles, J. The plaintiff was clearly a trespasser. Erle, C. J. The question is whether as a jury we can infer that the plaintiff was in with the consent of the landlord. The reservation was, to reduce the damages by the 25l., if there was any evidence that [373] the will was determined. I think there was, and that the landlord had a right to enter and turn the plaintiff out.] The determination of the will is

a question of intention; and the defendant could not be assumed to intend to determine a tenancy the existence of which he denied.

Jones was not called upon to support the rule.

ERLE, C. J. I am of opinion that this rule must be made absolute to reduce the verdict by 25l., the amount of damages found upon the fourth count. It is clear that the plaintiff had at the utmost only the interest of a tenant at will. I incline to think that the defendant never intended to create even that limited interest: but the jury have found it. The defendant, having a right to determine the plaintiff's possession at any moment, sent to demand the key, telling the plaintiff at the same time (by letter) that he was in against his will. I am of opinion that either of these was a sufficient intimation to the plaintiff that he was no longer tenant at will, and that his continuance of the possession was without a shadow of right, and therefore that the defendant was justified in treating him as a trespasser and removing him from the premises. There was abundant evidence that, at the time of the expulsion, the plaintiff was on the premises without any right. I therefore think the rule must be made absolute.

WILLIAMS, J. I also think there was sufficient evidence of a determination of the will, and consequently that the plaintiffs are not entitled to recover damages for the expulsion.

CROWDER, J. I am of the same opinion. I do not see what more the defendant could do than he did to determine what the jury have found to be a tenancy at [374] will. It is said that there was no proper determination of the tenancy, because the demand of possession or the key, was accompanied by an assertion that there never was any tenancy at all. I do not, however, see how that can cut down the evidence of determination. The defendant demands the key, then a correspondence ensues, and then he makes an entry. This was a clear intimation to the plaintiff of his election to determine any right he might have.

BYLES, J. I also am clearly of opinion that the rule to reduce the damages should be made absolute. I have nothing to add to what has fallen from the rest of the court.

Rule absolute.

FITZGERALD AND OTHERS v. DRESSLER. Nov. 18, 1859.

[S. C. 29 L. J. C. P. 113; 5 Jur. N. S. 598. Referred to, *Reader v. Kingham*, 1862, 13 C. B. N. S. 354; *Sutton v. Grey*, [1894] 1 Q. B. 288. Discussed, *Harburg India Rubber Comb Company v. Martin*, [1902] 1 K. B. 787. See *Dacys v. Buswell*, [1913] 2 K. B. 57.]

A. through the agency of B., a broker, sold a parcel of linseed to C., who through the same broker sold at an increased price to D. The time for D. to pay the price was to arrive before that fixed for the payment by C. D. sent a clerk to the broker for the delivery order for the seed. The broker took him to A., from whom the clerk obtained the order upon the faith of his engagement that D. would pay A. for the seed. D. on the following day sent the broker a cheque for 900l. on account, - the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A. under his contract with C. was 971l. 15s. 6d. - In an action by A. against D. to recover the difference between that sum and the 900l. cheque: - Held, that the agreement by D.'s clerk was not a contract or promise to pay the debt of a third person within the 4th section of the Statute of Frauds, the seed, the giving up the delivery order for which was the consideration for that promise, being the property of D., subject only to A.'s lien for the contract price. But held, by Williams, J., Crowder, J., and Willes, J. (Cockburn, C. J., dissenting), that, there being no evidence that D.'s clerk had communicated to him the bargain he had made with A.'s clerk when he obtained the delivery order, D. was not liable.

The first count of the declaration was for money which the defendant agreed with the plaintiffs to pay to the plaintiffs, in consideration that the plaintiffs, at his request, and with the consent of the purchasers from the plaintiffs of certain goods upon which

for the [375] price thereof the plaintiffs had a lien, delivered the said goods to the defendant.

There were also counts for goods sold and delivered, for interest, and for money due on accounts stated.

The defendant pleaded never indebted, whereupon issue was joined.

The cause was tried before Cockburn, C. J., at the sittings in London after Hilary Term, 1858, when evidence to the following effect was given on the part of the plaintiffs:—

On the 25th of September, 1855, the plaintiffs, who carried on business under the firm of Greenhill & Co., and were the importers of a cargo of linseed then on its way from Calcutta in a ship called the "Pequot," sold such linseed to Messrs. Haakman & Co., through Messrs. Dale, Morgan, & Co., brokers of the city of London, under the following contract:—

"London, 25th September, 1855.

"Sold this day for Messrs. Greenhill & Co. to Messrs. Haakman, Jansen, & Co., the contents [G. & Co.] 682 bags Calcutta linseed, expected to arrive per 'Pequot' from Calcutta, warranted of sound merchantable quality and of fair average of this season's shipments made at that port, at 74s. per quarter, duty free; to be worked and paid for in fourteen days from landing after arrival here, in ready money, allowing 2½ per cent. discount. Should the quality of the linseed on arrival here not turn out equal to the warranty specified above, be sea or otherwise damaged, or out of condition, this contract is not to be cancelled on that account, but the same to be taken with an allowance, to be fixed by the brokers."

(Signed) "DALE, MORGAN, & Co., brokers."

On the 6th of November, 1855, and before the arrival of the linseed, Messrs. Dale, Morgan & Co. re-sold it for Messrs. Haakman & Co. to William Schenk, at the increased price of 75s. 3d. per quarter. The contract [376] of such re-sale to Schenk was in other respects similar to the contract of sale to Messrs. Haakman & Co.

On the 28th of December, 1855, and after the arrival of the ship, but before any part of the said linseed had been landed or worked, Messrs. Dale, Morgan, & Co. re-sold the linseed for Schenk to the defendant according to the following contract:—

"London, 28th December, 1855.

"Sold this day for William Schenk, Esq., to Mr. Gustavus Dressler the contents [G. & Co.] six hundred and eighty-two bags Calcutta linseed ex 'Pequot' lying in the London Docks, of sound merchantable quality, per sample, at 77s. per quarter, to be worked and paid for in fourteen days, in ready money, allowing 2½ per cent. discount. Any damaged seed or sweepings in the above parcel of linseed to be taken with an allowance, to be fixed by the brokers."

(Signed) "DALE, MORGAN, & Co., brokers."

It appeared, that, on the 2nd of January, 1856, Lindsey Harvey, one of the defendant's junior clerks, who was only aged about sixteen, applied on behalf of the defendant to Mr. Morgan for a delivery order for the said linseed, when Mr. Morgan asked if he had brought the money for it, to which Harvey answered "No"; that Mr. Morgan then sent him with one of Dale, Morgan, & Co.'s clerks to the office of the plaintiffs, where they saw one Gardiner, who, upon Harvey's stating that he had come for the delivery order, asked Harvey if he had brought a cheque, and, finding that he had not, told him that before the plaintiffs parted with the order they should require the money.

According to the plaintiffs' evidence, it appeared that Gardiner then went and consulted the plaintiff, Mr. Greenhill, as to whether he would take the clerk's promise to pay, and, obtaining his assent, Gardiner asked Harvey whether the defendant would pay for the [377] seed, and, on Harvey's answering "Yes," Gardiner handed to him the order, which was in the following terms:—

"To the Superintendent of the London Docks.

"1st January, 1855.

"Sir,—Please to deliver to Messrs. Dale, Morgan, & Co. the under-mentioned

packages ex 'Pequot' from Madras, entered by ourselves 18th December, 1855. All charges, and rent, if incurred, to prompt, to be paid by our deposit account.

"Marks, [G. & Co.].

"Particulars. The contents of six hundred and eighty-two bags of linseed (682 bags)."

(Signed) "P. pro GREENHILL & Co.,
"THOMAS GARDINER."

Gardiner stated that the order had been made out by him on the first of January, and it was dated by mistake 1855 for 1856.

It further appeared that Harvey, on obtaining the order, took it to Mr. Morgan for his indorsement, and that Mr. Morgan, on being informed by Harvey that he had promised that the defendant should pay for the seed, and that he had obtained the order by that promise, indorsed the order in the name of his firm, and handed it to Harvey. This indorsement was necessary to enable the defendant to make use of the order. It was as follows:—"Deliver to Gustavus Dressler or order. Dale, Morgan, & Co."

On the following day, viz. the 3rd of January, the defendant's cheque for 900l. was received by Dale, Morgan, & Co., on account of the linseed.

Mr. Morgan stated, that he indorsed the delivery order, and handed it to Harvey, on his informing him he had obtained it, and that he did not hand it to him in exchange for the said cheque for 900l.; but he added [378] that he should have indorsed the order independently of Harvey's representations, and that he would have given credit to his possession of it. At this time the linseed had not been landed or paid for; and the precise quantity of it had not been ascertained. After the said delivery order had been indorsed and handed to Harvey, it was indorsed by Mr. Dumas, the defendant's managing clerk, and handed to the superintendent of the docks. The said linseed was afterwards landed and measured, and ultimately delivered to the defendant's orders. On the measuring being completed, Messrs. Dale, Morgan, & Co. sent to the defendant, on the 11th of January, 1856, an account, from which it appeared that the contents of the 682 bags of linseed were $277\frac{3}{4}$ quarters, and that, after allowing for damaged seed and sweepings, the sum payable by the defendant was 1017l. 10s. 4d., against which credit was given for the 900l. cheque as paid on account. It appeared, however, that this 900l. was not credited by Messrs. Dale, Morgan, & Co. to the plaintiffs or to Schenck, but that the plaintiffs had received at different times from Messrs. Dale various sums on account of the seed, amounting altogether to 900l.

The price payable to the plaintiffs, according to the terms of the first-mentioned contract, was 971l. 15s. 6d., and at the trial the plaintiffs claimed 711. 15s. 6d., being the difference between such 971l. 15s. 6d. and the amount of the said cheque.

It appeared that Schenck had failed about the end of January, 1856, and that there were at that time outstanding accounts and contracts between him and the defendant.

Evidence was given on the part of the defendant, that, at the time when he received the delivery order, he did not know that Messrs. Haakman had anything to do with the seed, or that the plaintiffs were the im-[379]-porters, or what were the terms of the plaintiffs' contract with Messrs. Haakman. It also appeared from the defendant's evidence, that the defendant had sold some linseed to Messrs. Soames, which had not at that time arrived, and that there was a pressing necessity for him to obtain delivery of the linseed in question, for the purpose of delivering it to Messrs. Soames in lieu of that which he had sold to them.

It was denied by the defendant and his witnesses that Harvey had been authorized either by the defendant or Dumas to make any contract with the plaintiffs at all; but it was admitted that Dumas was the person who sent Harvey for the delivery order, telling him to follow it up and get the order, and that Dumas had authority to act for the defendant in such matters.

It also appeared that the defendant knew of the sending of the cheque, and that he had been consulted about it on the morning of the 3rd of January, and had ordered it to be written out; and, according to the evidence on the part of the defendant, it was sent the same day the order was obtained, for the purpose of getting such order, and was given by Harvey to Mr. Morgan, in exchange for such order.

It was, however, admitted by Harvey, that, when he first went to Messrs. Dale, Morgan, & Co.'s office, he was informed that the order was with the importers, and that he might on that occasion have been informed who the importers were, and that they would not part with the order without a cheque; and that he might have told this to his employers.

It was objected at the trial by the counsel for the defendant, that there was no evidence of any authority from the defendant to Harvey to make the contract relied upon by the plaintiffs, and that any such authority was completely negatived by the evidence on the part of the defendant; and it was also objected [380] that the contract, if any, was, to pay Haakman's debt, and that there was no contract in writing to satisfy the Statute of Frauds.

The learned judge, however, declined to withdraw the case from the jury: and his Lordship left it to them to say whether the defendant had by himself or by any one having authority to act for him, promised the plaintiffs to pay the price payable to them for the linseed, or ratified any such promise made by Harvey.

The jury found this in favor of the plaintiffs, and thereupon a verdict was entered for them for 711. 15s. 6d., with leave to the defendant to move the court on the above points so taken by the defendant's counsel,—the court being at liberty to draw inferences of fact from the evidence not inconsistent with the finding of the jury, and, if necessary, to amend the declaration.

In pursuance of the leave so reserved, the defendant obtained a rule nisi to set aside the verdict and enter a verdict for the defendant, or a nonsuit, on the ground that there was not sufficient evidence that the contract relied upon by the plaintiffs was authorized by the defendant: that the contract should have been in writing: and that there was no proof of the goods having been delivered to the defendant as alleged in the first count.

Pigott, Serjt., and Kemplay, in Hilary Term, 1858, shewed cause. The first question is whether there is any evidence that Harvey, the defendant's clerk, made the promise declared on. It was expressly sworn by Gardiner, the plaintiff's clerk, that he only consented to hand over the delivery order for the linseed to Harvey upon his making the promise to pay the contract price; and, although Harvey denied it, it was for the jury to say which of the two they believed.

The next question is whether the defendant authorized [381] Harvey to make the contract, or ratified it when made. There was abundant evidence to warrant the jury in inferring that Harvey, on his return to the defendant's counting-house with the order, communicated to Dumas, the managing-clerk, as it was his duty to do, the condition upon which he obtained it, and that Dumas by sending the cheque ratified and confirmed Harvey's act. Having already sold the linseed at an advanced price, it is obvious that the defendant had a strong interest in affirming what his clerk had done.

The only remaining question is, whether the case falls within the 4th section of the Statute of Frauds, which provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of a third person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The statute is confined to cases where the answering for the debt, default, or miscarriage of another simpliciter is the subject of the promise, and has no application to a case like this, where the defendant has an interest; as, where the promise is made for the purpose of relieving property in which he is interested from a lien or charge. The rule is so stated in the notes to *Forth v. Stanton*, 1 Wms. Saund. 211 e. where the learned editor observes,—“There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the [382] absence of any liability on the part of the defendant or his property, except such as arises from his express promise.” In *Williams v. Leper*, 3 Burr. 1886, A., being indebted for rent, assigned his effects to the defendant in trust for his creditors: the defendant advertised a sale, and, on the landlord's threatening to distrain the effects, promised, that, if he would not distrain, he the defendant would pay the rent: and it was held that this promise need not be in writing. Lord Mansfield said: “The

landlord had a legal pledge. He enters to distrain: he has the pledge in his custody. The defendant agrees 'that the goods shall be sold, and the plaintiff paid in the first instance.' The goods are the fund. The question is not between Taylor (the tenant) and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the Statute of Frauds. It is rather a fraud in the defendant to detain the 45l. from the plaintiff, who had an original lien upon the goods." This was confirmed by Lord Ellenborough in *Houlditch v. Milne*, 3 Esp. N. P. C. 86, where it was held, that, if a tradesman, having goods in his possession upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within the Statute of Frauds. [Crowder, J. That case is the subject of some disparaging remarks in the notes to *Forth v. Stanton*.] It is not necessary to contend that the decision in *Houlditch v. Milne* proceeded on the correct ground. [Willes, J., referred to *Gregon v. Ruck*, 4 Q. B. 737.] In *Couturier v. Hastie*, 8 Exch. 40, the plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and, having there loaded a cargo of Indian corn, to proceed to a safe port of the United Kingdom. The plaintiffs [383] shipped at Salonica 1180 quarters of Indian corn; and on the 22nd of February, 1848, accordingly the master signed a bill of lading making the corn deliverable "to order of the plaintiffs, or to their assigns, he or they paying freight as per charterparty." The plaintiffs indorsed the bill of lading and sent it together with the charter-party to B., their London agent, with orders to sell the cargo on their account; and they also, through B., insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," &c., "corn warranted free from average, unless general or the ship should be stranded." On the 1st of May, 1848, B. employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading indorsed, the charterparty, and policy of insurance; and they advanced 600l. on the cargo. The custom of corn-factors is to sell under a del credere commission, and, when so selling, not to mention the purchaser. On the 15th of May, 1848, the defendants sold the cargo to C., and sent him a bought note, which stated that he had bought of them "1180 quarters of Salonica Indian corn of fair average quality when shipped, at 27s. per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom; payment at two months from this date, upon handing over shipping documents." On the same day the defendants wrote to B. advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 23rd of February; and, having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found unfit to be carried further, and on the 24th of April it was sold. On the 23rd of May, C. gave the defendants notice that he repudiated the contract, on [384] the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C. became bankrupt. The plaintiffs brought the present action against the defendants to recover the price of the cargo, and declared specially on a del credere guarantee: and it was held that the defendants were responsible by reason of their del credere commission, although there was no guarantee in writing signed by them, since this was not an undertaking to pay the debt of another within the 4th section of the Statute of Frauds. In giving the judgment of the court upon this point, Parke, B., says: "Doubtless, if the defendants had for a per-centage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but, being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them: and, though it may terminate in the liability to pay the debt of another, that is not the immediate object for which the consideration is given; and the case resembles in this respect those of *Williams v. Leper*, 3 Burr. 1886, and *Castling v. Aubert*, 2 East, 325. We entirely adopt the reasoning of an American judge (Mr. Justice Cowen), in a very able judgment on this very point in *Wolff v. Keppel*, 5 Hill, N. Y. Rep. 458" (a). Although the decision in that case was reversed by the Exchequer

(a) See the judgment, 8 Exch. 56 (c).

Chamber (see 9 Exch. 102) [385] upon another point (the decision of the Exchequer Chamber being affirmed by the House of Lords,—5 House of Lords Cases. 673), the ruling of the court below upon this point remains untouched. In *Eastwood v. Kenyon*, 11 Ad. & E. 438, 3 P. & D. 276, it was held that the 4th section of the statute contemplates only promises made to the person to whom another is liable; and therefore a promise by the defendant to the plaintiff to pay A. B. a debt due from the plaintiff to A. B. is not within the statute. [Williams, J. The statute only applies where the promise is made to the person entitled to the money.] The test suggested in the notes to *Forth v. Stanton* is well illustrated by the case of *Green v. Cresswell*, 10 Ad. & E. 453, 2 P. & D. 430, coupled with *Thomas v. Cook*, 8 B. & C. 728, 3 M. & R. 444. In the former of these cases it was held, that, if the plaintiff becomes bail to a stranger, in consideration of the defendant's request and of the defendant's promising him to indemnify him the plaintiff against the consequences, no action lies upon such promise, unless it be in writing; and the court refused to assent to the doctrine laid down in *Thomas v. Cook*, that a promise to indemnify does not fall within the words or policy of this statute. *Williams v. Leper*, 3 Burr. 1886, was recognized and acted upon in *Bampton v. Paulin*, 4 Bingh. 264, 12 J. B. Moore, 497, and in *Edwards v. Kelly*, 6 M. & Selw. 204. In *Hargreaves v. Parsons*, 13 M. & W. 561, the defendant and P. agreed for the sale by P. to the defendant of the "put or call" of 50 foreign railway shares, at a certain price per share premium, at any time on or before the 18th of February, 1844. Before that day, the defendant agreed to re-sell the option to the plaintiff, and to guarantee the performance of the agreement by P. On the 16th of February, the plaintiff called the shares (i.e. required [386] the delivery of them pursuant to the agreement), but it was at the same time verbally agreed between the defendant and P. that they should be delivered by P. to the plaintiff, not on the 18th of February, but on the 2nd of March, at Paris. And it was held that this was not an agreement by the defendant to be answerable for the default of P., but an original promise by the defendant for the delivery of the shares by P., for which a note in writing was not required by the Statute of Frauds. *Williams v. Leper* and all the other authorities upon the subject are commented upon by Chief Baron Brady in *Fennell v. Mulcahy*, 8 Irish Law Rep. 434. There, the plaintiff having distrained the goods of his tenant, in consideration that he would withdraw the distress, the defendant undertook by parol to pay the amount of the rent due; the distress was thereupon withdrawn, and the goods left in the possession of the tenant: and it was held that this was a collateral undertaking to pay the debt of another, and, not being reduced to writing, was void by the Statute of Frauds. After referring to *Williams v. Leper*, 3 Burr. 1886, 2 Wils. 308, *Bampton v. Paulin*, 4 Bingh. 264, 12 J. B. Moore, 497, *Edwards v. Kelly*, 6 M. & Selw. 204, *Read v. Nash*, 1 Wils. 305, *Costling v. Aubert*, 2 East, 325, *Tomlinson v. Gell*, 6 Ad. & E. 564, 1 N. & P. 588, *Kirkham v. Marter*, 2 B. & Ald. 613, *Thomas v. Williams*, 10 B. & C. 664, 5 M. & R. 625, *Houlditch v. Milne*, 3 Esp. N. P. C. 86, and *Green v. Cresswell*, 10 Ad. & E. 453, 2 P. & D. 430, and to the notes in 1 Wms. Saund. 211 b. c., the learned judge says,—“The first question here then is, what liability has the defendant incurred? Plainly none, except on this promise. He did not become a trustee or bailiff for the plaintiff. No goods were left in his hands, out of the produce of which he was to pay this debt.” In *Fennell v. Mulcahy*, the whole benefit was to go to the debtor. [387] In *Williams v. Leper*, the party making the promise had an interest in the goods. This clearly is not the case of a promise to pay the debt of a third person: it was a mere bargain between the plaintiff and the defendant (who had an interest in the goods) irrespective of the debt of the third party. And by the passing of the delivery order to the defendant, Haakman & Co. were discharged. *Rounce v. Woolyard*, 8 Law Times, 186, cited on moving,—where it was held, that a promise to guarantee certain arrears of rent, in consideration of the landlord's withdrawing a distress, was a promise to answer for the debt of another within the 4th section of the Statute of Frauds,—is to all intents and purposes the same as *Fennell v. Mulcahy*. *Clancy v. Pigott*, 2 Ad. & E. 473, 4 Nev. & M. 496, and *Gull v. Lindsay*, 4 Exch. 45, also cited on the motion, have no material bearing upon the question.

Montagu Chambers, Q. C., and Garth, in support of the rule. There was no evidence to go to the jury of any authority in Harvey, the clerk, to make the promise he did; nor was there any evidence that the fact of that promise having been made was ever communicated to the defendant or to his managing clerk, or that it received his confirmation.

Then, this was a promise to answer for the debt, default, or miscarriage of a third person, within the 4th section of the Statute of Frauds. The sum payable to Fitzgerald & Co. as the price of the linseed was a debt due to them from Haakman & Co.; and the consideration for letting the defendant have the delivery order, was, his promise to pay that debt. There was no debt due from the defendant to Fitzgerald & Co. Almost all the authorities are discussed in *Fennell v. Mulcahy*, which is precisely in point, and clearly distinguishable from *Williams v. Leper*, and that class [388] of cases. The true rule is that laid down in the notes to *Forth v. Stanton*, 1 Wms. Saund. 211 d., 211 e., which the learned editor sums up with these observations,—“There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question whether each particular case comes within this clause of the statute or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, together with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.” [Williams, J. Was not the defendant's property subject to the plaintiff's lien in this case?] That was not an obligation affecting the property itself in rem. *Williams v. Leper* is the authority upon which all the modern cases rest. There, the tenant was insolvent, and had conveyed all his effects for the benefit of his creditors. The defendant was employed to sell the goods. The landlord came to distrain them for arrears of rent; whereupon the defendant promised him, that, if he would desist from so doing, he would pay him the amount. The goods thus continued in the defendant's hands charged with the debt. Lord Mansfield says: “The landlord had a legal pledge. He enters to distrain: he has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff paid in the first instance. The goods are the fund. The question is not between Taylor (the tenant) and the plaintiff (the landlord). The plaintiff had a lien upon the goods. Leper (the defendant) was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior claim. This has nothing to do with the Statute of Frauds.” And Wilmot, J., says: “This case is not within the spirit or meaning of the act. The [389] tenant was here the original debtor. The plaintiff had two remedies against him. The defendant (meaning ‘the tenant’) made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is in possession of the goods; having entered with intent to distrain them. Leper was the agent of the creditors. He makes this promise in order to discharge the goods of this distress. I consider this distress as being actually made. Leper says, ‘If you will quit the goods and disincumber the fund, I will pay you.’ Leper became the bailiff of the landlord: and, when he had sold the goods, the money was the landlord's in his own bailiff's hands.” *Bampton v. Paulin*, 4 Bingh. 264, 12 J. B. Moore, 497, proceeded upon the same ground, and was decided upon the authority of *Williams v. Leper*. *Edwards v. Kelly*, 6 M. & Selw. 204, likewise proceeded upon the same principle. Lord Ellenborough there says: “Perhaps this case might be distinguishable from that of *Williams v. Leper*, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them in trust, in effect, to raise by sale of the goods sufficient to satisfy the plaintiff's demand: the goods were put into their possession subject to this trust. So that, in substance, this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent. There was, therefore, a consideration for this promise, partly falling within the authority of *Williams v. Leper*, partly within that of *Read v. Nash*, 1 Wils. 305.” In *Castling v. Aubert*, 2 East, 325, the plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might receive for the principal [390] the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: and it was held that this was not a promise for the debt or default of another within the Statute of Frauds. Lawrence, J., there says: “This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing so.” *Bird v. Gammon*, 5 Scott, 213, 3 N. C. 883, was a case of trust. [Williams, J. There,

Lloyd, the original debtor, was discharged by the transaction.] Yes. As to *Houlditch v. Milne*, 3 Esp. N. P. C. 86, that case is only to be supported on the ground stated in the notes to *Forth v. Stanton*, 1 Wms. Saund. 211 d., viz. that the work was originally done upon the defendant's order. In *Walker v. Taulor*, 6 C. & P. 752, the widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licences of the house as a security for the payment of his bill. A., one of the firm of the distillers who supplied the house with spirits, by arrangement with the widow, took out administration: B., the other partner in the firm, promised the undertaker that, if he would give up the licenses to him, he would pay his bill for the funeral. It was held that the undertaker, having given up the licenses to B., might recover his bill against B., although the widow was his original employer, and although he had made out his account charging the administrator as his debtor. Tindal, C. J., said: "It is a new contract under a new state of circumstances. It is not 'I will pay, if the debtor cannot;' but it is 'in consideration of that which is an advantage to me, I will pay you this [391] money.' There is a whole class of cases in which the matter is excepted from the statute, on account of a consideration arising immediately between the parties. It is a new contract: it has nothing to do with the Statute of Frauds at all." *Couturier v. Hastie*, 8 Exch. 40, 5 House of Lords Cases, 673, was the case of a del credere agent, and not of a promise simpliciter to answer for the debt of another. What is the nature of the promise here? To constitute a promise to answer for the debt of another, must it not be a promise to pay the same amount and under the same conditions as the original debtor was liable to? Here, the debt due from Haakman & Co. was not at the time ascertained: it was not even ascertainable; for, the linseed had not been measured. The giving up of the lien does not take the case out of the statute, unless it were under such circumstances as would bring it within the rule in *Williams v. Loper*, 3 Burr. 1886. [Williams, J. Was not the property here subject to the lien?] The question is whether the property was subject to pay the amount after the promise. [Williams, J. *Williams v. Loper*, if looked at closely, was within the statute. The threat to distrain was treated as tantamount to an actual distress. The court got the case out of the statute by saying it was a purchase by the party of a lien upon his own property. That is this case. In *Edwards v. Kelly*, 6 M. & Selw. 204, the promise was absolute.] There, the defendant had no interest in the goods. The present case, it is submitted, is clearly distinguishable from all the others.

COCKBURN, C. J. Two points have been made in this case,—first, that there was no evidence of authority on the part of the defendant's clerk, Harvey, to make the promise upon which the defendant is sought to be made liable, that is, that there was no evidence of [392] any antecedent authority in the clerk to make the contract, nor any evidence of subsequent ratification by the defendant of the contract so made,—secondly, that, supposing the contract is assumed to have been made with the defendant's authority, he is not liable, inasmuch as the case falls within the 4th section of the Statute of Frauds.

We are all agreed that the case is not within the Statute of Frauds. The law upon this subject is, I think, correctly stated in the notes to *Forth v. Stanton*, 1 Wms. Saund. 211 e., where the learned editor thus sums up the result of the authorities,—“There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute (s. 4) or not, depends, not on the considerations for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.” I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz. an absence of prior liability on the part of the defendant or his property,—it being, as I think, truly stated there as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of [393] fact his own or is property in which he has some

interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I therefore agree with my learned Brothers that this case is not within the Statute of Frauds. The linseed in question had been sold to Haakman & Co., and by them to Schenck, and by Schenck to the defendant, and was therefore at the time of the alleged promise the property of the latter, subject to the plaintiffs' lien for the price. The defendant, therefore, had a property in the seed, the giving up by the plaintiffs of their lien thereon being the consideration for the defendant's promise to pay the contract price: consequently the case falls clearly within the qualification at the end of the note in 1 Wms. Saund. 211 e.

As to the other point, viz. whether there was evidence of the authority of the clerk Harvey to make the promise declared on so as to bind the defendant, I regret to find that my opinion stands in conflict with that of the other members of the court. It is unnecessary to go into any minute consideration of the facts: the simple question is whether there was any evidence for the jury of such authority. The finding of the jury in favor of the plaintiffs seems to me necessarily to involve this, that they find the fact to be as represented by the witnesses for the plaintiffs, viz. that the promise was actually made by the defendant's clerk. As to that, I apprehend, there is no diversity of opinion. The fact was controverted at the trial: but the verdict shews that the jury gave credit to the plaintiffs' witnesses. Then, if the fact be that the defendant's clerk when he obtained the delivery [394] order for the seed did enter into the contract upon which the action is founded, when that is coupled with the fact that the defendant had a most pressing necessity for the seed, and that he, or his managing clerk, sent Harvey to obtain the delivery order, although I do not quite agree with the plaintiffs' counsel that that involved an authority to the clerk to enter into any engagement on the defendant's part which might enable him to carry out his instructions, still, with the greatest possible deference to the view entertained by the other members of the court, I think it is impossible not to come to the conclusion that the clerk Harvey, on returning to the defendant's counting-house, communicated to the defendant what had passed between him and Gardiner, the plaintiffs' clerk. I think it was so palpable and almost necessary that such communication should have taken place, that the jury were warranted in coming to the conclusion that the promise made by the defendant's clerk was confirmed and ratified by him. Though perhaps not very strong, I think there was some evidence upon which the jury might fairly and reasonably come to the conclusion they did, and therefore that the verdict ought not to be disturbed.

WILLIAMS, J. As to the first point, I agree with my Lord that the case is not within the 4th section of the Statute of Frauds. At the time the promise was made, the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute. The case of *Williams v. [395] Loper*, 3 Burr. 1886, proceeded upon this, that the defendant there had an interest in the property: his property was incumbered by the landlord's claim for rent; therefore, the promise was a promise to pay a debt to which that property was subject, and not simply a promise to answer for the debt or default of another, within the meaning of the statute. This is in accordance with the cases of *Casling v. Aubert*, 2 East, 325, and *Austey v. Marden*, 1 N. R. 124, which, as is stated in the note to which my Lord has referred, were decided not to be within the statute, "on the ground that there was in both cases a purchase of an interest, not a mere undertaking to pay the debt of another."

As to the other point, I regret to say that I have the misfortune to entertain a different opinion from that expressed by my Lord Chief Justice. There was, no doubt, ample evidence that the clerk Harvey made the promise: but the question is whether there was any evidence that he was authorized by the defendant or by his managing clerk Dumas (who for this purpose must be taken to be the defendant himself) to make any such promise. Now, there was no direct evidence that Dumas ever knew that the promise had been made: but the way in which it was put at the trial was this, that, upon the evidence as it stood, the jury were justified in inferring that

Harvey communicated to Dumas the terms upon which alone he could obtain the delivery order, and that Dumas ratified the promise so made and so communicated to him, by sending the cheque to the brokers in pursuance of the promise. I am quite prepared to admit, that, inasmuch as Harvey, in pursuance of the instructions of Dumas, had succeeded in obtaining the delivery order, it is extremely probable that he told Dumas on his return, that, in order to obtain it, he was forced to make the promise he did. That, however, is a thing which is [396] only probable, whereas what is required here is positive proof of the fact, or circumstances from which it may be legitimately inferred that the promise was ratified by Dumas. Where the burthen of proof lies upon the plaintiff, there must be something more than mere probability, or even strong probability: there must be facts from which the inference of authority may legitimately be drawn. Unless it can be inferred that the fact of the promise having been made by Harvey was communicated to Dumas, it seems to me that the sending of the cheque was perfectly immaterial and valueless: for, it is equally consistent with his ignorance as with his knowledge of the promise having been made that he should have sent the cheque to Dale, Morgan, & Co. There was no promise to pay at any particular time: therefore, the sending of the cheque was just as consistent with its being sent in the ordinary course of business as with its being sent in fulfilment of the promise made by Harvey. It seems to me that it would be very unsafe to say, that, because there is a strong probability of the existence of a state of things from which a prior authority or a subsequent ratification might be inferred, a jury would be warranted in acting upon it as if there were strict legal proof. Upon these grounds, I am of opinion that the rule to enter a nonsuit should be made absolute.

CROWDER, J. As to the first point, I am of opinion that the promise declared on was not a promise to answer for the debt, default, or miscarriage of another, within the Statute of Frauds. The matter has been so fully gone into by my Lord and my Brother Williams that I do not consider it necessary to add anything.

As to the other point, after much consideration, I find myself unable to come to any other conclusion [397] than that there was no evidence of any authority in the clerk Harvey to make the promise he did make. Now, the authority for that purpose was capable of being shewn either by proof of a previous authority or by proof of a subsequent ratification of the act of Harvey. The argument on the part of the plaintiffs put it both ways. They say that the instructions given by Dumas to Harvey to obtain the delivery order, authorized him to do that without which he could not have obtained it, viz. to make the promise he did. It is clear, however, that that was not sufficient to shew an authority in Harvey to make the promise. Then arises the question whether there was any ratification by Dumas of that which Harvey had done. It must be assumed that the promise was made by Harvey: the jury have so found. But, upon the evidence, there is a total absence of any positive ratification. There is no thing shewn of any communication between Harvey and Dumas which amounts to a ratification. To establish a case of authority by ratification, there must be some substantive proof: it must not rest upon probability or conjecture. Now, the only evidence I can discover of any approach to ratification is, that, after Harvey had obtained the delivery order from Gardiner, Dumas writes out and sends to Dale, Morgan, & Co., the brokers through whom the sale was effected, a cheque for 900l., the approximate amount of the contract price. If that act of sending the cheque could be naturally referred to the promise made by Harvey and the communication of that fact by Harvey to Dumas, it would have been some evidence of ratification to go to the jury: but I agree with my Brother Williams that the fact of the sending of the cheque was consistent with a transaction in the ordinary course of business, and did not afford any reasonable evidence to shew that Dumas was actuated [398] by, or that he had any knowledge of, the promise made by Harvey. I also agree with my Brother Williams, that, if the promise had been to pay at a particular time, or immediately on receipt of the delivery order, the sending of the cheque might have been some evidence of ratification. But here the promise was general, and would be satisfied by payment at any time. The strong probability therefore seems to me to be, that the sending of the cheque was a thing done in the ordinary course of business, and not in consequence of a communication by Harvey to Dumas of the promise which had been made. The whole case on the part of the plaintiffs rests upon conjecture: and I see no evidence which would have justified the jury in coming to the

conclusion that Dumas had notice of and ratified the unauthorized promise made by Harvey.

WILLES, J. I also am of opinion that the rule to enter a nonsuit in this case must be made absolute. Upon the first point we are all agreed, and I do not think it necessary to say more than that I think the Statute of Frauds is altogether inapplicable to such a promise as this. Upon the other point, I am clearly of opinion that there was no evidence that the defendant or his managing clerk Dumas authorized or ratified the promise made by Harvey. If Harvey had been the defendant, and the question had arisen whether there was any evidence of his having communicated to his employer the fact of his having made the promise, it would have presented a very different aspect. When dealing with the acts of a third person, it is not competent to the jury to act upon probabilities. There being no original authority in Harvey to make the promise, it was a thing done by him out of the ordinary scope of his duty : and, though there was [399] a moral duty cast upon him to communicate to his employer the fact of his having made the promise, it was nothing more than a moral duty : and the rule *Omnia presumuntur rite esse acta* donec probetur in contrarium, is never applied to such a duty as that. There is, therefore, no presumption either that Harvey did or did not perform that duty : and, in the absence of positive evidence that the promise was communicated to the defendant or to Dumas, the jury would not have been warranted in assuming that it was, merely because the evidence was equally consistent with either supposition. My opinion is founded upon this, that there is no presumption, and no principle of law by which the jury could be justified in arriving at a conclusion against the defendant, that Harvey performed a duty which was out of the scope of his authority. The fact of the cheque having been sent by Dumas on the following day cannot affect the question. There was nothing to shew that that was not a transaction in the ordinary course of business.

Rule absolute for a nonsuit.

[400] IN THE MATTER OF THE NORTH BRITISH AUSTRALASIAN COMPANY (LIMITED) AND THE JOINT-STOCK COMPANIES ACTS, 1856 AND 1857,—EX PARTE ROBERT SWAN. 1859.

[S. C. 30 L. J. C. P. 113. Referred to, *Arnold v. Cheque Bank*, 1876, 1 C. P. D. 588. Applied, *Ex parte Shaw*, 1877, 2 Q. B. D. 470. Discussed, *Société Générale de Paris v. Walker*, 1885, 11 App. Cas. 35. See *Scholfield v. Loundsbrough*, [1894] 2 Q. B. 663; [1895] 1 Q. B. 546; [1896] A. C. 514.]

A holder of shares in a joint-stock company, by entrusting his broker with blank transfers signed by him, and affording him an opportunity of obtaining access to a box containing the certificates for the shares, enabled him by forgery and fraud to induce the company to register the transfers of the shares in the names of bona fide purchasers. A motion under the 19 & 20 Vict. c. 47, s. 25, and 20 & 21 Vict. c. 14, ss. 8, 9, to rectify the register by replacing thereon the name of the original shareholder, failed : the court being equally divided, — Erle, C. J., and Keating, J., holding that the applicant had precluded himself by his negligence from availing himself of the equitable jurisdiction of the court under the statutes ; Willes, J., and Byles, J., holding that the property in the shares had not been changed by the forged transfers.

Hurlstone, in Easter Term last, on behalf of Mr. Robert Swan, obtained a rule calling upon the North British Australasian Company (Limited) to shew cause why this court should not order the register of shareholders in the said company to be rectified by replacing thereon the name of Robert Swan as a shareholder therein from the time his name was removed from the said register, in respect of the shares in the affidavit of the said Robert Swan mentioned or referred to.

The motion was founded upon the affidavits, amongst others, of Mr. Swan, Mr. Ker, his attorney, Robert Shepherd, and Caroline Bourne.

Mr. Swan's affidavit was in substance as follows :—That, in the year 1854, I purchased 700 shares in the North British Australasian Company, which is a joint-

stock company registered, with limited liability, under the Joint Stock Companies Act, 1856. In the year 1857, I purchased 300 other shares in the said company, and thereupon I became and was the holder of 1000 shares in the said company, numbered 156735 to 157434, 115204 to 115403, 177206 to 177305 : and my name was entered on the register of the said company in respect of the said shares, and so continued on the said register until it was without my consent or knowledge removed by the said company, as hereinafter mentioned.

That, for upwards of five years, I employed as my broker in the purchase and sale of shares one William Lemon Oliver, of, &c. I placed the said 1000 shares in [401] the said company, together with other securities, in a box, which I caused to be deposited with the London and County Bank for safe custody ; and he received from the bank the following receipt on account thereof,—“ London and County Bank, 21 Lombard Street, 15th November, 1856. Mr. W. L. Oliver has this day deposited a box on account of Mr. R. Swan, of Alnwick. James Gray, Accountant.” I locked this box with a key which I kept, to the best of my belief, and saw the said 1000 shares in the said box in the month of November or December, 1857.

That, in the month of October last, the said W. L. Oliver was brought before a magistrate on a charge of embezzling a sum of 5000*l.*, the money of one Caroline Adelaide Dance, of Southsea, Hants ; and then I for the first time discovered that the said shares had been taken out of the said box, and that my name had been removed from the said register of shareholders, in manner hereinafter mentioned.

That, on or about the 15th of January, 1858, the said W. L. Oliver feloniously stole, took, and carried away 500 of the said 1000 shares in the said North British Australasian Company, numbered 156735 to 157234, and delivered the same to one Horace Barry. I have been informed and believe, that, on or about the 18th of January, 1858, the said Horace Barry delivered to the directors of the said company a paper partly written and partly printed, and purporting to be a deed of transfer by me to the said Horace Barry of the said 500 shares, and that the said Horace Barry claimed to have the same transferred to his name as the owner thereof ; and that thereupon the secretary of the said company caused my name to be removed from the said register of shareholders, and the name of the said Horace Barry to be placed thereon in respect of the said 500 shares. I have since searched the said [402] register, and found that my name had been removed therefrom, and the name of Horace Barry placed therein in respect of the last-mentioned shares. I never executed any deed of transfer of the said 500 shares, or any of them, to the said Horace Barry or any other person : and the said alleged deed of transfer is a false and fraudulent document, concocted by the said W. L. Oliver as hereinafter mentioned.

That, on two occasions, I employed the said W. L. Oliver as such broker to sell for me some shares which I then possessed in the Scottish Australian Investment Company, for the transfer of which six deeds of transfer only were required ; nevertheless, the said W. L. Oliver, by false and fraudulent representations, obtained from me eight blank forms of transfer with my name and seal attached thereto (a copy of which was annexed). At the time I gave the said blank forms of transfer to the said W. L. Oliver, on some of them there was not any attestation of the execution thereof. The said W. L. Oliver fraudulently made use of one of the said blank transfers, and interlineated the same by writing therein and thereon certain words so as to cause the same to appear to be a deed of transfer by me to the said Horace Barry of the said 500 shares in the said North British Australasian Company ; and the said W. L. Oliver also wrote on the said blank transfer certain words purporting to be an attestation of the execution by me of the said alleged deed of transfer, and signed by one Caroline Bourne ; but the signature of the said Caroline Bourne was forged by the said W. L. Oliver.

That I never gave the said W. L. Oliver, or any other person, any authority whatever to fill up the said blank transfer in the manner hereinbefore mentioned, or to use the same for any purpose whatever, except for the transfer of the said shares in the said Scottish Australian Investment Company.

[403] That I never delivered as my act and deed, nor did I ever authorize the said W. L. Oliver or any other person to deliver as my act and deed, the said alleged transfer or any other transfer of the said 500 shares to the said Horace Barry.

That one of the regulations of the North British Australasian Company provides that shares may be transferred by deed in manner approved by the directors ; and I

am informed and believe that the form of deed approved by the directors has an attestation of the execution thereof.

That, on or about the 23rd of July, 1858, the said W. L. Oliver feloniously stole, took, and carried away the other 500 of the said 1000 shares in the said North British Australasian Company, numbered 157235 to 157434, 115204 to 115403, 177206 to 177305, and delivered the same to the London and County Bank. I have been informed and believed, that, on or about the 23rd of July, the said London and County Bank caused to be delivered to the secretary of the said company a paper partly printed and partly written, and purporting to be a deed of transfer by me to William M'Kewan and James Gray of the said last-mentioned 500 shares, and that the said London and County Bank claimed to have the same transferred to the said William M'Kewan and James Gray; and that thereupon the secretary of the said company caused my name to be removed from the said register, and the names of the said William M'Kewan and James Gray to be placed thereon in respect of the said last-mentioned 500 shares. I have since searched the said register, and found that my name had been removed therefrom, and the names of the said William M'Kewan and James Gray placed thereon in respect of the said last-mentioned shares. I never executed any transfer of the said last-mentioned shares or any of them to the [404] said William M'Kewan and James Gray, or either of them, or to any other person, or to the London and County Bank; and the said last-mentioned deed of transfer is a false and fraudulent document, executed by the said W. L. Oliver as hereinafter mentioned.

That the said W. L. Oliver fraudulently made use of another of the said blank transfers hereinbefore mentioned, and interlineated the same by writing therein and thereon certain words so as to cause the same to appear to be a transfer by me to the said William M'Kewan and James Gray of the said last-mentioned 500 shares; and the said W. L. Oliver also wrote on the said last-mentioned blank transfer certain words purporting to be an attestation of the execution by me of the said last-mentioned alleged deed of transfer, and signed by one Caroline Bourne at Paris, and which last-mentioned pretended attestation was not signed by the said Caroline Bourne, but the signature of the said Caroline Bourne was forged by the said W. L. Oliver.

That I never gave the said W. L. Oliver or any other person any authority whatever to fill up the said last-mentioned blank transfer in the manner hereinbefore mentioned, or to use the same for any purpose whatever except for the transfer of the said shares in the said Scottish Australian Investment Company.

That I never delivered as my act and deed, nor did I ever authorize the said W. L. Oliver or any other person to deliver as my act and deed, the said last-mentioned alleged transfer or any other transfer of the said last-mentioned 500 shares to the said William M'Kewan and James Gray or either of them, or to any other person, or to the said London and County Bank.

That, at a session holden at the Central Criminal Court on the 22nd of November last, I prosecuted the said W. L. Oliver for feloniously stealing, taking, and carrying away the said 1000 shares, and forging the [405] signature of the said Caroline Bourne as hereinbefore mentioned; and the said W. L. Oliver was then convicted of the said offences, and sentenced to twenty years' penal servitude.

And that I was present at the examination of the said W. L. Oliver before the magistrate who committed him for trial, and heard the testimony of the witnesses, — a copy of which, and of the conviction, were exhibited.

Mr. Ker's affidavit set out a correspondence which he had had with the secretary of the North British Australasian Company, in which the latter declined to accede to his demand to have Mr. Swan's name restored to the register, and also verified a copy of the rules and regulations of the company.

Sheppard's affidavit stated that the form of transfer referred to in Swan's affidavit was the form prescribed by the rules of the company.

Caroline Bourne in her affidavit stated that neither the attestation nor the signature to the deeds of transfer referred to was in her hand-writing, nor did she ever witness such documents.

The application was rested upon the 25th section of the 19 & 20 Viet. c. 47, and the 8th and 9th sections of the 20 & 21 Viet. c. 14. The 25th section of the former act enacts, that, "if the name of any person is without sufficient cause entered or

omitted to be entered in the register of shareholders of any company, such person, or any shareholder of the company, may, as respects companies registered in England or Ireland, by motion in any of Her Majesty's superior courts of law or equity, and, as respects companies registered in Scotland, by summary petition to the court of session, apply to such court for an order that the register may be rectified, and the court may either refuse such application, with or without costs, to be paid by the ap[406]plicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion or petition, and any damages the party aggrieved may have sustained; and, if the company make default or is guilty of unnecessary delay in registering any transfer of shares, they shall be responsible to any person injured by such default or delay, for the amount of damage he may thereby have sustained." The 8th section of the 20 & 21 Vict. c. 14 enacts, that, "if the name of any person is without sufficient cause entered or omitted to be entered in the register of stock of any company, such person, or any holder of stock in the company, may apply to have the register rectified in manner directed by the 25th section of the principal act." And the 9th section enacts that "the court may, in any proceeding under the 25th section of the principal act, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or erased from the register, whether such question arises between two or more holders or alleged holders of shares or stock, or between any holders or alleged holders of shares or stock and the company, and generally the court may in such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register."

The cases of *Dalton v. The Midland Railway Company*, 13 C. B. 474, and *Taylor v. The Great Indian Peninsular Company*, 28 Law J., Ch. 285, 709, were cited.

A difficulty being suggested as to the parties who should be called upon by the rule, Hurlstone prayed the advice of the court.

WILLIAMS, J. We cannot bind ourselves or the parties by any preliminary opinion upon that point. You [407] must exercise your own discretion on the matter. It certainly does seem strange that the rights of third parties,—subsequent transferees included,—should be affected without their having had an opportunity of being heard.

The rule having been drawn up calling upon the company only,

Hawkins, Q. C., in Trinity Term, 1859, on behalf of the company, took an objection to the rule, as not calling upon the proper parties. He submitted that it ought to have called upon the now shareholders to shew cause, it being most important to the company that the matter should be litigated between the parties really interested; that the transfer of the shares from Mr. Swan's name was effected by an instrument bearing the genuine signature of Swan, and apparently complying with all the requirements of the company's rules and regulations, and the transferees being bona fide purchasers for value, having no notice of Oliver's fraud. [Byles, J. The transfers were obtained by means of the fraudulent misapplication of a genuine signature, which would amount to a forgery.] As against the company, Swan is estopped from saying that the deed is an inoperative instrument. [Cockburn, C. J. Suppose it to be quite clear that the transfers are void, how then?] There would be the more reason that the parties claiming under them should come in and be bound by the decision of the court. [Cockburn, C. J. To whom do you say that notice should be given?] To those persons whose names are now upon the register; and also, perhaps, to the immediate transferees (a). [Cockburn, C. J. To direct the company [408] to restore the name of Swan would be to displace the names of the other parties, which would be prejudicing them without giving them an opportunity of being heard, Byles, J. I think the rule should be amended by calling also upon the parties who are now upon the register, or who have been on the register.]

Knowles, Q. C., contra. If the question had arisen respecting stock transferred by means of a forged power, the Bank of England would have been the only persons liable. The company here are the only persons of whom Mr. Swan has any knowledge. In *Dalton v. The Midland Railway Company*, 12 C. B. 458, where a similar question arose as to railway shares, the court refused to allow the company to interplead. It is no answer for the company, when charged with having improperly

(a) To these latter notice of the rule had been given.

removed a subscriber's name from the register, to say that they cannot restore it because the rights of sub-transferees have intervened.

COCKBURN, C. J. This is an application to the discretion of the court; and we must look at all the surrounding circumstances to see how justice may best be done. I think the rule should be amended, and served upon the persons whose names now appear upon the register.

WILLIAMS, J. The 9th section of the 20 & 21 Vict. c. 14 enacts that the court may, in any proceeding under the 25th section of the 19 & 20 Vict. c. 47, decide on any question relating to the title of any person who is a party to such proceeding,—whether such question arises between two or more holders or alleged holders of shares or stock, or between any holders or alleged holders of shares or stock and the company; and generally the court may in such proceeding decide any question that [409] it may be necessary or expedient to decide for the rectification of the register. The legislature, therefore, considers that two sorts of questions and controversies may arise. To which class of disputes does this belong? If to the former, we clearly ought to have before us all the parties whose interests may be affected by the decision we may come to.

The rest of the court concurring the rule was ordered to be amended, and it was accordingly amended by calling upon the following persons, in addition to the company, to shew cause, —Thomas Haines, John Frederick Fredericksen, James Punch, Scarlett Lloyd Parry, Margaret Ann Lever, Bryan Ward Gibbins, Martha M'Auliffe, Charles Wellington Howell, and Isaac Tracey, jun.,—they being respectively registered as the present holders of shares in the said company formerly standing in the name of the said Robert Swan.

The affidavits upon which cause was shewn against the rule were those of David Budge, the secretary of the company, William M'Kewan and James Gray, officers of the London and County Bank, and Horace Barry, the original transferee of 500 of the shares.

The affidavit of David Budge was as follows:—That previous to the 15th of January, 1858, Robert Swan was the registered proprietor of 1000 shares in the North British Australasian Company, numbered 156735 to 157434, 115204 to 115403, and 177206 to 177305.

That, on or about the 16th of January, 1858, deponent received a transfer deed, with the certificate of shares therein mentioned, and a request from Horace Barry in the deed mentioned that the same should be registered by the company in the name [410] of the said Horace Barry. The transfer deed and certificate were as follows:—

“Transfer No.

“I, Robert Swan, of 4 Austin Friars, gentleman, in consideration of the sum of 375l. paid to me by Horace Barry, of the Stock Exchange, London, gentleman, do hereby bargain, sell, assign, and transfer to the said Horace Barry five hundred shares, numbered 156735 to 157234 of and in the undertaking called the North British Australasian Company (Limited), To hold to the said Horace Barry, his executors, administrators, and assigns, subject to the same rules, orders, restrictions, and conditions that I held the same immediately before the execution hereof: And I the said Horace Barry do hereby agree to accept and take the said shares subject to the same rules, orders, restrictions, and conditions. Witness our hands and seals this 15th day of January, 1858.

“ROBERT SWAN

L. S.

“HORACE BARRY

L. S.

“Signed, sealed, and delivered by the above-named Robert Swan in the presence of Caroline Bourne, Paris.

“Signed, sealed, and delivered by the above-named Horace Barry in the presence of C. V. Goode, Stock Exchange.”

"Certificate of shares.

"The North British Australasian Company (Limited), Established, &c.

"No. 911. 700 shares.

"This is to certify that Robert Swan, of 4 Austin Friars, is the registered proprietor of seven hundred shares of 1l. each, fully paid up, in the North British [411] Australasian Company (Limited), as appears by the books of the same, subject to the regulations of the company: which shares are numbered respectively 156735 to 157434. Given under the common seal of the company the 15th of September, 1857.

"EUSTACE ANDERSON, } Directors.

"DAVID PRICE,

"DAVID BUDGE, Secretary."

"N.B.—No transfer of any of these shares will be registered, unless accompanied by this certificate.

"The North British Australasian Company (Limited).

"Shares transferred from the certificate.

Date.	To whom transferred.	Number of shares.	Distinctive numbers.	
1858. Jan. 19.	Horace Barry	500	156735	157234
	To new certificate pro balance	200	157235	157434
		700		

That, on or about the 19th of January, 1858, the said shares were duly registered by the said company in the name of the said H. Barry as the proprietor thereof, and certificates were duly issued by the company to Barry that he was the registered proprietor of the same.

That, on or about the 14th of November, 1856, deponent received from Swan the following letter, which he believed to be in the handwriting of Swan:—"4 Austin Friars, November 13th, 1856. Sir,—Having left my late residence, Alnwick, Northumberland, I have to request that you will be good enough to alter my address in the books of your company to Robert Swan, care of W. L. Oliver, 4 Austin Friars, Old Broad Street."

That, previous to the said shares being so transferred [412] out of the name of Swan, and registered in the name of Barry, deponent sent by post a notice addressed to Swan, to the care of W. L. Oliver, Esq., 4 Austin Friars, being the last address of Swan registered by his direction in the books of the company, as follows,—

"No. 911. The North British Australasian Company (Limited).

"27 New Broad Street, London,

"January 16th, 1858.

"Sir, —I beg to inform you that a deed of transfer of 500 shares of this company from your name in favor of Horace Barry, has been lodged at the office for registration. The certificate accompanying the same represents 700 shares, numbered 156735 to 157434.

"The transfer will be retained here for three clear days from the date hereof, in order to afford you an opportunity of communicating with me in the event of there being any irregularity in the transaction: and, failing your reply within the time mentioned, the transfer will be registered, and a new certificate issued to the purchaser."

That, previous to such transfer and registration, deponent never received, and to the best of his knowledge and belief the company never received, nor did any officer or director of the company ever receive any communication from Swan, or any person on his behalf, or any notice whatever that the said deed was not a genuine and valid deed of the said Robert Swan, or that the same had not been wholly filled up and

completed as the same then was previous to its signature and execution by Swan, or that any part of the same was a forgery : nor to the best of the deponent's knowledge and belief had the company, or any officer or director thereof, any notice or knowledge whatever that any part of the said deed was a forgery, or that the same was not a genuine and valid deed, wholly [413] filled up and completed as the same now is, previous to its signature and execution by Swan.

That, on the 9th of December, 1858, deponent received from Swan the following notice,—

“ 24 Northumberland Street, Strand.
“ 9 Dec. 1858.

“ Sir,—The undermentioned shares, numbered 156735 to 157234, 157235 to 157434, 115204 to 115403, 177206 to 177305,— 1000 in all,— having been transferred from my name in the books of the North British Australasian Company by means of fraud and forgery, which I have proved by having the thief and forger convicted on his own confession, I hereby give you notice of the fact, and request that the same may be restored, so that I may be put in my original position, and entitled to all the rights and privileges of a proprietor of the said above-mentioned shares numbered as aforesaid.”

That the said transfer deed was registered as aforesaid in the ordinary course of the business of the said company, and after the usual notice of such transfer being about to be made had been given to Swan, and without any means of knowledge on the part of the company that the said deed was not a genuine and valid transfer by Swan, or that Barry was not legally entitled to compel them to register the said transfer of the said shares in the books of the said company.

That, of the above-mentioned shares, those numbered from 156735 to (156754) now stand on the register of shareholders of the company in the name of Thomas Haines, who acquired the same by a deed of transfer from Richard Walker, who acquired the same by a deed of transfer from Barry ; and that the company in the ordinary course of business from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the said last-mentioned shares, and from time to time issued to [414] them respectively certificates of their being the registered proprietors of the said last-mentioned shares.

That, of the above mentioned shares, those numbered 156735 to 156804 now stand on the register of shareholders in the name of Johann Frederick Fredericksen, who acquired the same by a deed of transfer from William McKewan and James Gray, who acquired the same by a deed of transfer from James Pickering, who acquired the same by deed of transfer from Richard Walker aforesaid, who acquired the same by deed of transfer from Barry ; and that the said company in the ordinary course of business and from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the said last mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the last-mentioned shares.

That, of the above-mentioned shares, those numbered from 156805 to 157004 now stand on the said register of shareholders in the name of James Punch, who acquired the same by a deed of transfer from Barry ; and that the said company in the ordinary course of business from time to time duly registered the said James Punch as the proprietor of the said last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157005 to 157104 now stand on the register of shareholders in the name of Scarlett Lloyd Parry, who acquired the same by a deed of transfer from John Dunkin Lee, who acquired the same by deed of transfer from Barry ; and that the company in the ordinary course of business from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the last-mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the said last mentioned shares.

[415] That, of the above-mentioned shares, those numbered from 157105 to 157134 now stand on the register of shareholders in the name of Margaret Ann Lever, who acquired the same by a deed of transfer from Barry ; and that the company in the ordinary course of business duly registered the said Margaret Ann Lever as the

proprietor of the said last-mentioned shares, and issued to her a certificate of her being the registered proprietor of the last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157135 to 157184 now stand on the register of shareholders in the name of Bryan Ward Gibbins, who acquired the same by a deed of transfer from Joseph Pattison Webb, who acquired the same by a deed of transfer from Barry; and that the company in the ordinary course of business from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the last-mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157185 to 157204 now stand on the register of shareholders in the name of Martha McAuliffe, who acquired the same by a deed of transfer from Thomas Tichmarch, who acquired the same by a deed of transfer from Barry; and that the company in the ordinary course of business duly registered the said persons in this paragraph mentioned respectively as the proprietors of the said last-mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the said last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157205 to 157234 now stand on the register of shareholders in the name of Charles Wellington Howell, who acquired the same by deed of transfer [416] from Barry; and that the company in the ordinary course of business duly registered the said C. W. Howell as the proprietor of the last-mentioned shares, and issued to him a certificate of his being the registered proprietor of the last-mentioned shares.

That, on or about the 26th of July, 1858, deponent received a transfer deed dated the 23rd of July, 1858 (in the same form and similarly attested to that set out ante, p. 410), purporting to be a transfer from Swan to William McKewan and James Gray of 500 shares, numbered 157235 to 157434, 115204 to 115403, and 177206 to 117305, together with the certificate of the shares therein mentioned, and a request from McKewan and Gray that the same should be registered by the company in their names.

That, on or about the 2nd of August, 1858, the said shares were duly registered by the company in the names of McKewan and Gray as the proprietors thereof, and certificates were duly issued by the company to them that they were the registered proprietors of the same.

That previous to the said shares being so transferred out of the name of Swan and registered in the names of McKewan and Gray, deponent sent by post a notice addressed to Swan, to the care of W. L. Oliver, Esq., of 4 Austin Friars, being the last address of Swan registered by his direction in the books of the company, in the same form as the notice set out ante, p. 412, informing him of the intended transfer of the last-mentioned shares.

That previous to such transfer and registration, deponent never received, and to the best of his knowledge and belief the company never received, nor did any officer or director of the company ever receive any communication from Swan or any person on his behalf, or any notice whatever, that the said deed was not a [417] genuine and valid deed of Swan, or that the same had not been wholly filled up and completed as the same now is previous to its signature and execution by Swan, or that any part of the same was a forgery; nor had the deponent, nor to the best of his knowledge and belief had the company or any officer or director thereof any notice or knowledge whatever that any part of the said deed was a forgery, or that the same was not a genuine and valid deed, wholly filled up and completed as the same now is previous to its signature and execution by Swan.

That the said transfer deed was registered as aforesaid in the course of the business of the company and after the usual notice of such transfer being about to be made had been given to Swan, and without any means of knowledge on the part of the company that the said deed was not a genuine and valid transfer by Swan, or that McKewan and Gray were not legally entitled to compel them to register the said transfer of the said shares in the books of the company.

That, of the above-mentioned shares, those numbered 157235 to 157314 now stand on the register of shareholders in the name of Johann Frederick Fredericksen aforesaid, who acquired the same by a deed of transfer from McKewan and Gray; and that the company in the ordinary course of business duly registered the said Johann F.

Fredericksen as the proprietor of the last-mentioned shares, and issued to him a certificate of his being the registered proprietor thereof.

And that, of the above-mentioned shares, those numbered 157315 to 157434, 115204 to 115403, and 177206 to 177305, now stand on the said register in the name of Isaac Tracey, jun., who acquired the same by a deed of transfer from M'Kewan and Gray; and the company in the ordinary course of business duly registered the said Isaac Tracey, jun., as the pro-[418]-prietor of the last-mentioned shares, and issued to him a certificate of his being the registered proprietor thereof.

The affidavit of M'Kewan and Gray stated, that, on or about the 23rd of July, 1858, they, for and on behalf of the London and County Banking Company, became and were the bonâ fide purchasers for value of 500 shares in the North British Australasian Company, and that the same were transferred to them under and by virtue of the deed of transfer referred to in Budge's affidavit (ante, p. 416); that, at the time when the said deed was first produced and shewn to the deponents, and when they first received the same, the said deed was filled up with the numbers and descriptions of the said shares, and with the deponents' names as the purchasers thereof, in the same manner, and was in precisely the same form and condition as the same now is; that the deponents then bonâ fide paid for the said shares for and on behalf of the said banking company the sum of 300l.; that deponents purchased the said shares and took and received the said deed of transfer in the ordinary course of business, and without any knowledge or notice whatever that the said deed was not a true and valid deed; that deponents took and received the said deed with a full and bonâ fide belief that the deed was a true and valid transfer of the said shares, and that the same had been and was duly executed by Swan; and that, on or about the 2nd of August, 1858, and before deponents had any knowledge or notice whatever that the said deed was a forgery, or that the same was not a true and valid deed, deponents procured the said transfer to be duly registered in the books of the said North British Australasian Company.

Barry's affidavit stated that, on or about the 15th of November, 1858, he became the bonâ fide purchaser [419] for value of 500 shares in the North British Australasian Company, and that the same were transferred to him under and by virtue of the deed of transfer referred to in Budge's affidavit (ante, p. 410); that, at the time when the deed was first produced and shewn to him, and when he first received the same, the said deed was filled up with the numbers and descriptions of the said shares, and with his name as the purchaser thereof, in the same manner and in precisely the same form and condition as the same now is; that deponent then bonâ fide paid for the said shares the sum of 375l.; that he purchased the said shares and took the said deed of transfer in the ordinary course of business, and without any knowledge or notice whatever that the said deed was not a true and valid deed; that he took and received the said deed with the full and bonâ fide belief that the said deed was a true and valid transfer of the said shares, and that the same had been and was duly executed by Swan; and that, on or about the 19th of January, 1858, and before deponent had any knowledge or notice whatever that the said deed was a forgery, or that the same was not a true and valid deed, he procured the said transfer to be duly registered in the books of the said company.

The case was twice argued, the first time before Erle, C. J., Williams, J., Crowder, J., and Byles, J., and the second time before Erle, C. J., Williams, J., Willes, J., and Keating, J.—cause being shewn against the rule by Hawkins, Q. C., and Holt, for the company, and by Petersdorff, Serjt., and Rew, for the several parties called upon by the amended rule: and Knowles, Q. C., and Hurlstone, being heard in support of it.

Argument in opposition to the rule. The shares in question were transferred from Swan's name in the [420] books of the company, in the usual course of business, after due notice had been sent to Swan at the place he himself had caused to be registered as his address, and in the bonâ fide belief on the part of the transferees and of the company's officers that the transaction was in all respects regular. [Erle, C. J. I think we may assume that the notice never reached the hands of Swan. The question is, which of two innocent parties is to suffer from the fraud of Oliver.] The company were guilty of no negligence; neither were the transferees of these shares: but both were misled by the gross negligence of Swan, who, trusting blindly to Oliver, his broker, by attaching his signature to blank transfers, and entrusting them to Oliver,

enabled that person to impose upon the company and upon the purchasers. The circumstance of the signature of Caroline Bourne being a forgery, it is submitted, makes no difference. The statute does not require any attesting-witness; it is only the form annexed to the rules and regulations of the company that makes attestation necessary, and that is only for the protection of the company. [Crowder, J. The company would not have acted upon the transfer deed without an attesting-witness.] Probably not. Although as between Swan and Oliver the transfer deeds would be null and void, there are numerous authorities to shew that the former would be estopped from setting up his right as against a *bonâ fide* purchaser for value. In *Young v. Grote*, 4 Bingh. 253, 12 J. B. Moore, 484, a customer of a banker delivered to his wife certain printed cheques signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business. She caused one to be filled up with the words "fifty pounds two shillings," the words "fifty" being commenced with a small letter and placed in the middle of a line, and the figures 50 [421] and 2 being also placed at a considerable distance from the printed £.: in this state she delivered the cheque to her husband's clerk to receive the amount, whereupon he inserted at the beginning of the line in which the word "fifty" was written the words "three hundred and," and the figure 3 between the £ and the 50. The bankers having paid the 350l. 2s., it was held that the loss must fall on the customer. Best, C. J., in giving judgment, says: "Undoubtedly, a banker who pays a forged cheque is in general bound to pay the amount again to his customer, because in the first instance he pays without authority. But, though that rule be perfectly well established, yet, if, it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. That principle has been well illustrated by Pothier, in commenting on the case put by Scaccia, 'Cependant, si c'était par la faute du tireur que le banquier eut été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications: puta, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eut ajouté zero, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lien: et c'est à ce qu'on doit restreindre la décision de Scaccia.'" *Taylor v. The Great Indian Peninsular Railway Company*, 28 Law J., Ch. 285, is a strong authority in favor of the company. There, T. being the holder of certain shares in a company upon which 20l. each had been paid up, and being also entitled to other shares in the same company upon which 2l. each had been paid, instructed his brother to sell the 2l. shares. The broker sold the 20l. shares, and brought to T. for execution by him deeds of transfer in which blanks were left for the name of the transferee and for the number and [422] the distinctive numbers of the shares. The deeds bore stamps high enough to carry the 20l. shares, and were executed in blank by T. The deeds were delivered in this condition, together with the share certificates for the 20l. shares, which had been fraudulently obtained by the broker, to *bonâ fide* purchasers, who filled up the blanks. Upon a bill filed by T., it was held that the deeds of transfer were void, and that he was entitled to the shares expressed to be transferred thereby, and to have his name restored to the register. The ground upon which Vice-Chancellor Wood proceeded in that case was, that the company had been guilty of great negligence in taking a transfer in a form which was illegal: but he fully acceded to the doctrine laid down by Ashurst, J., in *Lickbarrow v. Mason*, 2 T. R. 63, 70, that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." And that decision was confirmed by the Lords Justices, on appeal: see 28 Law J., Ch. 709. In *Coles v. The Bank of England*, 10 Ad. & E. 437, 2 P. & D. 521, in case by the executors of a stockholder against the Bank of England for refusing to transfer stock of the testatrix, and to pay the dividends, it appeared that nearly all the stock had been sold and transferred, in the life-time of the testatrix, by her nephew C., who had brought another woman to personate her and forge her signature. After the sale, the testatrix had repeatedly received the warrants for the reduced dividends in person, and had signed the warrants and the bank-books, being on those occasions accompanied by C. who mentioned the amount of dividend in her presence. The jury found that the testatrix had the means of knowing of the transfer, but that there was no evidence of actual knowledge; that she had been guilty of gross negligence; and that there had been no [423]

negligence on the part of the defendants. It was held that these facts afforded a defence on the plea of not guilty. The case of *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company v. Woodcock*, 2 Railw. Cas. 522, 7 M. & W. 574, cited by the Lord Chancellor in *Re the North of England Joint-Stock Banking Company*, 16 Jurist, 435, 440, also supports this view. [Williams, J. That went upon ratification. Crowder, J., referred to the opinion of the judges delivered by Parke, B., in *The Bank of Ireland v. The Trustees of Evans's Charity*, 5 House of Lords Cases, 389.] A person by giving another a blank acceptance makes him as to third parties his general agent to fill up the bill to the extent the stamp will cover, and he is bound by his acceptance in the hands of an innocent holder for value: *Montague v. Perkins*, 22 Law J., C. P. 187, 17 Jurist, 557. Upon the whole, it is submitted that the court will not under the circumstances exercise the authority conferred upon it by these acts of parliament, but will leave Mr. Swan to any remedy he may have by the ordinary course of proceedings at law or in equity, when the matter might if necessary be reviewed by a court of error. If the court were to make this rule absolute, it would be dealing with the rights and interests of persons not now before it,—the intermediate transferees, who are not called upon by the rule. [Erle, C. J. I certainly entertain a strong objection to trying on a summary application like this a matter which the parties have the means of trying in a much more satisfactory manner by the ordinarily constituted tribunals. Williams, J. Is there any mode of proceeding, either at law or in equity, whereby the same remedy may be had as is sought here?] Swan might have a mandamus to the company to restore his name to the register,—*Norris v. The Irish Land Company*, 8 Ellis & B. 512; or he might file a bill in Chan-[424]-cery, and so bring all the parties before the court, as in *Taylor v. The Great Indian Peninsular Railway Company*; or he might have an action at law against the company for wrongfully taking his name off the register,—*Daly v. Thompson*, 10 M. & W. 309; or an action for the dividends,—*Dalton v. The Midland Railway Company*, 12 C. B. 458, 13 C. B. 474. In *Sloman v. The Bank of England*, 14 Simons, 475, where one of two trustees of a sum of stock sold it out under a power of attorney to which he had forged the signature of his co-trustee, and some time afterwards absconded,—it was held that the Bank of England was compellable in a court of equity to re-invest the stock in the name of the other trustee. There is nothing in the 9th section of the 20 & 21 Vict. c. 14 to make it obligatory on the court to interfere in the manner prayed by this rule. Undoubtedly, there are many cases where the enabling words of a statute have been held to be obligatory. Most of these are collected in *Mardouffall v. Paterson*, 11 C. B. 755; but there is an authority in point upon the 25th section of the 19 & 20 Vict. c. 47, viz. the case of *The British Sugar Refining Company*, 3 Kay & J. 408, where it was held that the section, enabling a shareholder whose name is without sufficient cause omitted to be entered in the company's register to apply by motion for an order that the register may be rectified, was not meant to give to every shareholder ex debito justitiæ this summary remedy. The object of that section was, to enable the court to avoid the inconvenience and injustice which occasionally arise from capricious or frivolous objections on the part of companies to complete the registration of their shareholders. It was not intended by the act, that, in the event of there being a serious question to be tried, the matter should be disposed of summarily. [Williams, J. The language of the second [425] act is larger.] A summary jurisdiction is conferred upon this court by the Railway Traffic Act, 1854, 17 & 18 Vict. c. 31, the language of which is imperative; but that act applies to cases for which there was no existing remedy; and the most extensive powers are given for investigating the facts and ascertaining the rights of the parties: whereas none such are given by the acts now under consideration.

Argument in support of the rule. The court undoubtedly has power under the 19 & 20 Vict. c. 47, s. 25, and 20 & 21 Vict. c. 14, ss. 8, 9, to grant the relief prayed by this rule, and, if a proper case is made out, is bound to exercise it: and there can be no need for the interference of a court of equity, when the same measure of justice may be meted out here under the statutes. Upon the facts disclosed by the affidavits, it is submitted that there has been no valid transfer of the shares in question, and consequently that Swan remains the legal owner of them. The company have by means of a forgery been induced to remove Swan's name from the register: but that act of the company, to which he was no party, cannot vary Swan's rights. The case differs in no respect from that of a forged bill or a forged transfer of government or

bank stock : the forgery does not alter the position of the party whose name has been so improperly used : the stock still remains the property of the original holder. The cases relied upon on the other side are all founded upon the doctrine of *Pickard v. Sears*, 6 Ad. & E. 469, 2 Nev. & P. 488, where Lord Denman, delivering the judgment of the court, says, — "The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is [426] concluded from averring against the latter a different state of things as existing at the same time." But in no case has it been held that a person whose signature to a transfer has been forged ceases to be the legal owner of the stock. Mr. Swan's legal title to these shares being clear, what has he done to dispossess himself of them ? It is said that he was guilty of negligence in placing blank transfers in the hands of Oliver. But it is the well-known practice of the Stock Exchange to execute transfers in blank : therefore, there was no negligence in that. Besides, Oliver could not avail himself of the transfer without forging the signature of an attesting witness. *Young v. Grote*, 4 Bingh. 253, 12 J. B. Moore, 484, has been much relied on. There, however, the plaintiff's agent, by her negligent manner of filling up the cheque, afforded the clerk an opportunity of committing the forgery which imposed upon the bankers. Vice-Chancellor Wood, observing upon that case in *Taylor v. The Great Indian Peninsular Railway Company*, 28 Law J., Ch. 289, says : "In that case, the alteration was made in such a manner that no person using due and ordinary diligence could have discovered that it had been made improperly." And there, as the learned judge remarks, the decision proceeded partly on the ground of negligence, and partly, by analogy to the doctrine applicable to bills of exchange, on the ground that the banker was bound to pay to the order of his customer. The doctrine of Ashhurst, J., in *Lickbarrow v. Mason*, 2 T. R. 63, 70, that, "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," was also relied on. But the facts there were altogether different from and can have no application to those of this case. In *Coles v. The Bank of England*, 10 Ad. & E. 437, 2 P. & D. 521, there was clear proof that the testatrix allowed the diminished [427] dividends to be paid with full knowledge or means of knowledge of the fraud. In the case of *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company v. Woodcock*, 7 M. & W. 574, the court only carried out the intention of the parties : the transferor meant that the transfer should be an operative instrument. Assuming that Swan had been guilty of some degree of negligence, that clearly would not divest his legal title to these shares. At all events, as to the 500 shares which the company allowed to be transferred after Oliver's conviction, and after they had full notice of the forgery and fraud, they cannot have a shadow of equity. For these the transferees would clearly have a remedy against the London and County Bank, who sold them with full knowledge of the taint upon them. The 25th section of the 19 & 20 Vict. c. 47 was intended to give authority to the court to do that which could not conveniently be done in any other way. In the case of *The British Sugar Refining Company*, 3 Kay & J. 408, which came before Vice-Chancellor Wood shortly after the passing of that act, his Honor refused to decide upon the question of title : and thereupon the provision in the 20 & 21 Vict. c. 14 was passed expressly to enable the court to inquire into the title. The word "may" is one which is either directory or compulsory, according to circumstances. The true principle is, that, where an authority is given to the court by that word, the court is bound to exercise the authority where a proper case is made for it ; or, as Jervis, C. J., expresses it in *Maddougall v. Paterson*, 11 C. B. 755, 773, "when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application." And this is no new doctrine : [428] for, in *Rex et Regina v. Barlow*, 2 Salk. 609, upon an indictment on 14 Car. 2, c. 12, against church-wardens and overseers for not making a rate to reimburse the constables, exception was taken that the statute only puts it in their power to do so by the word *may*, &c., but does not require the doing of it as a duty for the omission of which they are punishable. Sed non allocation : for, where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall* : thus, the 23 H. 6 says the sheriff *may* take bail ; this is construed *shall*, for he is

compellable to do so. So, in *The Queen v. The Tithe Commissioners for England and Wales, in the Matter of Great Hale Tithes*, 14 Q. B. 459, Coleridge, J., in delivering the judgment of the court, says,—"Upon the construction of the 7th section of the 5 & 6 Vict. c. 54, we are of opinion, that, in the cases to which it applies, the tithe-commissioners are bound to act under it, and must confirm according to its provisions. The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom, that, in public statutes, words only directory, permissive, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." It becomes, therefore, the imperative duty of the court to grant the relief prayed under this statute the moment it becomes apparent to it that the name of a person having an unimpeachable legal title to shares has been improperly omitted or erased from the register. If the court decline to interfere under the statute, the party will be practically without remedy. He clearly has no legal redress against the now shareholders. It is said that he may file a bill in equity. But, against whom? The first transferee, the present holder of the shares, or the company? As against the two former, how could [429] it be said that the plaintiff has a better equity than the defendant, who has in ignorance of the fraud parted with his money? [Willes, J. The same jurisdiction is given by the statute to the courts of law and equity. The court of equity usually considers the title of a bonâ fide purchaser for value without notice unassailable. Can a court of law, pronounce a decision different from that which a court of equity would pronounce, under an authority conferred upon both by the same words in the same section of an act of parliament? Williams, J. I do not think this statute meant to alter the law, or to give any new right.] To restore Swan's name to the register would be effecting no alteration of the legal rights of the parties. [Erle, C. J. If we were to decide upon this application in favor of Mr. Swan, we should be conclusively determining the title to these shares. Williams, J. The question which presses me is, whether the rights of the parties might not be ascertained by some mode of proceeding in which an appeal would lie.] The court might, if so advised, direct a special case or an issue to inform its conscience as to the rights of the several parties. But, if any recourse is to be had to a court of equity, it is for the other parties to proceed there, and not Mr. Swan.

Cur. adv. vult.

The court being equally divided, their judgments were on a subsequent day delivered seriatim, as follows:—

ERLE, C. J. This was a motion on behalf of Mr. Robert Swan for an order to the North British Australasian Company to rectify their register of shareholders, by restoring his name, under the 19 & 20 Vict. c. 47, s. 25, and the 20 & 21 Vict. c. 14, ss. 8, 9. The facts were, that Swan had purchased 1000 shares in the company in 1857, and was duly registered, [430] and deposited the certificates in a box in a bank, and had never intended to transfer them. In October, 1858, he discovered that the certificates had been stolen, and as to 500 of the shares Barry had been registered as transferee of Swan in January, 1858, and as to the other 500 shares McKewan and Gray were registered as transferees. For each of these transfers there was a deed in the proper form purporting to be duly executed by Robert Swan, and to be attested by Caroline Bourne; and the transferees in each case took the transfers bonâ fide for value. These shares had been afterwards transferred again bonâ fide for value; but I take the case as if it had arisen between Mr. Swan and the first transferees.

Mr. Swan states that he never executed or gave authority for executing any deed of transfer of these shares, and so had a primâ facie case: but it appeared further that he had employed one Oliver as his broker in the purchase and sale of shares for several years, and, among others, in the purchase of the shares in question; and that, having occasion to sell some Manchester and Lincoln shares and some Scottish Australian Investment shares, he had signed and sealed and delivered to Oliver blank forms of transfer, to be completed by him for the transfer of these last-mentioned shares; that for such transfers six forms only were necessary, but Oliver induced him to give, and he did deliver to Oliver, eight forms so signed and sealed. Oliver used six of these forms for the transfers according to the order of Swan, and used the remaining two forms for the transfer of the two sets of 500 shares now in dispute, without any order or authority from Swan; and this raises the question whether

Mr. Swan has a right to an order to restore his name to the register as the holder of these shares.

Upon the first statute, Wood, V.-C., was of opinion [431] that the legislature intended to give a summary remedy where companies from frivolous or capricious objections refused to complete the register, and did not intend to give every claimant a right, *ex debito justitiæ*, to try a serious question of right by motion on affidavit: *In re the British Sugar Refining Company*, 3 K. & J. 408. But the subsequent statute has enacted, that, on a motion to rectify the register, the court may decide the title to the shares, if it arises incidentally; and that is the case here.

Now, although the deeds of transfer, as between Swan and Oliver, were null and void, yet, as between Swan and a purchaser for value on the faith that they were valid, they may be valid to pass the property, if not directly, yet indirectly, by estopping Swan from setting up his right against such purchaser. The authorities for the application of this principle in respect of negotiable instruments are numerous. The giver of a blank acceptance or an indorsement on a blank note filled up for a larger sum than he authorized, is estopped, as against a bona fide holder, from setting up any other limit of authority than the amount which the stamp will bear: *Russell v. Langstaff*, 2 Dougl. 514; *Russell v. Perkins*, 25 Law J., C. P. 187. In *Young v. Grote*, 4 Bingh. 253, 12 J. B. Moore, 484, the plaintiff left cheques signed in blank with his wife, to be filled up according to need: she filled up one so imperfectly as to enable the bearer to alter the 50l. for which it was given into 350l.; and it was held that the plaintiff was estopped from setting up against the defendant, who had acted with ordinary caution in paying the cheque in the usual course of banking business, that his agent had only drawn the cheque for 50l., inasmuch as it was his negligence, by his agent, that enabled the fraudulent holder to cheat the banker. These decisions relate to negotiable [432] instruments: and the question arises more frequently in respect of such instruments, because they are more frequently given in blank, to be filled up by agents: but I am of opinion that the principle on which they rest is entirely independent of negotiability: it has no relation to passing of property by delivery, which is negotiability: it relates to validating, as against bona fide purchasers, that which, according to *Minder Hart's case*, 7 C. & P. 652, 1 M. C. C. R. 486, as against the agent, is a forgery: and the law for negotiability never affects the validity of a forgery. The principal, whose negligence has enabled his agent to cheat a third party acting with ordinary caution, is universally estopped from denying the authority of the agent. A retired partner, who has given no notice of dissolution to a customer is estopped from denying the authority of the continuing partner to bind him with that customer. A master who has accredited a servant to a tradesman to order goods in his name, and has recalled the authority from the servant without giving notice to the tradesman, is estopped from denying the authority of the servant to bind him with such tradesman. I am further of opinion that the same principle applies to instruments under seal.

In *Texira v. Evans*, which was cited by Wilson, J., in *Master v. Miller*, 1 Anstr. 225, 228, Evans gave a bond executed in blank to his broker, to raise thereon as much money as he could get. Texira consented to lend 200l., and the broker filled in his name and the sum. In an action by Texira on this bond, Evans pleaded non est factum; and, as against Texira, Lord Mansfield held it to be a valid bond. Though the facts are shortly stated, and it was a ruling at Nisi Prius, still, as far as appears, Texira was a bona fide holder for value paid to Evans. Therefore, it was not the ordinary question which of two innocent parties [433] should suffer by the fraud of a third; but a direct claim by the defendant that the law should support his fraud, and, instead of making the debtor pay his debt, make the creditor pay to the debtor his costs. If these are the facts, Lord Mansfield was entirely right in holding that the defendant should not set up the alteration as against this plaintiff.

Where an agent intrusted with the custody of the seal of a corporation, applied it without authority to a power of attorney for selling out stock, and obtained the proceeds, and the question was who should lose by the fraud of this agent, the Irish judge directed the jury to find for the defendant if they thought the plaintiffs by their negligence had contributed to the loss. Upon bill of exceptions, this was held wrong by the House of Lords, because the negligence, if any, of intruding the custody of the seal was not so proximately connected with the loss as was thought necessary. Lord Cranworth, in giving judgment, explains the case of *Young v. Grote*, by the estoppel of a principal from denying his authority to an agent, where his negligence has enabled

the agent to cheat a person acting with ordinary caution. In Ireland and in the House of Lords this rule of law was treated as applicable to deeds as well as to negotiable instruments, and the judgment of the House of Lords, holding that the negligence was not proximate, by implication holds, that, if it had been so, between these parties the false deed would have been valid: *The Bank of Ireland v. Evans's Charities*, 5 House of Lords Cases, 389, 413.

Where the transfer of shares was executed with a blank for the purchaser's name, by a proprietor who was not registered, and the purchaser delivered to the company a proxy-paper purporting to be by a proprietor, such purchaser was estopped from setting up against the company, in an action for calls, that the [434] transfer was void. Parke, B., says the defendant held out false colours to induce the company to register him as a proprietor, and therefore to bring this action against him. It is an universal rule of law, that, where a party makes a representation to another whereby the situation of the latter is altered, he is bound thereby: *The Sheffield and Manchester Railway Company v. Woodcock*, 7 M. & W. 574. This is the general principle which in various forms pervades all the cases here cited, and the very numerous class often referred to with the case of *Pickard v. Sears*, 6 Ad. & E. 469, 2 Nev. & P. 488.

Where the plaintiff tendered to the defendant transfers executed in blank, in performance of his contract to deliver valid transfers, and sued the defendant for not accepting and paying for them as valid transfers, the judgment was for the defendant, and rightly so; for, between these parties, there had been no deception, and no ground for applying the doctrine of estoppel: *Hibbiewhite v. M'Morine*, 6 M. & W. 200: and it should be noted that the same court afterwards held the transfer valid by estoppel, in the action for calls against Woodcock: 7 M. & W. 574.

Where the plaintiff had delivered to his broker transfers executed in blank, with authority to fill them up for 2l. shares, and he sold and delivered them, still being blank, to another broker, to be filled up for 20l. shares, and with the purchaser's name when they should sell, Wood, V.-C., granted relief to the plaintiff, and decided that he was still proprietor of the 20l. shares; and this judgment that the transfers executed in blank and misapplied by the broker did not bind the principal, is in entire consistence with the cases I have cited, because the party who claims to benefit by this doctrine of estoppel must shew that he has acted in the transaction where he was deceived with ordinary [435] caution; and the Vice-Chancellor held that a broker taking transfers blank as to names and sums did not act with ordinary caution, but paid his money for transfers which he knew to be void: *Taylor v. The Great Indian Peninsular Railway Company*, 28 Law J., Ch. 285. This view is entirely confirmed by the judgment of Lord Justice Turner, in the same case on appeal, who sanctions the doctrine of estoppel as here explained, but declares it has no application in the case before him, for the reason above assigned: 28 Law J., Ch. 710.

This doctrine of estoppel to validate some void transfers seems essential; otherwise, a seller of shares might by these means receive the purchase-money, and recover back the shares if their value should rise or he should wish to rescind. The doctrine, limited to throwing the loss from the party who has acted with due care to the party who has caused the loss by wilful imprudence, must always operate to promote the substantial interest of commerce, without introducing any pernicious uncertainty that I can discover; and the doctrine, as I have stated, seems to me to reconcile all the cases.

Then, did Swan by his negligence enable Oliver to cheat Barry by the transfers in question? I think the answer must be in the affirmative. According to the 5th and 11th regulations of the company here in question, the holder of a share may transfer it, and the transferee may accept it, by a deed of transfer in the form approved of by the directors. The transfers executed in blank by Swan, and intrusted by him to Oliver to fill up, were in the form approved of by the directors: and they alone if valid would have passed the property. Swan gave to Oliver the number of transfers that he asked for, and took no care, by inquiry, or examination of the register, or in any way, to see how they had been used. He put them into his [436] hands, not only to be filled up, but to be attested, although the filling up of a deed by an agent not authorized by deed would be void, and although the attestation must be signed by a witness who could not truly attest. Furthermore, although the certificates were locked in a box at the bank, yet Swan, as I gather, trusted the key to Oliver to get the shares that were to be transferred, and at the same time, or by the same key, he

probably had the opportunity to take the certificates of the other shares now in question. In this I think Swan was guilty, not only of the negligence of an extreme trust in Oliver, but also of misconduct in planning that Oliver should issue transfers as valid which were neither properly executed nor attested. This negligence and misconduct were as proximately connected with the cheat by Oliver as the wrongful filling up of a blank acceptance is with the attempted cheat on the holder.

Then, did the third party shew ordinary care in paying for these transfers? They were received from an established broker fully accredited by Swan. They were signed, sealed, and attested exactly the same as those which Swan intended to pass as valid, in respect of which he had received the purchase-money. Swan intended that a purchaser might properly receive and pay for them; and he cannot say that there was any apparent difference between them and the transfers now in dispute.

As to one set of transfers, Swan says he authorized them: as to the other, he says he did not: but that is a matter which the purchaser could by no examination of the documents of title discover. Neither, as it seems to me, was it want of ordinary care not to go to the attesting witness to inquire about the execution. There is no evidence of such a precaution being common.

[437] It is objected that the certificates were stolen, and that no property in them could be acquired from the thief. The answer is, that the certificates were neither the share nor the title to the share: they are an indication of title which the purchaser with ordinary care would inquire for. In this case he did so, and Oliver produced them: and it is probable, as above observed, that Swan by his careless trust gave him the opportunity of taking them.

For these reasons, between these parties, I have come to the conclusion that Mr. Swan has not proved his title to the shares in question. I fully agree with my Brother Keating that on the ground taken by us the rule should be discharged.

KEATING, J. In this case Mr. Robert Swan obtained a rule calling upon the North British Australasian Company, Limited, and others, registered holders of shares formerly standing in his name, to shew cause why the register of shareholders in the said company should not be rectified by replacing the name of the said Robert Swan thereon, as it had originally stood, and why the said company should not pay the costs of the application.

The application was made under the 19 & 20 Vict. c. 47, s. 25, and 20 & 21 Vict. c. 14, s. 9: and it appeared by the affidavits that Mr. Swan had for some years previous and up to 1858, employed as his stockbroker, in the purchase of shares a person named Oliver, with whom also he was on terms of private intimacy and friendship. In 1857, he had purchased 1000 shares in the North British Australasian Company, and deposited the certificates for these shares, with other securities of a similar nature, in a box, which Oliver on his behalf deposited for safe custody at the London and County Bank. On two occasions, before January, [438] 1858, Mr. Swan had employed Oliver to sell for him shares in the Manchester, Sheffield, and Lincoln Railway Company, and in the Scottish Australian Investment Company, and on each occasion sent him for that purpose blank forms of transfer, signed and sealed, to be filled up by Oliver on such sales. It does not appear that any of these forms (eight in number) were attested, although each contained a printed attestation form. Six of the forms were filled up and used by Oliver for the sales of the shares as directed by Mr. Swan, but the remaining two forms, which he had represented as being necessary for those sales, he filled up and used for the transfer of the North British Australasian shares, 500 in January, 1858, to Barry, and 500 in July, 1858, to McKewan and Gray, the purchasers in both cases taking them bona fide, for value, in the usual course of business, without any notice whatever of the fraud, and the transfers being complete on the face of them at the time of the sales. How the blank attestation had been filled up by Oliver for the purpose of the authorized sales does not appear: but, in the transfers upon the sales in question, he had inserted, as attesting witness, but without her authority, the name of Caroline Bourne, who was a friend of Robert Swan, and then living at Paris, where he also then resided. The certificates of the 1000 shares Oliver had obtained by feloniously abstracting them from the box in which they were deposited, by means of a duplicate key which without the authority of Mr. Swan he had retained in his possession. Whether the certificates for the shares previously transferred had been in the same box, or, if so, how they had been obtained, does not appear.

The purchasers of the Australasian shares took the deeds to the offices of the company for the purpose of [439] being registered, but the company, before doing so, sent in each case a notice of the intended transfer to Mr. Swan, addressed "To the care of Mr. Oliver, No. 4 Austin Friars," that being the address which was last registered by Mr. Swan's direction as his address. These notices were of course intercepted by Oliver, and the company, not receiving any countermand, registered the transfers in the usual course.

In August, 1858, Mr. Swan authorized the transfer of the shares in question by means of a blank transfer sent by him for that purpose to Oliver, upon a false representation by the latter that he could dispose of them advantageously, his object being to prevent Mr. Swan discovering that they had been already sold: and it was not until the 9th of October, that Oliver, being charged with frauds upon other persons, Mr. Swan first discovered that his Australasian shares had been fraudulently disposed of. He then prosecuted Oliver, who pleaded guilty to an indictment charging him as a bailee with the felonious conversion of the shares. An application was afterwards made by Swan to the company to restore his name to the register as holder of the 1000 shares. Upon their declining to do so, the present rule was obtained: and the question is, how far upon these facts Mr. Swan can claim the interposition of this court to rectify the register in the manner prayed.

By the 25th section of the 19 & 20 Vict. c. 47, the court may, at the instance of a shareholder, omitted from the register "without sufficient cause" and "if satisfied of the justice of the case," make an order for the rectification of the register, and the 9th section of the 20 & 21 Vict. c. 14, gives the court power to decide on any question relating to title, or, generally, "any question that it may be necessary or expedient to decide," for the purpose of so rectifying the register.

[440] In the well-known case of *Lickbarrow v. Mason*, 2 T. R. 63, Mr. Justice Ashurst says, "We may lay it down as a broad general principle, that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must bear it." This principle, in itself so just, has been applied in many instances in our common law courts, where negligence has occasioned the loss, although, in its application, it has been more or less modified by circumstances.

The cases in which an innocent holder has been allowed to recover upon a bill of exchange, which, having been accepted in blank, had been filled up with an amount larger than the sum authorized, or which had been lost and fraudulently circulated, all contain the principle referred to, although strengthened by considerations of policy with regard to the nature of the instruments as part of the circulating medium of the country. The case of *Young v. Grole*, 4 Bingh. 253, 12 J. B. Moore, 484, also illustrates the same principle: there, a cheque drawn so as to admit easily of an alteration in the sum from 50l. to 350l. having been fraudulently altered in that way, and paid to the larger amount, it was held a good payment by the banker as against the party drawing the cheque. It is true that the principle above referred to has been hitherto chiefly applied in those cases in which the instruments were not under seal: but, in *The Bank of Ireland v. Trustees of Evans's Charities*, 5 House of Lords Cases, 389, where a fraudulent transfer of stock had been effected by means of a power of attorney improperly sealed with the seal of the respondents, alleged to have been negligently intrusted to their secretary, and where it was held that the negligence which would preclude the respondents from insisting that the transfer was invalid, must be immediately connected with the trans-[441]fer itself, there was no distinction whatever taken, although *Young v. Grole*, and the principle upon which it was decided, were fully discussed, and put upon the ground of estoppel, which would seem equally applicable to both classes of instruments: see also *The Sheffield and Manchester Railway Company v. Woolcock*, 7 M. & W. 574.

Assuming, however, that, if the present inquiry related simply to ascertaining the strict legal title of the transferees of the shares in question, difficulty might arise from the fact that Oliver had no authority under seal to complete the transfers, according to the rule laid down and acted on in the case of *Hibblewhite v. M'Morine*, 6 M. & W. 200, yet that difficulty, at best of a technical character, does not appear to me to create any embarrassment on the present rule, where the application is made to the equitable jurisdiction of this court, under an act of parliament which, whilst conferring large discretionary powers for the purpose of rectifying the register, at

the same time provides that those powers are to be exercised by the court only "if satisfied of the justice of the case." The position of Mr. Swan, upon these affidavits, is not, in my opinion, such as to entitle him to claim the interposition of this court in his favor under the provisions of that statute; his reckless execution and delivery of blank transfers for the express purpose of enabling Oliver to effect sales of shares in a manner contrary to law, which he must be taken to have known, has mainly contributed to the loss which has occurred, assisted (at least as to 500 of the shares) by his depriving himself of the safeguard of a notice of the intended transfers, by giving Oliver's address as his own. Had the parties against whom he applies contributed to the misfortune by any laches on their part, or by improperly omitting to do anything which [442] could have prevented it, the case might have been different, according to Vice-Chancellor Wood, in *Taylor v. The Great Indian Peninsular Railway Company and Others*, 28 Law J., Chan. 285, where it was held by that learned judge that negligence on the part of transferees of shares in accepting transfers with the numbers of the shares and the names of the purchasers in blank, deprived them of the right to insist on the negligence of the vendor in executing and delivering to the broker such blank transfers: but, in the present case, the transfers are sworn to have been complete upon the face of them at the time of the sale, and it is not suggested in the affidavits that the transferees, much less the present holders of the shares in question, took them otherwise than *bonâ fide*, and in the ordinary and regular course of business.

Under these circumstances, I think Mr. Swan has not entitled himself to claim the assistance of this court as against innocent parties, in order to get rid of the consequence of his own negligence, and the effects of his misplaced confidence.

I am therefore of opinion that the rule should be discharged.

WILLIAMS, J. This was an application made under the 25th section of the 19 & 20 Vict. c. 47 (Joint Stock Companies Act, 1856), whereby it is enacted, that, "if the name of any person is, without sufficient cause, entered, or omitted to be entered, in the register of shareholders of the company, such person or any shareholder of the company may, by motion in any of Her Majesty's superior courts of law or equity, apply to such court for an order that the register may be rectified; and the court may either refuse such application, with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the recti-[443]-cation of the register, and may direct the company to pay all the costs of such motion or petition, and any damages the party aggrieved may have sustained; and, if the company makes default, or is guilty of unnecessary delay in registering any transfer of shares, they shall be responsible to any person injured by such default or delay for the amount of damage he may thereby have sustained."

And by the 9th section of the 20 & 21 Vict. c. 14, it is enacted that the court may, in any proceeding under the above-mentioned section of the former act "decide on any question relating to the title of any person who is a party to such proceeding, to have his name entered or erased from the register, whether such question arises between two or more holders or alleged holders of shares or stock, or between any holders or alleged holders of shares or stock and the company; and, generally, the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register."

Mr. Swan has made this application on affidavits which disclose that his name was formerly on the register of the North British Australasian Company as the proprietor of 1000 shares thereof, but was removed therefrom, and other names substituted in lieu of his, by reason of transfers of them purporting to have been executed by him, but which were forgeries perpetrated by one Oliver, who had on other occasions acted as broker for the applicant. He, therefore, having discovered these facts, requested the company to re-enter his name on the register, as the proprietor of the shares: but the company refused to do so, and thereupon this application is made, on the ground that his name is omitted to be entered on the register without sufficient cause, for an order that the register may be rectified.

[444] The application is resisted on the ground that the forged transfers were to persons who were *bonâ fide* buyers of the shares, and that Oliver was enabled to perpetrate the forgery by the carelessness of the applicant, who had been induced by Oliver to sign, for another purpose, transfers in blank, which he fraudulently filled up with the transfer of the shares in question; and it was contended,—first, that,

under the circumstances, the transaction was binding as against bonâ fide buyers, on the principle of the case of *Young v. Grote*, 4 Bingh. 253, and also the cases in which a man who has signed an acceptance in blank, is presumed to have given authority to fill it up with any amount which the stamp will cover, and, secondly, that, at all events, the court ought not to deal with such a question on motion, especially as there is no appeal against our decision.

With respect to the latter ground of objection, the court must necessarily feel great reluctance to entertain in this shape, and to decide without appeal, questions of this kind, on which the right of property to an enormous amount will depend. But the language of the two acts, taken together, appears to me to be such as to leave no doubt that the legislature has thought proper to make it our duty to do so, inasmuch as it has enacted by the latter statute that the court may, in proceeding under the former, decide the question of the title of the applicant to have his name entered on the register, and any other question that it may be necessary or expedient to decide for the rectification of the register. And, the court having this power, I think the applicant has a right to call on us to exercise it, in order to give him the benefit of the enactments, if he can maintain his title. In a case before Vice-Chancellor Wood, which occurred before the latter act passed, *In re the British Sugar Refining Company*, 26 Law J., Chan. 369, his Honor was of opinion that the 25th section of [445] the earlier act was not meant to apply where the title came in question. But, if the case had arisen after the passing of the latter act, I think it probable that learned judge would have taken a different view.

But the question remains, whether the applicant has lost his right to the shares. The case of *Young v. Grote* has been recently recognized in this court, and its authority cannot be disputed. It is thus stated by Parke, B., in *Roberts v. Tucker*, 16 Q. B. 560,—"In that case the customer had signed blank cheques, and left them with his wife to fill up; she filled them up in such a manner that the holder was enabled to add to the amount; and it was held that the bankers who had paid this larger amount might charge their customer with it. This was, in truth, considering that the customer had, by signing a blank cheque, given authority to any person in whose hands it was, to fill up the cheque in whatever way the blank permitted." This view of that decision appears to be put on the same principle as that of *Shultz v. Astley*, 2 N. C. 544, 2 Scott, 815, where it was held, that, by accepting a bill in blank, authority is given to draw the bill for any amount which the stamp will cover, not only to the party who has obtained the blank acceptance, but also to a stranger (which case was mentioned by Crompton, J., in *Stoessig v. The South Eastern Railway Company*, 3 Ellis & B. 549, 556, as one which went to the utmost extent of the law). In the case of *The Governors and Company of the Bank of Ireland v. Trustees of Erasmus's Charities*, 5 House of Lords Cases, 410, Parke, B., in delivering the opinion of the judges, adverted to *Young v. Grote*, as having been decided on the ground that it was the fault of the drawer of the cheque that he misled the banker on whom it was drawn, by want of proper caution in the mode of drawing the cheque, and consequently that the drawer could not complain of the payment which [446] was caused by such neglect. But Lord Chancellor Cranworth spoke of that case as proceeding on the ground (whether correctly arrived at in point of fact was immaterial) that the plaintiff was there estopped from saying that he did not sign the cheque for the larger amount. However, in *Marsden v. Allen*, 8 M. & W. 494, 504, Alderson, B., in delivering the judgment of the court of Exchequer, refused to adopt the proposition, that the previous party to a bill is estopped from setting up the defence of fraud against the case of a bonâ fide holder for value, and thought it better to say that by the law-merchant every person having possession of a bill has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer it to a bonâ fide holder for value. It seems, therefore, doubtful whether the cases as to the liability of a man who signs a blank bill or note or cheque, are founded on the doctrine of estoppel, or on a rule of law-merchant that an actual authority is thereby conferred on the person in whose hands the instrument is. It is, however, plain that none of the decisions as to the effect of signing instruments in blank extend beyond the case of negotiable instruments. And it seems to me that it would be inconvenient and dangerous to apply the principle of them any further. If a man were induced to sign, seal, and deliver to his attorney a deed of conveyance with the parcels in blank, upon the understanding that it should be filled up by a description of estate

A., it would surely be difficult to contend, that, if the attorney were fraudulently to fill up the blank by a description of estate B., the latter would pass to a bona fide purchaser, who paid for the estate on the supposition that he was buying the latter estate.

It is not, however, in this case necessary, in my opinion, to decide this question, because I think the con-[447]duct of the applicant in signing the blank transfer was not such that a man of ordinary prudence and caution would have shunned it, as being attended with an obvious risk of being taken advantage of by filling up the blank with a transfer of the shares in question. When that had been done, two things more must have happened, before the transaction would have been perfected. Some person must have been found either so dishonest or so careless as to attest Swan's execution without any letter or other voucher from him in any way authorizing or recognizing the transaction. Secondly, the bankers with whom the certificates of the shares had been deposited must have been guilty of negligence in allowing them to be abstracted. It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might well foresee and dread, and would therefore shun. But it is another and very different proposition to maintain, that a man shall forfeit his property because he has done an act which will not be perilous unless others are also guilty of misconduct which that act does not cause.

In my opinion such an act ought not to disentitle the applicant, even supposing the doctrine established that he would be disentitled if the filling up of the blank transfer had *per se* enabled Oliver to commit the fraud.

I am therefore of opinion that the rule ought to be made absolute; because I think the title of the shares has all along remained in the applicant.

But it is said, that, inasmuch as by this statute a motion may be made either in a court of law or of equity, the legislature must have intended that the rights of applicants must necessarily be regulated by the doctrines of both courts; and cases were cited to shew that, in a court of equity, no relief would be [448] afforded to the applicant in this case, as against an innocent purchaser for value. But it is not proper, I think, to inquire whether the court of Chancery would afford any relief in the exercise of its ordinary jurisdiction. If the statute means that the courts may be required to rectify the register, by making an order that the name of him who shall be found to have the right to the shares shall stand there, both courts must take the same course of ascertaining who has the title, and making or refusing an order accordingly; only with the obvious consequence, that, if the application be made to a court of law, regard must be had to the equitable as well as to the legal title.

WILLES, J. It appears to me that the rule ought to be absolute. As a general rule, no one can found a title upon a forgery. The doctrine adopted in *Young v. Grote*, as to negotiable instruments, which form part of the currency, and therefore stand upon a peculiar footing, has never yet been extended to conveyances by deed of land or other property. I am unwilling to be the first to do so. The loss in this case should rest where it has fallen, namely, upon the supposed purchasers, who have parted with their money for nothing or for what is nothing worth, and not upon the alleged vendor, who has never parted with his property either by his own act or that of any one authorized by him.

The court being thus equally divided, the rule dropped (*a*).

[449] SWEETING v. PEARCE. May 26th, 1859.

[Affirmed in Exchequer Chamber, 9 C. B. N. S. 534.]

The plaintiff, a shipbuilder in London, employed one W., an insurance-broker, to effect a policy upon a ship at Lloyd's, and, after the happening of a loss, gave W. the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he had retained possession of it. An

(*u*) Mr. Swan has obtained a similar rule in the court of Exchequer, which will be argued early in Michaelmas Term, 1860

adjustment having taken place, the loss was settled,—in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found was not known to the plaintiff, who had merely left the policy in W.'s hands for safe custody,—by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—Held, that, although the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy in money, he was not bound by the usage, and, consequently, that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement.

This was an action on a policy of insurance in the usual form on the ship "Caroline" and freight, on which the defendant was an insurer for 50l., the declaration alleging a total loss.

The defendant pleaded,—first, payment.

Secondly, that Walton & Sons were the insurance-brokers and agents of the plaintiff, and after the loss were authorized by the plaintiff to adjust and settle the loss, which they did at 96l. 13s. 9d. per cent.; that, at the time of the adjustment and settlement, Walton & Sons were indebted to the defendant on the account between them as brokers and the defendant as underwriter in a sum exceeding the defendant's proportion: and that by the authority and with the sanction of the plaintiff, Walton & Sons accepted a credit in the account with the defendant as satisfaction.

Thirdly, that the plaintiff employed Walton & Sons, who were brokers at Lloyd's, as his brokers to procure the policy to be underwritten there for him, and they procured it to be underwritten for 50l. by the defendant, who was an underwriter there, in the usual and customary manner, and afterwards, a total loss with benefit of salvage having occurred, the plaintiff employed Walton & Sons as his brokers to have his claim on the policy adjusted and settled in the usual and customary manner, and for that purpose entrusted them as such brokers with the policy: that Walton & Sons as such brokers for the plaintiff did in the usual and customary manner adjust the claim with [450] the several underwriters, including the defendant, at 96l. 13s. 9d. per cent., and, as such brokers for the plaintiff, at the usual and customary times, settled the claim with the underwriters, and by the usage and custom of Lloyd's, well known to all brokers and underwriters, and to all merchants and ship-owners making insurance in general, a broker so employed to make a policy and to adjust and settle a claim thereon, and so entrusted with the policy for that purpose, has, as incidental to such employment and entrusting, authority from the assured so employing and entrusting him, and is held out to the underwriters dealing with him as from such employment and entrusting having authority from the assured, to accept and receive in satisfaction of the claim against each underwriter a credit in the usual and customary account between that underwriter and the broker, as underwriter and broker, at the usual and customary time, if that account is at the adjustment and settlement good for that amount, and thereby at the usual and customary time to discharge the underwriter, and become himself liable to the assured, unless the assured before then intervene, and give notice to the underwriter of such intervention. The plea then averred, that the account between Walton & Sons and the defendant as broker and underwriter was at all material times good for a greater amount, and that Walton & Sons, as brokers for the plaintiff so employed and entrusted as aforesaid, accepted, and the defendant as underwriter, confiding in the usual and customary authority given to Walton & Sons by such employment and entrusting, gave to Walton & Sons credit in the account in satisfaction of the plaintiff's claim, and all times elapsed and all things happened to make that credit in account a good and final discharge of the defendant as underwriter according to the usual and customary course, and to make [451] Walton & Sons as brokers debtors to the plaintiff according to the usual and customary course, and the plaintiff never intervened or gave notice to the defendant till after the stoppage of Walton & Sons, and the settlement was in all respects in pursuance of the authority conferred by usage and custom on a broker so employed and entrusted: and that the defendant afterwards, relying on the settlement, gave fresh credit to Walton & Sons for premiums to an amount exceeding the claim. The plea also contained a final averment that the plaintiff, at the time he so employed

and entrusted Walton & Sons to adjust and settle the claim, had notice of the custom and usage.

The fourth plea was similar to the third : but, instead of the final averment of notice of the usage at the time of the employment, it alleged subsequent notice to the plaintiff, and an adoption by him of Walton & Sons as his debtors, and a ratification of their acts.

The fifth plea was similar to the third, with the exception that it did not contain the final averment that the plaintiff had notice of the custom, and averred that the credit was given and accepted without any notice to the defendant from the plaintiff, or otherwise, that the plaintiff had in any respect restricted or limited the authority of Walton & Sons, or given them an authority more limited than by custom or usage aforesaid conferred on brokers so employed and entrusted, and in the bona fide belief that they had such authority.

The cause was tried before Cockburn, C. J., and a special jury, at the sittings in London after Michaelmas Term, 1858. The following is a statement (settled by the learned judge) of so much of the evidence and proceedings as is material to the point reserved :—

The defendant began, and proved by Mr. Natusch, an [452] insurance-broker at Lloyd's, who had been so for more than twenty-five years, and was well acquainted with the custom there, that an account is always kept by the broker with each underwriter. When the broker effects an insurance for a principal at Lloyd's, he credits the underwriter in the account between them with the premium. The broker also keeps an account with the assured. In that he debits the assured with the premiums. The account between the broker and underwriter is settled every year. All the premiums in the course of the year go into it on the credit side. It is settled at the end of the year, when the broker is allowed a discount depending on the amount of the balance : it is 12 per cent on the balance then due to the underwriter. The account is always stopped by a loss wherever it takes place.

Sometimes the broker retains the policy. If a claim is to be made on the policy, and the policy is in the broker's hands to obtain the amount of such claim, the settled amount of such claim is put to the debit of the account between the broker and the underwriter. In such case, the following is the course pursued at Lloyd's :—The broker, having prepared or obtained through the medium of an average-stater a statement of the claim, makes an indorsement upon the policy, in the following form,—"Settled a loss upon this policy of [so much] per cent." The policy so indorsed is put before the underwriter for his assent to the claim : and, if the underwriter assents to the claim, he puts his initials to the indorsement. When the claim is so adjusted and settled, the amount is put to the debit of the underwriter.

The account is stopped when the loss is known : but the loss is not carried to account till it is adjusted.

If the amount of the premiums due to the underwriter up to the time when the loss was first known at [453] Lloyd's exceeds the amount so adjusted, such amount is considered as paid at the end of a month from the date of the adjustment by the underwriter. If such amount of premiums is not sufficient to cover the loss, the underwriter at the end of the month gives a cheque for the difference. This is what is technically called the account being good or not for the loss.

If, for instance, on the 13th of June, a loss became known, and the balance due from the broker to the underwriter on that day was 20l., the account would be good only to that amount : if then, on the 30th of October, the loss was settled at 100l., the underwriter would pay the broker in cash 80l. on November the 30th, that is, one month after the date of the adjustment.

It is very common, where a claim is large, to agree upon an adjustment on account, leaving the balance to be adjusted afterwards. In such a case, the amount of the adjustment on account is equal to cash a month after that adjustment on account. The amount of the final balance is cash a month after the adjustment of it. The same process is pursued with regard to returns of premiums. If the account continues good to the end of the month, the carrying to the account is a payment from the day it becomes equal to cash. If it is not good, the underwriter pays the balance to the broker in cash on that day.

It was proved that the indorsements on the policy on which this action was brought were in the ordinary form.

The witness further stated that it is unimportant whether the signatures of the underwriters who have initialed the policy are struck through or not, though formerly the name was very often struck out: that sometimes it is done, and sometimes it is not.

It was also proved, that the broker on the settlement [454] usually sends the assured a credit note either indorsed on the policy or on a separate paper. In that he states the whole amount, and when it is due. There is by the general custom between brokers and assured a period of credit between them. It is ordinarily three months from the time of settlement; but that is subject to arrangement. Many brokers pay in a month, deducting discount; but that is matter of arrangement.

The said insurance-broker, on cross-examination by the counsel for the plaintiff, said that such custom, in the absence of special arrangement, was, that the broker had two months' credit from the time he had the money (that is, three months' credit from the date of the settlement): if there was any payment by the broker before that day, it was under discount; but that the practice of brokers varied very much. It was also proved that the name of the underwriter was more usually struck off the policy than not: but it was often left undone.

None but members and subscribers have a right of entrance at Lloyd's: nobody else is allowed to transact business there. Many merchants are members; but no one can become a member or subscriber, unless elected.

The statement of what is due on a loss is generally first prepared by an average-stater. In the majority of cases that is acted on; but it is often questioned.

The amount of the loss is carried to the account immediately upon the adjustment, and not at the end of the month. Sometimes a considerable time elapses after the knowledge of a loss, before settlement. It is not usual to adjust a loss till the papers come home.

On re-examination, the witness stated that, at any time during the month after adjustment, the assured may intervene and give notice to the underwriter not [455] to pay the broker: that is sometimes done; then the underwriter must at the end of the month pay the principal in cash.

The average-statement is prepared by the broker or some other person acting for the assured. It is not the adjustment or settlement, but contains the particulars of the claim. The adjustment is the agreement of the underwriter to the percentage claimed, as shewn by initialing the memorandum indorsed on the policy. The striking off the name is more frequently done than not, but is no necessary part of the operation. The entry in the account between the broker and underwriter is made as of the date of the adjustment. It is not necessarily actually entered on the day of adjustment. That depends on how often the books are written up.

The witness, being recalled, stated, in answer to a question put to him by the Lord Chief Justice, that the premiums are generally put down to the debit of the assured in account between the broker and the assured, and that the amount of the settled loss is put in the same account to his credit, and only the balance of that account paid.

On the close of the examination of this witness, the plaintiff's counsel stated, with the exception of that part of it which related to the credit usually taken by the broker which he was not prepared to admit, the custom as between broker and underwriter stated by this witness was correct, and no further trouble need be taken to prove it.

The defendant then called several brokers who made policies at Lloyd's on a very extensive scale for many merchants and ship-owners, and other mercantile witnesses, who gave evidence that the custom was generally known to merchants and ship-owners in general, whether belonging to Lloyd's or not.

[456] In the course of this part of the case, some further explanations of the practice were elicited; and Mr. Natusch was re-called. The statements of the witness were, that the broker, if he paid his principal during the first month after the adjustment, required discount, and also a *del credere* commission for guaranteeing the solvency of the underwriter, or else a written promise to return the money if at the end of the month the underwriter did not pay the broker.

The defendant's counsel then proceeded to prove the facts as to this particular adjustment.

William Henry Hulbert proved that he was clerk of the defendant at the time of

the settlement, and that it was his department to underwrite and settle policies for the defendant. In 1857, there was an account kept between Charles Walton & Sons and the defendant, which the witness himself wrote up. [This account was produced and shewn to the witness.] The loss by the "Caroline" became known at Lloyd's on the 7th of September, 1857. At that date the account between Charles Walton & Sons and the defendant was good for considerably more than 50l. Afterwards the loss was adjusted by the witness himself. There was on the 20th of October, 1857, a settlement on account of 95l. per cent. indorsed on the policy. The witness then initialed it for the defendant. Afterwards, on the 26th of November, there was a final adjustment of 1l. 13s. 9d. per cent., which was also indorsed on the policy, and was initialed by the witness for the defendant. The witness himself entered both those sums in the defendant's account with Charles Walton & Sons, to the credit of the latter,—the one under the 19th of October, 1857, and the other under the 30th of November. The witness stated that the entry as of the 19th of October was either a clerical error or that the claim was considered as adjusted on [457] that day, though not so considered by the brokers till the next day. The account on the 5th of September, when the loss was known, was good for more than 50l. : and it continued good for more than that sum up to the end of the year. At the end of the year the balance was struck ; and, after giving the brokers credit for the loss on the "Caroline," it was in favor of the defendant. The fresh credit for premiums subsequent to the time of the final adjustment, and before the end of the year, exceeded 50l.

The witness further proved, that, in the previous year (1856), there had been a return of premium on the "Caroline," which was settled in the account between Charles Walton & Sons and the defendant in the same manner.

Nicholas Gibson gave evidence that he was clerk to Charles Walton & Sons, and that they kept an account with the defendant in the usual way as brokers. The witness himself effected the insurance on the "Caroline." The plaintiff had been for many years a client of the firm now represented by Charles Walton & Sons at least for nine or ten years, and sometimes gave instructions about insurance personally to the witness. The plaintiff himself twice went with witness to Lloyd's to inquire about the rate of the premiums ; and the witness believed the plaintiff did so on the occasion of effecting the present policy ; but the plaintiff was not there when the policies were actually underwritten. The premiums on this insurance were carried to the account between Charles Walton & Sons and the defendant. The loss on the "Caroline" became known on the 7th of September. The policy remained in Charles Walton & Sons' hands from the time it was made.

The plaintiff brought the papers to the office, to enable Charles Walton & Sons to adjust the loss. It was a total loss, with benefit of salvage. The witness [458] stated that he thought no average-statement was prepared at first. An amount was settled on account in the first instance. The whole amount settled was 96l. 13s. 9d. per cent. It was carried to account in Charles Walton & Sons' books as one sum under the date 20th of October ; but it was not actually entered in the books till after the final settlement on the 26th of November. The witness himself wrote out the settlements on the policy, and sent them round to be initialed.

On cross-examination, the witness stated, that the plaintiff, before the policy was effected, saw the defendant at Lloyd's, and negotiated with him about the amount of the premium ; that, from what then passed, the defendant must have known he was the party interested in the ship ; and that the 95l. per cent. was adjusted before the papers came home.

Charles Walton & Sons estopped payment on the 23rd of January, 1858.

The papers were brought to the office of Charles Walton & Sons after the settlement on account, and before the final settlement of the balance. The witness did not remember telling the plaintiff that 95l. per cent. had been settled on account, nor whether he was asked or not ; but, if he was asked, he certainly would have told him so. He did not recollect being asked by the plaintiff when the money would be due : but, if asked, he certainly should have answered "Due in three months from the settlement," for, that was always witness's answer. Was quite certain that he never said that the underwriters always took three months to pay, or anything to that effect. Had no recollection of plaintiff saying anything about it, or turning to Mr. Beech and saying "Did you ever hear of underwriters taking three months ?"

[459] A paper was then put in and read, in the following terms:—

"1857. Nov. 5. To settlement on account loss		
per 'Caroline,' 3000l. at 95 per cent.	£2,850	0 0
Less 1 per cent. for settling	28	10 0
	<hr/>	
Due 5th January, 1858	£2,821	10 0
"E. & O. E. 6th Nov. 1857.	"CHARLES WALTON & SONS."	

The witness said that he did not know why the date was 5th of November instead of 20th of October. Perhaps the policy had been kept back by some underwriter, and November 5th was the date of the last underwriter initialing: but, unless there was something of that sort, the witness could not account for it.

Some other evidence which in the result proved not material was given, and the defendant's case closed.

The plaintiff's counsel then and in support of his case called evidence of which the material facts were as follows:—

The plaintiff, George Waters Sweeting, gave evidence that he was a ship-builder at Rotherhithe, and was not a member of Lloyd's. In 1854 he became owner of the "Caroline." In 1857, he instructed Charles Walton & Sons to get her insured, and himself saw the defendant on that occasion, and told him that he was owner of the "Caroline." The witness heard of the loss early in September. He then went to Charles Walton & Sons' office, and there saw Walton himself. The policy was then with Walton. Witness always left his policies at Waltons' for safe custody. Had only had one loss before,—nine years ago. On that occasion old Mr. Walton received the money for him. Had had one return of premium on the ship "Caroline." That also Charles Walton & Sons received for him: but he [460] had given specific directions in those two cases to receive the money. In this case no directions to receive the money were given by the plaintiff. The plaintiff stated he avoided giving such directions, because he knew Walton & Sons' pecuniary position. Afterwards, on the 16th of November, witness got the ship's papers, and took them to Charles Walton & Sons. Witness was not aware that the money was due from the underwriters. The witness heard of the usage at Lloyd's four or five days after Waltons' stoppage. He learnt it from one of Waltons' clerks. He had never heard of the custom before. The witness stated, on the 7th of November he saw the witness Gibson, and asked him when the money would be due from the underwriters. Gibson answered, "In three months." Witness said, "Do underwriters take three months to pay after having settled?" and Gibson said, "Yes, it is the custom: they always take three months." Witness turned to Mr. Beech, a ship-owner, who came in, and told him what Gibson said. He said to Gibson, "Is it so?" Gibson said, "Yes; it is the custom," or words to that effect. Witness and Beech then went into Walton's private room and saw him. Witness repeated what Gibson had said; and Walton said, "Oh yes; it is the custom. You will have to wait three months." He then handed witness the credit note (previously read as part of the defendant's case). Witness stated that he made other applications to Charles Walton & Sons with a view to obtain the money from the underwriters, being in want of it: and that neither then nor at any time till after Charles Walton & Sons' bankruptcy was he aware that he could have got the money by applying to the underwriters.

That credit-note was delivered to him on the 7th of November, and was the first time witness heard of the adjustment on account. Witness knew nothing of the [461] amount being credited in account, or of the custom, till after the stoppage, about the end of January, when it was explained to him. Charles Walton & Sons were indebted to witness.

On cross-examination, the witness stated that he had owned several ships, which were all insured through Charles Walton & Sons.

The witness was then asked,—“When you first knew of the loss, what did you do to get paid?” He answered,—“I went to Mr. Walton, and related the circumstances to him. I did not demand the policy from him, because, if I had had it in my own possession, I should have delivered it to him to lay before the underwriters as soon as I could get the papers. I knew of no other course. Afterwards, on the 16th of November, when I got the papers, I took them to Mr. Walton, and requested they

might be sent immediately to an average-stater, which Mr. Walton told me was necessary, to make up the amount to claim from the underwriters, and which I believed to be necessary on all occasions. I gave no specific directions what was to be done with the statement when prepared. I afterwards asked to see it, and was told it was before the underwriters."

The witness was cross-examined as to other matters which are not material to the point now raised. He further stated that he knew that underwriters did not pay at once,—that they took some time,—a month or so: but did not know how long; and was surprised when told it was three months; that he employed Charles Walton & Sons to make the claim, and left the papers with them in order to have the loss adjusted, because he could not go into Lloyd's to do so himself, and thought he was bound to employ the broker who made the policy to do so: but that he did not understand that they were to collect the money [462] from the underwriters; and that he never authorized them to receive the money: that his belief then was that the underwriters would not pay it till due, and they would not even then pay it to the broker without a written authority from him, the assured.

Mr. Beech was next called, and stated that he was present at the interview between the plaintiff and Gibson and Walton on the 7th of November, and corroborated the plaintiff. He himself was a ship-owner residing in London, and was quite ignorant of all the usages.

Some other ship-owners, also resident in London, were called, who did not know of this usage.

It was then admitted that the first application on behalf of the plaintiff to the defendant was on the 3rd of February, after Charles Walton & Sons had stopped payment.

The Lord Chief Justice then inquired whether it was intended to take the opinion of the jury on the question whether the plaintiff himself had knowledge of the custom and usage.

After some discussion, it was admitted by the defendant's counsel that the plaintiff was ignorant of the usage in question, and that he did not intend Charles Walton & Sons to receive the money: and that he did not in fact leave the policy in the hands of Walton & Sons to enable them to receive the money, unless the legal effect of leaving the policy there was such.

Subject to these admissions,—the effect of which in point of law it was agreed was to be reserved to the court,—the cause went to the jury on the question whether the usage was generally known to merchants and ship-owners effecting insurances: and the jury found that it was.

The only material thing is the finding of the jury: summing-up has become wholly immaterial.

[463] The Lord Chief Justice then directed that the verdict should be entered for the plaintiff for the amount claimed, subject to leave to the defendant to move to enter the verdict for him on any or all the issues, leave being reserved to either side to amend the pleadings in any way that might be necessary to raise the real question.

James Wilde, Q. C., in Hilary Term last, accordingly obtained a rule nisi to enter a verdict for the defendant on the whole of such issues, or on such of the same as the court should direct, on the ground "that the evidence given at the trial proved the issues for the defendant." He referred to *Stewart v. Aberdeen*, 4 M. & W. 211, *Cuthbert v. Cumming*, 11 Exch. 405, *Graves v. Legg*, 11 Exch. 642, *Taylor v. Stray*, ante, vol. ii., pp. 175, 197, and *Story on Agency*, § 443.

Montague Smith, Q. C., and Honyman, in Trinity Term, shewed cause. It was incumbent on the defendant to shew that Walton & Sons had authority to receive from the underwriters the amount of the loss, and, further, that their authority extended to setting it off against a debt due from themselves to the underwriters. It is submitted, in the first place, that there was no evidence that they had authority to receive it at all. The policy was not left with them for that purpose, but merely for safe custody. [Cockburn, C. J. The plaintiff swore distinctly that he thought a further authority in writing would be necessary to enable Walton & Sons to receive the money. The real question is, whether the custom alleged in the third and fourth pleas is binding on all persons insuring at Lloyd's: whether they knew of its existence or not.] Generally speaking, an agent authorized or employed to receive money can only receive it in cash. [464] The result of the finding as to the usage is, that it

was generally, not universally, known. The course of practice between the broker and the underwriter is thus stated in 1 Arnould on Insurance, 2nd edit. p. 119:—“The insurance-broker opens a separate account with each separate underwriter with whom he effects policies for his different principals, and the underwriter opens a like account with the broker. In this account the broker credits the underwriter in his books for all premiums payable on the different policies subscribed by that particular underwriter (less his commission of 5 per cent. thereon), and debits him for all losses and returns of premium which may take place on any one of the policies so effected. The underwriter in like manner enters in his books all premiums payable to him, to the debit of the broker, and credits him for all losses that may become due. When a loss has occurred, and the percentage payable by the underwriters in respect of it is ascertained, an indorsement to that effect is made on the policy, which is frequently in the following form: ‘Adjusted £ per cent. on loss by the [*name of ship*], payable in a month.’ The policy thus indorsed is taken round to each of the underwriters, who signs his initials under such indorsement. This is called the adjustment of the policy. If upon this adjustment it be found, on examining the accounts, that the sum then due from the broker to the underwriter for premiums, on the general account between them, exceeds the sum due to [from] the underwriter for losses and returns of premium, the account is said to be in favor of the underwriter, who generally strikes his name off the policy at the time, and at the end of a month from the adjustment credits the broker in his books for the loss, and the broker on his side enters the loss to the debit of the underwriter. In this case no money whatever passes between the [465] broker and the underwriter; but the general account between them is carried on to the 31st of December in each year, when a balance is struck, which is either paid in money or carried on to the next year’s account. If, on the other hand, upon such adjustment, it appears that the whole amount of losses exceeds the whole amount of premiums which had become due to [from] the broker up to the date of the knowledge of such losses, the underwriter, at the expiration of one month from the adjustment (which time is allowed him as an indulgence), either pays the amount to the broker in cash, or carries it on to the credit side of the broker’s account, and at the same time strikes a pen through his subscription to the policy and his signature to the memorandum of adjustment. In either case, as between the broker and underwriter, the amount of the loss is considered as paid directly it is thus passed in account.” At p. 149, it is said: “Lord Ellenborough, in a case that came before him at Nisi Prius (*a*), and Lord Tenterden, in the two earliest case of the same kind that presented themselves for decision in the court of Queen’s Bench (*b*), seemed to consider that the authority given by the assured to the broker was only to receive losses from the underwriter in money; and that, therefore, nothing but actual cash payment by the underwriter to the broker, or a credit given to the underwriter by the assured himself, could estop the assured, in case of the broker’s insolvency, from recovering against the underwriter. Lord Tenterden, however, subsequently admitted (*c*), and the rule of law undoubtedly now is, that, if the assured, upon the whole facts of the case, can be shewn to have [466] been cognizant of the usage of settling losses in account, at the time he procured the insurance to be effected, he shall be bound by it; and the fact that a loss has been passed in account according to the usage between broker and underwriter, shall preclude him from recovering such loss from the latter, on the insolvency of the former:” for which are cited *Bartlett v. Pentland*, 10 B. & C. 760, *Scott v. Irving*, 1 B. & Ad. 605, and *Stewart v. Aberdeen*, 4 M. & W. 211. In *Gabry v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, one who was not found to have been in the habit of effecting policies at Lloyd’s, was held not to be bound by the usages of that place. The principle of the decision in these cases is said by Lord Tenterden, in *Bartlett v. Pentland*, 10 B. & C. 770, to be, that the usage of Lloyd’s as to settling losses in account being “the usage of a particular place, or of a particular set of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage, and adopt it.” [Cockburn, C. J. *Stewart v. Aberdeen*, 4 M. & W. 211, seems to go much beyond *Bartlett v. Pentland*.] There, there was

(a) *Jell v. Pratt*, 2 Stark. N. P. C. 67.

(b) *Todd v. Reid*, 4 B. & Ald. 210, and *Russell v. Bangley*, 4 B. & Ald. 395.

(c) In *Russell v. Bangley*, 4 B. & Ald. 398.

evidence that the plaintiff knew of the usage, and assented to the settlement on that footing. [Cockburn, C. J. In *Scott v. Irving*, 1 B. & Ad. 605, the assured was resident in Glasgow. Here, the plaintiff is a ship-owner in London: and there was evidence that the usage was generally known amongst merchants and ship-owners in London. If a man carries on business at a particular place, or in a particular market, is he not estopped from setting up his ignorance of the usages which prevail there?] The cases proceed on the ground of the presence or absence of knowledge. Lord Tenterden, in *Scott v. Irving*, 1 B. & Ad. 612, says: "The general rule is, that the broker is the debtor of the underwriter for the premiums, and the underwriter the debtor of the assured for the loss. If the usage [467] relied upon in this case were allowed to prevail, it would have the effect of making the broker, and not the underwriter, the debtor to the assured for the loss. Such a usage, however, can be binding only on those who are acquainted with it, and have consented to be bound by it. There may possibly be cases proved where an assured, being cognizant of such usage, may be supposed to have assented to it, and therefore may be bound. Here no such assent is shewn." This is not like the case of *Taylor v. Stray*, ante, vol. ii., p. 175, 197, where a broker employed to buy shares on the Stock Exchange was held to be impliedly authorized to deal according to the usages of that market. [Williams, J. In *Baillif v. Butterworth*, 1 Exch. 425, the court seem to take a distinction between the case of a contract for the purchase of shares and the case of insurance. There, the question arose upon the usage amongst brokers on the Liverpool Stock-Exchange: and Parke, B., says: "It is not now necessary to decide the point whether the defendant would be bound if he did not know of such a usage. It appears to me, however, that a person who authorizes another to contract for him, authorizes him to make that contract in the usual way. There are some cases which look the other way, which have not been noticed. There is the case of *Bartlett v. Penland*, 10 B. & C. 760: that, however, was not with respect to the usage of the Stock Exchange, but of insurance-brokers: and it was there held that the custom which prevailed at Lloyd's Coffee House was not binding on a party who was not shewn to be cognizant of it, or to have assented to it. That, however, is a different question from the present, which is one of contract. In the case of a contract which a person orders another to make for him, he is bound by that contract if it is made in the usual way. There is another case, of [468] *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, which was an action on a policy of insurance. It was found in the special verdict, that a certain usage with respect to such policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee-House, and that the policy in question was effected there: but it was not found that the plaintiff was in the habit of effecting policies at that place. The court held that this usage was not sufficient to bind the plaintiff. But that case differs from the present, the question here being as to the authority which the plaintiff received. I have said this in order to shew my concurrence in the opinions expressed by Lord Denman and Mr. Justice Littledale in the case of *Sutton v. Tatham*, 10 Ad. & E. 27 (a), although it is not necessary to determine the same point here, as there was sufficient evidence to shew that the defendant knew the usage of the Stock Exchange at Liverpool, if it were requisite to prove it in order to make him liable." I must own I do not quite appreciate the distinction.] *Greaves v. Legg*, 11 Exch. 642, is more in favor of the defendant's view. There, the defendant, a London merchant, employed a broker at Liverpool to purchase some wool: the broker negotiated a sale by the plaintiff to the defendant of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for the plaintiff and defendant. By the custom of Liverpool, [469] where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee. It was held that the defendant was bound by such usage, and therefore that a notice by the plaintiff (the vendor) to the broker of the names of the vessels in which the wools were shipped was a per-

(a) Lord Denman, in that case says,—“I think a person employing one who is notoriously a broker, must be taken to authorize his acting in obedience to the rules of the Stock Exchange.” And Littledale, J., says,—“A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he is himself acquainted with the rules by which brokers are governed.”

formance of that stipulation, although the broker omitted to communicate them to the vendee. But that also was a case of contract. [Byles, J. Did it appear that the defendants were aware of the usage there?] No. [Cockburn, C. J. The case proceeded on the principle that a man is bound to know the usages of the markets in which he deals. Williams, J., referred to *Milward v. Hibbert*, 3 Q. B. 120, 2 Gale & D. 142.] In *Kirchner v. Finnis*, 12 Moore's P. C. Cas. 361, 399, Lord Kingsdown, in giving the judgment of the judicial committee of the Privy Council, says: "The ground upon which it appears to us that this case must be decided in favor of the appellants, is this, that, when evidence of the usage of a particular place is admitted to add to or in any manner to affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it." [Williams, J. Those learned persons express their disapprobation of a decision of this court, *Gilkison v. Middleton*, ante, vol. ii., p. 134. The case, however, does not involve quite the same principle as the present. It does not follow that one who employs an insurance-broker does not invest him with authority to act as brokers usually act.] The usage relied on here is not applicable to all policies made in London, but is limited to a particular [470] class of underwriters, viz. those belonging to Lloyd's. The mere possession of the policy by Walton & Sons did not authorize them to receive the amount of the loss: *Wilkinson v. Cundlish*, 5 Exch. 91. At all events, they could only have authority to receive the money, not to set off the amount against a debt of their own. [Williams, J. I observe that Maule, J., in the course of the argument in *Bayley v. Wilkins*, 7 C. B. 886, 892, says, "*Scott v. Irving*, 1 B. & Ad. 605, is the last of a series of cases, beginning with *Russell v. Baughey*, 4 B. & Ald. 395, which went upon the ground of the unreasonableness of paying the debt of one with the money of another, as was said by the court in *Todd v. Reid*, 4 B. & Ald. 210." And Wilde, C. J., in the same case, says, "I feel some difficulty in saying that a man who buys shares buys subject to the rules of the Stock Exchange, of which he may not be cognizant. And there is this further difficulty, that those rules are framed by, and are to receive their construction from, a body that is totally independent of the rules of law, and irresponsible." Byles, J. The inference drawn by the learned author of Smith's Mercantile Law from the case of *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 611, was this, "The usage of Lloyd's, being *prima facie* only the usage of a single house, will not be binding upon one who cannot be shewn to be acquainted with it." 5th edit. p. 334.] In *Stewart v. Aberdeen*, 4 M. & W. 211, it was assumed that the plaintiff was cognizant of the custom. The authority of that case seems to have been very much questioned in America: see 1 Arnould on Insurance, 154, citing Duer on Marine Insurance, vol. ii., pp. 260, 261. In *Partridge v. The Bank of England*, 9 Q. B. 396, the Exchequer Chamber recognize the distinction here contended for. Tindal, C. J., in delivering the judgment of the court, there says, "It is not necessary to inquire what the effect of a general im[471]-memorial custom in a particular place might be, as this usage is not so pleaded, but is described as an usage and custom of bankers and merchants used and approved of for divers, to wit, sixty years, according to which dividend warrants pass by delivery without indorsement, and the bona holder thereof is entitled to receive the amount from the defendants: which is rather a practice of trade than a custom properly so called: and such a practice cannot alter the law, by which such an instrument does not confer any right of action on an assignee. It by no means follows from this opinion that mercantile usage, or the practice of particular trades or places, is inoperative. Such usage and practice may have, and often has, an important operation between parties who contract with the knowledge of its existence, and with reference to it. See the case of *Stewart v. Aberdeen*, and also that of *Bartlett v. Penland*: in the first of which a practice of brokers and underwriters to settle losses by set-off on [in] account was held binding on a principal who knew of and acquiesced in the practice: and in the second of which a similar practice was held not to be binding on a principal who was not shewn to be cognizant of and to have assented to it." [Byles, J. That is an expression of opinion by the Exchequer Chamber, in the year 1816, upon the very practice now in question. They hold that it is not binding unless the party is positively proved to have known it.] Precisely so. Thus, besides *Todd v. Reid*,

4 B. & Ald. 210, there are no less than five cases, viz. *Bartlett v. Pentland*, 10 B. & C. 760, *Scott v. Irving*, 1 B. & Ad. 605, *Sutton v. Tatham*, 10 Ad. & E. 27, 2 P. & D. 308, *Partridge v. The Bank of England*, 9 Q. B. 396, and *Bayliffe v. Butterworth*, 1 Exch. 425, which have decided that the practice or usage in question binds only those who are shewn to be cognizant of it, and therefore may [472] be presumed to have contracted with reference to it, — all of which this court must overrule before it can make this rule absolute.

James Wilde, Q. C., and Blackburn, in support of the rule. What is the custom here relied on? The merchant or ship-owner usually effects an insurance through a broker. The subscribers to Lloyd's transact their business, like the members of the Stock Exchange, in a sort of club-house. The premium is not at once paid by the assured, nor by the broker: the assured gets credit from the broker, and the latter gets credit from the underwriter, with whom he has an open account. On the happening of a loss, an adjustment takes place in the manner described in 1 Arnould on Insurance, p. 119. In a subsequent part of the same volume, p. 196, the learned author, treating of the rights, duties, and liabilities of insurance agents, says,—"Generally, the agent entrusted with the policy after its execution is the substitute of the assured in all the relations of the latter with the underwriters, and has cast upon him the duty of enforcing the rights and protecting the interests of his principal in all matters arising out of the contract of insurance. Thus, according to the varying circumstances that may arise, he must, where the assured is entitled to it, demand from the underwriters a return of the premium: where a loss has occurred, he must prepare and submit the proof thereof, and settle and adjust the amount, and at the proper time collect and receive the various sums from the underwriters, and pay them over to his principals." In *Russell v. Bangley*, 4 B. & Ald. 395, where the policy had been put into the hands of the broker, as here, for adjustment of a loss, Bayley, J., says,—“When Russell (the assured) left the policy in the hands of Savery (the broker), he made [473] him his agent to receive the money from the underwriter.” And Holroyd, J., says,—“The delivery of the policy to the broker to settle the loss authorizes him to receive the money due to the assured on the policy. If he had received the money, and afterwards failed, the assured could not have called on the underwriter again, because he would then have paid the money to an agent duly authorized to receive it” (a). *Bousfield v. Creswell*, 2 Campb. 545, is a still stronger authority as to the duty of the broker to procure a settlement of the loss from the underwriter. Having dealt with Walton & Sons upon the faith of their being entitled to settle the loss, the defendant has continued to give them credit for further premiums, which but for this settlement he might not have been inclined to do: and so his position has been altered to his prejudice through the conduct of the plaintiff, and the case is brought within the rule laid down in *Pickard v. Sears*, 6 Ad. & E. 469, 2 N. & P. 488, and *Freeman v. Cooke*, 2 Exch. 654. The judgment of the Exchequer Chamber in *Graves v. Legg*, 2 Hurlst. & N. 210, is conclusive to shew that one who employs an agent to make a contract in a particular market, must be taken to authorize him to make it subject to all the incidents of a contract entered into in that market. There was no evidence there that the party who was held to be affected by the custom had ever heard of it. *Cuthbert v. Cumming*, 10 Exch. 809, in error 11 Exch. 405, and *Stray v. Russell*, 28 Law J., Q. B. 279, in error 29 Law J., Q. B. 115, are further instances of the application of this doctrine. [Byles, J., referred to *Clayton v. Gregson*, 5 Ad. & E. 302, 6 N. & M. 694, [474] and also to *Sykes v. Giles*, 5 M. & W. 645.] The counsel for the defendant, in shewing cause against the rule in *Stewart v. Aberdeen*, 4 M. & W. 219, speaking of *Todd v. Roul*, says,—“The court disposed of the case by saying, ‘This is in fact an attempt to pay the debt of one person with the money of another.’ It is difficult to see how such a conclusion could be applied to such a case. An insurance-broker owes money to the underwriter, and the underwriter to the assured,—is there anything unlawful in an agreement amongst them that the assured shall receive his money from the broker, and take him for his debtor, and that the debt of the broker to the underwriter, and of the latter to the assured, shall both be discharged? It is not like the case where a servant is specifically employed

(a) “But,” proceeds the learned judge, “the delivery of the policy to the broker to obtain payment does not authorize him to settle the loss in any other way than by receiving the money.

to fetch money for his master in specie: this is the case of the employment of an agent, whose creditor, by the very nature of the business in which he is employed, the assured is to become. The strict rule laid down in *Todd v. Reid* is no more applicable to the case of an insurance-broker than to that of a banker. When once the broker makes himself conclusively the debtor of the assured, whether by receipt in cash from the underwriters, or by settlement with them in account, that is all the assured has to require." Lord Abinger then interposes with this remark,—"Suppose two merchants have a running account, and one of them desires to increase his credit, and authorizes the other to receive money for him,—does not that mean, to carry it to the account, unless the party specifically directs the contrary? Is it not a question of fact, what the principal means the agent to do?" The counsel then proceed to distinguish *Todd v. Reid* upon the ground urged to-day. And, in delivering the judgment, Lord Abinger says,—“The court is of opinion, that, where an insurance-broker, or other [475] mercantile agent, has been employed to receive money for another in the general course of his business, and where the known general course of business is for the agent to keep a running account with his principal, and to credit him with sums which he may have received by credits in account with the debtors with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that, where an account is bonâ fide settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal.” In *Story on Agency*, § 443, it is said that “the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority. It extends farther, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or is held out to the public, or to the other party, as having competent authority, although in fact he has in the particular instance exceeded or violated his instructions, and acted without authority. For, in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by holding out the agent as competent to act, and as enjoying his confidence.” Again, in § 84, it is said,—“By far the most numerous cases of agency arise, not from formal or informal written instruments, but from verbal authorizations, or from implications from the particular business or employment of the principal or agent, or from the usual dealings between them, or from the general usages of trade and commerce.” “In all such cases (§ 85), whether the agency be of a special nature, or of a general nature, it may also be [476] laid down as a universal principle that it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency.” “So (§ 93), if a person should authorize another to assume the apparent ownership or right of disposing of property in the ordinary course of trade, it will be presumed that the apparent authority is the real authority: for, in such a case, strangers can look only to the acts of the parties, and to the external indicia of property, and ought not to be affected by any mere private communications which pass between the principal and the agent,” *Pickering v. Busk*, 15 East, 38. In § 98 the learned author says,—“In some cases, the nature and extent of the incidental authority turn upon very nice considerations, either of actual usage or of implications of law. Thus, an agent employed to make or negotiate or conclude a contract, is not as a matter of course to be treated as having an incidental authority to receive payments which may become due under such contract. An agent authorized to take a bond, is not to be deemed as of course entitled to receive payment of the money due under that bond. But, if he is entrusted with the continued possession of that bond, an implication of such authority may be deduced from that fact, in connection with the other. So, an agent authorized to receive payment, has not an unlimited authority to receive it in any mode which he may choose: but he is ordinarily deemed intrusted with the power to receive it in money only. So, an agent intrusted to receive payment of a negotiable or other instrument, is ordinarily deemed entitled to receive it only when and after it becomes due, and not before it becomes due. But, if there be a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, [477] extending the ordinary reach of the authority, that may well be held to give full validity to the act.” Again, in § 103, it is said that “an agent to insure has, if

the policy remains in his hands, an incidental authority to receive payment of losses thereon." And see to the same effect, §§ 109, 191. It is clear, therefore, that the circumstance of the policy being left in the hands of Walton & Sons imposed on them a duty to receive this money; and that the assured would be bound by any known usage of trade as to the mode of payment. In Taylor on Evidence, 3rd edit. 165, § 148, it is said: "It may be laid down as clear law, that, if a man deals in a particular market, he will be taken to act according to the custom of that market: and, if he directs another to make a contract at a particular place, he will be presumed to intend that the contract should be made according to the usage of that place (*a*). Thus, if a person employs a broker on the Stock-Exchange, he impliedly authorizes him to act in accordance with the rules there established: and in such case it matters not whether the principal be himself acquainted with the rules by which such brokers are governed (*b*). Whether this doctrine would be held to apply in its full force to cases of maritime insurance, may admit of some doubt, as authorities (*c*) are not wanting which, in the language of Lord Wensleydale, 'look the other way' " (*d*). In *Russell v. [478] Bangley*, 4 B. & Ald. 395, Abbott, C. J., seemed inclined to give effect to the usage here relied on. In *Bartlett v. Pontland*, 10 B. & C. 760, the insurance was effected with an Irish insurance company, who had an agency in Lombard Street. [Williams, J. That case, as well as *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, established that the usage at Lloyd's is not a general usage: it is not a usage of underwriters generally.] In *Bartlett v. Pontland*, the assured lived at Plymouth: he was not shewn to have ever had any dealing at Lloyd's. Here, the assured is a shipowner in London. Lord Tenterden in that case says: "The usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage, and adopt it. Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it." The presumption meant there was a presumption of law. The defendant was seeking to invoke a usage of Lloyd's when he himself was wholly unconnected with that establishment. Parke, B., alludes to this in his judgment in *Bayliffe v. Butterworth*, 1 Exch. 428. In *Scott v. Irving*, 1 B. & Ad. 605, the underwriter was not prejudiced by the conduct of the assured: here, he is. The conclusion the court of Exchequer came to in *Stewart v. Aberdeen*, 4 M. & W. 211, expressly overrules the principle laid down in *Todd v. Reid*, 4 B. & Ald. 210, as applicable to underwriters. [Byles, J. Where the usage is known to the plaintiff, as appears from the context.] The language is general. The Lord Chief Baron says,—"The court is of opinion, that, where an insurance-broker or other mercantile agent has been employed to receive money for another in the general course of his business, and where the known general course of business,"—that is, the [479] course of business generally known,—“is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that, where an account is bonâ fide settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention and with the authority of the principal.” [Cockburn, C. J. How do you get over the case of *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, which seems to be a direct authority?] That was a question of construction of the contract, between which and the case of an authority given to an agent to deal in a particular market there is a manifest difference. You cannot override the express terms of a written contract by superadding the usage of a particular place. [Cockburn, C. J. It was there sought to construe the contract by the usage at Lloyd's; but the court

(*a*) Citing *Bayliffe v. Butterworth*, 1 Exch. 425, 429 (per Alderson, B.), 5 Railw. Cas. 288, *Pollock v. Stables*, 12 Q. B. 765, 5 Railw. Cas. 352, *Greaves v. Legg*, 11 Exch. 642, in error, 2 Hurlst. & N. 210.

(*b*) *Sutton v. Tatham*, 10 Ad. & E. 27, 2 P. & D. 308, *Bayliffe v. Butterworth*, 1 Exch. 426, *Pollock v. Stables*, 12 Q. B. 765, *Bayley v. Wilkins*, 7 C. B. 886, *Taylor v. Stray*, 2 C. B. (N. S.) 175.

(*c*) *Bartlett v. Pontland*, 10 B. & C. 760, *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641.

(*d*) *Bayliffe v. Butterworth*, 1 Exch. 428.

said that was only the usage of a particular place, and that, unless it were shewn that the plaintiff had knowledge of the usage, he would not be affected by it."] The true principle, to be deduced from all the cases, is, that, if the usage be general, the party is presumed to know it, but that, if it be a particular or a local usage, his knowledge of it must be shewn by evidence. In construing a contract, you have to ascertain the intention of the parties: but, in the case of an authority, the principal is bound by his act of employing a person whose known course of business is such as to give him authority to do what he does. The business transacted upon the Stock-Exchange is not of more large and general interest and importance than that which is transacted at Lloyd's. [Byles, J. The [480] Stock-Exchange is the only market for the purchase and sale of government securities. Cockburn, C. J. An insurance-broker does not confine his dealings exclusively to Lloyd's.] No: but every insurance-broker deals at Lloyd's. The circumstance that Walton & Sons were allowed to make the policy in their own names is not unimportant: *Koster v. Eason*, 2 M. & Selw. 112, cited in 1 Arnould on Insurance, 133.

COCKBURN, C. J. I am of opinion that the rule in this case should be discharged. I quite concur in the first point contended for by the defendant's counsel, that, the policy remaining in the hands of the brokers, the plaintiff is estopped from saying that it was not in their hands with authority to collect. Then arises the question whether this is to be interpreted according to the general rule of law, as an authority to collect by the receipt of the money, or whether the usage at Lloyd's that the collection may be made by setting off the loss on the policy against a debt due from the brokers to the underwriter is to control the rule of law. It is not disputed that, in general, an agent with authority to receive must be taken to have authority to receive in cash only, and not by means of a set-off of his own debt against the debt due to his principal. The question, therefore, in the present case is, whether the rule of law can be controlled by the usage at Lloyd's; and, as to that, I am of opinion that we are bound by positive authority. *Scott v. Irving*, 1 B. & Ad. 605, is a decision directly in point. There, the same question as to usage arose as in the present case, and the court held that the claim was not answered by a defence substantially the same as that here set up. Lord Tenterden says: "The general rule is, that a broker is the debtor of the underwriter for the premiums, and the underwriter the debtor of the assured [481] for the loss. If the usage relied upon in this case were allowed to prevail, it would have the effect of making the broker, and not the underwriter, the debtor to the assured for the loss. Such usage, however, can be binding only on those who are acquainted with it, and have consented to be bound by it." The language of Parke, J., is equally clear. "The authority of the broker" he says, "is *prima facie* to receive payment in money. Mitchell, therefore, was the agent of the assured to receive payment from the underwriter in cash, or that which was equivalent to payment in cash. A special authority may be given by the assured to the broker to receive payment in some other mode, and such authority may be inferred from facts or from some usage to which the assured has assented: and here there is some evidence of a usage prevailing between the broker and the underwriter; but the plaintiff was not cognizant of that usage, for, he states in one of his letters that this was the first total loss he ever had experienced." The decision of the court of Queen's Bench, therefore, in that case was, that, in the absence of knowledge of such usage, the right of the assured to recover from the underwriter must prevail. Now, in the present case, it is not left as a matter of inference that the assured had not knowledge of any such usage; but there is positive proof that he was not cognizant of it: so that the case is brought precisely and pointedly within the principle of *Scott v. Irving*. It has, however, been contended by Mr. Wilde, for the defendant, that the case of *Scott v. Irving* is virtually overruled by *Stewart v. Aberdeen*, 4 M. & W. 211. But, when the case of *Stewart v. Aberdeen* is looked at, it will be found that, although the court held that there was evidence there of a usage prevailing amongst brokers and underwriters to make settlements in account by taking credits as payments, [482] and that, where a settlement had taken place according to that known usage, the underwriter was discharged; still it was there assumed that such usage was known and assented to by the assured. It is true that the evidence of his having had such knowledge was unsatisfactory: nevertheless, the court could not have arrived at the result they did without coming to the conclusion that the assured had knowledge of the custom. I cannot, therefore, consider the case of *Stewart v. Aberdeen* as overruling *Scott v. Irving*:

but, on the contrary, it rather seems to me to confirm it. That being so, *Scott v. Irving* stands as an authority which is not overruled, and we are bound by it. The duty of setting it right, if it be a wrong decision, must be left to a court of error.

WILLIAMS, J. I am entirely of the same opinion. I am not inclined to dispute the proposition, that, when a broker is employed to buy in a particular market, he is authorized to buy according to the usage of that market. That proposition was confirmed by the decision of the Exchequer Chamber in *Graves v. Legg*, 2 Hurlst. & N. 210. That rule is not confined to the case of purchasing, but applies to an authority generally to deal in the market. Then, the question arises, is Lloyd's a market within that rule? As to that, the case of *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, is a distinct authority that the usage at Lloyd's is not such a general usage as to bind a person unacquainted with its existence. But it is said that, in *Gabay v. Lloyd*, the question was as to the construction of a contract, and not as to the authority given to the broker: and certainly it does appear that a distinction to that effect was taken by Lord Wensleydale in *Bayliffe v. Butterworth*, 1 Exch. 425, 428; but I do not understand how it can be reconciled with previous authorities. In the present case, however, I think we are precluded from deciding differently by the case of *Scott v. Irving*, 1 B. & Ad. 605, which is, as to this particular usage, precisely in point: and I do not see how the defendant can get out of it. But it is contended on his behalf, that here, after the settlement with Walton & Sons, the defendant had given fresh credit for premiums. That is rather matter of hardship; but it is not a matter which constituted any part of the view the court took in *Scott v. Irving*. What the court said in that case was, in effect, that, if, after the assured had knowledge of the usage, he acquiesced in it, he would be bound,—Lord Tenterden saying that, if, after such knowledge, the relative situation of the underwriter and broker had been changed, as if the underwriter, on the supposition that the loss had been paid by the allowance in account, had given the broker fresh credit for other premiums, he probably would have come to a different conclusion from that which he did in that case. In Arnould on Insurance, 2nd edit. p. 149, it is said: "Lord Ellenborough, in a case that came before him at Nisi Prius, and Lord Tenterden, in the two earliest cases of the same kind that presented themselves for decision in the court of King's Bench, seemed to consider that the authority given by the assured to the broker was only to receive losses from the underwriter in money; and that, therefore, nothing but actual cash payment by the underwriter to the broker, or a credit given to the underwriter by the assured himself, could estop the assured, in case of the broker's insolvency, from recovering against the underwriter." But the learned author adds,—“Lord Tenterden, however, subsequently admitted, and the rule of law undoubtedly now is, that, if the assured, upon the whole facts of the case, can be shewn to have been cognizant of the usage of settling [484] losses in account, at the time he procured the insurance to be effected, he shall be bound by it: and the fact that a loss has been passed in account according to the usage between broker and underwriter, shall preclude him from recovering such loss from the latter on the insolvency of the former. The question, then, as to the right of the assured to recover from the underwriter in these cases, is now reduced to a pure question of evidence, and depends solely upon the point whether the assured, upon the whole facts, must not be taken to have been cognizant of the custom.” That is the view taken by the pleader who drew the pleas in this case: for, they are not founded on a general custom, but on the usage at Lloyd's; and the third and fourth pleas aver that the plaintiff had notice of the usage. When a case is established of a usage at a place, generally known to all persons conversant with business there, it is very cogent evidence that such persons had notice of the usage: still, it is only a question of degree: and the whole matter would have to be left to the jury. Here, the pleas have failed, because the jury could not, on the evidence, find that the plaintiff had knowledge of the usage set up.

WILLES, J. I am of the same opinion. As a general rule, when a person employs an agent to receive a debt, the agent must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent. The rule is to be found laid down by Alderson, B., in *Barker v. Greenwood*, 2 Y. & C. 414. In the present case, it is said that such a mode of payment is allowed by the usage of the place where the settlement is made. But I apprehend that that is not sufficient to make the transaction valid, unless there has been previous notice to the creditor of such usage. Therefore, according to the authorities which have been referred to,

[485] I am of opinion that the defendant is in the wrong, and that the verdict which has been entered for the plaintiff is right.

BYLES, J. I entirely accede to the proposition, that, when Walton & Sons were entrusted with the policy, they were entitled to receive the money under it from the defendant. The policy was the title-deed, which they had no authority to hand over to the defendant without receiving payment. On that point, I agree with the view taken by the defendant's counsel. But, on the other hand, I think the plaintiff gave Walton & Sons no authority to settle the loss in the way they did. It is not disputed that the general rule of law is, that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal: but, if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over: at all events, it would very much diminish the chance of the principal ever receiving it; and, upon that principle, it has been held that the agent, as a general rule, cannot receive payment in anything else but cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money. Then, what is the usage relied on to take this case out of that general rule? It is not the usage of London, but the practice of keeping accounts adopted at a particular place. It does not fall within the description of a general custom or usage, but it is only the usage at a particular place,—of a particular counting-house, I may say. Independently, therefore, of any authority upon the subject, I should have thought it would have been necessary to have brought knowledge of such usage home to the plaintiff before he could have been affected [486] by it. In addition to the authorities which have been cited, I may observe that Mr. Smith, in his work on *Mercantile Law*, 6th edit. p. 347 says,—"The usage of Lloyd's, being *prima facie* only the usage of a single house, will not be binding upon one who cannot be shewn to be acquainted with it." Then there have been three cases at least (*a*) in which it has been held that the principal is not affected unless he be shewn to have been cognizant of the usage. Upon principle, therefore, as well as upon authority, I think that the brokers in the present case had authority from the plaintiff to receive the loss only in cash. It was urged by Mr. Wilde in the course of his argument, that there was here an apparent authority for the brokers to receive a settlement in the way they did. That apparent authority, however, must be derived from the principal: and it still brings it back to the question whether the latter ever knew, or was blameable for not knowing, the usage. Upon principle and authority equally, I think this rule ought to be discharged.

Rule discharged.

[487] HEMMING v. HALE AND ANOTHER. Nov. 9th, 1859.

[S. C. 29 L. J. C. P. 137; 6 Jur. N. S. 554; 8 W. R. 16.]

An attorney having obtained judgment against B., at the suit of A., employed W., another attorney, to sue out execution. W. accordingly sued out a *ca. sa.* against B., under which he was taken in execution. B. prevailed upon the sheriff's officer to discharge him, upon his paying him the debt and costs, 45l. 2s. One F., a clerk of W. (with, as the jury found, W.'s concurrence), received 20l. of the money from the officer.—In an action against the sheriff for the voluntary escape, the defendant paid 25l. 5s. into court, and pleaded payment of the 20l.:—Held, Byles, J., dissentiente,—that the payment to F. being a payment to W., the defendant was entitled to a verdict,—the plaintiff having sustained no damages by reason of the escape, beyond the sum to be paid into court.

This was an action against the sheriff of Middlesex, for an escape.

The first count of the declaration stated that the plaintiff, in the court of Queen's Bench, by the judgment of the said court, recovered against one Thompson a certain sum of 56l. 8s. 6d., and for having execution sued and prosecuted out of the said court a certain writ of our lady the Queen called a *capias ad satisfaciendum* upon the said judgment against Thompson, directed to the sheriff of Middlesex, by which said writ

(*a*) *Todd v. Reid*, 4 B. & Ald. 210, *Scott v. Irving*, 1 B. & A. 605, and *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641.

our said lady the Queen commanded the said sheriff that he should take the said Thompson, if he should be found in his bailiwick, and him safely keep so that the said sheriff might have his body before our said lady the Queen at Westminster immediately after the execution thereof, to satisfy the plaintiff the sum aforesaid; which said writ was, before the delivery thereof to the said sheriff to be executed, indorsed with a direction as follows,—"Take to satisfy 43l. 11s. 10d. and interest thereon at 4l. per cent. per annum from the 25th of September, 1858, until payment, besides officer's fees and other legal expenses, and 1l. 10s. for costs of execution," &c.; and which said writ so indorsed as aforesaid was delivered to the now defendants, who were and still are sheriffs of Middlesex, and who by virtue of such writ took and arrested the said Thompson by his body, and detained him in custody in execution for the said sum and interest so indorsed on the said writ, and 1l. 10s. for costs of execution, and kept and detained him in such cus-[488]-tody until afterwards and before the commencement of this suit the defendants, so being such sheriff, without the leave or licence and against the will of the plaintiff, permitted the said Thompson to escape and go at large wheresoever he would out of the custody of the now defendants, whereby the plaintiff lost and had been deprived of his aforesaid sum and interest and 1l. 10s. costs of execution so indorsed on the said writ of execution as aforesaid, and was otherwise injured, &c.

There was also a count for money received by the defendants to the use of the plaintiff.

The defendants pleaded,—first, except as to 20l., payment into court of 25l. 5s.,—secondly, as to 20l., payment before action.

The plaintiff took issue on the second plea, and, as to the first, replied damages ultra.

The cause was tried before Crowder, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows: The plaintiff had employed one Robertson as his attorney to sue one Thompson. Having obtained judgment against Thompson, but not being desirous of issuing execution in his own name, Robertson got another attorney named Winter to do so, and Winter, on the 28th of September, 1858, sent the writ by the hand of one Fox, his clerk, to one Willis, an officer of the defendants, indorsed to satisfy 43l. 11s. 10d. and interest, and 1l. 10s. for costs of execution. The writ was not executed until the 26th of October, on which day Thompson was taken to Willis's lock-up house. Throughout the proceedings Fox was the only person with whom Willis had any communication upon the subject of the execution. Thompson remained in custody until the 29th of October, his attorney in the meantime making unavailing efforts to find either the plaintiff or Winter [489] for the purpose of paying the debt and costs. Under these circumstances, Thompson being extremely ill, Willis, the officer, consented to receive the debt and costs, amounting to 45l. 2s., and to discharge Thompson.

On the following day, viz. the 30th of October, Fox called at Willis's office: and, finding that the money had been paid, asked Willis to hand it to him. This Willis declined to do without Winter's receipt; but ultimately, upon Fox's representation that Winter was out, and that the plaintiff was in want of the money, Willis paid Fox 20l. on account, with which the latter absconded.

Winter a few days afterwards called at the office of Willis, and demanded the whole proceeds of the execution, repudiating Fox's authority to receive any part of it.

On the 10th of November the sheriffs were ruled to return the writ, whereupon they returned that they had arrested Thompson, who had paid the sum indorsed on the writ, that they had paid 20l. to the plaintiff, and held the balance ready to hand over to him. The plaintiff thereupon sued the sheriffs for the escape.

The learned judge left it to the jury to say, —first, whether the plaintiff authorized Robinson, and Robinson authorized Winter, to receive the debt and costs,—secondly, whether Fox was authorized either by Robinson or Winter to receive the 20l. As to the first question, he observed that there could be little doubt that Winter was duly authorized to get the money, and that a payment to him would be a payment to the plaintiff; and, as to the second, that, although the mere fact of Fox being Winter's clerk would not confer upon him authority to receive the money from the sheriff, it would be for them to say whether Fox had authority [490] expressly conferred on him for that purpose, or whether his act had been subsequently ratified by Winter.

The jury found that the plaintiff authorized Winter to receive the money, and that Winter authorized Fox. A verdict was thereupon entered for the defendants.

Griffiths, in Easter Term last, obtained a rule nisi for a new trial on the ground of misdirection and that the verdict was against evidence. He submitted that the officer was not authorized to receive the money, and that the discharge of the debtor was in point of law an escape,—*Connop v. Challis*, 2 Exch. 484; *Woods v. Finnis*, 7 Exch. 363; that the authority of the attorney on the record was limited to the receipt of the debt and costs from the debtor, and did not warrant him in accepting from the sheriff satisfaction for the escape; and that, even assuming that Winter had authority to receive the money, he had no power to delegate that authority to another.

Hawkins, Q. C., and Quain, shewed cause. That there was an escape, cannot be denied: the only question is whether the plaintiff has thereby sustained any damage beyond the sum paid into court: and that depends upon whether the payment to Fox was an authorized payment. That was a question of fact, which is disposed of by the finding of the jury. That the attorney who has the conduct of the suit may receive the money is clear from the cases of *Savory v. Chapman*, 11 Ad. & E. 829, 3 P. & D. 604, and *Connop v. Challis*, 2 Exch. 484. [Byles, J. Yes, from the debtor. But, may he receive it from the sheriff after the escape of the debtor?] If he might receive it from the party, there can be no reason why he should not receive it from the officer. If the whole amount of the levy has reached the hands of the plaintiff, or those of an [491] authorized agent of the plaintiff, there is an end of the question. Now, a payment to Winter, the attorney entrusted with the issuing of the execution, would clearly be a good payment: and Fox being authorized (as the jury have found) by Winter to receive the money for him, the sum paid to Fox has in truth been paid to Winter. Formerly, the sheriff was liable to an action of debt for an escape, as well as to an action upon the case: but now, by the 31st section of the 5 & 6 Vict. c. 98, it is enacted, "that, if any debtor in execution shall escape out of legal custody after the passing of this act, the sheriff, bailiff, or other person having the custody of such debtor shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape:" see *Regina v. The Sheriff of Leicestershire*, 11 C. B. 367; *Arden v. Goodacre*, 11 C. B. 371. It was competent to the attorney to give an order for the discharge of the debtor: 15 & 16 Vict. c. 76, s. 126. It may be conceded that Winter had no authority to receive money in satisfaction of the plaintiff's claim in an action against the sheriff for the escape. But, the 20l paid to Fox was a payment in the original action. Suppose, after the escape, Thompson, the debtor, had met Winter, and had paid him the amount of the debt and costs, would not that have been a good payment? If so, might not Willis, the officer, be the agent of the debtor to pay the money? [Byles, J. The sheriff's may receive the debt and cost on a fi. fa., but not on a ca. sa.: *Woods v. Finnis*, 7 Exch. 363.] That is conceded. [Byles, J. The sheriff cannot retake the debtor after a voluntary escape: Arch. Pr. 10th edit. 662.] No: but the plaintiff may. [Erle, C. J. No doubt the plaintiff can take him again, certainly [492] in another county: and, my Brother Williams thinks, in the same county also.] The distinction is between the plaintiff and the sheriff. [Byles, J. In the note in the margin of the case of *Allanson v. Butler*, 1 Sid. 330, it is said, that, upon a negligent escape, the sheriff or the party may re-take the debtor, but that, if the escape is voluntary, the party only can retake him. Williams, J. The sheriff cannot purge his wrongful act by a recapture.] The only question here is, whether a payment to Fox, who was acting in the matter of the execution as Winter's clerk, was not equivalent to a payment to Winter himself. It is submitted that it was, and consequently that the finding of the jury conclusively negatives the plaintiff's right to recover in this action beyond the amount paid into court.

Griffiths and Lawrance, in support of the rule. The question is, what damages is the plaintiff entitled to recover against the sheriff for the escape. [Crowder, J. If the plaintiff had received 20l. before action, could he be said to have sustained greater damages by reason of the escape than the sum paid into court?] The payment made to Fox has no reference to the action for the escape. [Erle, C. J. What more can the plaintiff be entitled to recover than the 15l. 5s.?] If the plaintiff had recovered the full amount against the sheriff, he might still issue a ca. sa. against the debtor and recover it again from him, and the sheriff would have no claim to the money. [Erle, C. J. Do you find any case where the plaintiff has been so fortunate as to

recover his debt twice in that way ?] No : but the two rights are totally distinct. The authority of the attorney is limited : all he is justified in doing is, to discharge the debtor upon receiving the money from him. The duty of the sheriff is equally clear. In *Slackford v. Austin*, 14 East, 468, it was held, that, if, [493] upon the execution of a writ of ca. sa., which requires the sheriff to take and keep the body so that he may have it on the return day of the writ at Westminster, to satisfy the plaintiffs of their damages and costs, the sheriff before the return day receive the money due from his prisoner, and thereupon liberate him before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape ; and his return under the common rule of *cepi corpus* and that he detained the prisoner until he satisfied him (the sheriff) the levy money indorsed on the writ, which he had ready as commanded, &c., is of no avail. The attorney upon the record is only authorized to discharge the debtor, on receipt of the money : *Savery v. Chapman*, 11 Ad. & E. 829, 3 P. & D. 604. [Williams, J. It seems to be well established that payment to the attorney on the record is a good payment : *Crocer v. Pilling*, 4 B. & C. 26, 6 D. & R. 129.] No doubt, provided the payment is before the debtor's discharge. But the payment subsequently made does not purge the escape : *Langton v. Wallis*, 1 Ld. Raym. 399, Lutw. 587 ; *Conuop v. Challis*, 2 Exch. 484. However small the damages for the escape may be, they cannot be taken in reduction of what is due to the plaintiff on the judgment. In *Woods v. Finnis*, 7 Exch. 363, 371, Parke, B., in delivering the judgment of the court, says : "If the sheriff's officer permits the defendant to go at large on paying to him the sum mentioned in the writ, the sheriff would be liable for an escape ; for, it is a neglect of duty by the officer, seeing that the writ commands the sheriff to have the body of the debtor at the return to satisfy the plaintiff and not to pay the debt to the sheriff : and in that respect his duty upon the ca. sa. differs from that under a fi. fa., by which the sheriff is directed to make a sum out of the goods and chattels of the defendant, and himself to [494] have that money at the return ; so that, in the latter case, the defendant is discharged by payment to the sheriff, and the sheriff becomes debtor to the plaintiff : in the former, he is discharged by payment to the plaintiff alone : and the sheriff, by receiving the money, has no right to substitute his responsibility for that of the debtor, whose body the creditor has a right by law to keep until the debt is paid to him. The authorities are very full and clear upon this point : *Taiter v. Baker*, T Jones, 97, 2 Lev. 203, nom. *Taylor v. Beckon* ; *Slackford v. Austen*, 12 East, 468 ; *Stringer v. Stanlack*, Cro. Eliz. 404." In the present case, the attorney upon the record was Robinson. He employed Winter to sue out the execution. Winter thus became a limited agent. [Williams, J. If the debtor had tendered the debt and costs to Winter, and he had refused to receive the money and give a discharge, would not that have given Thompson a right of action against the plaintiff, Robinson, and Winter ?] No doubt it would. [Byles, J. Winter was the attorney on the record within the 126th section of the 15 & 16 Vict. c. 76.] Winter had no authority to interfere after a new state of things had arisen,—after a right of action had accrued to the plaintiff for the escape. [Erle, C. J. Might not Winter have issued a fresh *capias* ?] There was no evidence that he had any further authority than to issue the particular ca. sa. But, assuming that Winter was authorized to receive the money, he clearly had no power to delegate that authority to Fox. If the payment of the 20l. had taken place at Winter's office, the case might have been different. [Crowder, J. We must assume that authority was given by Winter to Fox.] Or a subsequent ratification. An attorney employed in this way, has no right to delegate to another the power to receive the money. [Williams, J. The maxim "*Delegata potestas non potest delegari*" [495] has been very much misapplied. Where it is perfectly indifferent whether the act is done by the hand of the agent or by another, the authority may be implied : see the observations of Maule, J., in *Lord v. Hall*, 8 C. B. 627. It was perfectly indifferent here whether the money was received by Winter himself or by some person employed by him. In either case, Winter would be responsible for it.]

Cur. adv. vult.

ERLE, C. J. I am of opinion that this rule must be discharged. The facts which appeared in evidence were substantially these :—The plaintiff, having recovered a judgment against Thompson through the agency of Robinson, one Winter was appointed as his attorney in the action in lieu of Robinson, to issue execution ; and Winter accordingly sued out a ca. sa. Winter, then, having authority to issue execution, had

by law authority to receive the money to be levied under the execution ; and I take it that he would have authority and would be bound to receive the sum indorsed upon the writ if tendered to him before the arrest of the debtor under it, and that he would have rendered himself liable to an action, and probably his client also, if he had refused to receive it. If Winter had authority to receive the whole of the judgment-debt, I am of opinion that his authority would also extend to the receipt of a portion of it. I am further of opinion, that, if the sheriff had arrested the debtor for the amount indorsed on the writ, and there had been a voluntary escape, it would have been competent to Winter to issue another *ca. sa.* against him into another county. The authority given to Winter was, to obtain satisfaction of the judgment by getting the money or taking the body of the debtor. The effect of the evidence is, that the debtor was arrested under the [496] *ca. sa.* and permitted to escape, and that afterwards the debtor, by the hand of the sheriff's officer, who was his agent for this purpose, paid Winter, the attorney authorized by the plaintiff to issue the execution and to receive the debt and costs, the sum of 20*l.* in part payment of the amount which the sheriff was directed by the writ to levy. I am of opinion that this payment by the sheriff's officer to Winter was just the same as if Thompson the debtor had by his own hand paid the 20*l.* to Hemming himself : and, if Hemming had received the 20*l.*, and afterwards brought an action against the sheriff for the escape, the proper measure of damages would have been the difference between that sum and the amount directed to be levied by the writ : and that being covered by the amount paid into court, the whole claim of the judgment-creditor is satisfied. I have hitherto assumed that Winter, the attorney authorized to issue the execution, had authority to receive and did receive payment of the 20*l.* But it has been contended that Winter was appointed the plaintiff's attorney for the purpose of issuing this particular *capias* only ; and, further, that, assuming that a payment to Winter would have been a good payment, the payment to Fox was not. I see no reason why the authority of Winter should be limited to the particular writ : his substantial duty was to take all necessary steps for obtaining satisfaction of the judgment. If, then, the 20*l.* had been received by Winter, it clearly would have bound Hemming. A great deal has been said about the second of these propositions, viz. that the payment to Fox (who it is found by the jury acted under the authority of Winter) was not a payment to Hemming ; for that Winter had only a special limited authority, and that the maxim "*delegata potestas non potest delegari*" is applicable here. But I am of an entirely different opinion. Winter was the attorney [497] employed by Hemming to issue the execution ; and, in the ordinary conduct of business, an attorney must necessarily authorize his clerks to receive moneys and to do many other acts for him and in his name. It would be introducing a most pernicious doubt to hold that these acts of the clerk are not binding upon the attorney and upon his client. The attorney is responsible : and it must in most cases be a matter of utter indifference whether the thing is done by his own hand or by that of a clerk. I am clearly of opinion, that, Fox being authorized by Winter, the receipt of the money by him was a receipt by Winter, and so binding upon Hemming. And I come to this conclusion with the more confidence because the question is who is to lose by the wrongful act of Fox. Now, the plaintiff authorized Winter to receive the debt, and Winter authorized Fox. If the creditor had received the money himself, I do not think he would have had the audacity to sue the sheriff for the escape, and so seek to recover his debt twice. I think it would be gross oppression on the sheriff if he were made the loser, seeing that he has in no way been guilty of any breach of duty. The judgment-debtor and the sheriff were both diligently seeking the attorney, — the former being ready to pay the sum due upon the judgment, and his health suffering materially from his detention. Under these circumstances, the sheriff very humanely took upon himself the risk of letting the defendant out upon his depositing the money : and I am not disposed to cast upon him the loss of the 20*l.* received by Fox.

WILLIAMS, J. I am of the same opinion. The jury having found that Fox was authorized by Winter to receive the 20*l.*, I think we are bound to treat the receipt of the money by Fox as identical with a receipt by Winter : and, further, I am of opinion, that, if the [498] money had been received by Winter, that would have been a receipt by Hemming himself, and would have gone in mitigation of the damages he might have been entitled to recover by reason of the escape. Winter having been employed by Hemming, I do not see that his right to employ a clerk to perform part

of his duty is at all affected by the maxim "*delegata potestas non potest delegari*." Where a man employs an agent, relying upon his peculiar aptitude for the work entrusted to him, it is not competent to that person to delegate the trust to another. But, where the act to be done is of such a nature that it is perfectly indifferent whether it is done by A. or by B., and the person originally entrusted remains liable to the principal by whomsoever the thing may be done, the maxim above referred to has no application. Here, it was a matter of perfect indifference to the plaintiff, Hemming, whether the money due to him upon the judgment against Thompson was received by Winter or by his clerk. The receipt by Fox, then, being a receipt by Winter, the question is whether that binds the plaintiff. Now, it has been established by many cases which are referred to in *Crozer v. Pilling*, 4 B. & C. 26, 6 D. & R. 192, and by that case itself, that, if the judgment-debtor had remained in custody, a tender of the debt and costs to Winter would have been the same as a tender to Hemming: and, if Winter had upon that tender refused to discharge the debtor from custody, both he and his client Hemming would have been liable to an action. So, I take it to be equally clear, that, if, before the writ had been executed, the money had been paid or tendered to the attorney entrusted with the execution, and the debtor had afterwards been taken on the *ca. sa.*, an action would have lain against the attorney or against the client. The question is whether the same principle does not apply where the debtor has [499] been taken upon the *ca. sa.*, and the sheriff has allowed him to escape. The reason why a payment or a tender to the attorney is considered as a payment or tender to the client is, that it is impossible in all cases to find the client, so as to make the payment or tender to him personally. The consideration of the great hardship and difficulty which would be imposed upon the defendant by requiring the payment or tender to be made to the plaintiff himself, has led to the attorney's being in this respect treated as if he were the client himself. Now, here, when the debtor had escaped, the duty and functions of the attorney employed to carry out the judgment were by no means over. It is clear that there are steps which the attorney has the means of taking and is bound to take still further to enforce the execution: for instance, if the debtor has escaped into another county, it is the attorney's duty to issue a fresh *ca. sa.* If it be the duty of the attorney to go on with the execution, it must also be his duty upon a proper occasion to hold his hand. It cannot be disputed that the attorney would be bound to receive the debt and costs after the escape, if duly tendered to him by the judgment-debtor. According to Mr. Griffiths's argument, the execution must go on until the judgment-creditor himself is found and the money paid to him: but that, as I have already observed, is so fraught with inconvenience and hardship as to be practically impossible. It seems to me that the same reasoning which establishes that the attorney entrusted with the execution is bound to take all necessary steps to enforce it, also shews that he has an implied authority to hold his hand if circumstances should arise which make it right that the execution should not go on: and his duty and authority in this respect must be the same whether before or after the discharge of the debtor from [500] custody. It seems to me, therefore, to be abundantly clear, upon principle as well as upon authority, that Winter was authorized to receive this money, and that his receipt of it was identical with a receipt of it by the client himself. But it is further urged by the counsel for the plaintiff, that the payment of the 20*l.* took place after the escape of Thompson, when the plaintiff had a vested right of action against the sheriff, the true measure of the damages in which was the value of the body of the debtor at the time of the escape: and that nothing which has happened *ex post facto* can alter that measure. Justice clearly would be defeated by the application of any such rule in this case. As a general proposition, no doubt, the true measure of damages against the sheriff for an escape is, the value of the body of the debtor at the time; but I apprehend that, if the debt and costs be afterwards paid, that might be given in evidence in mitigation of damages. We have a familiar instance of this in the action of trover. In 1 Rolle's Abridgment, 5, (L.) pl. 1, it is said: "*Si home prist mon cheval, et ceo chevaucha, et puis ceo redeliver al moy, uncore jeo poio aver cest action vers luy; car ceo est un convercion, et le redelivery nest ascum barr del action, mes solement serra un mitigacion de damages.*" I do not see why the jury might not in assessing the damages here look at the fact of the debt due from Thompson having been reduced by the 20*l.* paid to Winter through Fox, and give the sheriff the benefit of that payment. And if so, the 25*l.* 5*s.* paid into court was sufficient to cover all the

plaintiff was entitled to recover. For these reasons, I concur with my Lord Chief Justice in thinking that this rule should be discharged.

BYLES, J. I am of opinion that the rule should be made absolute, though it is with much deference and reluctance that I differ from my Lord and my learned Bro-[501]-thers. Although it is clear that the sheriff has paid a sum of 20l., it is also clear that the money has not been personally received by the plaintiff: somehow or other he has fallen through. The first question is, whether the payment to Fox was a payment to Winter. I must confess that I am unable to appreciate the argument of Mr. Griffiths upon this part of the case: it seems to me to be perfectly clear that a payment to the attorney's clerk is a payment to the attorney. But the great question is, whether Winter had authority to receive the money. It is not pretended that he had any special authority. If he had any authority at all, it was an authority conferred on him by the law. If Winter had been the sole person charged with the execution, the authority conferred on him by the law was simply to receive the debt and costs from the debtor, and thereupon and thereafter to discharge him from custody. Here, Winter received the money from the sheriff after the debtor had been suffered to escape. The plaintiff then had a double remedy,—against the debtor upon the judgment,—and against the sheriff for the escape; and it by no means follows that the measure of damages would be the same in both actions. Put the case of the action against the sheriff. There, the measure of damages would be the value of the body of the debtor at the time of the escape: see *Arden v. Goodeve*, 11 C. B. 371. Suppose it appeared in evidence that the debtor was ill and likely to die, the jury might think 40s. enough; or they might think his state more hopeful, and give the plaintiff damages to the amount of the debt and costs in the action in which the escape took place. Whether they give more or less can make no difference in principle. Or, suppose the debtor were hopelessly insolvent at the time of the escape, and consequently the value of his custody to the creditor was merely a nominal sum, and the next day he had a legacy of 1000l. left to him! It [502] seems to me that Mr. Griffiths is quite right when he says that the creditor's remedy upon the judgment is not gone by a recovery against the sheriff in an action for the escape; though probably the court would, in case he attempted to enforce it, interpose to prevent him from recovering a double satisfaction. Here, Winter, instead of confining himself to the duty which his position cast upon him of receiving the money from the debtor, and thereupon and thereafter discharging him from custody, does that which I think the law did not authorize him to do, viz. receive the money from the sheriff. Upon the authorities which have been cited, it is quite clear that the sheriff is not the agent of the execution-creditor to receive the debt and costs from the debtor and give him a discharge. Was Winter acting as the agent of the plaintiff in receiving the money from the sheriff? I think not. Every man is bound to know the law: and the sheriff must be taken to have received the money, and to have paid a portion of it over to Winter, with full knowledge that the law did not warrant him in receiving it, and that Winter was acting beyond the scope of his authority in taking it from him. For these reasons, it appears to me that the rule for a new trial should be made absolute.

CROWDER, J. This being a complaint against the propriety of my direction, I confine myself to expressing my entire concurrence in the judgments pronounced by my Lord and my Brother Williams. They have so fully and so clearly expressed the opinion which I entertain that I need not repeat it: and I am not at all shaken in that opinion by the dissent expressed by my Brother Byles.

Rule discharged (a).

[503] BROOM v. HALL AND ANOTHER. Nov. 3rd, 1859.

[Principle applied, *The Millwall*, [1905] P. 173.]

A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and

(a) An appeal is pending. [No appeal appears to be reported.—Ed. E. R.]

incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff, — Held, that A. was entitled to recover the costs.

The plaintiff, a broker at Liverpool, made a contract for the purchase of goods for the defendants, who were merchants there. The defendants having refused to accept the goods, the sellers brought an action against the plaintiff, which the latter (the now defendants repudiating all liability on the contract) defended, but unsuccessfully. The plaintiff thereupon brought this action upon the implied contract of indemnity, seeking to recover the damages and costs which he had been compelled to pay and incur in the former action. The defendants paid into court a sum sufficient to cover the damages, but denied their liability to the costs.

The cause was tried before Hill, J., at the last Assizes at Liverpool, when it was contended on the part of the defendants, that, assuming that they were bound to indemnify the plaintiff against the damages for the breach of contract, they were not liable for the costs incurred by him in the wrongful defence of that action.

The learned judge left it to the jury to say whether the plaintiff in defending the action had pursued the course which a prudent and reasonable man would have done in his own case.

The jury returned a verdict for the plaintiff.

Overend, Q. C., in pursuance of leave reserved to him at the trial, moved to enter a nonsuit. He submitted that the plaintiff had no right to bring upon the defendants a greater charge than the damages for the breach of contract. [Erle, C. J. The defendants by their conduct in repudiating their liability for the breach of contract, compelled the plaintiff to adopt the course he [504] did. The case seems to have been left to the jury precisely in the terms of the notes to *Lampleigh v. Braithwait* (Hob. 105), in 1 Smith's Leading Cases, 4th edit. p. 126, where it is said: "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action he cannot defend: per Lord Denman. *Short v. Kalloway*, 10 Ad. & E. 28. See *Walker v. Hatton*, 10 M. & W. 249, and *Tindall v. Bell*, 11 M. & W. 228. But, if he make a reasonable and prudent compromise, he will be justified in doing so: *Smith v. Compton*, 3 B. & Ad. 407. And, where the plaintiff's claim is of an unliquidated nature, and needs investigation, it seems that he may, unless expressly forbidden, incur the expense of investigating it, or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so: *Blyth v. Smith*, 5 M. & G. 405, 6 Scott, N. R. 360. It seems to be for the jury in each case to say whether, in defending and incurring the costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case, and, if the jury find that he did, the costs may be recovered: *Tindall v. Bell*, 11 M. & W. 228." Crowder, J. It seems a strong thing for the defendants, who repudiate their liability on the contract, to say that the plaintiff ought at once to have paid the money.] They might at least have let judgment go by default, and had the damages assessed (*a*). The verdict shews that the defence was wrongful. [Byles, J. It is to be remembered that the action was an action of tort, where the damages would be assessed according to the rule laid down in *Hadley v. Baxen*-[505]-*dale*, 9 M. & W. 341. Erle, C. J. The jury have found that the plaintiff, in defending the action, acted as a prudent and reasonable man would do in his own case.] Here, the defendants did not assent to the defence of the action.

ERLE, C. J. I am of opinion that there ought to be no rule in this case. It appears that the plaintiff entered into a contract on behalf of the defendants for the purchase of certain goods, and that the defendants were the persons who caused that contract to be broken; that, the plaintiff having become liable for that breach of contract, the vendors brought an action against him; and that, the now defendants repudiating all liability on their part, the plaintiff defended the action, and was compelled to pay the damages and costs. It seems to me that the point left by the

(a) The master stated that this would not very materially have diminished the costs.

learned judge and found by the jury is decisive as to the plaintiff's right to recover the costs of that defence. The action was for unliquidated damages. If the defendant in that action had abstained from offering any defence, and had paid all that the plaintiff demanded, he could not have recovered it as against his principals if the jury had found that a prudent man would not have adopted that course. The defendants throughout denied their liability for the breach of contract which they themselves were instrumental in causing. The direction of the learned judge, which was precisely in accordance with the rule laid down in the notes to the case of *Lampligh v. Brathwait*, in 1 Smith's Leading Cases, 4th edit. 126, was in my opinion perfectly correct, and the finding of the jury was quite right.

The rest of the court concurring,
Rule refused.

[506] MEMORANDA.

In Michaelmas Term, Peter Burke, Esq., of the Inner Temple, was called to the degree of the Coif. He gave rings with the motto "Veritas et judicium."

In Michaelmas Vacation, Sir Richard Budden Crowder, Knight, one of the Judges of the Court of Common Pleas, died.

Sir Henry Singer Keating, Knight, Her Majesty's Solicitor-General, was appointed a Judge of the Court of Common Pleas, in the room of Sir Richard Budden Crowder; having first been called to the degree of the Coif, on which occasion he gave rings with the motto "Fortitudine et constantia."

William Atherton, Esq., of the Inner Temple, one of Her Majesty's Counsel, was appointed Solicitor-General, in the room of Sir Henry Singer Keating. He shortly afterwards received the honor of Knighthood.

[507] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in banco in this term, were, — Erle, C. J., Williams, J., Willes, J., and Keating, J.

HOWKINS v. BENNET. Jan. 18th, 1860.

In the memorial of an annuity under the 53 G. 3, c. 141, it is not necessary particularly to describe the instrument of grant: it is enough to state it to be a "grant of annuity." The consideration for an annuity was stated in the memorial to be 4000l. Of this sum 400l. was (pursuant to a previous understanding) immediately handed by one of the grantors to the solicitor for the grantee for procuration money and expenses:—Held, that this, though it might have been ground for a motion to set aside the securities under the 6th section of the 53 G. 3, c. 141, afforded no defence by way of plea to an action upon the covenant. There were two attesting witnesses to the deed; but, in the memorial, the names of four persons appeared as witnesses,—the clerk in copying the attestation having by mistake inserted the names of two of the grantors:—Held, that this was so evidently a blunder that no one could be misled by it, and that therefore it did not affect the validity of the memorial.—The annual payments (exceeding 5 per cent. on the sum advanced) were secured upon land, and the principal sum by a policy on the life of one of the grantors, with a covenant for payment of the annual premium:—Held, that the transaction was not usurious,—the principal being still placed in some degree of jeopardy.

This was an action to recover 507l. 8s. 3d., the half-yearly payment of an annuity covenanted to be paid by the defendant to the plaintiff and his wife, by an indenture dated the 8th of December, 1852, and the [508] sum of 4000l., the consideration-money for the same annuity.

The defendant pleaded, —first, non est factum,—secondly, that no memorial was enrolled, —thirdly, to the claim for money payable, never indebted,—fourthly, to the whole declaration, payment,—fifthly, usury. The plaintiff joined issue on those pleas, and also replied to the last plea, that the matters and things in the fifth plea mentioned happened after the passing of the 13 & 14 Vict. c. 56; and the defendant

rejoined that the alleged contract was a contract for the loan and forbearance of money upon the security of land; upon which rejoinder the plaintiff took issue and demurred; and the defendant joined in demurrer.

The particulars of the plaintiff's demand delivered with the declaration were as follows:—

“Under the indebitatus counts, the plaintiff seeks to recover the sum of 4000*l.* lent, paid, advanced, and received, to, by, or on behalf of the defendant on the 8th of December, 1852, together with interest on the same after the rate of 10 per cent. per annum from the 8th day of June, 1853.”

The cause came on for trial before Coleridge, J., at the Summer Assizes at Ipswich, 1856, when it was ordered that a verdict should be entered for the plaintiff for 5000*l.* and 40*s.* costs, subject to a special case to be stated for the opinion of this court; and that the defendant should within fourteen days furnish a list of his objections; and that, in the event of the parties disagreeing, the case should be stated by a barrister, who for that purpose should be at liberty to examine witnesses touching the matters in dispute between the said parties.

The parties having disagreed, the arbitrator stated for the opinion of the court the following case:—

In the month of August, 1852, Lewis Ambrose [509] Williams, a mining engineer residing at Bridgend, in Glamorganshire, applied to Messrs. Cates & Son, solicitors, to whom he had previously been slightly known, to obtain for himself and his brother William Williams, a mining engineer residing at Swansea, a sum of 3500*l.* on the security of a lease of mineral property in Glamorganshire, afterwards called by the parties the Pandy estate or colliery, which had been granted to them by the defendant, who was at that time personally unknown to Messrs. Cates & Son; and on the 22nd of September, 1852, Messrs. Cates & Son wrote and sent to Mr. D. Keane, the plaintiff's attorney, the following letter:—

“22nd September, 1852.

“Dear Sir,—Two clients of ours, mineral surveyors and civil engineers of standing and respectability, have lately taken a lease for 75 years from June, 1852, of some mineral property in Glamorganshire, consisting of about 120 acres, and are anxious to raise a sum of 3500*l.* by way of annuity at 7½ per cent. on the security of the lease, &c., for the purpose of working it. To assist in this object, their landlord, a man of fortune, who at present holds the property under his father (who is in his ninety-second year, and whose only son he is), for a term of ninety-nine years, which term will of course merge in the fee-simple on his father's death, has agreed to become surety for the payment of the annuity; thus, in addition to his personal security, which is ample, postponing the dead rents and royalties to the payment of the annuity, and charging his interest as well in the minerals as in the surface. The annuity will thus be the first charge on the property, with the exception of a rent of 100*l.* per annum reserved to the superior landlord (the father), but which will of course cease on the son coming into possession. The present position and respectability of the principals and the [510] surety will bear the strictest inquiry; and the latter on his father's death will succeed to very large landed property in Glamorganshire, besides personal estate to a very large amount. If you have any client on whose behalf you can entertain the advance, we shall be happy to furnish you with further particulars; and, as the matter presses very much, we will do ourselves the pleasure of calling on you to-morrow morning. We may add that so fully satisfied are we with the security, that we should not hesitate for a moment, had we the means at the present time, in advancing the amount ourselves, or in recommending a client to do so.

“Daniel Keane, Esq.

“CATES & SON.”

Mr. Keane on the same day wrote in reply,—“I like the security you have forwarded, and will lay same immediately before my client, who I have very little doubt will entertain it.”

In consequence of this letter, Mr. F. N. Cates, one of the firm of Cates & Son, on the 24th of September, called on Mr. Keane, when Mr. Keane said he thought he could effect the loan at 10*l.* per cent., and required in that case to be paid 10*l.* per cent. commission, to include all his charges, which Mr. F. N. Cates promised to submit to his clients; and, having told Lewis Ambrose Williams thereof, and received instruc-

tions from him, Cates & Son, on the same day wrote to Mr. Keane as follows:—"We have our client's authority to pay you the commission you require on negotiating the proposed loan, provided you can procure it at 8 per cent.; and, in order to meet the heavy deductions from the money they will have to receive, they will require 4000l., instead of 3500l." On the 4th of October Mr. Keane wrote to Cates & Son, as follows:—"I have advised with my clients on the subject of the loan of the 3500l.; and I am instructed to say that they will [511] entertain it. I should be glad to see you at your earliest convenience on the subject."

Messrs. Cates & Son accordingly sent to Mr. Keane an abstract of a lease dated the 24th of June, 1852, granted to Messrs. Williams by the defendant, of the mineral property mentioned in Messrs. Cates & Son's letter of the 22nd of September, 1852, the defendant being the person therein mentioned as their landlord: and, on the following day, the 5th of October, Mr. F. N. Cates called on Mr. Keane, who said he was instructed to complete the loan if his inquiries as to the personal character and position of the parties were satisfactorily answered, and, as he wished to peruse the abstract and consider the security to be taken, he appointed Mr. F. N. Cates to call again on the following day, which the latter accordingly did, when Mr. Keane said he proposed to take merely a deposit of the lease, and to secure the loan (which he agreed to make 4000l.) by a warrant of attorney accompanied by a deed of covenant, lending the money for a period to be agreed on. To this Mr. Cates said he had no authority to assent, and that he thought Mr. Bennet, the defendant, would object to it, as making himself liable to be called upon to repay the principal money. Mr. Keane also at this interview proposed to insure defendant's life against his (defendant's) father's life. The mode of securing the advance was not agreed on: but Mr. Keane proposed to make a journey to Bridgend, in Glamorganshire, where one of the Messrs. Williams resided, and in the neighbourhood of which the defendant's father's family residence and property and the premises comprised in the lease to Messrs. Williams were situate, to make inquiries respecting Messrs. Williams and the defendant, and wished to meet the defendant there; and Mr. Keane intimated, that, if his inquiries were satisfactorily answered, he was authorized to complete the loan at 8l. per cent. interest.

[512] On the 7th of October, Messrs. Cates & Son wrote to Mr. Keane, as follows:—"£4000 loan. We are awaiting a communication from you on this subject before writing to our clients and Mr. Bennet, which we are anxious to do to-day." To this letter Mr. Keane, on the same day, replied as follows:—"£4000 loan. I shall carry out this loan as soon as on a personal inquiry at Bridgend I find every thing as stated by you turns out to be the fact, of which I have no doubt. I need hardly say that such inquiry shall be conducted with a due regard to the feelings and position of Mr. Bennet, so as not to be brought to the knowledge or attention of parties whom he would not be desirous of informing of the matter. I propose leaving town on Monday for the purpose, and should require a letter of introduction to Mr. Bennet's solicitor at Bridgend."

On the 9th of October, Messrs. Cates & Son wrote to Mr. Keane a letter inclosing a copy of one from the defendant to Mr. William Lewis, of Bridgend, the country solicitor of the defendant's father and family, written with a view to introducing Mr. Keane to Mr. Lewis. Such letter and copy letter were severally as follows:—

"23 Fenchurch Street, 9th October, 1852.

£4000 Loan.

"Dear Sir,—We do not think we are quite justified in furnishing you with a copy of Mr. Bennet's letter to Mr. Lewis, without the sanction of the former; but, nevertheless, as you desire it, and we cannot anticipate any objection on his part to our doing so, we inclose you a copy of it.

"CATES & SON.

"Daniel Keane, Esq."

"London, October 7th, 1852.

"My dear Sir,—Having let the Pandy colliery to Messrs. Williams, and being very anxious that they [513] should have the means of fully developing its resources, which I believe are good, I have been induced to become a surety for the regular payment of interest, and that the principal of a sum to be borrowed (4000l.) shall

not be applied otherwise than to be laid out entirely on the property; for which end it will be placed in the Bridgend Bank in my name jointly with theirs. My position and probable future prospects must be explained, and that I am not likely to be quite a man of straw. I have no reference which I could offer which would be likely to carry so much weight as this to yourself: and I feel that confidence in you will be unbroken. Will you oblige me by stating to Mr. Keane, who will call on you at Bridgend, your opinion on the subject.

“J. W. BENNET.

“Wm. Lewis, Esq., Bridgend.”

On the 14th of October, Mr. F. N. Cates called on Mr. Keane to inquire about the result of his journey, and found that he had not then been to Bridgend; but he informed Mr. Cates that he had made inquiries respecting the Messrs. Williams, which had been satisfactorily answered.

Mr. Keane on the same day went to Bridgend, and saw Mr. Lewis, who told him, in answer to his inquiries, that Mr. Bennet, the father, was a very wealthy man; that he was very old; and that the defendant was his only son; and there were several daughters. Mr. Keane inquired about some property at Swansea belonging to the defendant, and was told by Mr. Lewis that he did not know anything about it. Mr. Keane, on the same day, saw the defendant at Bridgend, when the defendant informed Mr. Keane that he was in possession of some property at Swansea, the title-deeds of which were in the hands of his father; and the defendant was understood by Mr. Keane to [514] consent that this property should be included in the security for the proposed advance.

On the 16th of October, Mr. F. N. Cates had an interview with Mr. Keane in London, at which Mr. Keane said that, although disappointed with the result of his inquiries as regarded the defendant, he was satisfied to complete the loan of 4000l., and to advance a further sum if necessary, the defendant's life being insured at Messrs. Williams's expense against his (the defendant's) father's, and the defendant giving a security upon his property at Swansea, to which he said the defendant and Lewis Ambrose Williams had agreed; and he thought his client would advance the amount at 8 per cent.

On the 21st of October, Mr. F. N. Cates called on Mr. Keane, and read to him a letter which he had received from Lewis Ambrose Williams, to the effect that the defendant denied having consented to put the Swansea property into security, and objected to do so: when Mr. Keane said that Mr. Bennet had most distinctly consented, in Mr. Lewis Ambrose Williams's absence, to give a security upon the Swansea property; and that he had explained to Mr. Bennet that he considered him the real principal in the transaction; and he proposed to write a letter, to be communicated to the Messrs. Williams; and, on the 21st and 23rd of October, Mr. Keane wrote to Messrs. Cates & Son, as follows:—

“21st October, 1852.

“Re Williams and Bennet.

“Dear Sirs,—In reply to your communication on the subject of Mr. Bennet not intending to put the Swansea property into this security, I beg leave to observe that Mr. Bennet expressly consented to charge the Swansea property with the due payment of the proposed loan. I understand Mr. Bennet, sen. has [515] given his son the possession and ownership of the Swansea estate, but whether by deed or otherwise I do not know. I do not think Mr. Bennet will retreat from that: and all I want to know is, a sufficient description of the parcels, to insert them in the deed, so as to give the lenders a general charge over the particular property.

“Messrs. Cates & Son.

“D. KEANE.”

“23rd October, 1852.

“£4000 Loan.

“Dear Sirs,—I have this morning received definite instructions to proceed with the loan to Mr. Bennet and others. In reply to your favor, I beg to say that I regret much that I cannot oblige you in the matter of the policy of insurance, as my client has an office that he takes an interest in himself. I have to request that you will send me the parcels of the Swansea property as soon as possible, and also give me a

general notion of how Mr. Bennet gets that estate. I shall send you a proposal for a policy on Monday on Mr. Bennet's life.

"DANIEL KEANE.

"Messrs. Cates & Son."

Messrs. Cates & Son accordingly, on the 27th of October, sent Mr. Keane a copy of the half-yearly rent-roll of the Swansea property, accompanied by the following letter:—

"27th October, 1852.

"Williams's Loan.

"Dear Sir, -We send you herewith a copy of the half-yearly rent-roll of Mr. Bennet's property in Swansea and its neighbourhood, shewing a rental for the half-year of 203l. 17s. 5d.; and, as the lessees of a portion of the property are now working the minerals thereunder, there will shortly be a considerable increase [516] of income arising from the royalties. As regards Mr. Bennet's title, we can give no further information than that he was put in possession of the property some years since by his father, who was owner in fee; and he has since then been in receipt of the rents, and in the habit of granting leases of the property for building and other purposes. Mr. Bennet, in consenting to give a greater security upon this property than his personal covenant would afford, only does so upon the distinct understanding that the grantee's remedies against him and it are only exercised in case the colliery fail in realizing sufficient to keep down the annuity.

"CATES & SON.

"Daniel Keane, Esq."

Messrs. Williams were anxious to commence opening the colliery, and, for this purpose, were desirous of obtaining a sum of 1000l. in advance on account of the 4000l. Mr. Keane agreed to make the advance on a contract being signed; and on the 2nd of November he prepared and delivered to Messrs. Cates & Son a memorandum without date, a copy of which was contained in an appendix to the case (a)¹. This contract [517] was prepared while Mr. F. N. Cates waited in Mr. Keane's office; and Mr. Cates objected to the form of it, in the defendant being made the principal in the transaction, and pointed out to Mr. Keane that the transaction as expressed in the contract could not be legally carried out, inasmuch as the principal money and 8l. per cent were purported to be secured. Mr. Keane accordingly requested Messrs. Cates & Son to prepare a form of contract, and submit it to him for his approval, which they did on the same day. The contract so prepared by Messrs. Cates & Son was also appended to the case (a)².

[518] On the 3rd of November, Mr. F. N. Cates saw Mr. Keane on the subject

(a)¹ Memorandum between Daniel Keane of the one part, and John Wick Bennet of the other part. Mr. Keane agrees to lend or procure to be lent to the said John Wick Bennet 4000l., within one month from this day, on the security and terms following, that is to say, Mr. Bennet is to pay interest after the rate of 8l. per cent. per annum to the lender of such 4000l., and to pay Mr. Keane 400l. procuration money on the day of execution of same, which is to include all expenses of drawing and engrossing and completing on the part of the lender of the proposed security; Mr. Bennet to pay all his own expenses. The two Messrs. Williams, the engineers, to concur and join as sureties. The security to include a charge on the property of Mr. Bennet at Swansea, of which the rental has been produced and sent to Mr. Keane, amounting half-yearly to 203l. 17s., with power of distress and entry in case of default of payment of interest. It is agreed that an effectual insurance is to be made on Mr. J. W. Bennet's life against his father's, for the amount of 4500l. Loan to be only during the life of his father, when lenders to call it in by giving one month's notice, if they please. A warrant of attorney to be given collateral with the mortgage deed. A separate warrant of attorney from the two Williamses. Judgment to be entered up and registered against both. The security to embrace not only the Swansea property, but all other property, whether present or reversionary, expectant on the decease of the father.

(a)² Memorandum of agreement made the _____ day of _____, 1852, between Daniel Keane, attorney for and on behalf of _____, of the one part, and

of this latter contract. Mr. Keane objected to it, on the ground that under it the loan being made by way of annuity the principal [519] would not be recoverable. Mr. Keane required that the loan should be made so as to secure 8l. per cent. interest and the principal money, which he considered could be done; and, Mr. Cates being of a different opinion, Mr. Keane requested Mr. Cates to accompany him to his (Mr. Keane's) conveyancer, to consult him on the subject. Mr. Cates did so, and his view was supported by the gentleman appealed to, with whom Mr. Cates left Mr. Keane to advise with him on the security to be taken.

William Williams and Lewis Ambrose Williams, civil engineers and mineral surveyors, and John Wick Bennet, Esq., of the other part.

The said Daniel Keane doth hereby agree, on behalf of the said _____, to lend and advance unto the said William Williams and Lewis Ambrose Williams, within one calendar month from the date hereof, the sum of 4000l., upon the security and the terms and conditions following, that is to say:—

The said William Williams and Lewis Ambrose Williams, in consideration of such advance, are to grant an annuity of 320l. per annum, and the said John Wick Bennet is to join in granting the said annuity, as surety for the said William Williams and Lewis Ambrose Williams.

The said annuity to be charged upon and payable out of certain lands and minerals in and under the parish of Newcastle, in the county of Glamorgan, and other the premises comprised in and held under a lease granted by the said John Wick Bennet to the said William Williams and Lewis Ambrose Williams, bearing date the 24th of June, 1852, an abstract whereof has been already furnished by them to the said Daniel Keane.

The said annuity to be also issuing and payable out of and charged upon certain messuages, tenements, lands, and premises situate in and near Swansea, in the said county of Glamorgan, and in the county of Carmarthen, belonging to or possessed by the said John Wick Bennet, and producing an annual value of 407l. 14s., or thereabouts: the particulars of which last-mentioned property are comprised in the half-yearly rental or income thereof already furnished by the said William Williams, Lewis Ambrose Williams, and John Wick Bennet to the said Daniel Keane.

The said Daniel Keane shall not be entitled to call for the title of the said John Wick Bennet to any or either of the said lands and premises hereinbefore mentioned; nor the production or delivery to him of any deeds, documents, or other evidence relating thereto; and the powers, rights, or remedies of the grantee of the said annuity against the person or property of the said John Wick Bennet shall only be exercised in case of the insufficiency of the said premises comprised in the said indenture of lease of the 24th of June, 1852, to keep down the said annuity.

That, in addition to such securities, the said John Wick Bennet is to effect an insurance in such insurance office as shall be approved of by the said Daniel Keane upon the life of him the said John Wick Bennet against that of his father John Bennet, in the sum of 4500l.

That the said William Williams and Lewis Ambrose Williams shall give and execute unto the grantee their warrant of attorney for collaterally securing the due payment of the said annuity, upon which judgment shall be forthwith entered up and registered.

That a like warrant of attorney shall be given and executed by the said John Wick Bennet, upon which judgment shall be forthwith entered up and registered.

That the sum of 4000l. shall be paid by the said grantors to the said Daniel Keane upon the completion of the securities and payment of the consideration money, as and for his costs and charges and remuneration in negotiating the said loan and preparing and ingrossing the securities and all incidental expenses, except the costs of the said grantors, which shall be borne by themselves respectively.

That copies of the several securities shall be furnished to the grantors or their solicitors by and at the expense of the grantees; and, in case of difference arising between the parties touching any of the covenants, clauses, or powers inserted therein, or the consideration thereof, or of this contract, the same shall be submitted to a barrister, the costs of such reference to be in his discretion, and his decision to be binding on all the said parties.

That, pending the preparation of the said securities, and until the same shall be

[520] On this conference being ended, Mr. Keane stated to Mr. Cates (who was waiting its result) that he agreed to the terms contained in the contract, but that, as he had led his clients (the plaintiff and his wife) to believe that he could secure the repayment of the principal money, he could not sign it without their previous authority, which he should receive on the following Friday.

On this day (the 5th of November) Mr. F. N. Cates called on Mr. Keane, who said he had been considering the security to be taken, and must have a policy on the whole life of Mr. Bennet (the defendant), and subsequently wrote the following letter embodying the requisition, "I have heard from my client: and, as it is impossible to shew with anything like certainty that Mr. Bennet has any thing more than a life-estate, if even he has that, he thinks he cannot do without a full policy on Mr. Bennet's life. If this is assented to, I am prepared this day to advance 1000l. on the contract being signed, and to make the loan 5000l."

This was objected to by Messrs. Cates & Son on behalf of their clients, who however proposed to pay half the premium: and, on the 7th of November, Mr. Keane wrote to Messrs. Cates & Son, as follows:—"I have advised at considerable length with my clients, and they have determined on reducing the rate of interest to 7l. per cent., but on the understanding that you pay the full insurance on 4350l. On this understanding, I am instructed to complete."

On the 9th of November, before receiving this letter, Mr. F. N. Cates called on Mr. Keane, who referred to the letter he had written, the terms of which Mr. Cates declined: and, after some discussion, in the course of which Mr. Cates proposed a policy on the life of Mr. Lewis Ambrose Williams for the whole amount, which was objected to by Mr. Keane because it would defer [521] for too long the re-payment of the principal money, Mr. Keane proposed to reduce the amount of the proposed policy on the defendant's life to 4070l.; and he wrote the following letter to that effect:—

"9th November, 1852.

"Dear Sirs,—In further explanation of my letter of yesterday, I beg to say that I shall be content with a policy on Mr. Bennet's life for 4070l. The title I will be satisfied with as to the land, &c. in Wales, is, Mr. Bennet's covenant that he is entitled to the fee on his father's death, and will warrant same. I have no objection to advance 1000l. this day on a bill and a warrant of attorney at a month, in anticipation of loan. This will be my own transaction; but I will not part with the bill at all.

"Messrs. Cates & Son.

"DANIEL KEANE."

Messrs. Williams objected to take the 1000l. except on the contract being signed; and this was communicated by Messrs. Cates & Son to Mr. Keane by the following letter, of the same date:—

"9th November, 1852.

"Dear Sir, Our clients will not take the 1000l., except on a positive contract on the part and in the name of your clients to advance the remaining 3000l. on the terms agreed on. Mr. Bennet will, as you require, covenant that he is seised in fee in the Swansea property; but we beg again to remind you of the terms on which Mr. Bennet includes that property in the security contained in our letter to you (accompanying copy rentroll) of the 27th ult., and which we understood you to-day to agree to. Mr. Bennet proposes to insure in the Argus, an office approved by you, where the rates are lower than in the English and Scottish; and he will assign the policy to your clients, [522] to be re-assigned to him on the redemption of the annuity. We shall be glad to be favoured with an answer to this letter, or at least an acknowledgment by the bearer. We trust, after the long delay, you will lose not a moment in forwarding the securities.

"CATES & SON.

"Daniel Keane, Esq."

completed, the said Daniel Keane shall pay unto the said grantors on account and in part of said consideration money of 1000l., the sum of 1000l., for which sum the said William Williams and Lewis Ambrose Williams shall draw upon the said John Wick Bennet, and he shall accept a bill of exchange payable one month after date, but which shall not be negotiated or parted with by the said Daniel Keane, but shall remain in his hands until the completion of the said loan, when the same shall be delivered up to the other parties hereto to be cancelled.

Mr. Keane having declined to have the contract signed as referred to in the above letter, the 1000l. was not advanced.

A proposal for an insurance on the life of the defendant with the English and Scottish Law Life Assurance Society for the sum of 4070l. was accordingly submitted to that society by Mr. Keane on behalf of the plaintiff, and was accepted at the annual premium of 227l. 8s. 3d. On the 16th of November, Mr. Keane wrote to Messrs. Cates & Son, in reply to their inquiry as to the progress Mr. Keane was making with the draft annuity deed, as follows:—"The draft is now in hand. I hope will be finished to night. The first year's policy will be advanced by me, but I presume will be paid by Mr. Bennet."

The draft of the deed for securing the proposed sum of 4000l. was prepared by Mr. Keane on behalf of the plaintiff and his wife, and laid by him before Messrs. Cates & Son. [The form in which it stood when sent by Mr. Keane to them, and the subsequent alterations therein, were shewn in a copy draft deed marked and signed by the arbitrator, which was a fair copy of the original draft made for convenience of reference, and which original and copy were to be deposited with one of the masters, for the purposes of the argument of the special case. In such copy, the text of the original draft was shewn in black ink, and the subsequent alterations in red ink; and the same as it then stood was admitted to be a true copy of the ingrossment [523] of the deed; and either party was to be at liberty to refer to it on the argument of the case as such true copy.]

Accompanying the draft of the indenture were drafts warrants of attorney to confess judgments at the suit of the plaintiff and Marian his wife against the defendant and the Messrs. Williams respectively, in the sum of 8000l., and costs of suit, with a defeazance to each of such warrants of attorney limiting the effect thereof. Such drafts were altered by Messrs. Cates & Son on behalf of the defendant and Messrs. Williams, in accordance with their alterations in the draft of the said indenture. [The form in which such respective drafts warrants of attorney and defeazance stood when sent by Mr. Keane to Messrs. Cates & Son, and the subsequent alterations therein, were shewn in the copies thereof marked and signed by the arbitrator, which were respectively fair copies of such original drafts thereof made for convenience of reference, and which originals and copies were to be deposited with one of the masters, for the purposes of the argument of the case. In such respective copies the original text was shewn in black ink, and the subsequent alterations in red ink; and the same as they then stood were admitted to be true copies of the ingrossment of the said warrants of attorney and defeazances respectively, and either party was to be at liberty to refer to them on the argument of the case as such true copies.]

The annuity deed and warrants of attorney were respectively ingrossed by Mr. Keane in the form in which they had been ultimately settled.

On the 1st of December, whilst the drafts of the deed and warrants of attorney were in the course of being settled, Mr. F. N. Cates saw Mr. Keane; and, not having received the original lease to the defendant from his father, he promised Mr. Keane that he would [524] use every effort to obtain it, and proposed, that, in the absence of it, Mr. Keane should take a declaration by the defendant, made under the statute 5 & 6 W. 4, c. 62, that the lease was in existence and was unincumbered, which Mr. Keane agreed to do. On the 2nd of December, Mr. F. N. Cates accordingly prepared a draft of such a declaration, and left the same, together with a copy of the lease, with Mr. Keane, who approved of the draft. Mr. F. N. Cates had, however, in the meantime, written to the defendant at Bridgend, stating that a declaration had been proposed to be made; and, on the 3rd of December, he received by post from the defendant a letter together with a declaration which had been prepared by Mr. Lewis and made by the defendant at Bridgend on the previous day. This declaration, together with the letter which accompanied it, Mr. F. N. Cates shewed on the same day to Mr. Keane, who perused and approved of the declaration, and returned it to Mr. F. N. Cates, by whom it was kept until the 8th of December, when it was handed over to Mr. Keane, as after mentioned. [A copy of this declaration was contained in the appendix to the case.] On the same day, in consequence of remarks having been made by Mr. Keane's counsel on the meagreness of the description in the draft of the property at Swansea, Mr. F. N. Cates offered to furnish a declaration by William Williams, who had acted as defendant's land agent, verifying the schedule annexed to the deed, and stating the defendant's acts of ownership, and that he,

William Williams, had no notice of any incumbrances, and received the rents for the defendant. This was agreed to by Mr. Keane; but, on Mr. Cates applying to William Williams to make the proposed declaration, he declined to do so, stating that he had for the last three years ceased to collect the rents, but that his son could make it, [525] with some alterations. Accordingly, on the 7th of December, a declaration under the statute 5 & 6 W. 4, c. 62, was made by William John Williams, the son, a copy of which was contained in the appendix to the case.

On the 6th of December, the ingrossments of the annuity-deed, and of the warrant of attorney from the defendant, were executed by him at Bridgend in the presence of Mr. F. N. Cates, who attested the execution; and, on the same day, Mr. Keane wrote to Messrs. Cates & Son, as follows:—"I have been searching for judgments, but found none against your client Mr. Bennet: but I have found two annuities inrolled, of 100l. and 105l., which must be explained before completion. They were granted to a Mr. Davies. Pray let me know if they are still subsisting." The annuities referred to were not then subsisting.

In the afternoon of the 8th of December, the parties met by appointment for the purpose of completing the transaction. There were present Mr. Lewis Ambrose Williams, Mr. William Williams, Mr. Keane, Mr. Calcott, clerk to Mr. Keane, Mr. G. Cates, and Mr. F. N. Cates. Mr. F. N. Cates had previously, by arrangement with Mr. Keane, prepared an undertaking on Mr. Keane's part to procure the plaintiff's receipt for the 227l. 8s. 3d., the amount of the premium on the policy of insurance, as a payment on account of the first half-year's annuity; and Mr. Keane signed the undertaking and handed it across the table to William Williams, together with two stamped receipts signed by him for 400l. and 227l. 8s. 3d. respectively. The undertaking and receipts were as follows:—"Gentlemen,—I should feel obliged by your advancing 227l. 8s. 3d., the first year's premium on the policy of insurance effected by my clients Mr. and Mrs. Howkins on the life of Mr. Bennet with the English and Scottish Insurance Company, for which sum I [526] hereby undertake immediately to procure and deliver the stamped receipt of Mr. and Mrs. Howkins as a payment in advance on account of the first half-year's annuity to become due on the 8th June next." (Signed) "W. & L. A. Williams." "Received, the 8th December, 1852, of Messrs. Williams, the sum of 227l. 8s. 3d., to pay premium on policy on Mr. J. W. Bennet's life. Daniel Keane." "Received the 8th December, 1852, of Messrs. Williams, 400l., my costs, charges, and expenses, as agreed. Daniel Keane." Mr. Keane at the same time produced 4000l. in bank notes and gold, and passed the same across the table to William Williams, who counted it, Mr. Keane's clerk and Mr. T. N. Cates at the same time taking down the numbers, dates, and amounts of the notes. Some discussion then ensued on the subject of the 227l. 8s. 3d.; Messrs. Williams claiming a rebate of interest in respect of that sum; and ultimately it was agreed that a rebate of 13l. should be made. The annuity deed and the warrant of attorney from the Messrs. Williams were then executed by them, and the receipt for the consideration money signed; and William Williams then immediately returned to Mr. Keane out of the money which had been passed across the table to him notes and gold to the amount of 614l. The execution of the said deed by the said William Williams and Lewis Ambrose Williams, respectively, was attested by the said F. N. Cates, who signed such attestation "Fras. N. Cates," and by the said Mr. Calcott, who signed such attestation "F. H. Calcott;" and there were no other witnesses to the execution who signed the attestation.

At the close of the transaction, Mr. F. N. Cates handed to Mr. Keane the declarations before mentioned made by the defendant and William John Williams.

Mr. Keane took possession of the annuity deed and [527] the warrants of attorney and declarations: but the lease from the defendant to Messrs. Williams was not handed over to him. The lease was brought to the place of meeting by Mr. G. Cates in a leather travelling bag. No inquiry was made for it by Mr. Keane, and it was not offered to him or taken out of the bag, but was carried away again by Mr. G. Cates, who was aware it was in the bag. On the next morning, the lease was taken by Mr. G. Cates to the office of Messrs. Cates & Son, and William Williams and F. N. Cates became aware that it had not been handed over to Mr. Keane; but no communication was made to Mr. Keane that the lease was still in Mr. Cates's possession, nor were any steps taken by any of the parties to put Mr. Keane in possession of it; and the lease was, notwithstanding several applications for it on the part of Mr. Keane,

retained by Messrs. Cates & Son until the 5th of August, 1854, when they handed it over to Mr. Keane, on his giving the following letter and memorandum,—

“Memorandum. Messrs. Cates & Son have this day, 5th August, 1854, handed me the original lease, dated 24th June, 1852, from J. W. Bennet, Esq., to Messrs. W. and L. A. Williams, of lands and minerals at Pandy, &c., being the lease of that date comprised in the grant of annuity to Mr. and Mrs. Howkins, dated 8th December, 1852 and referred to in the next letter, upon the terms of Messrs. Cates & Son's letter to me of the 1st instant.”

The letter referred to was as follows,—

“1st August, 1854.

“Sir, —We have written to Mr. W. Williams and Mr. Verity informing them of your application for the lease from Mr. Bennet to Messrs. Williams, and of our intention to give it up to you, which we shall do without they send us express notice to the contrary, in [528] which case it might be necessary for us to consider our position. We have also written to Mr. Bennet in reference to the other lease, and will give you what information we can about it, on hearing from him.

“Of course, the delivery to you of the leases or either of them must not be taken as a recognition or ratification in any way of the annuities, or as an admission that the leases are legally affected by them. It must be understood that they are only given up now instead of on the day of the date of the deed, and that your client's legal position is the same as if they had then been delivered to them.

“D. Keane, Esq.

“CATES & SON.”

In the course of the evening of the 8th of December, and on the 9th, when the Messrs. Cates and William Williams were alone together, some observations were made by the Messrs. Cates as to the incautious way in which Mr. Keane had acted in the transaction, particularly with reference to the stipulating for the 400l.; and it was remarked by Mr. F. N. Cates that that circumstance had a tendency to jeopardize the transaction.

Some time previously to the 22nd of September, 1852, and before the lease from the defendant to Messrs. Williams was made, the property comprised in the lease to the defendant from his father, and particularly described in the statutory declaration made by the defendant on the 2nd of December, 1852, was mortgaged by the defendant to one Mattheson, to secure the sum of 1200l., and continued so mortgaged until and at the time the defendant made the said declaration and thence until the present time; and the said lease was at the time the declaration was made, and has ever since continued to be, in the possession of the said Mr. Mattheson. The property at Swansea comprised in the schedule annexed to the annuity deed, and in the schedule referred to in the declaration of [529] William John Williams before mentioned, was some time previous to the 22nd of September, 1852, mortgaged by the defendant to one David Francis, to secure the sum of 5000l., and has ever since continued so mortgaged; and the title deeds of the said property were and have ever since continued to be in the possession of the said David Francis. The fact of such mortgage to David Francis was known to William Williams at the time of the application to Messrs. Cates & Son in September, 1852, and the said William Williams, in the course of his communications with the Messrs. Cates, stated to them that the defendant's father had put the defendant in possession of the property at Swansea, and that the title deeds were in the possession of the father, who would not part with them, which statements were communicated by Messrs. Cates to Mr. Keane. The said William Williams, at the time he made such statements, knew them to be false.

Previously to the execution of the annuity deed, there was an understanding between the defendant and Lewis Ambrose Williams and William Williams that the defendant was to borrow of them a portion of the money obtained from the plaintiff; and, on the 15th of December, 1852, the Messrs. Williams paid to Francis, on account of the defendant, 319l. 12s. On the 10th of December they paid to the defendant 150l., on the 26th 100l., and on the 5th of March, 1853, 100l. Part of this money was repaid by the defendant, and no rent has been paid to the defendant by the Messrs. Williams.

Shortly after the 8th of December, 1852, Mr. Keane paid the first year's premium on the policy of insurance, which was thereupon delivered to him on behalf of the plaintiff by the English and Scottish Law Life Assurance Society.

Judgment was signed on the warrant of attorney [530] against the defendant at the suit of the plaintiff and his wife for 8000*l.* and 3*l.* 10*s.* costs on the 15th of January, 1853, and against William Williams and Lewis Ambrose Williams, at the like suit, and for the same amounts, on the 13th of February, 1853; and the warrants of attorney were filed of record in the court of Queen's Bench.

A memorial of the annuity was inrolled in Chancery on the 4th of January 1853. [See next page.] No other memorial was inrolled.

On the 4th of January 1853, William Williams applied to Messrs. Cates & Son to raise 12,000*l.* on mortgage of the property at Swansea, for the purpose of paying off the annuity and certain judgments against the defendant, a list of which he handed to them; and they informed him that 8000*l.* was the largest sum they should probably be able to obtain, or for which there was a security.

On the 12th of April, 1853, Messrs. Cates & Son wrote and sent to Mr. Keane the following letter—

“Fenchurch Street, 12th April, 1853.

“Dear Sir, —In order to a proper developement of the mineral property they hold of Mr. Bennet at Pandy, Messrs. Williams will shortly require an additional sum of 1500*l.*, and we should be glad to be informed whether your clients Mr. & Mrs. Howkins are disposed and prepared to advance that further sum upon the security they now hold, and upon the terms of the former loan, with the exception of any policy, which for the additional sum our clients would decline being at the expense of. It becomes a simple question, therefore, of advancing or not the further sum required at 7 per cent. interest. Messrs. Williams have succeeded in opening their colliery, and are now working coal (as we can testify from our own personal knowledge, Mr. P. Cates having visited the spot,) to ad-[532]-vantage: and, whatever reason you might before have had for requiring a policy, there is now in this property an ample security independently of Mr. Bennet's estate at Swansea, which is of daily increasing value. Messrs. Williams have heavy payments to make shortly, for a steam-engine 600*l.*, and other necessary plant for the colliery, involving a great outlay, which will considerably intrench upon the balance remaining at their bankers'; and we must therefore beg the favor of an early reply, in order that, in the event of its being in the negative, we may at once make other arrangements.

“CATES & SON.

“D. Keane, Esq.”

Mr. Keane, in answer to this letter, declined to make the proposed advance.

On the 23rd of April, Mr. F. N. Cates, by the instructions of Mr. Bennet, applied to Mr. Keane to make an advance of money, which Mr. Keane declined to do.

The balance of the half year's annuity which became due on the 8th of June, 1853, 26*l.* 5*s.* 10½*d.*, was paid by the Messrs. Williams after a fi. fa. had been issued against them on the judgment signed on the warrant of attorney.

In the month of July, 1853, William Williams being still desirous of obtaining an advance of money, Messrs. Cates & Son proposed themselves to make an advance; and, in order to do so, they at an interview with him on the 16th of July required to be appointed receivers and managers of the colliery for the purpose of keeping down the plaintiff's annuity and seeing that the money was properly laid out: and they required to have the titledeeds, when he informed them that the estate at Swansea was already mortgaged for 7000*l.*, and that the mortgagee had the titledeeds.

On the same 15th of July, Mr. F. N. Cates, in consequence of William Williams stating to him that Mr. [533] Keane complained that the abstracts of the title to the Swansea estate had not been delivered to him, wrote a letter to Mr. Keane, which he gave to William Williams to deliver, and which letter was never delivered to Mr. Keane. In this letter no mention was made of the fact that the Swansea estate was mortgaged; but, on the 6th of August, 1853, Mr. F. N. Cates did inform Mr. Keane of the fact of there being a mortgage of the estate; and, having on the 12th of August obtained the particulars from the defendant he on the 13th told Mr. Keane he understood the mortgage amounted to 7000*l.*

The fact of the mortgage of the property comprised in the lease to the defendant from his father was not known to either of the Messrs. Cates until the 1st of October, 1855.

The half-year's annuity which became due on the 8th of December, 1853, was not

[531] *A Memorial to be enrolled in Her Majesty's High Court of Chancery pursuant to an Act of Parliament made and passed in the Fifty-third year of the reign of His late Majesty King George the Third, intitled "An Act to repeal an Act of the Seventh year of the reign of His present Majesty, intitled 'An Act for Registering the Grants of Life Annuities, and for the better protection of Infants against such Grants, and to substitute other provisions in lieu thereof.'"*

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or names of person or persons by whom annuity or rent is to be paid, or to be received.	Person or persons for whose life or lives the annuity or rent is granted.	Consideration, and how paid.	Amount of annuity or rent—charge.
8th December, 1852.	Grant of Lewis Ambrose Williams, John Wick Bennett, Theophilus Howkins, and Marian his wife, and Daniel Keane.	William Williams, Lewis Ambrose Williams, John Wick Bennett, Theophilus Howkins, and Marian his wife, and Daniel Keane.	Fra. M. Cates, J. H. Cullcott, Wm. Williams, Lewis A. Williams.	Theophilus Howkins and Marian his wife.	John Wick Bennet.	Four thousand pounds, paid as follows, viz. £1000 R/H 31898, 14th July, 1852 1000 do. 32644, ditto 1000 do. 34195, ditto 500 R/O 93854, 29th May, 1852 100 D/O 75472, 10th May, 1852 100 do. 75473, ditto 100 do. 75474, ditto 100 do. 75475, ditto 10 R/W 31465, 6th October, 1852 10 do. 31466, ditto 10 do. 31467, ditto 10 do. 31468, ditto 50 O/A 66825, 9th March, 1852 10 in gold and	
						£4000	

Enrolled at eleven o'clock in the forenoon of the fourth day of January, in the year of Our Lord, 1853.

This agrees with the record,

W. WRIGHT, Clerk of Inrolments in Chancery.

paid; and, on the plaintiff issuing a writ of fi. fa. against the Messrs. Williams, and seizing under it the property at the colliery, an application was made by Messrs. Cates & Son, as attorneys for Messrs. Williams, to set aside the warrants of attorney and the judgment signed thereon and writ of fi. fa. and other proceedings; and, on the 17th of January, 1854, they were ordered by Erle, J., to be set aside, on the ground that the warrant of attorney was not mentioned in the memorial.

The writ of summons in this action was issued on the 25th of January, 1854; and, on the 7th of February, 1854, the warrant of attorney executed by the defendant and the judgment signed thereon were, on the application of Messrs. Cates & Son, as attorneys for the defendant, set aside, by consent, by an order of Coleridge, J.

Since this action was commenced, the plaintiff has brought actions against William Williams and Lewis [534] Ambrose Williams, to recover the arrears of the annuity and the sum of 4000*l.*, the consideration money thereof. The pleadings in such actions respectively and the issues joined therein were precisely similar to those in the present action; and the Messrs. Williams submitted to a verdict against them in such actions respectively on the first count of the declaration therein respectively.

The defendant's father died in the month of November, 1855.

The following is the list of objections to the validity of the deed on which the defendant insisted under his second plea, delivered pursuant to the order of Nisi Prius in this cause. [Those printed in italics were abandoned in the course of the argument.]

"1. *The memorial does not describe the nature of the said deed. The only instrument described in the memorial is a grant of annuity; and the said deed is not a grant of annuity. The same is a covenant to pay an annuity or yearly sum for a term of sixty years, if the defendant so long live, and a demise and conveyance of certain tenements therein mentioned, and shall have been so described.*

"2. *All the instruments by which the said annuity was secured are not mentioned in the memorial, that is to say, a policy of assurance by the English and Scottish Law Life-Assurance Society for 4070*l.* on the life of the defendant; a warrant of attorney by William Williams and Lewis Ambrose Williams, authorising judgment in the court of Queen's Bench for 8000*l.* and costs of suit, at the suit of Theophilus Howkins and Marian his wife; a warrant of attorney by the defendant authorizing judgment in the said court for 8000*l.* and costs of suit, at the suit of the said Theophilus Howkins and his said wife,—the same being instruments by which the said annuity was secured,—[535] are not mentioned or in any way described in the said memorial.*

"3. *The names of the parties to the said deed are not mentioned in the said memorial. Their names are merely stated as William Williams, Lewis Ambrose Williams, John Wick Bennet, Theophilus Howkins and Marian his wife, and Daniel Keane, when in fact the said deed purports to be an indenture made between William Williams and Lewis Ambrose Williams of the first part, John Wick Bennet of the second part, Theophilus Howkins and Marian his wife of the third part, and Daniel Keane of the fourth part; and the said memorial does not describe the deed as an indenture between parties, but as if it were a deed poll, and as if all the parties named as parties to the said deed were grantors of the said annuity.*

"4. *The said deed was not executed by the said Theophilus Howkins and Marian his wife and Daniel Keane, or any or either of them, and they were therefore not parties to the deed, and ought not to have been so described.*

"5. *The said Marian Howkins was at the date of the deed a married woman, and could not in law be a party to a deed; and the memorial is defective in describing her as such.*

"6. *The names of the witnesses to the said deed are not inserted in the said memorial. The said deed was witnessed by Francis Nethersole Cates, who signed the attestation 'F. H. Calcott;' and Frederick Herbert Calcott, who signed the attestation 'F. H. Calcott;'* and the names of the witnesses inserted in the said memorial are, 'Fras. M. Cates,' 'J. H. Calcott,' 'Wm. Williams,' and 'Lewis A. Williams.' There were two witnesses to the said deed, that is to say, the said Francis Nethersole Cates and Frederick Herbert Calcott, and not four, as stated in the said memorial.

[536] "7. *The annuity was granted for sixty years, if the defendant should so long live, and not for the life of the defendant, as stated in the memorial.*

"8. *The consideration was not paid as stated in the memorial. The only consideration paid for the said annuity was 3486*l.*, and not 4000*l.*, as stated in the said memorial.*

"9. *Some of the notes and gold mentioned in the memorial, that is to say, the*

500l. note, one of the 100l. notes, one of the 10l. notes, and 4l. of the gold, were returned to and retained by the said Daniel Keane, the solicitor and agent of the plaintiff, at the time of the execution of the said deed, in pursuance of a previous arrangement, and cannot therefore be said to have been paid to the grantors of the annuity as the consideration for the annuity."

The pleadings in this action, and the documents contained in the appendix, were to form part of the case; and the court was to be at liberty, if it should think fit, to draw such inferences from the facts stated as a jury might have drawn.

The questions for the opinion of the court are,—first, whether the grant of annuity was void on any of the grounds stated in the list of objections,—secondly, whether the deed and contract were void for usury,—thirdly, whether the plaintiff was entitled to recover from the defendant all or any and what part of the consideration money for the said annuity.

The verdict and judgment were to be entered in such manner and for such amount as the court should direct.

Lush, Q. C., for the plaintiff. The first question is, whether the annuity deed is void. The first objection urged is, that the memorial does not describe the nature of the deed: for, that the only instrument [537] described in the memorial is a grant of annuity, and the deed is not a grant of annuity. The deed purports to be an indenture between William Williams and Lewis Ambrose Williams, of the first part, John Wick Bennet, of the second part, Theophilus Howkins and Marian his wife of the third part, and Daniel Keane of the fourth part: it recites the property to be charged, the agreement for the grant of the annuity, and a covenant for payment, and then assigns the lease from Bennet to the Williamses, and conveys the Swansea estate by way of security. The whole effect of the indenture is, to grant an annuity to Howkins and wife. The 2nd section of the 53 G. 3, c. 141, enacts, that, "within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity, or rent-charge shall be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be inrolled in the high court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require: otherwise every such deed, bond, instrument, or other assurance shall be null and void to all intents and purposes." In the second column of the form of memorial there given, under the head "Nature of instrument," are the words "Indentures of lease and release, Bond in penalty of 1200l., Warrant of attorney to confess judgment on the same bond." But no section in the act says that the grant shall be by deed, or that a particular description of the instrument shall be given. This very point has been twice discussed and decided in the court of Queen's Bench. The first case was that of *Butler v. Capel*, 2 B. & C. 251, 3 D. & R. 485. There, in the memorial of an annuity inrolled pursuant to the statute, an instrument was described as an assignment of certain leasehold premises: the instrument was in fact an underlease: and it was held that the description given was a sufficient compliance with the statute,—the court saying, "The schedule of the 53 G. 3, c. 141, requires that the nature of the instrument should be inserted: and that is satisfied by a description of the instrument in popular language, although that be not according to its strictly legal effect." And in *Brown v. Lee*, 6 B. & C. 689, 9 D. & R. 700, it was held that an instrument which contained, besides covenants to pay the annuity, also an assignment of stock to secure the same, was sufficiently described as "a grant of an annuity." It was objected that the nature of the whole instrument ought to be set out: but Bayley, J., in his judgment, said: "The enacting clause does not in terms require the nature of the instrument to be described: but the schedule which follows this clause contains several columns, one of which is headed 'Nature of the instrument,' and under that head there is given an instance of the description of the nature of the instrument which the statute requires, viz. 'Lease and release,' 'Warrant of attorney to confess judgment,' 'Bond in penalty.' The statute imposes no obligation on the parties to describe the property

on which the annuity is secured. The object of the statute was, that such a description should be given as to enable a party, on looking at the memorial, to claim a copy under the 5th section." The words [539] "grant of an annuity" are as true a description of the nature of an instrument by which an annuity is secured, as the words 'lease and release.' They convey as much information as the legislature intended to be conveyed by the description of the nature of the instrument, within the meaning of this act of parliament (a). [O'Malley, Q. C., for the defendant, here intimated that he abandoned that objection, as well as the second, third, fourth, and fifth.]

The sixth objection is, that the names of the witnesses to the deed are not truly inserted in the memorial,—that is, the signatures of the witnesses (by initial) are copied, and not the names of the witnesses; and that there were but two witnesses to the deed, and the names of four appear in the memorial. The mistake arose thus,—the two Williamsses signed the acknowledgment for the consideration money in such a way that the clerk who copied it took them to be additional witnesses. This defect is cured by the 7 G. 4, c. 75, which recites that "it frequently happens that the names of witnesses to grants of annuities or other assurances are unknown to the grantees thereof or to their solicitors or agents otherwise than as they appear by the subscriptions of such witnesses to the attestations of the execution of such grants or assurances, and it might greatly endanger the validity of any such assurance if any name were inserted in the memorial thereof as the name of any such witness in any other manner than as the same appears signed by such witness as attesting the execution of such assurance; and that a very great number of memorials of grants of annuities have since the [540] passing of the said act [53 G. 3, c. 141] been inrolled, in which the surnames of witnesses to the deeds, instruments, or assurances specified in such memorials have been inserted together with such initial letter or abbreviation of the Christian names of such witnesses as appeared subscribed to the attestation by such witnesses of the execution of such deeds, instruments, or assurances, without stating at full length the Christian names of such witnesses; and that doubts have been entertained whether, according to the true construction of the said act, it is necessary to the validity of any such grant or other assurance that the Christian as well as surnames of all the witnesses to such deed, grant, or other assurance should be inserted in the memorial thereof in any other manner than as the same may appear subscribed to the attestation of such deed, grant, or other assurance by such witness respectively," and, in order to remove such doubts, enacts and declares, "that, by the said act of 53 G. 3, no further or other name or names of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is or may be granted, is or are required in the memorial thereof besides the names of all such witnesses as they shall appear signed to the attestations respectively of the execution of such deed, bond, instrument, or other assurance; and so the said act shall be deemed, construed, and taken." [Willes, J., referred to *Gibbs v. Hooper*, 9 Simons, 89, where the memorial of an annuity stated that the grantee's execution of the deed was attested by three persons whose names it mentioned, but the name of only one of them was indorsed on the deed; and it was held that the grant of the annuity and all the securities for it were void.] There, the names so introduced were those of entire strangers: here, the Williamsses are the granting parties and [541] nobody could be misled. There is no pretence for that objection.

The seventh is a very subtle objection: it is, that the annuity was granted for sixty years, if the defendant should so long live, and not for the life of the defendant, stated in the memorial. [O'Malley. That objection is disposed of by the case of *Barber v. Gamson*, 4 B. & Ald. 281, where it was held, that, in the memorial, it is sufficient to state that the annuity was granted for the lives of A. B., &c. (naming them), without adding that it was granted for their joint lives or the life of the survivor, or for a term of years determinable on those lives.]

The eighth objection is that the consideration was not paid as stated in the memorial, the consideration paid for the annuity being 3486l. only, and not 4000l., as stated in the memorial. Even if there had been a return of part of the consideration money here, that would be no ground for avoiding the deed, though the court might have set aside the securities, upon terms. It is clearly no ground of answer by

(a) And see *Crowther v. Wentworth*, 6 B. & C. 366, 9 D. & R. 286, and *Cane v. Lovelace*, 2 B. & Ad. 767.

way of plea to an action on the deed. The ninth is the same objection substantially, though in a different form.

Then, as to the alleged usury. The first proposal of the grantees' solicitor was that the grantors should pay 8 per cent. interest, and that the principal should be secured upon Mr. Bennet's Swansea property. This was objected to by the grantors' solicitors on the ground that the transaction would be void for usury. It was consequently abandoned; and in lieu of it, an annuity deed in the ordinary form was proposed, in which the annuity only is secured upon the land, the only security for the principal being the policy of assurance on Mr. Bennet's life. The collateral security for the principal does not make the securities void. [Willes, J. Your best point is, that the principal is put in jeopardy.] It is.

[542] O'Malley, Q. C. (with whom was the Common Serjeant), for the defendant. As to the sixth objection, the 7 G. 4, c. 75, is conclusive with regard to the names of the witnesses being set out by initials. But still the addition of the two names is fatal. In considering this objection, the court cannot look at who are the parties whose names are thus added, or whether their insertion in the particular case is calculated to embarrass or mislead. The only question is, whether the requirement of the statute has been complied with. "The object of the legislature," says Vice-Chancellor Shadwell, in *Gibbs v. Hooper*, 9 Simons, 92, "in requiring the several particulars mentioned in the act to be set forth in the memorial was, to enable any person who might be desirous of inquiring into the transaction to ascertain what the res geste of it really were: and, in my opinion, that object is not complied with, when, in addition to the names of the persons who did witness the transaction, the names of other persons are introduced into the memorial. Such a mis-statement would lead to endless trouble and confusion, by inducing a person desirous of inquiring into the transaction to apply for information to persons who were entire strangers to it. Moreover, the memorial would contain an untrue representation of the res geste of the transaction; and the public would be deceived, if the parties were allowed to represent that the transaction had the sanction of two persons, both, perhaps, of the greatest respectability, but who were wholly ignorant that any such transaction had taken place." Suppose, instead of two additional names, there had been fifty, could it be said that the statute was complied with? In *Hart v. Lordlace*, 6 T. R. 471, the memorial stated that the indenture, bond, and warrant of attorney "were all attested by and executed in the presence of A. B. and C. D., or one of them," and it was [543] held to be insufficient, —Lord Kenyon saying: "I cannot get over the objection that the names of the witnesses to each of the deeds are not set forth with sufficient accuracy in the memorial: and this objection applies to the indenture as well as to the bond and warrant of attorney. The legislature, in framing this act of parliament, intended that every circumstance relating to the annuity should be disclosed: and more information is likely to be collected on the subject if all the witnesses to the different instruments be set forth in the memorial than if only some of their names be there mentioned; for, some important parts of the transaction may perhaps be known only to the witnesses to one of the instruments. In this memorial, the names of the witnesses are not distinctly set forth; if we allow this mode of stating their names to be sufficient, it will be difficult to draw the line: and in the next case it may be alleged in the memorial 'that the different instruments were executed in the presence of an hundred witnesses (naming them), some or one of them.'" That is quite in point.

The consideration for the annuity is not truly stated in the memorial. No doubt, if the objection had been that part of the consideration money had been retained or returned, it would only have been ground for setting aside the deed upon terms. But the question here is, whether the memorial truly states the consideration paid for the annuity. The memorial should so state the consideration as to disclose at once the rate of interest charged. Instead of 4000l., the true consideration paid was only 3486l.: and therefore, instead of paying $12\frac{1}{2}$ per cent. interest, the grantors are made to pay more than $14\frac{1}{2}$ per cent. The nominal consideration was made 4000l. for the express purpose of giving back 400l. to the solicitor who negotiated the transaction. This is a clear evasion of [544] the act of parliament. [Erle, C. J. The line drawn in the cases seems to be this,—was the whole consideration money ever in the power and under the control of the borrower? Willes, J. The precise point arose in *Hill v. Fox*, 4 Hurlst. & N. 359. There, the defendant being indebted to the plaintiff and other persons for money lost by betting on a horse-race, applied to the plaintiff for a

loan. The plaintiff lent the defendant 2000*l.* upon the security of a deed which assigned to the plaintiff certain policies of assurance, and contained a covenant by the defendant to pay the 2000*l.* and interest. On the settling day, the defendant paid the plaintiff his bets out of the 2000*l.* In an action by the plaintiff on the covenant, the defendant pleaded that the deed was a mortgage security, part of the consideration for which was a gaming debt. At the trial the judge told the jury, that, if the 2000*l.* was advanced in pursuance of a stipulation or agreement between the plaintiff and defendant that out of it the plaintiff should be paid the money which he had won of the defendant by betting, it was a mere colourable loan and evasion of the statute: but that, if there was no such stipulation or agreement, and the plaintiff advanced the 2000*l.* as a loan for the defendant to dispose of it as he pleased, the deed was valid, although the plaintiff expected to be paid out of the money so lent: and it was held by the Exchequer Chamber, on a bill of exceptions, that the direction was right.] Here, 400*l.* was immediately handed over to the solicitor pursuant to a previous agreement, which could have been enforced. Then, if the transaction be such that the deed is void, can the plaintiff recover back the consideration? [Erle, C. J. The 6th section of the 53 G. 3, c. 141 (a)¹, only [545] provides that the deed may be set aside on motion.] In *Williamson v. Gould*, 1 Bingh. 234, where, upon the grant of an annuity, the agent of the grantee, on paying the consideration money, retained or caused to be returned to him a considerable sum for the expense of deeds, investigating the title, journeys, &c. (two witnesses, brought from a considerable distance for the purpose of attesting the annuity deed, having first retired), the court held this an illegal retainer for which the grantee was responsible, and on that ground set aside the annuity ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for and was ignorant of such retainer. The court there ignore the distinction between returning and retaining. [Willes, J. The facts of that case are very differently reported in 8 J. B. [546] Moore, 109. Williams, J. All the cases are collected in Mr. Lumley's book (a)², which is very accurate; but no trace is to be found of this having ever been set up as an answer to an action on the deed.] All the cases certainly appear to have been under the 6th section of the statute.

Then, as to the count for the consideration,—no doubt, where the annuity deed is set aside, the ordinary course is, to order the consideration to be returned. But the defendant was not the person who received the money: he was merely a surety for payment of the annuity. The first agreement proposed to make Bennet the principal and the Messrs. Williams the sureties; but this was objected to by the solicitors for the grantors, who prepared the second agreement, which though not signed by the parties, was ultimately acted on as the basis of the transaction. In *Stratton v. Rastall*, 2 T. R. 366, it was held that, where an annuity-bond granted by two becomes void by the neglect of the grantee in not registering a memorial under the statute, he cannot recover back any part of the consideration money from the one who was known to be only a surety for the other, and had not in truth received any

(a)¹ Which enacts, “that, if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same; or, in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privy and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or, if such consideration is expressed to be paid in money, but the same, or any part of it, shall be paid in goods; or, if the consideration, or any part of it, shall be retained on pretence of answering the future payments of the annuity or rent charge, or any other pretence; in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the court in which any action shall be brought for payment of the annuity or rent-charge, or judgment entered, by motion, to stay proceedings on the action or judgment; and, if it shall appear to the court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the court to order every deed, bond, instrument, or other assurance whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated.”

(a)² Lumley's *Life Annuities and Rent Charges*, 149, et seq.

part of it, notwithstanding they both joined in signing a receipt for it. [Erle, C. J. This point only becomes material if the deed be held void. We will hear you upon it if necessary.]

The transaction was clearly an evasion of the usury laws. In *Doe d. Titford v. Chambers*, 4 Campb. 1, it was held that an agreement, that, upon the advance of a sum of money by B. to A., A. should assign to B. the lease of premises of greater value, with a power of redemption on re-payment of the money, and that in the meantime B. should grant A. an underlease of the [547] premises at a greater rent than the legal interest of the money,—A. insuring the premises and paying the ground-rent and taxes,—was usurious, and the assignment of the lease executed under such agreement void. Lord Ellenborough said: “The question here is whether this transaction was a contrivance to receive usurious interest for the loan of money. The defendant actually received 25l. a year beyond the legal interest of money. Therefore, if the assignment was intended as a security for the advance, and not as a purchase of the lease, it is void. Had there been a stipulation, that, upon the redemption, the 70l. a year should be brought into account, and interest in that case only taken at 45l., the effect might have been different. But, as the deeds really stand, the defendant, had the premises been redeemed, would have received 70l. a year as interest upon the 900l. advanced. If he ran any risk, or the re-payment of the principal was liable to any contingency, there would be no usury: but I see no risk or contingency involved in the transaction, except the solvency of the borrower. The latter was to insure the premises, to keep them in repair, to pay the ground-rent and all taxes. The covenant with regard to the property-tax is void; but it shews the nature of the transaction. In short, the defendant advanced the money by way of loan: it was in contemplation of both parties that this should be repaid: it was never put in hazard: and interest above the rate of 5l. per cent. was to be paid for the forbearance. The assignment executed in pursuance of this agreement is therefore void.” *Doe d. Grimes v. Gooch*, 3 B. & Ald. 664, is to the same effect. There, a builder, having taken ground on a building lease at the ground-rent of 108l., assigned over his lease to A. for a sum considerably exceeding the then value of the premises, and at the same time took a lease from A. at [548] an increased rent of 395l., and containing the same covenants for building as the original lease, together with a stipulation that he should be allowed to re-purchase the lease at the same sum for which it was assigned by him to A.: and it was held, that, under these circumstances, it was properly left to the jury to say whether this was a purchase or an usurious loan: and, the jury having found it to be the latter, the court refused to disturb the verdict. In *Chillingworth v. Chillingworth*, 8 Simons, 404, A. applied to B. to lend him 400l. on mortgage of certain leasehold houses, but B. refused: it was then agreed that A., in consideration of the 400l., should grant to B. two annuities of 21l. each, for forty years, to be issuing out of the houses: and was it held that the transaction was usurious. In *Kenny v. Lynch*, 8 Irish Equity Reports, 207,—where the question was whether an annuity for a term of years certain, which would within the term repay the purchase-money and more than legal interest upon it, was usurious,—the Lord Chancellor (Sir E. Sugden) says: “There is no doubt that if the deed is a shift for the purpose of evading the statute, and the jury come to that conclusion, it would be void; for, it is not the form, but the substance of the transaction that would be regarded.” The question is, was this a device whereby the lender was to obtain from the borrowers more than 5 per cent. interest, without the principal sum being jeopardized. There is no case where the transaction has been upheld, where there has been a stipulation that the borrower should pay premiums of insurance. [Williams, J. Several. Erle, C. J. It is quite immaterial out of whose pocket the premiums come.] Where is the risk? [Erle, C. J. In *Ex parte Naish*, 7 Bingh. 150, 4 M. & P. 793, this court refused to set aside a warrant of attorney given to secure an annuity granted on [549] four lives, with a covenant on the part of the grantor to insure the principal sum within thirty days after the expiration of the third life. It was urged that it was a usurious contract, for the principal was never risked. But the court held that it did not appear to be a loan, but that the hazard was considerable: that, even if the insurance were effected, there are clauses in policies which induce considerable hazard; and that the mode of re-payment was too precarious for the court to say the parties intended a loan. They therefore dismissed the rule for setting aside the warrant of attorney, with costs. The grantor, however, tried the question again in the court of Exchequer,—*Holland*

v. *Pelham*, 1 C. & J. 575, 1 Tyrwh. 438, by pleading that the agreement was usurious, to an action of covenant on the annuity deed. But, after argument, that court held, agreeably with the decision of this court, that the covenant for the insurance did not make the transaction usurious. The argument of Mr. Comyn was adopted, that it can make no difference whether the grantor pay the insurance, and therefore his annual payment be less, or the grantee, and then the annual payment will be higher.

Lush, Q. C., in reply, was stopped by the court.

ERLE, C. J. I am of opinion that none of the objections which have been urged in this case can be sustained, and therefore that our judgment must be for the plaintiff. We are not to regard this case as if it came before us upon a motion under the 6th section of the 53 G. 3, c. 141, to set aside the annuity: but the question is whether any of the points urged afford a defence to an action upon the deed. The statutes requiring a memorial of every grant of annuity to be inrolled, and rendering the securities void for non-[550]compliance, have been very much considered: but most of the objections from time to time brought forward have been found to be untenable. The statute (s. 2) amongst other things, requires the memorial to contain "the names of all the witnesses" to the deed or other instrument whereby the annuity is granted. Here, the names of the witnesses are inserted with initials for their Christian names, as they appeared in the deed itself. This defect, if defect it was, is cured by the statute 7 G. 4, c. 75. Then it appears that there were two attesting witnesses to the deed, and that two of the parties to the transaction had signed the deed in such a manner as to induce the clerk who drew the memorial to suppose that they were witnesses, and so the memorial gave the names of four persons as witnesses attesting the execution of the deed. I think the reasoning of the case before Vice-Chancellor Shadwell is wholly inapplicable to the present. The opinion there expressed may be said to be extrajudicial. Circumstances might no doubt arise which would bring a case within that dictum. But, here, the insertion of the two additional names was a mere blunder of the clerk, and does not come within the ground relied on in that case.

Upon the next point, much argument has been addressed to us which would have been very cogent if this had been a motion to set aside the securities. The question is whether the memorial truly states the consideration paid for the annuity. It appears from the case that the sum agreed to be paid for the annuity was 4000*l.*, and that that sum was handed over to the grantors, though with a perfect expectation on the part of the grantee's solicitor that 400*l.* of the money would be handed back to him for his services in procuring the money, and for the expenses of preparing the securities, together with a sum [551] paid for the first year's premium on the insurance of the life of Mr. Bennet. I am of opinion that the true consideration was 4000*l.*, and that that sum was paid if it ever passed into the legal possession of the grantors or their agent. It appears that the full sum did so pass into the hands of the grantors, so that no one had a right to intercept any portion of it. It appears, however, that the money was paid under an arrangement that 400*l.* should be returned for the purpose before mentioned, and a further sum for the first year's premium. There are many cases which seem to shew that that would be a breach of the statute of which the grantors might have availed themselves by motion under s. 6. But that question is not now before us. I think it affords no defence to this action.

The point mainly urged on the part of the defendant was, that this was a usurious transaction. A loan for more than 5 per cent. interest secured upon land is still void for usury: but, if the principal sum is not secured upon land, the usury laws have no application. Here, the principal money was not secured upon land. The grantors stipulate for the payment of an annuity, and the payment of that is secured on the land, but not the principal. It is said that this is only a cover and device to evade the usury laws, because the grantors covenant for the payment of the annuity for a period of sixty years, and part of the security was an insurance on the life of one of them, and the grantors contract to pay the premiums, and so the principal is never put in jeopardy. No doubt, the risk is extremely small: but it cannot be said that there is none. The insurance office might become insolvent, or the policy might become unavailing by reason of some of the many circumstances by which policies are vitiated. It seems to me that there is no foundation for the [552] objection. The law prohibits the securing an advance of money upon land at a higher rate of interest

than 5 per cent. : and parties must take care not to violate the law. But it is a misapplication of language to call a transaction like this a device to evade the law. It is rather a case where the parties have obeyed the prohibition of the law, by taking a security which is outside of the prohibition. Upon the whole, I am unable to find any objection which ought to prevent the plaintiff from recovering in this action.

WILLIAMS, J. I am entirely of the same opinion. As to the formal objection,—the only one which really gives rise to any difficulty,—that the memorial contains the names of two persons as witnesses whose names do not appear as witnesses on the deed, the case differs materially from that of *Gibbs v. Hooper*, 9 Simons, 89, where Sir L. Shadwell, V. C., intimated an opinion that there may be cases where the addition of names might be fatal. Here, the addition of the names of the two Williamses in the column in which the names of the witnesses ought to have been inserted, was due to a transparent blunder, the clerk who copied the names mistaking for witnesses two of the parties to the deed. I think such a mere blunder ought not to be allowed to invalidate the transaction.

As to the more substantial objection,—that the real consideration is not truly stated in the memorial,—it is contended the transaction is not correctly described as an advance of 4000l., inasmuch as 400l. of it was returned to the solicitor who acted for the grantee, for procuration money and expenses, and a further sum for the premium of insurance on Mr. Bennet's life. There are several cases in this court where the misconduct of the agent of the grantee in extorting an exorbitant sum for his charges, has been held good ground for setting aside [553] the annuity, though knowledge of the fact had not been brought home to the grantee himself. But it does not follow that it would afford a defence to an action on the deed. It is admitted that no instance can be found of a defence of that sort having been set up: and I am not inclined to establish a precedent for it.

As to the last point,—that the transaction was void as being an evasion of the laws against usury. No doubt, in one sense, granting annuities is an evasion of the usury laws. But parties are entitled to evade the law. A man is guilty of no offence who so conducts his affairs as not to infringe an act of parliament. I see no objection to an evasion of the law in that sense. The usury laws do not apply where the principal is put in jeopardy. Here the principal was put in jeopardy. Reliance was placed upon the covenant to insure Bennet's life, as shewing that the grantee incurred no risk of losing his principal. But still there is always a risk that the policy may turn out to be unproductive.

WILLES, J. I am of the same opinion. As to the witnesses, it is perfectly obvious on looking at the memorial that the addition of the names of the two Williamses was a mere blunder. Nobody could be misled by it, and therefore the case *Gibbs v. Hooper* does not apply. As to the statement of the consideration,—it is said that the 4000l. was not the amount really advanced, but that sum less 10 per cent. for procuration money and expenses, and the year's premium. As to that, the ruling of the Chief Justice in *Hill v. Fox*, 4 Hurlst. & N. 359, confirmed by the Exchequer Chamber, is precisely in point. The statute 53 G. 3, c. 141, makes a distinction between return and retainer. Where part of the consideration money has [554] been returned, the court may, under s. 6, order the securities to be set aside upon terms. That was the case of *Williamson v. Gould*, 1 Bingh. 234, 8 J. B. Moore, 109. Then it is said that the transaction was void on the ground of usury, inasmuch as this was a shift or device to enable the grantee to obtain greater interest than 5 per cent. secured upon land. As an illustration of what has been said by my Brother Williams on this point,—suppose a loan of 100l. to be contracted for, of which 50l. was to be received in coals or a horse or some other commodity or chattel intrinsically worth 5l. only. That would be a mere shift to obtain usurious interest, and would be a case within the statute. It is clearly established, that, where the principal is put in jeopardy, the case is unaffected by the statutes against usury.

KEATING, J. For the reasons already given, I entirely concur in the judgments pronounced by my Lord and two learned Brothers.

Judgment for the plaintiff on the first count: for the defendant on the second.

[555] HONESS AND ANOTHER *v.* STUBBS. Jan. 20th, 1860.

To a declaration containing three counts for three distinct libels, the court refused to allow the defendant to plead one general plea of justification.

This was an action for a libel. The declaration contained three counts for three separate libels charging the plaintiffs with swindling, and alleging special damage.

The defendants, in order to avoid the necessity of pleading a multiplicity of pleas, were desirous of pleading one general justification to the whole declaration, and for this purpose applied to Byles, J., at Chambers, for leave. The learned judge, however, declined to make the order, but referred the defendant to the court.

Grant now moved accordingly. He submitted that the course proposed would save much needless expense, and offered to deliver to the plaintiffs full particulars of the intended defence.

WILLIAMS, J. The difficulty is this,—if you set out in your pleas the facts upon which you rely, the court has an opportunity of judging whether they do amount to a justification or not; whereas, by the course proposed, you prevent the matter from getting on the record at all.

ERLE, C. J., and WILLES, J., concurring,
Rule refused.

[556] POWLE *v.* GANDY. Jan. 21st, 1860.

The 3 & 4 Vict. c. 24, s. 2, is not repealed by the 13 & 14 Vict. c. 61, ss. 11, 12.

Therefore, where, in an action of tort, the plaintiff recovered less than 40s. damages, —Held, that a certificate under the 12th section of the last-mentioned act, that it appeared to the judge at the trial that there was a sufficient reason for bringing the action in the superior court, did not entitle him to recover costs.

This was an action to recover damages from the defendant for an injury sustained by the plaintiff's vessel from a collision with a vessel of the defendant's in the river Thames. Plea, not guilty.

The cause was by arrangement tried before the secondary of London, when the jury returned a verdict for the plaintiff, damages 10s., and the secondary, upon the application of the plaintiff's counsel, certified, under the 13 & 14 Vict. c. 61, s. 12, that it appeared to him at the trial that there was a sufficient reason for bringing the action in the court in which it was brought. The plaintiff's costs having accordingly been taxed and allowed,

Jacob, on a former day in this term, obtained a rule nisi for a review of the taxation, on the ground, that, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, which he submitted was not repealed by the 13 & 14 Vict. c. 61, ss. 11, 12, the plaintiff, having recovered less than 40s., was not entitled to costs.

Pearce now shewed cause. The plaintiff, it is submitted, is entitled to his costs, by virtue of the certificate given at the trial. The 11th section of the 13 & 14 Vict. c. 61, enacts, that, "if in any action commenced after the passing of this act in any of Her Majesty's superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20l., or if, in any action commenced after the passing of this act in any of **[557]** Her Majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5l., the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default (*a*); and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court or otherwise." Then comes the 12th section, which provides and enacts, "that, if the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained shall certify on the

back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county-court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed." A certificate under this section clearly entitles the plaintiff to costs.

Jacob, in support of the rule. The 2nd section of the 3 & 4 Vict. c. 24, clearly disentitles the plaintiff to costs, unless there is a certificate such as is provided for by that section. The words are, "If the plaintiff in any action of trespass or trespass on the case brought or to be brought in any of Her Majesty's courts at Westminster, [558] &c., shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

WILLES, J.(a). I think that section is conclusive, and that this rule must be made absolute. The substantial question is, whether the 3 & 4 Vict. c. 24, s. 2, which was passed for the discouragement of trifling and frivolous suits, is repealed by the 13 & 14 Vict. c. 61, s. 12. This action is founded on a wrong within the description of those mentioned in the 2nd section of the 3 & 4 Vict. c. 24, and, consequently, apart from the county court act the verdict being for a less sum than 40s., in the absence of a certificate that the action was brought to try a right besides the mere right to recover damages, or that the grievance for which the action is brought was wilful and malicious, the plaintiff is not entitled to costs. Then comes the 13 & 14 Vict. c. 61. Now, when the scope and object of that statute are considered, it will plainly appear that it was not intended to repeal Lord Denman's Act. The object of the county-court act was, to enforce the bringing in the county court all actions for wrongs (save certain excepted ones) which a jury might esti-[559]-mate at a sum not exceeding 5l.: and, in order to bring about that, the 11th section deprives the plaintiff of costs where he brings his action in the superior court. The legislature, therefore, are dealing with cases in which but for that act the plaintiff would have been entitled to costs, and are not at all dealing with cases provided for by the 3 & 4 Vict. c. 24. Perhaps even that reasoning is unnecessary: for, the 11th section of the county-court act says that a plaintiff recovering in a superior court a sum not exceeding 5l. in an action of tort over which the county-court has jurisdiction, shall have no costs; and then the 12th section gives a right to costs in these terms,— "Provided that if the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county-court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which such action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed." This statute does not affect to repeal the former. The rule to set aside the taxation of costs, which has taken place per incuriam, and to amend the judgment by striking out the award of costs, must therefore be made absolute.

BYLES, J. I am of the same opinion. There were two obstacles in the way of the plaintiff's recovering any costs in this case,—one, the statute 3 & 4 Vict. c. 24, s. 2, which provides that the plaintiff in an action of trespass or trespass on the case shall not be [560] entitled to any costs, where the damages recovered are less than 40s., unless the judge or presiding officer shall certify on the back of the record in the manner therein mentioned,—the other, the 13 & 14 Vict. c. 61, ss. 11, 12, which

(a) Erle, C. J., and Williams, J., were absent.

provide that plaintiffs recovering in the superior courts sums not exceeding 20l. in actions of contract, or 5l. in actions of tort over which the county-court has jurisdiction, shall have no costs, unless the judge or other presiding officer shall certify on the back of the record that it appeared to him at the trial that there was a sufficient reason for bringing the action in the superior court. Now, the second obstacle, viz. the enactment contained in the 11th section of the 13 & 14 Vict. c. 61, is removed by the certificate which the secondary has given under s. 12. But that still leaves the other obstacle in the way of the plaintiff; and not only so, but it fortifies the difficulty. I am clearly of opinion that this is not a case in which the plaintiff is entitled to costs (a).

Rule absolute (b).

[561] CHRISTIE v. BORELLY. Jan. 17th, 1860.

[S. C. 29 L. J. C. P. 153; 6 Jur. N. S. 324; 8 W. R. 542.]

The declaration alleged, that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange of 100l. and 62l., drawn by A. & Co. upon B. & Co., and both due on the 23rd of January, 1859, would be paid by B. & Co. when due, the defendant, in return, guaranteed to the plaintiff the repayment of 300l. towards the payment of goods which C. had ordered and was about to receive from the plaintiff. It then averred a general performance of all conditions precedent by the plaintiff, that the two bills were duly paid by B. & Co. when due, that the goods were delivered to C., and that C. had failed to pay for them; and assigned for breach non-payment of the 300l. or any part thereof by the defendant.—Plea, that, although the said sum of 300l., re-payment whereof the defendant guaranteed to the plaintiff, was not by the terms of C.'s order payable until after the two bills became due, as the plaintiff and defendant at the time of the making of the mutual agreement and guarantees well knew; yet the said two bills were not duly or at any time paid by B. & Co., of which the plaintiff had due notice, but never at any time paid or retired the said bills:—Held, on motion for judgment non obstante veredicto, that the performance of the plaintiff's promise to pay the two bills was not a condition precedent to his right to sue the defendant for non-payment of the 300l., and consequently that the plea was no answer.

This was an action for an alleged breach of a guarantee.

The first count of the declaration stated, that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange of 100l. and 62l., both drawn by Messrs. C. W. Oliver & Co. upon Messrs. Owen & Co., 75 Lower Thames Street, and both due on the 23rd of January, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant, in return, engaged and guaranteed to the plaintiff the re-payment of the sum of 300l. towards the payment of Scotch whiskies, as follows,—6 puncheons, 5 hogsheads, 4 quarter-casks Auchtertool, 2 puncheons, 5 hogsheads, 8 quarter-casks Anderton, which Mr. B. Fisse, of Norris Street, had ordered and was about to receive from the plaintiff:—Averment, that the plaintiff had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to the due performance by the defendant of his

(a) Erle, C. J., when the rule was moved, intimated a strong impression that the 3 & 4 Vict. c. 24, s. 2, was not repealed by the 13 & 14 Vict. c. 61, ss. 11, 12.

(b) See the 34th sect. of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 136, which enacts, that, "when the plaintiff in any action for an alleged wrong in any of the superior courts recovers by the verdict of a jury less than 5l., he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought."

the defendant's part of the said agreement; that the said two bills of exchange of 100l. and 62l. were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable; that he the plaintiff delivered to the said Mr. [562] B Fisse the said Scotch whiskies in the said agreement hereinbefore mentioned; and that the said Mr. B Fisse, although requested to pay the said amount of 300l. towards the payment of the said Scotch whiskies, had not paid for the said Scotch whiskies, nor the said sum of 300l. or any part thereof, and the same still remained wholly due and unpaid: Breach, that the defendant had disregarded and broken his said promise, in this that he had not paid or caused to be paid to the plaintiff the said sum of 300l. or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

Second plea (to the first count), that, although the said debt and sum of 300l. in the said first count mentioned, re-payment whereof the defendant engaged and guaranteed to the plaintiff, was not payable, and by the terms of the said order of the said Mr. B. Fisse was not payable until after the said two bills drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and the defendant at the time of the making of the said mutual agreement and guarantees well knew; yet the said two bills of exchange of 100l. and 62l. in the said first count mentioned were not duly or at any time paid or retired by the said Messrs. Owen & Co., of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue.

A verdict having been found for the defendant upon this issue at the trial before Cockburn, C. J., at the sittings in London after last Trinity Term,

Edward James, Q. C., in Michaelmas Term, moved for judgment non obstante veredicto. He submitted that the question to be considered was, whether the consideration for the defendant's promise was the [563] agreement of the plaintiff or the performance of it; for that, if it was the performance that was the consideration, he could not contend that the case did not fall within the second rule in the notes to *Portage v. Cob*, 1 Wms Saund. 320 b., to bring the case within which the plea was manifestly framed: but he contended, that, upon the face of the guarantee, the price of the whiskies might be payable immediately on delivery; and he referred to *Starrs v. Curling*, 3 N. C. 355, 3 Scott, 740, as a strong authority to shew, that, where the breach may be compensated in damages, the court will so construe the contract. A rule nisi having been granted,

Petersdorff, Serjt., and Garth, now shewed cause. The performance of the contract by the plaintiff, viz. the payment of the bills in case Owen & Co. did not pay them at maturity, was to precede the performance of the defendant's engagement to pay the 300l. towards the price of the Scottish whiskies. Such was the natural order of events, and such is the construction which the plaintiff himself, by his general averment of performance of all conditions precedent on his part, has put upon the guarantee. In all cases of this description, the court endeavours to ascertain the intention of the parties, as it appears on the face of the contract itself. "The rule," says Tindal, C. J., in *Starrs v. Curling*, 3 N. C. 368, 3 Scott, 754, 'has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case.' In *Johnston v. Nicholls*, 1 U. B. 251, 14 Law J., C. P. 151, where the question was as to the sufficiency of the consideration [564] to support the promise laid in the declaration, the promise was thus alleged,—that, in consideration that the plaintiff would continue certain dealings which they had had with Messrs. Claridge & Co., the defendant promised the plaintiffs to be responsible and guarantee them the payment of any sums of money in which Messrs. Claridge & Co. then were, or at any time thereafter might be, indebted to the plaintiffs in the course of such dealings: and Maule, J., said (14 Law J., C. P. 156),—"These words in fact amount to this, that, in consideration that the plaintiffs would do something in futuro, the defendant promised to do something in futuro likewise." That is this very case. The meaning of the contract which the defendant is alleged to have entered into is,—“If you, the plaintiff, will pay the two bills drawn upon Messrs. Owen & Co., in case they are not duly honored by them, I will pay 300l. towards the amount of the Scotch whiskies ordered by Fisse.” The case of *Thorpe v. Thorpe*, 1 Salk. 171, and the notes to *Portage v. Cob*, 1 Wms. Saund. 320 b.,

have laid down certain tests by which to ascertain whether performance on the one side is a condition precedent to a right of action on the other. The first is,—“If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance: for, it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for performance of that which is the consideration of the money or other act.” The present case does not come within either of those conditions. The third is, that, “when a day is appointed for the payment of [565] money, &c., and the day is to happen after the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance.” The thing to be performed here is, the plaintiff's promise to guarantee the payment of the bills by Owen & Co.; and that is to be performed before the arrival of the time at which the defendant's promise was to be redeemed. [Willes, J., referred to *Bowes v. Croll*, 6 Ellis & B. 255.] Taking the contract as set out upon the record, it is manifest that the performance of the contract on the part of the plaintiff was to precede the performance of the defendant's contract. [Willes, J. In *Thomas v. Culwallader*, Willes, 496, where a lessee covenanted to repair, the lessor allowing and assigning timber for that purpose, it was held that it was a condition precedent to his right to sue the lessee for a breach, that the lessor should find and assign timber; but that was explained by the Chief Justice to be because the one covenant related to the other, and the lessee could not repair until the timber was assigned to him for such repairs. “But,” says his Lordship, “when two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others, that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other.”] The distinction between a partial and a total failure of consideration is noticed in *Franklin v. Miller*, 4 Ad. & E. 599, in accordance with the rule laid down by Lord Mansfield in *Boone v. Eyre*, 1 H. Bla. 273 (a). [Williams, J. I do not see what answer the plaintiff would have had, if he had neglected to pay [566] the bills on Owen & Co.'s default, and the defendant had brought an action against him.]

Grant (for James), in support of the rule, referred to *Glazebrook v. Woodrow*, 8 T. R. 366. He was then stopped by the court.

ERLE, C. J. I am of opinion that the plaintiff is entitled to have this rule to enter judgment for him non obstante veredicto made absolute. The question is whether the promises stated in the declaration are independent promises or are mutually dependent on each other, whether the performance of each was to be the consideration for the performance of the other. It appears to me that they are independent covenants. The plaintiff guarantees that the bills drawn by Olivier & Co. upon Owen & Co. shall be paid by the acceptors at maturity; and the defendant to the extent of 300l. guarantees that the whiskies shall be paid for by the purchaser, Fisse. It appears, therefore, that the damages for the breach of contract on the one side would be materially different from those for a breach on the other side: on the one side 162l., on the other 300l. The strong probability, therefore, as apparent from the contract itself, is, that it was not intended that the performance of the stipulation on the part of the plaintiff should be a condition precedent to the performance of that on the part of the defendant. It is entirely a question of fact, that is, of the interpretation of the contract the parties have entered into, and of what was their intention. The rules of law referred to are entirely assented to: the only dispute is as to their application. The construction I put upon this contract is, that the promises are not mutual, but independent promises: and consequently that the second plea affords no answer to the declaration.

[567] WILLIAMS, J. I am of the same opinion. The rules for determining what are and what are not conditions precedent are now well established. They are made with the declared object of discovering the intention of the parties. They are not inflexible, or to be applied when from the context or the nature of the agreement the application of them would frustrate the intention of the parties. If the undertaking on the part of the plaintiff had been an absolute undertaking to pay the

bills at maturity, the case might have been different. But what the plaintiff undertakes to do is, not to pay a certain sum on a certain day, but only that he will guarantee the defendant against the consequences of a default on the part of Messrs. Owen & Co. in paying the bills at maturity. Thus, the thing to be done by the plaintiff is not stipulated to be done on any particular day, but when the amount is ascertained. The very nature of the contract, therefore, shews that it was not intended that the performance by the plaintiff of the contract on his part should be a condition precedent to the performance by the defendant of his contract. It was obvious that Messrs. Owen & Co., though they might fail to pay the bills on the day on which they became due, might have afterwards retired them, and so nothing would be due from the plaintiff: or but a small portion only of the amount might have been left unpaid by those parties.

WILLES, J. I am of the same opinion. It appears to me that it was the promise only on the one side which was the consideration for the promise on the other, and not the performance. The second plea, therefore, is bad and the rule for entering judgment for the plaintiff non obstante veredicto must be made absolute.

KEATING, J., was sitting in the divorce court.

Rule absolute.

[568] RICHARD CHAMBERS EDDLESTON, *Appellant*: FREDERICK FRANCIS, *Respondent*. Jan. 17th, 1860.

[S. C. 3 L. T. 270. See *Grace v. Hunt*, 1877, 2 Q. B. D. 396; *Prescott v. Nicholson*, 1889, 60 L. T. 566.]

By the 51st section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), the local board are empowered, on the owner's default after notice, to provide certain necessary house accommodations, the expense of which is to be recoverable in a summary manner from the owner, the amount to be ascertained by and recovered before two justices,—s. 129.—By the 11th section of Jervis's Act, 11 & 12 Vict. c. 43, in all cases where no time is specially limited for making or laying the complaint or information, it must be done within six calendar months from the time when the matter of complaint or information arose:—Held, that a complaint under the Public Health Act, 1848, must be made within six calendar months of the work being done and notice of the amount due being given to the party, and not within six months of the demand of payment.—*Quere*, whether a receiver appointed by the court of Chancery is an "owner" within s. 2?

This was an appeal against the dismissal of an information laid by Richard Chambers Eddleston, clerk to the local board of health, Nantwich, for and on their behalf, against Frederick Francis, by Thomas Fletcher Twenlow, William Baker, and Samuel Cross Starkey, three justices acting in and for the Nantwich division of the county of Chester.

The following case was stated by the justices, pursuant to the statute 20 & 21 Vict. c. 43:—

"On the 19th of January, 1858, an information and complaint was made and preferred by the appellant before the Rev. Thomas Brooke against the respondent for non-payment of 14l. 16s. 6d., being a balance due for certain works of private improvements done in October, 1853, to houses at Nantwich under s. 51 of the Public Health Act, 1848, which case was fixed for hearing at the special sessions, Nantwich, on the 26th of January last, when Mr. Brooke appeared for the respondent, and objected to the magistrates' jurisdiction,—first, on the ground that the complaint was not made within the time limited by law and by s. 11 of the 11 & 12 Vict. c. 43, which enacts, "that, in all cases where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information, in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six [569] calendar months from the time when the matter of such complaint or information respectively arose:" nor in accordance with the decision of the judges in the case of *The Queen v. The Leeds and Bradford Railway Company*, 21 Law J., M. C. 193,—secondly, that the said Frederick Francis is not, nor was he for more than six calendar months before the said com-

plaint was made, the owner or occupier of the premises mentioned in the said complaint, as required by the Public Health Act, 1848,—thirdly, for other good and sufficient reasons: on which the case was adjourned until the 23rd of February last, when the appellant applied for a further adjournment until the 23rd of March last, which adjournment was granted. The magistrates present on that day were of opinion that the information should be dismissed; but, at the request of the appellant, who stated he wished it heard before a larger bench of magistrates, it was again adjourned to the 6th of April last, on which day the respondent's attorney was unable to attend in consequence of illness; but, to save the expense of witnesses being under the necessity of attending again, the appellant called his clerk to prove the posting of two notices to a Mr. Joseph Woolf, of Haslington Hall, in Cheshire, who acted as agent for the respondent, which said notices were dated respectively the 23rd of April, 1853, requiring the works to be done by the respondent.

On Mr. Woolf being called, the notices were shewn to him, and he proved that he received copies of them from the appellant, and wrote to the respondent on the 4th of May, 1853, as to the same, and that he also saw the respondent at the Rising Sun at Westaston on the 19th of May, 1853, when he handed the notices over to him.

"The case was then adjourned until the 4th of May instant, when it came on for hearing before us. The [570] respondent's attorney handed in a written notice of the foregoing objections to our jurisdiction to hear the case; and, after hearing the arguments on behalf of the appellant and the respondent, we were unanimously of opinion that the information should be dismissed, and therefore we dismissed it, on the ground that it appeared to me, the undersigned Thomas Fletcher Twemlow, that, so far back as 1853, certain permanent improvements were done by the direction and under the superintendence of the local board of health at a cost of 44l. 16s. 6d. upon houses in Nantwich belonging to a property over which the respondent had been appointed receiver by the court of Chancery, and that for the raising the sum required a mortgage had been agreed upon and prepared between the local board of health and the receiver, which mortgage was never executed. For some time there was an account current kept between the builder and the board of health, and 30l. was paid by the receiver to the builder; but, the receiver having retired from the office, after various applications, finally, by letter dated December, 1857, declined to pay the sum of 14l. 16s. 6d. Then it was objected by the respondent's attorney that the complaint was laid too late under the 11 & 12 Vict. c. 43, s. 11: but I the said Thomas Fletcher Twemlow was of opinion that this objection should be overruled. On referring to the Public Health Act, 1848 (11 & 12 Vict. c. 63), I thought that the money should have been raised under s. 90; but, as it appeared that another mode of raising the money had been adopted, in a way not pointed out, as I thought, by the statute, I doubted whether the balance of the account came under the provisions of s. 129, which provides for the recovery in a summary way of damages and costs, and therefore I agreed with the other justices in dismissing the said complaint. And we, the undersigned Samuel Cross Starkey [571] and William Baker being of opinion that the said complaint was not laid within the time limited by the 11 & 12 Vict. c. 43, s. 11, also dismissed the said complaint; when, the appellant being dissatisfied with our determination as being erroneous in point of law, on the 6th of May instant gave notice of appeal against the same under the 20 & 21 Vict. c. 43, s. 2, and the case is now signed by us."

The case was sent back to be restated by the magistrates, and was returned by them with the following additional statement by way of amendment:—

"On the 19th of January, 1858, complaint was made before a justice of the peace by the appellant, by the direction of the local board of health of Nantwich, under the 129th section of the Public Health Act, 1848 (11 & 12 Vict. c. 6), against the respondent, seeking to recover from him the sum of 14l. 16s. 6d. mentioned in the statement of facts; and the case was fixed to be heard on the 26th of that month. The hearing was, however, adjourned from time to time until the 4th of May, 1858, when it came on for hearing before the justices mentioned in the original case.

"The respondent's attorney then handed in a written notice of certain objections to the justices' jurisdiction to hear the case, which objections (with the exception of that one which arose during argument, to the effect that the local board of health had no power to adopt summary proceedings after having determined to declare the expenses a private improvement rate) are set out in the original case; and, after

hearing the arguments on behalf of the appellant and respondent, the justices were unanimously of opinion that the information should be dismissed, and therefore dismissed it, on the grounds,—first, that it appeared to the undersigned Thomas Fletcher Twemlow, one of the justices [572] present, that, so far back as 1853, certain permanent improvements were done by the direction and under the superintendence of the local board of health at a cost of 44l. 16s. 6d., upon houses in Nantwich belonging to a property over which the respondent had been appointed receiver by the court of Chancery; that, for raising the sum required, a mortgage had been agreed upon and prepared between the local board of health and the receiver, which mortgage was never executed; that for some time there was an account current kept between the builder and the local board of health, and 30l. was paid by the receiver to the builder, but, the receiver having retired from the office, after various applications, finally, by letter dated December, 1857, declined to pay the sum of 14l. 16s. 6d.; that then it was objected by the respondent's attorney that the complaint was laid too late, under the 11 & 12 Vict. c. 143, s. 11, but the said Thomas Fletcher Twemlow was of opinion that this objection should be overruled: that, on referring to the Public Health Act, 1848 (11 & 12 Vict. c. 63) the said Thomas Fletcher Twemlow thought the money should have been raised under s. 90; but, as it appeared that another mode of raising the money had been adopted, in a way not pointed out, as he thought, by the statute, he doubted whether the balance of the account came under the provisions of s. 129, which provides for the recovery in a summary way of damages and costs, and therefore he agreed with the other justices in dismissing the said complaint.

“And the undersigned Samuel Cross Starkey and William Baker, the other justices present, being of opinion that the objections to their jurisdiction taken by the respondent's attorney as set out in the written notice handed in to them as before mentioned, were valid objections, also concurred with the said Thomas [573] Fletcher Twemlow, and dismissed the said complaint.

“The questions to be submitted for the opinion of the court were,—first, Was the complaint made within the time limited by law and the 11th section of the 11 & 12 Vict. c. 43,—secondly, Was the respondent the owner or occupier of the premises mentioned in the said complaint at the time it was made, on the 19th of January, 1858, as required by the Public Health Act, 1848, to give the justices jurisdiction to make an order,—thirdly, Had the local board of health any power whatever, after having agreed that the work should be done and the costs thereof declared private improvement expenses under s. 51 of the Public Health Act, 1848, and made the subject of private improvement rates under s. 90 of the same act, to be spread over a period of thirty years, to let the matter remain in abeyance from October, 1853, when the works were completed, until the 19th of January, 1858, long before which last-mentioned date the respondent had ceased to be the receiver, and then to adopt a new and different remedy, and endeavour to avail themselves of s. 129 of the said Public Health Act, 1848, to recover the 14l. 16s. 6d. by summary proceedings, instead of as a private improvement rate, to be paid in thirty years, as before mentioned.”

The following statement of facts was also appended to the case, and was by agreement to be referred to as part thereof:—

“The Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to the township of Nantwich in the year 1850, and a local board of health duly formed thereunder.

“The appellant is clerk to such local board of health. In the year 1847, there was a suit in Chancery intituled William King and Edward Vincent against Thomas [574] Hector, Penelope Hammond, widow, and Penelope Hammond, spinster, and James Walthall Hammond, in which the respondent was appointed receiver of certain entailed estates to which the said James Walthall Hammond was entitled for his life, and also, after the determination of an estate-for-life, and of divers intervening estates-tail, to the ultimate remainder contingent thereon.

“The premises in Nantwich to which the works the subject of the dispute were executed, form parcel of the said estates. All the time the respondent Francis was appointed receiver, there was a mortgage of 24,000l. secured on the interest of the said James Walthall Hammond in the property above mentioned; and in this mortgage the respondent's wife had an interest through her trustees, but the respondent himself had no direct beneficial interest. In the year 1853, a portion of the Nantwich property appeared to the local board of health, upon their surveyor's report, to be deficient in privy accommodation: and, in April in that year, notices were given

to the respondent to do the necessary works within a time therein specified. These works were of a permanent nature. Upon receipt of notices dated the 23rd of April, 1853, and a letter from the surveyor to the board, the respondent wrote to the surveyor proposing to the board that the works, if they were actually necessary, should be paid for by a private improvement rate under the acts, and declining to make himself personally liable for such permanent improvements, on the ground that he was only a receiver under the court of Chancery, and might lose all interest in the property any day. The local board agreed that the works should be done and the cost thereof declared private improvement expenses under the 51st sect. of the act, and made the subject of private improvement rates under [575] s. 90, to be spread over a period of thirty years: the respondent on his part agreeing to advance the money to cover the expense of the same, upon security of a mortgage of the private improvement rates under the 107th section, to be repaid by thirty equal annual instalments of principal and interest. The works were done under the direction of the local board by Thomas Bowker, a builder, who completed them in October, 1853, at a cost of 44l. 16s. 6d. This amount actually became due to Bowker as soon as the works were completed in October, 1853. In pursuance of this arrangement, the local board proceeded to obtain the formal sanction of the general board of health to the borrowing of the amount, in accordance with s. 119 of the Public Health Act, 1848; which was granted, and bore date the 21st of April, 1854. In May, 1854, the mortgage of the private improvement rates upon the property to the respondent was drawn and submitted to him for perusal, who returned it with some remarks thereon. In the same month, the respondent was applied to personally by Bowker for payment of the 44l. 16s. 6d.; and, on the 25th of the same month, the respondent's agent paid over to Bowker a cheque of respondent's for 30l., who gave a regular receipt for the same. The equity of redemption of the mortgaged estates was by an order of the court of Chancery, dated the 16th of February, 1854, absolutely foreclosed; and the ultimate remainder in fee in the property became vested in the trustees of the respondent's wife upon the trusts mentioned in the will of her father Henry King. On the 7th of July, 1854, James Walthall Hammond, the tenant for life of the property, died, and Penelope, the wife of Edward Delves Broughton, late Penelope Hammond, spinster, became tenant-for-life of the property in question, with remainder to her son, now aged about ten years, as tenant-in-tail. Upon Hammond's [576] death, in July, 1854, the respondent ceased to be receiver, and to exercise any control or authority whatever over the property in question or the rents and profits thereof. On the 8th of March, 1855, the trustees of Henry King's will, with consent of the respondent and his wife, sold and conveyed to Broughton, in consideration of 5000l., the ultimate contingent remainder in fee in the property which became vested in them on the foreclosure of the equity of redemption before mentioned, subject as aforesaid to the intervening life-estate of Mrs. Broughton, and the said estates-tail. On the 22nd of March, 1855, Broughton, who had in right of his wife become interested as before mentioned upon the death of Hammond in the property in question, and entitled to receive the rents and profits thereof, refunded to the respondent the sum of 30l. so paid by him to Bowker in respect of the said works as aforesaid. The respondent gave Broughton, then a member of the Nantwich local board of health, a regular receipt for the same. The local board of health contended that they had nothing to do with these transactions between the respondent and Broughton. No further step having been taken with regard to the proposed mortgage of the private improvement rates, the sanction which had been obtained for the same by the Nantwich local board of health was by them on the 18th of September, 1855, returned to the general board of health to be cancelled, which was done accordingly without the respondent knowing that such sanction had ever been sent up to be cancelled; nor did the respondent know, when the case was heard before the justices, that such sanction had been cancelled. The respondent was not applied to for the unpaid balance until the 10th of October, 1857, when the local board of health, by their clerk, the appellant, sent a letter, of which the following is a copy, to the respondent:—

[577] "Local Board of Health,
"Nantwich, 10th Oct. 1857.

"Dear Sir,—This board has now been called upon by Mr. Bowker, builder here, for 14l. 16s. 6d., balance of his account for works of private improvements to cottages

in Wall Lane, part of the late Mr. Hammond's estate, done whilst in your possession in 1853; and I am instructed to request you will forward me your cheque for that amount. I find the amount was originally 44l. 16s. 6d. which has been reduced by your payment of 30l. on account thereof to the amount now claimed.

"F. Francis, Esq.

"RICHARD C. EDDLESTON."

To this application the respondent replied by letter of the 21st of December, 1857, of which the following is a copy:—

"Sir,—I beg to acknowledge the receipt of your application for 14l. 16s. 6d. for some improvement works on cottages in Wall Lane.

"You do not say how you make me liable for the payment; and I beg to say that I do not intend to pay the amount unless compelled to do so. If it should appear that I am liable, then I have a claim for reimbursement by Mr. Broughton. To save trouble and expence, I have thought it better to send him a copy of your application and this reply. I hope you will have no further trouble on the subject.

"R. C. Eddleston, Esq.

"FREDERICK FRANCIS."

Hereupon Mr. Broughton was applied to, but declined to pay, on the ground that he was not liable.

Welsby, for the appellant. The first question is whether the complaint was made in time. It was a complaint made on the 19th of January, 1858, under [578] the 129th section of the Public Health Act, 1848, 11 & 12 Viet. c. 63, which enacts, "that, in all cases in which the amount of any damages, costs, or expenses is by this act directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before two justices, together with such costs of the proceedings as the justices may think proper; and, if the sums adjudged be not paid by the party against whom the adjudication is made, the same may be levied by distress and sale of his goods and chattels by warrant under the hands and seals of the justices making the adjudication." The complaint in question was in respect of the non-payment of expenses under s. 51, which enacts "that it shall not be lawful newly to erect any house, or to re-build any house pulled down to or below the floor commonly called the ground-floor, without a sufficient water-closet or privy and an ash-pit, furnished with proper doors and coverings; and whosoever offends against this enactment shall be liable to a penalty not exceeding 20l.; and if at any time, upon the report of the surveyor, it appear to the local board of health that any house, whether built before or after the time when this act is applied to the district, in which it is situate, is without a sufficient water-closet or privy and an ashpit, furnished with proper doors and coverings, the said local board shall give notice in writing to the owner or occupier of such house, requiring him forthwith, or within such reasonable time as shall be specified therein, to provide a sufficient water-closet or privy and an ashpit so furnished as aforesaid, or either of them, as the case may require; and, if such notice be not complied with, the said local board may, if they shall think fit, cause to be constructed a sufficient water-closet or privy and an ashpit, or either of them, or do such other works as the case may re-[579]-quire; and the expenses incurred by them in so doing shall be recoverable by them from the owner in a summary manner, or, by order of the said local board, shall be declared to be private improvement expenses, and be recoverable as such in manner hereinafter provided." The 11th section of Jervis's Act, 11 & 12 Viet. c. 43, enacts, "that, in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." The question is whether the cause of complaint arises on the failure to comply with the notice to do the work, or on the failure to comply with the demand of payment of the expenses incurred by the surveyor in the doing of the work. Here, the notice to the respondent to do the works in question was dated the 23rd of April, 1853; and the demand of payment was made on the 10th of October, 1857. By the Metropolitan Building Act, 1855 (18 & 19 Viet. c. 122), s. 73, all expenses incurred by the commissioners in respect of any dangerous structure shall be paid by the owner; and by s. 103 all expenses to be recovered in a summary manner may be recovered as directed

by the 11 & 12 Vict. c. 43, by s. 11 of which complaint must be laid within six months from the time when the matter of such complaint arose. In *Labalmoudiere, App.*, *Addison, Resp.*, 28 Law J., M. C. 25, the owner of a dangerous structure not having taken it down, as required, pursuant to the former act, the commissioners took it down; and the amount of the expenses incurred was demanded of the owner, and refused. A complaint was laid before a magistrate for the non-payment of the [580] expenses, within six months of the demand and refusal, but beyond six months from the completion of the works: and it was held, that the matter of complaint was the non-payment of the expenses, and that the time of limitation ran from the demand, and not from the completion of the works, and therefore that the complaint was in time. Lord Campbell said: "It seems contrary to all reason to say that there was any liability or default in the respondent before application had been made to him, stating what the amount of expenses was, and demanding payment, although a demand is not expressly required by the statute. The six months, therefore, had not elapsed when the complaint was laid." And Wightman, J., said: "The default alleged in the summons is, the non-payment of the amount of expenses after having been applied to for them." Here, the application by the board was made within six months from the day of laying the complaint. The 62nd section of the Local Government Act, 1858, 21 & 22 Vict. c. 98, enacts, that, "where the local board have incurred expenses for the re-payment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any act incorporated therewith, or this act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5l. per centum per annum till payment thereof;" and that, "in all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within such proceedings [581] may be taken shall be reckoned from the date of the service of notice of demand." [Erle, C. J. Does that apply to liabilities already incurred?] It is submitted that it does. [Williams, J. According to the usual mode of interpreting acts of parliament, such a provision, in the absence of express words shewing it was meant to be retrospective, would be held to apply only to future proceedings.] The matter of complaint here, it is submitted, is the non-payment of the balance. The next question is, whether the respondent is not an "owner" within the meaning of the interpretation clause, s. 2, of the 11 & 12 Vict. c. 63 (a)¹, by which it is provided that "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." The facts are these:—The premises in question being under mortgage, and there being a suit pending in Chancery in relation to them, the respondent was appointed receiver in 1847. He ceased to be receiver in 1855, when Mr. Broughton bought the equity of redemption. At the time these expenses were incurred, therefore, the respondent was the party who received the rents of the estate: he alone could answer the description of "agent" or "trustee." [Erle, C. J. It would be rather a formidable construction of the act, to hold that a person employed to collect rents is to be treated as owner, and made liable for all improvements on the property.] The respondent was not a mere collector. [Williams, J. If the receiver is not liable, it is difficult to see who is.] The remaining [582] question is, whether, after the negotiation which took place between the respondent and the local board in 1853, with reference to a private improvement rate under s. 90 of the 11 & 12 Vict. c. 63 (a)², it was competent to the

(a)¹ Or, rather, whether he was the party properly chargeable when the works were done.

(a)² Which enacts, "that, whenever the local board of health have incurred or become liable to any expenses which by this act are or by the said local board shall be declared to be private improvement expenses, the said local board may, if they shall think fit, make and levy upon the occupier of the premises in respect of which the expenses shall have been incurred, except in the cases hereinafter provided, in addition

board to resort to their remedy under s. 129. [Erle, C. J. The respondent expected a private improvement rate for the reimbursement of the expenses, and a mortgage of that rate to him under ss. 107 and 119. A change of circumstances takes place, and he afterwards ceases to be the receiver. Why is he to be now charged as if he were the owner?] The money not being recoverable by rate, it must be recoverable by summary proceeding under s. 129.

Huddleston, Q. C. (with whom was Campbell Forster), for the appellant. The respondent was receiver of certain property, a portion of which is found by the local board of health to be deficient in accommodation. Notice is given to the receiver to remedy the defect. [583] He states that he has no beneficial interest in the premises; and thereupon the local board of health, upon the report of their surveyor, order the necessary work to be done. The expenses thus incurred were either recoverable from the owner by summary proceeding under s. 129, or by a private improvement rate under s. 90, which latter would be imposed upon the occupier, who, under s. 91, would be entitled to deduct a proportion thereof out of the rent payable by him to his landlord (a). Here, the works in question were done in 1853, and all the circumstances were fully brought to the knowledge of the respondent in 1854, when the amount of the expenses was ascertained. Under these circumstances, it is impossible to say that a complaint [584] made in 1857 was made within the time prescribed by the 11th section of the 11 & 12 Vict. c. 43,—even if the rule laid down in *Labbmondien v. App.*, *Addison, Resp.*, 28 Law J., M. C. 25, is adopted, viz. that the demand is the “cause of complaint.” In *The Queen v. The Justices of Shrewsbury*, 31 Law Times, 114, more than six months after a demand of immediate payment of a church-rate, which was not complied with, a second demand was made, and a refusal given. Three days after such refusal, a summons was taken out to levy the same by distress (under the 55 (4. 3, c. 127, s. 7), which the justices dismissed on the ground that the matter of complaint arose more than six months before the summons (11 & 12 Vict. c. 43, s. 11). It was contended that there was no demand and refusal until three days before the summons was taken out. But Erle, J., said,—“If I make a demand of immediate payment and don’t get the money, is not that tantamount to a refusal? The application to the justices ought to have been made within six months of that demand.” He was then stopped by the court.

ERLE, C. J. I am of opinion that this appeal must be dismissed. It is sufficient to take the first objection relied on by the respondent, viz. that the complaint was not made in time, the 11th section of Jervis’s Act, 11 & 12 Vict. c. 43, requiring it to

to all other rates, a rate or rates to be called private improvement rates, of such amount as will be sufficient to discharge such expenses, together with interest thereon at a rate not exceeding 5l. in the 100l. in such period not exceeding thirty years as the said local board shall in each case determine: Provided always, that, whenever any premises in respect of which any private improvement rate is made become unoccupied before the expiration of the period for which the rate was made, or before the same is fully paid off, such rate shall become a charge upon and be paid by the owner of the premises so long as the same continue to be unoccupied.”

(a) The 91st section enacts, “that, if the occupier by whom any private improvement rate is paid holds the premises in respect of which the rate is made at a rent not less than the rack rent, he shall be entitled to deduct three fourths of the amount paid by him on account of such rate from the rent payable by him to his landlord, and, if he hold at a rent less than the rack rent, he shall be entitled to deduct from the rent so payable by him such proportion of three fourths of the rate as his rent bears to the rack rent; and, if the landlord from whose rent any deduction is made under the provision last aforesaid is himself liable to the payment of rent for the premises in respect of which the deduction is made, and holds the same for a term of which less than twenty years is unexpired, but not otherwise, he may deduct from the rent so payable by him such proportion of the sum deducted from the rent payable to him as the rent payable by him bears to the rent payable to him, and so in succession with respect to every landlord (holding for a term of which less than twenty years is unexpired) of the same premises both receiving and liable to pay rent in respect thereof: Provided always, that nothing herein contained shall be construed to entitle any person to deduct from the rent payable by him more than the whole sum deducted from the rent payable to him.”

be made "within six calendar months from the time when the matter of complaint arose." The matter of complaint here was the non-payment of the expense of certain improvements on premises of which the respondent was the receiver under the court of Chancery, which improvements were begun and completed in 1853. Part of the money remaining unpaid, the complaint was preferred by the clerk of the local board of health on the 19th of January, 1858. The first ques-[585]-tion then is, whether the proceedings were begun within six months of the cause of complaint. The appellant relies upon the fact, that, in October, 1857, he demanded of the respondent payment of the amount in dispute; and he insists that there was no matter of complaint until the sum payable for the works was ascertained and fixed, and payment thereof demanded; and the case *Labalmondiere, App., Addison, Resp.*, 28 Law J., M. C. 25, was cited. Now, it is perfectly clear, that, under this provision of the statute, the party should have notice of the amount which he is called upon to pay. Whether, after the amount has been fixed and ascertained, it is competent to the board to lie by and for several years abstain from making any demand, it is unnecessary to decide. But the question here is, has this debt, ascertained and due in 1853, become for the first time a debt recoverable in October, 1857? I am of opinion that it has not. It appears that Mr. Francis, being receiver of the property in 1853 and 1854, was applied to be answerable for the expenses of these works, when he objected that he was a mere receiver, and therefore had no interest in respect of which he could be liable. Ultimately, an agreement was come to between him and the local board that the works should be done, and that the owner should not be looked to for the expenses, but that they should be defrayed by an improvement rate upon the occupier, under the 90th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63. That agreement was come to in May, 1854, and it was proposed to effect a mortgage of the rate to Mr. Francis, under s. 107, and notice was given to him that the total sum due for the work was 41l. 16s. 6d., and that the board looked to him for payment. Mr. Francis accordingly paid 30l. Now, it is clear to my mind that that must either be taken to be a notice of the [586] amount due, and a demand on Mr. Francis, so as to give the local board a right to proceed summarily against him under s. 129, or an agreement between the local board and him that the expenses should be a charge on the occupier in the shape of an improvement rate, and not upon the owner. If so, the local board clearly had no right in 1857, to change their option, and fall back upon Mr. Francis as owner, and call upon him to pay the balance: and especially are they estopped when Mr. Francis ceased to be receiver of the property in 1854. If they had the option, they were bound to exercise it within a reasonable time. If the matter of complaint was the non-payment of the expenses when the amount was ascertained and notice thereof given to the party called upon, as I think it was, then, as all that took place in 1854, this proceeding is out of time. It is perfectly reasonable so to decide. The money is not in fairness due from the respondent at all. We therefore dismiss this appeal upon the merits. With regard to the 62nd section of the Local Government Act, 1858, 21 & 22 Vict. c. 98, which provides, that, "in all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand,"—I am clearly of opinion that that applies only to proceedings commenced after the passing of that act. For these reasons, I am of opinion that the appeal should be dismissed, with costs.

WILLIAMS, J. I am of the same opinion. Without at all meaning to dissent from what has been said by the Lord Chief Justice upon the first point, I prefer resting my judgment on the ground stated by Mr. Twemlow. It appears to me, that, having elected to [587] proceed under the 90th section of the act, by an improvement rate upon the occupier, it was not competent to the local board afterwards to turn round and take proceedings summarily under s. 129. It is true no rate was in fact made. But the 30l. was obtained from the respondent upon the footing that he was to have a mortgage on the rate which they had agreed to make. Having consented to throw the burthen on the occupier, and that the respondent should be a mortgagee for the money advanced, I think the board are estopped from saying they are remitted to their right of shifting the burthen to the respondent.

WILLES, J. I am of the same opinion. If the proceeding towards charging the sum on the occupier by means of an improvement rate was operative, it was a final

election by the board: if not, the notice to Mr. Francis operated as a demand of payment by him. I see no way of getting out of that dilemma.

KEATING, J. I quite concur with the court in dismissing this appeal, and particularly on the ground taken by the Lord Chief Justice. There was such a demand in 1854 as would have entitled the local board to proceed in the summary way under s. 129, provided the respondent, as receiver, was the person chargeable. This decision is entirely in accordance with the merits. If the local board have lost their remedy for these expenses, they have only themselves to blame for not having made their election at an earlier period.

Appeal dismissed, with costs.

[588] COUNT PORTALES GORGIER *v.* MORRIS. Feb. 25th, 1860.

[S. C. 29 L. J. C. P. 208; 6 Jur. N. S. 705.]

It being in contemplation to construct a railway from Verrieres to Thielle, in the canton of Neuchâtel, in Switzerland, and the plaintiff being a person of influence there, and desirous that the construction of such railway should be carried into effect, and having prepared certain plans and drawings for that purpose, and incurred expenses in relation to the proposed undertaking,—it was agreed between the plaintiff and the defendant and one Merrett, amongst other things, that the plaintiff would give his support and aid to the defendant and Merrett for obtaining the concession or grant of the right of constructing such railway; that the defendant and Merrett would construct the railway; that they should be paid for their works in advance by means of the issue of shares in a company to be formed; that, with two thirds of the capital, the defendant and Merrett should construct the railway, and that the remaining one third should be remitted in free shares to the plaintiff; and that the shares so to be placed at the disposal of the plaintiff should cover all that might be due to the plaintiff as well for his trouble as for certain other expenses to be incurred by him.—Application was accordingly made for the concession: but, as two other persons, named Besnard and Beslay, were also endeavouring to procure the concession for themselves, it was ultimately arranged that all the parties should join in one application, which resulted in the grant of a concession to the defendant in conjunction with Messrs. Besnard and Beslay, Merrett, and one Lelievre; and a second agreement was entered into, to which Besnard and Beslay became parties, whereby it was, amongst other things, agreed that 35,600*l.* in free shares was to be allotted to the plaintiff for the care and trouble he had had up to that time, and which he might yet have to take up to the complete organization of the company. The defendant afterwards assigned his interest in the concession to a third person.—In an action against the defendant upon the above agreements, alleging for breach, that, by default of the defendant, the company had never been formed, and no free shares had been appropriated to the plaintiff:—Held, that there was no consideration for a binding promise on the part of the promoters of the undertaking to give the plaintiff the shares,—the mere expectation of future services of the plaintiff not being a valid consideration; and his past services not having been rendered for any payment or allotment of shares stipulated to be made in the event which had happened, of a joint concession to the defendant and his rivals.

This was an action upon a special agreement.

The first count of the declaration stated, that, before and at the time of making the agreement thereafter mentioned, it was in contemplation to construct a railway through the canton of Neuchâtel, in Switzerland, from the frontier at Verriers to Thielle, with a branch and certain other works: that the plaintiff, being a person of influence in the canton, and desirous that the construction of the said railway should be carried into effect, and having prepared certain plans and drawings for that purpose, and incurred expenses in relation to the said proposed undertaking, procured the defendant and one George Merrett, who were contractors in England, to inspect the proposed line of railway, and afterwards to undertake the construction thereof, and for that purpose to make a proposal to the government of Neuchâtel for a concession or grant of the right of constructing such railway; and thereupon, [589] on the 15th of November, 1853, it was agreed between the plaintiff and the defendant and Merrett,

amongst other things, that the plaintiff would give his support and aid to the defendant and the said George Merrett for obtaining the concession, and would use all his efforts, with the aid of his friends, to bring the matter of the granting of such concession to a good conclusion,—that the defendant and Merrett would construct the railway, &c.,—that payment should be made to the defendant and Merrett for their works in advance, by means of the issue of shares in a company, that is to say, a “Société Anonyme,” which would be regulated by the laws of the canton, and of which the statutes were to be thereafter agreed upon, that the capital of the said company should be formed as therein stated,—that, with two thirds of such capital, the defendant and Merrett should make the railway, and that the remaining one third should be remitted in free shares to the plaintiff of the same kind as those which would constitute the two thirds,—and that the shares so to be placed at the disposal of the plaintiff should cover all that might be due to the plaintiff as well for his trouble as for certain other expenses to be incurred by him. The count then alleged that the defendant and the said George Merrett and one Alphonse Lelievre applied for the said concession to the government of the canton, and that the plaintiff was always ready and willing to support and aid the defendant and the said other persons so applying, and to use his best endeavours to procure the granting to them of the said concession; and that afterwards it was agreed that other persons, to wit, Besnard and Beslay, should be associated with the defendant and Merrett and A. Lelievre in soliciting the said concession; that they all jointly applied for the concession, and that such application was aided and supported by [590] the plaintiff, and by means of the support and aid so afforded by the plaintiff a concession was made and granted by the government to the said Beslay, Besnard, the defendant, Merrett, and Lelievre, for making the said railway, on certain terms which were approved and accepted by the plaintiff and the defendant and the said other persons. The count then went on to aver, that, it having become necessary to alter and readjust some of the terms of the before-mentioned agreement, by reason of the introduction of the said Messrs. Besnard and Beslay as parties to the said concession, afterwards, on the 19th of December, 1853, it was further agreed by and between the defendant, the said G. Merrett, the said A. Lelievre, the said Beslay, Besnard, and the plaintiff, that the defendant, Merrett, and Lelievre should take upon themselves the construction of the said lines of railway, for the fixed sum of 632,400l., in consideration of which they engaged to construct the said railway, &c.; that, in consideration of 30,000l., they should pay interest on the capital of 800,000l., &c.; that they should place to the credit of the company (meaning the said Société Anonyme to be formed as aforesaid) 12,000l.; that the said sums, making a total of 674,000l., should be arranged as follows,—280,000l. were to be supplied by Besnard and Beslay; 90,000l. were to be represented by debentures, and the remaining 304,400l. in free shares of the said company; that the defendant, Merrett, and Lelievre were immediately to deposit the caution money, 8000l.; that, of the 280,000l. to be furnished by the said Besnard and Beslay, three fourths, or 210,000l., were to be against shares in the said company, and one fourth, or 70,000l., against debentures of the company; that, besides the said shares and debentures, they should receive 90,000l. in free shares of the said company as concessionnaires and for the purpose [591] therein mentioned; that there should be issued 640,000l., in shares and 160,000l. in debentures, and that such capital should be apportioned as follows,—to the defendant, the said G. Merrett, and Alphonse Lelievre 662,400l., to Besnard and Beslay 90,000l., to the plaintiff 35,600l., and to the credit of the said company for administration, &c., 12,000l.; and it was expressly agreed between all the said parties thereto that the said sum of 35,600l. should be allowed and appropriated to the plaintiffs in free shares of the company, as a compensation for the pains and trouble which he had had up to the day of making the agreement, and which he might thereafter have to take up to the complete organization of the company: Averment, that, the said agreement having been so made, the defendant promised the plaintiff, that, on the formation and complete establishment of the said company, the said sum of 35,600l. should be allotted and apportioned to him in such free shares as aforesaid, and that the defendant would use his best endeavours that the said company should be formed and established, and would do no act whereby the formation of the company and the appropriation of the said free shares to the plaintiff should be hindered or prevented: General averment of performance by the plaintiff of all things necessary to entitle him to maintain the action: Breach, that, although a reasonable time had elapsed for the forming and establishing

the said company, and appropriating to the plaintiff the said free shares, the defendant broke his promise, in this, that he did not use his best or any endeavours to form the said company and procure the said shares to be appropriated to the plaintiff: and that, by default of the defendant, the said company had never been formed and established, and no free shares therein appropriated to the plaintiff, &c.

[592] The second count stated that the agreement of the 15th of November, 1853, having been made as mentioned and set forth in the first count, and the said agreement of the 19th of December, 1853, having also been made as mentioned and set forth in that count, and the other acts and circumstances in that count mentioned having been also done and happened,—which agreement, acts, and circumstances were for brevity's sake not repeated therein, but were intended to be incorporated into and to form part of that count by reference to the said first count,—the defendant promised the plaintiff, that, on the formation and complete establishment of the said company, the said sum of 35,600*l.* should be allowed and appropriated to the plaintiff in free shares of the said company, as and for such compensation as in the said agreement of the 19th of December is mentioned: Averment, that the plaintiff did all things on his part, and all things were done and happened, to entitle him to have the said sum of 35,600*l.* allowed and appropriated to him on the formation and complete establishment of the said company, in such free shares as aforesaid: Breach, that, although the said company was formed and completely established, and a reasonable time afterwards elapsed for allowing and appropriating to the plaintiff the said sum of 35,600*l.* in such free shares therein as aforesaid, and such free shares would have been of great value,—of all which the defendant had notice,—yet no part of the said sum of 35,600*l.* had been allowed and appropriated to the plaintiff in free shares of the said company, or been paid or allowed to him in any manner whatsoever: and the said company had been so formed and established, that, by the statutes regulating the institution thereof, no allowance or appropriation of any sum of money to the plaintiff in free shares therein could or would be made.

[593] The defendant, amongst other pleas, pleaded non assumpsit, upon which issue was joined.

The cause was tried before Erle, C. J., at the sittings in London after Trinity Term last, when it appeared that the action was brought for the recovery of 35,600*l.* from the defendant under the two agreements declared on, in respect of the plaintiff's services in obtaining from the government of the canton of Neuchâtel, in Switzerland, a concession of the right to construct a railway from Verrieres to Thielle, traversing the canton of Neuchâtel. The plaintiff was a person having considerable influence in the canton: and, having caused plans and drawings of the proposed railway to be made, he entered into the agreement of the 15th of November, 1853, set out in the first count of the declaration, with the defendant and Merrett: and, pursuant to the terms of that agreement, the plaintiff caused application for the concession of the railway to be made. Messrs. Besnard and Beslay had also applied for a similar concession: and, in order to prevent competition, an amalgamation of the competing parties for the proposed railway was agreed to, which resulted in the agreement of the 19th of December, 1853, the terms of which were as follows:—

“December 19th, 1853.

“Between the undersigned,—first, Messrs. Morris, Merrett, and Lelievre, residing in London, &c.,—secondly, Mr. Beslay, residing at Paris, &c., acting for himself and in the name of Mr. Besnard,—thirdly, M. le Comte Pourtales Gorgier,—it has been agreed as follows:—

“Art. 1. Messrs. Morris, Merrett, and Lelievre take upon themselves the construction of the lines of railway in Neuchâtel, which form the subject of the agreement with the government of Neuchâtel, in Switzerland, dated the 29th of September last, ratified the [594] same day by a decree of the council of the same canton, that is to say, the line from Verrieres to Thielle, and the branches, &c., for the fixed sum of 632,400*l.*: in consideration of which they engage to construct and render in a complete and perfect state for working the railways above named, including the purchase of land, the construction of the permanent way, the works of art, the fixed material of every description, as well as the rolling stock, station-houses for guards, crossing junctions, closing, in short everything that constitutes the complete establishment of a railway fit for working, within the time prescribed by the act of concession. They

moreover take upon themselves, in consideration of the sum of 30,000*l.*, to pay interest at the rate of 4 per cent. on the capital of 800,000*l.* during the construction of the works until the completion of the railway and its being in a state fit for working. They will also have to place to the credit of the company 12,000*l.*, of which mention is made in Art. 6. The three sums above stated, forming a total of 674,400*l.*, will be settled in the following manner,—first, 280,000*l.* in money will be supplied, on the terms stated in Art. 4, by Messrs. Besnard and Beslay,—secondly, 90,000*l.* in debentures,—and the remainder, 304,400*l.*, in free shares.

“Art. 2. Messrs. Morris, Merrett, and Lelievre are immediately to deposit the caution-money, amounting to 8000*l.*, into the hands of the governor of the canton of Neuchâtel.

“Art. 3. The works are to be executed in conformity with the plans of Mr. Weltz, &c.

“Art. 4. Messrs. Besnard and Beslay will furnish 280,000*l.*, in money, of which three fourths, or 210,000*l.*, against shares, and one fourth, or 70,000*l.* against debentures. Besides the shares and debentures representing the above capital of 280,000*l.*, they shall receive [595] 90,000*l.*, in free shares, as concessionaires, to cover the premium necessary to raise the said capital of 280,000*l.*, and as a remuneration for their previous expense and trouble, and for giving up their share of the profits which they might have made in constructing the line.

“Art. 5. It is admitted (*reconnu*) by all parties that 35,600*l.* in free shares is to be allotted (*attribué*) to M. le Comte Pourtales Gorgier for the care and trouble he has had up to this day, and which he might yet have to take up to the complete organisation of the company.

“Art. 6. There shall be issued 640,000*l.* in shares, and 160,000*l.* in debentures, for making the above railway and branches. This capital will be in conformity with the preceding articles, and be apportioned in the following manner,—first, to Messrs. Morris, Merrett, and Lelievre, 662,400*l.*,—secondly, Messrs. Besnard and Beslay, 90,000*l.*,—thirdly, M. le Comte Pourtales Gorgier, 35,600*l.*,—fourthly, the credit of the company for expenses of administration, &c., 12,000*l.*,—total, 800,000*l.* On the capital, to be raised by shares of 500 francs, the first call will be of 1*l.* on the 1st of February next; the remainder in conformity with the statutes which shall be drawn up with common accord.

“Art. 7. The company will be managed by ten directors at the most, of whom five are to be named by Messrs. Morris, Merrett, and Lelievre, and five are to be named by Messrs. Beslay & Co. M. le Comte Pourtales is requested from this time to become the chairman of the board, which he agrees to.

“Art. 8. It is understood that the bridges of Lorquier and De la Reus shall be constructed of iron, if the expense do not exceed the estimate. It is understood that, if the company should make embellishments, or any changes in the plans other than those absolutely [596] required, the increased expense shall be borne by the company.

“Art. 9. In case that, on or before the 1st of February next, or, at the latest, within the month after the confirmation by the federal council of the act of concession, Messrs. Besnard and Beslay shall not have paid to the bankers of the company the 1*l.* agreed to on each of the 10,500 shares for which they are to provide the funds, they shall be deprived *ipso facto* of all rights whatsoever to the concession and to the 90,000*l.* in free shares mentioned in Art. 4. It is understood that Messrs. Morris and their colleagues shall have within the same date, under a like penalty, either in money, or caution-money, or the value of works effected, the payment of 1*l.* on each of the 3050 shares of which they are to provide the funds.

“Art. 10. Sir William Cubitt, civil engineer at London, shall be named consulting engineer of the company.

“Art. 11. All disagreements or difficulties relative to the carrying out of these presents shall be submitted, in the last resort, to two referees respectively named by the parties; and, in case of disagreement, to the decision of an umpire to be named by the president of the Tribunal of Commerce of the Seine.”

Before the execution of this last agreement, the plaintiff, being for that purpose authorized by the defendant, was instrumental in obtaining a concession for making the railway being granted to the defendant in conjunction with Messrs. Besnard, Beslay, Merrett, and Lelievre. This concession was on the 29th of November, 1853,

provisionally, and on the 16th of December, 1853, finally, ratified by the Grand Council of Neuchâtel.

After the execution of the agreement of the 19th of December, 1853, the plaintiff at his own cost prepared [597] the statutes or articles of settlement of the company which was to be formed according to the agreement.

In May, 1855, the defendant assigned all his interest in the concession to Messrs. Leuba & Co., and that assignment was duly recognized by the Federal Council of the canton: and, in consequence of that assignment, and of disputes which had arisen between the different concessionaires, the company proposed to be formed by the agreement of the 19th of December, 1853, was not formed, and consequently the defendant was never in a condition to give the plaintiff the 35,600l. in free shares.

The learned judge ruled that the agreement produced did not support the declaration, inasmuch as it was not a personal engagement by the defendant to pay the plaintiff 35,600l., or to give him free shares to that amount: and he thereupon directed a nonsuit to be entered, but reserved to the plaintiff leave to make any amendment which the court might think fit.

Lush, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that there was evidence for the jury of a contract upon which the plaintiff was entitled to recover, inasmuch as the defendant had wrongfully put it out of his power to perform the contract.

M. Smith, Q. C., T. Jones, and Milward, shewed cause, submitting that there was no agreement personally binding the defendant to give the plaintiff the stipulated number of shares, the company never having been formed: and that, if there had been any such promise, it was without consideration.

Lush, Q. C., and Holl, in support of the rule, insisted that there was ample evidence of a binding contract, [598] which but for the wrongful act of the defendant and his partners might have been carried out.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court.

In this case, when the position of the parties is closely considered, it becomes obvious that the provision relied upon by the plaintiff as a binding contract to give him the specified number of shares, was in truth only an arrangement of the amount of the present which the promoters were willing to award to him.

There was no consideration for a binding promise on their part to give him the shares. The past services of the plaintiff were not rendered for any payment or allotment of shares stipulated to be made in the event which has happened, of a joint concession to the defendant and his rivals. And, as for the anticipated future services of the plaintiff, the mere expectation of them was not a valid consideration, and he did not contract, and was not under any obligation, to render any.

There was, therefore, no contract with the plaintiff binding in point of law upon the defendant, and the nonsuit was right.

Rule discharged.

[599] DOE D. GUTTERIDGE v. SOWERBY. 1860.

[S. C. 29 L. J. C. P. 291; 6 Jur. N. S. 870; 8 W. R. 393.]

An admittance (previous to the 4 & 5 Vict. c. 35) by the steward of a manor, as such, out of the manor, whether at a court or otherwise, was bad. But, as such an admittance would have been good if a special authority for that purpose had been given by the lord, so also it might have been rendered valid by his subsequent ratification and notification to the homage, so as to make it an admittance by implication. —A. was in 1810 admitted, out of court, by the steward, to a copyhold, upon a surrender made in 1791, and paid a fine to the steward for the use of the lord. An informal entry of the admittance appeared on the court-rolls; and the admittance was in subsequent entries treated as a valid admittance, and the property had been held for about thirty-five years, under it, and transmitted to purchasers: —Held, upon a special case, upon which the court were to draw inferences as a jury, that the admittance, though at first invalid, was rendered a good admittance by the subsequent ratification and adoption of the lord.

This was an action of ejectment brought on the 31st of July, 1845, to recover an undivided moiety of certain copyhold premises situate in and being parcel of the

manor of Cockernhoe, in the parish of Otley, and county of Hertford, being the undivided moiety of which Mary Gutteridge was admitted tenant on the 27th of December, 1781, as hereinafter set out.

The declaration, which was dated the 31st of July, 1845, was served in August, 1845; and the cause came on to be tried before Lord Denman, C. J., at the Hertford Spring Assizes, 1848, when a verdict was found for the defendant, subject to the opinion of the court upon the following case:—

On the 27th of December, 1781, Mary Gutteridge, then being the wife of James Gutteridge, was, out of court, and out of the manor, admitted by the then lady of the manor alone, as devisee under the will of her father, William Rudd (then deceased), to the undivided moiety of certain copyhold premises held of the manor of Cockernhoe aforesaid, as tenant in common in fee, her sister Elizabeth (also a daughter of William Rudd), then the wife of Daniel Rudd, being admitted on the same day to the other moiety. The following is a copy of the entry on the court-rolls of the manor:—

The manor of Cockernhoe, in the county of Hertford.

“Whereas, William Rudd, late of Wandon End, in the parish of King’s Walden, in the county of Hertford, gentleman, a customary tenant of the said manor, in his life-time held to him and his heirs of the lady of the said manor,—

[600] “All that close of land called Cockernhoe Hall, containing all those 6 acres of land more there to the said close belonging, by copy of court-roll, fealty, suit of court, and the yearly rent of 6s. 8d.; and also all that other close of land called Brocker Croft, containing by estimation 10 acres; and also all those 9 acres of land lying in a certain place called Dane Croft: and also all those 5 acres of land lying in a certain place called Laybread, and all those 10 acres of land lying in Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid, by copy of court-roll, fealty, suit of court, and the yearly rent of 20s.: and also all that rood of land called Gibb’s Half-Acre, lying within the manor aforesaid, by copy of court-roll, fealty, suit, and the yearly rent of 3d.; and also all those three crofts of land with a pigtle called Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid; and all those 5 acres of land lying in the above place called Laybread, within the manor aforesaid, by copy of court-roll, fealty, suit of court, and the yearly rent of 21s. 8d.; and also certain lands and tenements, with the appurtenances, within the manor aforesaid, formerly the lands and tenements of Jeremy Godfrey, deceased, by copy of court-roll, fealty, suit of court, and the yearly rent of 8s. 6d.; and also all that piece of land lying in a certain place called Handicroft, within the manor aforesaid, containing by estimation 30 poles, more or less, lying between the lands formerly of Richard Brigg and the land some time of Richard Pilgrim, and abutting northwards upon a certain place called Pasture Close, and southward upon Brickpond Close, heretofore the land of one John Pilgrim, by copy of court-roll, fealty, suit of court, and the yearly rent of 4d.; and also one rood of land divided by a hedge from the northwest part of [601] a close formerly of Thomas Rudd, called Pidsdenhill, otherwise Pillsdenhill, by copy of court-roll, fealty, suit of court, and the yearly rent of 1d.

“To which said several premises the said William Rudd was admitted tenant at a general court-baron held for the said manor on the 30th day of September which was in the year of Our Lord 1762, upon the surrender of Henry Field, gentleman. That the said William Rudd died thereof seised, having first surrendered the same to the use of his last will and testament, as appears by the rolls of the same court; and that the said William Rudd is departed this life, having first duly made and published his last will and testament in writing, bearing date the 29th day of May, 1780, whereby he gave and devised unto his two daughters, Mary, the wife of James Gutteridge, and Elizabeth, wife of Daniel Rudd, being the Mary and Elizabeth above named,—

“All that his messuage or farmhouse situate at Cockernhoe, in the parish of Otley, in the said county of Hertford, with the barns, stables, out-houses, and appurtenances thereto belonging, with all and singular the lands and grounds thereto belonging, in the said will more particularly mentioned.

“To hold the said premises unto the said two daughters, Mary Gutteridge and Elizabeth Rudd, and to their heirs and assigns for ever, as tenants in common, and not as joint tenants, chargeable as in the said will is mentioned.

"Now be it remembered, that, on the 27th day of December, 1781, came before the Honorable Dame Sarah Salusbury, widow, the lady of the said manor, at her capital mansion-house called Offley Place, in the parish of Offley aforesaid, the said Mary, the wife of the said James Gutteridge, and then in the presence of William Wilshire the younger, gentleman, deputy-steward of William Richard Tristram, gentleman, capital steward [602] of the said manor, humbly desired of the said lady of the said manor to be out of court admitted tenant to one undivided moiety (the whole into two equal parts to be divided) of and in all the said pieces or parcels of land and premises, with the appurtenances: And thereupon the said lady of the said manor, at her humble request, by her own hands, out of her special grace and favor, out of court, in the presence of the said deputy-steward, did grant and deliver seisin thereof by the rod to the said Mary the wife of the said James Gutteridge, according to the custom of the said manor, to have and to hold the said moiety of the said pieces or parcels of land and premises, with the appurtenances, unto the said Mary, the wife of the said James Gutteridge, her heirs and assigns for ever, by the rod, at the will of the lady, according to the custom of the said manor, by copy of court-roll, fealty, suit of court, the yearly rents aforesaid, and other duties, customs, and services therefor due and of right accustomed: And she gives to the lady for a fine for such her estate and entry in the premises aforesaid as appears in the margin: her fealty is respited: and so, saving always the right of the lady, the said Mary, wife of the said James Gutteridge, is admitted thereof tenant in form aforesaid.

"S. SALUSBURY, Lady of the said manor.

"This admission was granted in the presence of

"WILLIAM WILSHIRE, JUN., deputy-steward."

The premises of which a moiety was included in this admission were the same as those of which the said William Rudd died seised, and which he devised to his said daughters, as stated in the said court-rolls; and under this admission the said Mary Gutteridge is alleged to have become and been seised of such moiety in fee, at the will of the lady, according to the custom of the said manor, as expressed in the said admission.

[603] On the 19th of November, 1782, the said James Gutteridge and Mary his wife (the latter having been first solely and separately examined) did out of court surrender the said undivided moiety to the use of the said Mary for life, with remainder to the use of the said James Gutteridge, her husband, for life, with remainder to the use of the heirs and assigns of the said Mary Gutteridge for ever.

Between the year 1782 and 1787, several general courts-baron were held in and for the said manor, at which nothing was done; and no presentment was made touching the premises in question.

On the 10th of March, 1787, at a special court-baron of the said manor, the said surrender was presented by the homage; and the said Mary Gutteridge was admitted, and enjoyed the said moiety in pursuance thereof. The following is the entry of the presentment and admittance on the court-rolls.

"The Manor of Cockernhoe, in the county of Hertford, 10 March, 1787.

"The special court-baron of the Honorable Dame Sarah Salusbury, widow, lady of the said manor, holden in and for the manor aforesaid, on Saturday, the 10th day of March, 1787, and in the 27th year of the reign of Our Sovereign Lord George the Third, &c., before Lawrence Times, gentleman, steward there.

"The homage there

"MATTHEW ROBINSON, } sworn.
"JOHN JOYNER, }

"Also at this court the homage aforesaid upon their oath present, that, since the last general court-baron held for the said manor, that is to say, on the 19th day of November, 1782, James Gutteridge, of Cockernhoe, in the parish of Offley, in the county of Hertford, yeoman, and Mary his wife, one of the two daughters and a devisee named in the last will and testament of Wil[604]-liam Rudd, late of Wandon End, in the parish of King's Walden, in the said county of Hertford, gentleman, deceased, late a customary tenant of the said manor, the said Mary being also a customary tenant of the said manor, and being first solely and separately examined

apart from her said husband by Richard Tristram, gentleman, steward of the said manor, and consenting thereto, did out of court surrender into the hands of the lady of the said manor, by the rod, according to the custom thereof, by the hands and acceptance of the said steward.

"All that undivided moiety or half part, the whole into two equal parts to be divided, of and in all that close of land called Cockernhoe Hall, within the manor aforesaid, containing by estimation 3 acres, more or less : and also of and in all those 6 acres of land more there to the said close belonging : and also of and in all that other close of land called Brock Croft, containing by estimation 10 acres : and also of and in all those 9 acres of land lying in a certain place called Dan Croft : and also of and in all those 5 acres of land lying in a certain place called Laybread : and also of and in all those 10 acres of land lying in Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid : and also of and in all that rood of land called Gibb's Half-Acre, lying within the manor aforesaid : and also of and in all those 3 crofts of land, with a pightle, called Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid : and also of and in all those 5 acres of land lying in the above said place called Laybread, within the manor aforesaid : and also of and in certain lands and tenements, with the appurtenances, within the manor aforesaid, formerly the lands and tenements of Jeremy Godfrey, deceased : and also of and in all that piece of land lying in a [605] certain place called Handicraft, within the manor aforesaid, containing by estimation 30 poles, more or less, lying between the lands formerly of Richard Ligg and the land sometime of Richard Pilgrim, and abutting northward upon a certain piece called Pasture close, and southward upon Brickpond close, heretofore the land of one John Pilgrim : and also of and in one rood of land divided by a hedge from the north-west part of a close formerly of Thomas Rudd, called Pidsdenhill, otherwise Pillsdenhill,—

"To which said moiety of the said several premises the said Mary, the wife of the said James Gutteridge, was admitted tenant by the lady of the said manor, out of court, on the 27th day of December then last past, under the surrender and will of the said William Rudd ;

"And also all other the copyhold or customary messuages, cottages, lands, tenements, and hereditaments, and parts and shares of customary or copyhold messuages, lands, tenements, and hereditaments, whatsoever, holden of the said manor, which were by the will of the said William Rudd devised to the said Mary, the wife of the said James Gutteridge, with their and every of their appurtenances, and of and in all hedges, ditches, trees, fences, commons, ways, waters, watercourses, easements, paths, passages, profits, commodities, hereditaments and appurtenances whatsoever to the said several closes, pieces and parcels of land, hereditaments, and premises belonging, used, or in any wise appertaining ; and the reversion and reversions, remainder and remainders thereof,

"To the use and behoof of the said Mary, the wife of the said James Gutteridge, and her assigns, for and during the term of her natural life ; and, from and after her decease, To the use and behoof the said [606] James Gutteridge and his assigns for and during the term of his natural life ; and, from and immediately after the several deceases of the said James Gutteridge and Mary his wife, and the decease of the survivor of them, then To the use and behoof of the heirs and assigns of the said Mary Gutteridge for ever, according to the custom of the said manor :

"Now, at this court, in her proper person, comes the said Mary Gutteridge, and humbly desires of the lady of the said manor to be admitted tenant to the said undivided moiety or half part of the said pieces or parcels of the said lands and premises so surrendered as aforesaid ; To whom the lady of the said manor, by her said steward, granteth seisin thereof by the rod, To have and to hold the said undivided moiety or half part of all the said pieces or parcels of land and premises, with the appurtenances, unto the said Mary Gutteridge and her assigns for and during the term of her natural life, with such remainders over as in the said surrender are mentioned, of the lady of the said manor, by the rod, at the will of the lady, according to the custom of the said manor, by copy of court roll, fealty, suit of court, customary heriots, when they happen, the yearly rents and other duties, customs, and services therefor due and of right accustomed : but she doth not give anything to the lady for a fine for such her estate and entry in the premises aforesaid, because the same was paid upon her former admission : her fealty is respited : and so, saving

always the right of the lady, the said Mary Gutteridge is admitted thereto tenant in form aforesaid.

“The end of this court.”

Between the making of the preceding surrender of the 19th of November, 1782, and its presentment on the 10th of March, 1787, two general courts baron were in fact holden for the said manor, viz. one on the [607] 4th of January, 1786, and another on the 27th of September, 1786: and entries of the proceedings of those courts were duly made upon the rolls of the manor, but at neither of those courts, nor at any time before the 19th of March, 1787, was the surrender of the 19th of November, 1782, presented or entered, or noted or mentioned upon the rolls of the manor.

On the 17th of September, 1791, the said James Gutteridge and Mary his wife, —the latter having been first solely and separately examined,—did out of court surrender, by the hands and acceptance of the steward of the said manor, the said undivided moiety to which the said Mary had been so admitted in 1781 as aforesaid to the use of the said Mary Gutteridge for the joint lives of herself and her husband; and, after her decease, in case he should survive her, To the use of the said James Gutteridge her husband for his life, with remainder to such uses as James Gutteridge should by will appoint; with remainder to the use of the heirs and assigns of the said James Gutteridge for ever.

The said Mary Gutteridge died in the year 1796 without having been admitted on the preceding surrender: and such surrender was never presented at any court of the manor.

Between the date of the last-mentioned surrender and the 10th of May, 1810, there were three special courts held for the said manor,—in 1797, 1802, and 1803, respectively,—at which presentments, surrenders, and admittances of copyholds took place; the two first courts relating each to one single transaction, and the third to three transactions; but no general court till after the 19th of May, 1810. Entries of such special courts appear upon the rolls of the manor, but they are not, and do not purport ever to have been, signed by the steward for the time being.

In order to prove the admittance of the said James [608] Gutteridge on the said surrender of 17th September, 1791, and its entry on the rolls of the manor, the defendant at the trial put in evidence a book produced by John Hawkins, the then steward of the manor, as the book containing the court-rolls of the manor, in which was the following entry:—

“The Manor of Cockernhoe, in the county of Hertford. 19th May, 1810.

“Be it remembered, that, on the 19th day of May, 1810, at the house of William Wilshire, Esq., the steward of the said manor, in Hitchin, in the county of Hertford, before the said William Wilshire cometh James Gutteridge, &c. [This entry relates to the other moiety, which is not in question in this cause]:

“And be it also remembered, that, on the 19th day of May, 1810, at the place aforesaid, the said James Gutteridge cometh before the said steward, and produceth to him a surrender made by the said James Gutteridge and by Mary his wife, of the tenor or to the effect following, that is to say,—‘The manor of Cockernhoe, in the county of Hertford. Be it remembered, that, on the 17th day of September, 1791, James Gutteridge, of Cockernhoe, in the parish of Otley, in the county of Hertford, yeoman, and Mary his wife, customary tenants of the said manor, in their proper persons came before William Wilshire the younger, gentleman, steward of the said manor, and, —she the said Mary being first solely and separately examined apart from her said husband, and consenting,—did out of court surrender unto the hands of the lady of the manor, by the rod, by the hands and acceptance of the said steward,—

“‘One undivided moiety or half-part, &c.’ [describing the premises].

“‘To which moiety the said Mary, the wife of the said James Gutteridge, was admitted tenant to her and [609] her heirs, out of court, by the hands of the lady of the said manor, on the 27th day of December, 1781, under the surrender and will of William Rudd, her late father, deceased, and at a court-baron holden for the said manor on the 10th day of March, 1787, was admitted for her life, with remainder to the said James Gutteridge for his life, with remainder to the heirs and assigns of the

said Mary, under a surrender thereof made to those uses by the said James Gutteridge and Mary his wife.

“And of and in all other the copyhold lands and hereditaments late of the said William Rudd; and of and in all hedges, ditches, trees, fences, common ways, waters, easements, profits, commodities, and appurtenances, to the said closes, pieces and parcels of land and premises belonging, or in anywise appertaining; and the reversion, &c.; and all the estate, &c.

“To the use and behoof of the said Mary Gutteridge during the joint lives of the said Mary Gutteridge and of the said James Gutteridge her husband; and, from and after the decease of the said Mary Gutteridge, in case the said James Gutteridge shall survive her, to the use of the said James Gutteridge for and during the term of his natural life; and, from and immediately after the decease of the said James Gutteridge, to the use of such person and persons, and for such estate and estates, intents, and purposes, and with and subject to such charges, powers, provisoes, restrictions, and limitations, as the said James Gutteridge shall in and by his last will and testament in writing, or any writing purporting to be or being in the nature of his last will and testament, give, devise, direct, or appoint the same moiety, or any part thereof; and, for default of such gift, devise, direction, or appointment, to the use of the heirs and assigns of the said James Gut-[610]-teridge for ever, according to the custom of the said manor.

“JAMES GUTTERIDGE.

“MARY GUTTERIDGE.

“Taken the day and year first above written, by me,

“WILLIAM WILSHIRE, JUN., Steward.”

“And the said James Gutteridge further informeth the said steward that the said Mary Gutteridge his wife hath since the making of the said surrender departed this life.

“And the said James Gutteridge now prayeth of the lord of the said manor to be admitted tenant of the said moiety and hereditaments; to whom the lord of the said manor doth by his said steward, out of court, grant seisin thereof by the rod, to have and to hold the said moiety, with the appurtenances, unto the said James Gutteridge, with such remainder as in the said surrender, of the lord of the said manor, by the rod, at the will of the lord, according to the custom of the said manor, by copy, of court-roll, fealty, suit of court, the yearly rents and other duties, customs, and services therefore due and of right accustomed. And he giveth to the lord for fines for such his estate and entry in the premises as appears in the margin: his fealty is respited; and so, saving always the right of the lord, the said James Gutteridge is admitted thereof tenant in form aforesaid.”

This entry was read subject to objections on the part of the lessor of the plaintiff.

The house of the said William Wilshire, in Hitchin, mentioned in the said entry, is and always was situate out of the said manor of Cockernhoe.

On this admission, or supposed admission, James Gutteridge, in respect of the said moiety in question in this cause, paid to the steward of the manor, for the use of the lord, a fine of 65*l.*; and afterwards, in respect of the same moiety, paid to the steward for the [611] use of the lord, annually, the quit-rents due for the same, amounting to between 3*l.* and 4*l.* a year.

On the 4th of February, 1820, James Gutteridge surrendered the said premises to William Oakley in fee, To prove the admission of William Oakley on such surrender, the defendant read in evidence (subject to objections on the part of the lessor of the plaintiff) the following entry in the book produced by John Hawkins, then steward of the manor:—

“The manor of Cockernhoe, in the county of Hertford. 19th May, 1826.

“The general court-baron of Richard Oakley, Esq., lord of the said manor, holden in and for the manor aforesaid on Friday, the 19th day of May, 1826, and in the 7th year of the reign of Our Sovereign Lord George the Fourth, &c., before John

Hawkins, gentleman, deputy-steward of Joseph Eade, gentleman, steward of the said manor.

“The homage { WILLIAM OAKLEY,
WILLIAM MARLOW, } sworn.
JOSEPH JOYNER, }

“At this court, the homage aforesaid upon their oath present, that, on the 4th of February, 1820, James Gutteridge, of, &c., one of the customary tenants of the said manor, for and in consideration of the sum of 4500*l.* of lawful British money to him upon or before the making of the said surrender in hand paid by William Oakley, the surrenderee thereafter named, in full for the absolute purchase of the closes, lands, grounds, and hereditaments thereafter mentioned and described, with their appurtenances, the receipt whereof is by the surrender acknowledged, did out of court surrender by the rod into the hands of the lord of the said manor, by the hands and acceptance of John Hawkins, gentleman, deputy-steward of Joseph Eade, gentleman, chief steward of the said manor, according to the custom thereof.

[612] “Of which moiety the said James Gutteridge was admitted tenant to him and his heirs on the 19th day of May, 1810, on the surrender of Daniel Rudd and Elizabeth his wife;

“And also all that other undivided moiety or half part of and in the same lands,

“Of which the said James Gutteridge was admitted tenant to him and his heirs on the said 19th day of May, 1810, on the surrender of himself and Mary his wife;

“And also all those 44½ acres of land and ground parcel, of 48½ acres holden of the said manor, formerly the estate of Valentine Rudd, deceased, and which were described many years since in the court-rolls of the said manor as 10 acres of land lying together in Pidesden Hill, 16 acres in Laybread, 13 acres in Dane Croft, 5 acres lying together in Long Croft, east of Brick Croft, and 2 roods in Thurley, 4 acres, residue of the said 48½ acres, being called Layercroft, and lying at the west corner of Little Reddings; And also one parcel of land to the same adjoining, containing 6 poles in length and 6 poles in breadth, more or less, lying and being in the parish of Otley aforesaid,—

“Of which last-mentioned premises the said James Gutteridge was admitted tenant on the 6th day of January last, on the surrender of William Rudd;

“And also so much and such part of certain closes called Long Close and Hilder's Croft, otherwise Middle Close, as is copyhold, containing about 6 acres :—

“To which the said James Gutteridge was also admitted tenant on the 26th day of January last;

“All which said copyhold closes, lands, grounds, hereditaments, and premises hereinbefore described, contain altogether by admeasurement 102*a.* 3*r.* 28*p.*, and were then or then late were in the occupation [613] of the said James Gutteridge, and were then called by the several names and contained the several quantities next hereinafter contained and expressed, that is to say, Dane Croft containing 9 acres, the copyhold part of Long Close and Middle Close containing 6 acres, Great Brick Croft Spring containing 5*a.* 2*r.*, Brick Croft containing 4*a.* 0*r.* 38*p.*, the Brick Kiln Inclosure, formerly called Cockernhoe Hall Close, containing 2*a.* 1*r.* 34*p.*, the Spring adjoining Cockernhoe Hall Close containing 3*r.* 14*p.*, Laybread Close containing 10*a.* 1*r.* 6*p.*, the Spring adjoining Laybread Close containing 1*r.* 14*p.*, Upper Pigeon Hill containing 13*a.* 2*r.* 8*p.*, Lower Pigeon Hill containing 9*a.* 1*r.* 3*p.*, Puddock Tails containing 3*r.* 35*p.*, Brick Pond Close containing 11*a.* 1*r.* 27*p.*, Twelve Acres Close containing 9*a.* 3*r.* 24*p.*, Ten Acres Close containing 10*a.* 0*r.* 35*p.*, and Eight Acres Close containing 8*a.* 3*r.* 3*p.*; And also all those two cottages or tenements, with the gardens thereto belonging and adjoining, situate, standing, and being on part of Brick Pond Close, hereinbefore described, and then or then late in the occupation of Joseph Lawrence and Benjamin Botsworth; And also all those two other cottages or tenements, with the gardens adjoining and belonging, situate and standing on part of Eight Acres Close, hereinbefore described, and then or then late in the occupation of Robert Hawkes and John Nash, together with all hedges, ditches, trees, mounds, fences, ways, paths, passages, waters, watercourses, profits, privileges, hereditaments, and appurtenances whatsoever to the said closes, lands, grounds, and premises belonging or appertaining; and the reversion, &c., and all the estate, &c. of him the said James Gutteridge of, in, and to the said premises and every part thereof.

[614] "To the use of William Oakley of Wandon End, in the parish of King's Walden, in the county of Hertford, gentleman, his heirs and assigns for ever, absolutely, according to the custom of the said manor :

"Now at this court in his proper person cometh the said William Oakley, and humbly prayeth of the lord of the said manor to be admitted tenant of the said moieties, pieces, or parcels of land and hereditaments, with the appurtenances so surrendered to his use as aforesaid ; to whom the lord of the said manor by his said deputy-steward granteth seisin thereof by the rod, To have and to hold the said moieties, pieces, or parcels of land and hereditaments, with the appurtenances, unto the said William Oakley, his heirs and assigns, of the lord of the said manor, by the rod, at the will of the lord, according to the custom of the said manor, by copy of court-roll, fealty, suit of court, the yearly rent aforesaid, and the duties, customs, and services therefor due and of right accustomed : And he giveth to the lord for fines for such his estate and entry in the premises as appears in the margin : his fealty is respited ; and so, saving always the right of the lord, the said William Oakley is admitted thereof tenant in form aforesaid."

The said William Oakley upon his admission, or supposed admission, above mentioned, paid to the lord of the said manor, who received from him, a fine of 225l. in respect of such admission. He died in 1834 : and by his will, dated the 6th of March, 1832, he devised all the said premises in the last-mentioned entry to Richard Oakley the younger, in fee, who was admitted thereto on the 30th of October, 1837, at a general court-baron holden in and for the said manor.

In 1839, Richard Oakley the elder, who was lord of the manor, died, having by his will, dated the 15th of January, 1835, devised the same manor to the said [615] Richard Oakley the younger, in fee, who thereupon became lord of the said manor. And, in 1843, the said Richard Oakley the younger bargained and sold, released, and conveyed the said manor, with the said last-mentioned premises, to the defendant, who then became, and from thence hitherto has been, lord of the said manor.

James Gutteridge, in the said several entries named, died in 1830. He was the husband of the said Mary Gutteridge, and the grandfather of the lessor of the plaintiff. He was not in possession at the time of his death, nor was he so for about ten years before that event.

Neither the above-mentioned entries in the book produced by the steward, nor the entries of the special courts held between 1791 and 1810, appeared to be signed by the steward of the manor for the then time being : and this was the case with respect to many other entries of courts holden for the said manor both before and since the year 1791 ; but they were proved by John Hawkins, the present steward, who produced them, to have been in the handwriting of a clerk of the steward for the then time being.

It appears by the rolls of the said manor, that, up to the last court holden for the said manor in 1812, Wilshire was steward of the manor, and that Eade had sometimes acted as his deputy-steward of the manor : that the next court was held in 1814, when Eade had become steward ; and that John Hawkins, the present steward, acted as his deputy-steward of the manor. Hawkins was also Eade's partner in business. Eade held the office till his death in 1828, and was succeeded by Hawkins, who has been steward ever since.

The above entry of the admission of 1810 is in the handwriting of a person who was at the time it pur-[616]ported to have been made, and until Wilshire ceased to be steward, a clerk of Wilshire. When Hawkins found the draft of the entry of the admission of 1810 in Wilshire's own handwriting, he thereupon compared the said entry on the rolls with the said draft in Wilshire's own handwriting, and, having found them to correspond, he then signed his name "John Hawkins" beneath the said entry, and so perfected the same as it now appears. This draft was not produced.

When Hawkins became steward in December, 1828, none of the courts or other entries on the court-rolls of the manor since 1787, —except one in 1814, signed by Eade, the then steward, —were signed at all : they amount in number to eleven. Hawkins found the drafts of the same courts and entries in Wilshire's own handwriting ; and, having compared and found them to correspond with the courts and entries on the said court-rolls, he then, as and being such steward, signed his name "John Hawkins" beneath each of the said courts and entries, and so perfected the same as they now appear.

The court of the 19th of May, 1826, was held by Hawkins as deputy-steward of the said manor.

Subsequently to the 17th of September, 1791, and before the 19th of May, 1810, the following and no other courts-baron were held in and for the said manor, as appears by the said books, viz. :—

On the 18th of November, 1797, a special court-baron of the Hon. Dame Sarah Salusbury, widow, the then lady of the manor, was held before William Wilshire the younger, steward of the said manor; James Gutteridge and William Rudd being the homage: it relates only to one transaction, and was not signed by anybody, but concludes with the words "Examined by."

On the 17th of April, 1802, there was a special [617] court-baron of the said manor, which related to only one transaction; and on the 12th of April, 1803, there was a third special court relative to three transactions: they were held before the said William Wilshire, the steward of the manor; but neither of them was signed by Wilshire, but by John Hawkins in 1828, as above mentioned.

On the 4th of December, 1812, the 10th of June, 1814, and on the 21st of January, 1820, general courts-baron of the said manor were held, as follows,—the court on the 4th of December, 1812, before the said William Wilshire as steward of the manor, not signed by him or anybody in his life-time, but by John Hawkins, in 1828, as aforesaid.

The court on the 10th of June, 1814, before Joseph Eade as steward of the manor, and which was duly signed by him; and the court on the 21st of January, 1820, before John Hawkins, as deputy-steward of J. Eade, steward of the manor.

There is not any special custom of the said manor relating to the presentment of a surrender at the next court, or in court.

There are three instances in the year 1781, one in the year 1805, and three in the year 1810, of admittances by the steward on surrenders never presented at any court. There are two surrenders made in 1791, presented at a court in 1812, and admittances taken on them accordingly.

No notice is given of the intention to hold a special court of the manor; and no business is transacted at a special court, except the special business for which the court is held. But public notice is given of the general courts-baron.

As well the surrender of the 19th of November, 1782, as that of the 17th of September, 1791, were without pecuniary consideration.

[618] The surrender by James Gutteridge to William Oakley, and the conveyances by his nephew Richard Oakley to the defendant, were both made for pecuniary considerations.

James Gutteridge, the father of the lessor of the plaintiff, was the eldest son of the said James Gutteridge and the said Mary his wife, and heir-at-law and customary heir of the said Mary Gutteridge, and was born in 1783, and died in August, 1822.

The lessor of the plaintiff was the eldest son of the said James Gutteridge the son and Sarah his wife, and was born in 1811. He was and is the heir-at-law and customary heir, as well of the said James Gutteridge the son, as of the said Mary Gutteridge, and also of the said James Gutteridge the grandfather.

The lessor of the plaintiff, before bringing this action, applied to the defendant, as lord of the said manor, to be admitted on the roll as tenant to the moiety of the said premises for which this action was brought, but was refused admission (a).

There is not by the custom of the said manor any tenancy by the courtesy.

It was agreed that the pleadings in the action should form part of the special case, and that the court-rolls of the manor and the before-mentioned books, surrenders, admissions, and documents should be referred to and inspected by the court and counsel on the argument. It was also agreed that the court might draw any inference from the facts stated which a jury would be warranted in doing.

The question for the opinion of the court was,—whether, on the facts and evidence above stated, giving [619] such effect to the objections above mentioned as was due to them, the lessor of the plaintiff was entitled to recover in this action the said

(a) This paragraph was struck out by the defendant's counsel, but ordered to be restored on the 14th of April, 1859, by Justice Byles, in chambers, to whom the case was referred to be settled.

moiety of the said copyhold estate to which the said Mary Gutteridge was, as alleged, entitled in fee under the said admission of the 27th of December, 1781.

If the court should be of opinion that he was so entitled to recover, then the verdict was to be entered for the plaintiff for 1s. damages, and 40s. costs: but, if the court should be of a contrary opinion, then the verdict was to be entered for the defendant.

H. James, for the plaintiff. The admittance of Mary Gutteridge, in 1787, upon the surrender of 1782, was valid, notwithstanding the lapse of time. As a general rule, no doubt, prior to the statute 4 & 5 Vict. c. 35, a presentment at the first court held after the surrender was necessary: see Co. Litt. 62 a., where it is said,—“By the surrender out of court, the copyhold estate passeth to the lord under a secret condition that it be presented at the next court according to the custom of the manor: and, therefore, if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good; and if it be presented at the next court, ce’ qui use shall be admitted thereunto; but, if it be not presented at the next court according to the custom, then the surrender becometh void; and so it was clearly holden, Pasch. 14 Eliz. in the Common Pleas, which I myself heard.” So, in Gilbert on Tenures, p. 280, it is said, “Presentment, by the general custom of manors, ought to be made at the next court day.” But it is for the lord to object to the want of a presentment; and he may waive it. Gilbert says, p. 278, “It seems that the presentment of a surrender in court is only by way of instruction, to let the lord know of the surrender, and [620] accordingly he may admit; for, it is apparent that a presentment is not of necessity, because the lord may admit out of court; and any act of the lord’s consenting to the surrender will amount to an admittance, which plainly shews that a presentment is only to shew there was such a surrender; for, if it were of necessity, then there could be no admittance out of court, nor no act implying the lord’s consent would be tantamount to an admittance; and then, if we go to the reason of the thing, since the estate is only to be surrendered to the lord, and by him transferred to the surrenderee, if he accept the surrender, and grant an admittance, which is all that can be done, what need is there of a presentment? and of what use can it be for the homage to present a surrender, in order for the lord’s admittance, when the lord may take notice that there was such a surrender, accept it, and admit accordingly?” There may be a special custom for the lord to waive a presentment at the next court: and on the face of this case it seems that several admittances appear upon the court-rolls without any previous presentment of surrenders; and some where the surrender has preceded the admittance by several years,—as in the case of James Gutteridge, who appears to have been admitted in 1810, upon a surrender made in 1791. In *Doe d. Mason v. Mason*, 3 Wils. 63, a single admittance to a copyhold was held sufficient to prove the custom of a manor for lands to descend to the youngest nephew. So, in *Roe d. Bennett v. Jeffery*, 2 M. & Selw. 92, a single instance of a surrender in fee by tenant in special tail of a copyhold estate, was held to be evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor had not been dead twenty years, and though one instance was proved of a recovery suffered by tenant-in-tail to bar the entail. [Williams, J. You must go to the length [621] of saying that a copyhold estate may pass without any surrender at all.] Without presentment. [Williams, J. In *Doe d. Priestley v. Calloway*, 6 B. & C. 484, 493, 9 D. & R. 518, 526, Lord Tenterden seems to doubt whether a custom to present a surrender at any subsequent court would be a valid custom.] The law upon the subject is to be found in 1 Scriven on Copyhold, 4th edit. 223, 224, where the case of *Doe d. Priestley v. Calloway* is referred to.

Then, the admittance of James Gutteridge in 1810, upon the surrender of 1791, was void. The admittance was made by the steward at his own residence, which was out of the manor. Though it may be competent to the lord so to admit, it clearly is not competent to the steward to admit otherwise than at a court held within the manor. In *Melwich v. Luter*, 4 Co. Rep. 26 a., “it was resolved (4th resolution) that the lord himself may make a grant or admittance of a copyhold out of the manor, at what place he pleases; but the steward of the court of a manor cannot at any court held out of the manor make grants or admittances.” So, in *Clifton v. Molineux*, 4 Co. Rep. 27 a., it was resolved by Wray, Chief Justice, Sir Thomas Gawdy, et tot. cur., upon evidence given to a jury, that, “if a court be held by a steward of a manor out of it, and divers grants and admittances there made, the court and all the grants

and admittances are void, for, the court of the manor ought to be held within the manor, and not out of the jurisdiction of it." There is a distinction between surrenders and admittances. Thus, in *Tukely v. Hawkins*, 1 Lord Raym. 76, it was resolved that a steward of a manor may take a surrender of a copyhold out of the manor, but cannot admit out of the manor; and that a custom that the steward shall not take surrenders out of the manor is a void custom. In Bacon's Abridgment, Copyhold (H.), 4, it is said: [622] "The lord himself may make admittances or grants at any place out of the manor, for he is not confined any more than any other person from granting an estate at will where he pleases. But, it being only custom which enables the steward to make such admittances or grants, that which he doth he must do upon the manor, unless there be a custom to keep a court out of the manor." In *Doe d. Leach v. Whitaker*, 5 D. & Ad. 409, where all the authorities are very elaborately discussed and considered, Lord Denman, in delivering the judgment of the court, says,—p. 434,—"The grant itself, or admittance, not being made by the lord in person, it is necessary to consider whether it was made by an unauthorized person. And the first question upon that is, whether the steward of a manor can admit out of the manor. It should seem that he may take a surrender out of the manor: *Howsego v. Wild*, 1 Roll. Abr. 500, F. 3. And so it would appear by *Dudfield v. Andrews*, 1 Salk. 184. It is so taken in *Tukely v. Hawkins*, 1 Ld. Raym. 76, and the court say that a custom to the contrary would be void. That is perhaps going a good way, for, in *Dudfield v. Andrews*, it is only by reasoning and queries that it is thought proper the steward should have such a power. But, as to an admittance out of the manor, *Tukely v. Hawkins* is express that the steward cannot admit out of the manor. And the fourth resolution in *Melwich's case*, 4 Co. Rep. 26 b., and *Clifton v. Molineux*, 4 Co. Rep. 27 a., are to the same effect, though in these cases it is said that the steward cannot admit at a court held out of the manor. Watkins, in his Treatise on Copyholds, vol. i., p. 253, seems to incline to the opinion that a steward may admit out of a manor; but it is only by putting queries and reasoning that he supports that opinion. But we are of opinion that a steward cannot, in his mere character of steward, admit out of [623] the manor." Further, it is submitted that the admittance of James Gutteridge was not properly proved. The book produced by Mr. Hawkins, the steward, did not contain a proper entry of the admittance of 1810, but merely a copy made from a draft said to have been prepared by the then steward. [Byles, J., referred to *The Bishop of Meath v. The Marquess of Winchester*, 3 N. C. 183, 3 Scott, 561, where a case touching the right of presentation to a living by the Bishop of Meath, stated for the opinion of counsel by a Bishop of Meath in 1695, and found in the family mansion of the descendants of that bishop, was held to be evidence against a subsequent bishop of the same see, on a question touching the right of presentation to the same living.]

Lush, Q. C. (with whom was Raymond), for the defendant. The admittance of 1782 was void for want of presentment in due time. It is quite clear, that, before the 4 & 5 Vict. c. 35, a surrender made out of court must have been presented, at the next court, in the absence of a special custom to the contrary.—Bac. Abr. Copyhold (G.); Co. Litt. 62 a.: *Doe d. Priestley v. Calloway*,—which as to this manor is negatived by the case. To entitle him to succeed, the plaintiff must establish that an admittance is sufficient without any surrender,—a proposition which clearly cannot be maintained. The title of the defendant under the admittance of 1810 is incontestable. That admittance, though made by the steward out of the manor, was valid, it not having been made at a court held out of the manor. And, even assuming that it was not valid per se, there was such a ratification by the lord's receipt of the fine, and the subsequent recognition of the admittance upon the rolls of the manor, as to make it good. It appears from the case that there [624] was no court holden between the surrender in 1791 and the admittance in 1810. And, though the admittance was made out of court by the steward, a fine was paid, which it must be assumed was received by the lord. Quit-rents also were paid: and the entries in the book were duly made. The opinion thrown out in *Doe d. Leach v. Whitaker*, that a steward cannot admit out of the manor, is a mere obiter dictum. It may be that he cannot admit at a court out of the manor. Mr. Serjt. Scriven seems to think that the better opinion is, that the steward may admit as well as take a surrender out of the manor, provided the transaction be duly recorded on the court-rolls: see 1 Scriven on Copyhold, 111, 112; and see *Parker v. Kett*, 1 Salk. 95, 1 Ld. Raym. 658.

H. James, in reply, submitted that the mere payment of a fine to the steward did

not operate an admittance,—citing *Brown v. Dyer*, 11 Mod. 73, *Doe d. Tofield v. Tofield*, 11 East, 246, Viner's Abridgment, Copyhold (G. b.), pl. 19, and 1 Scriven on Copyhold, 307, 311.

Cur. adv. vult.

KEATING, J., now delivered the judgment of the court (a):—

In this case the lessor of the plaintiff claimed as heir-at-law of Mary Gutteridge, his grandmother, who in 1781 was admitted tenant in fee of the lands in question (parcel of the manor of Cockernhoe, in the county of Hertford), and who in 1782 surrendered them to the use of herself for life, remainder to the use of her husband James Gutteridge for life, remainder to the use of the heirs of the said Mary. [625] This surrender was not presented until 1787, although several courts baron were held in and for the manor between 1782 and 1787: but, on the 10th of March, 1787, the surrender was presented, and the said Mary was admitted, and enjoyed the lands in pursuance of such admittance.

In 1791, James Gutteridge and Mary his wife surrendered the lands in question to the use of Mary for the joint lives of herself and husband, and, in case he should survive her, to his use for life, remainder to such uses as he should appoint, with remainder to his heirs and assigns.

Mary Gutteridge died in 1796; and in 1810 James Gutteridge was, upon the surrender of 1791, admitted by the steward of the manor out of court, at his house, which was situate out of the manor; and he thereupon paid to the steward, for the use of the lord, 65l. as a fine upon such admittance.

In 1820, James Gutteridge, in consideration of 4500l., surrendered the lands in question to the use of William Oakley (under whom the defendant claimed): and at the next general court-baron, held on the 19th of May, 1826, that surrender was presented by the homage, and Oakley admitted thereupon,—such surrender, amongst other things, reciting the admittance of James Gutteridge in 1810.

In 1830, James Gutteridge died; and, in 1845, the present action was commenced by the lessor of the plaintiff, who contended that the admittance of James Gutteridge in 1810 was invalid by reason of its being granted by the steward out of the manor, and that his title as heir-at-law to Mary Gutteridge under the limitations in the surrender of 1782 accrued upon the death of James Gutteridge in 1830. Another point,—that the book produced by the steward as being the court-rolls of the manor, and containing the entry of [626] the admittance of 1810, was not admissible, as the original draft ought to have been put in,—was not much pressed, and was disposed of during the argument.

The defendant, on the other hand, insisted that the surrender of 1782, under which the lessor of the plaintiff claimed, was invalid, not having been presented at the next court-baron, and that his own title was good, upon the grounds,—first, that the admittance of 1810, although made out of the manor by the steward, was valid, not having been made at a court out of the manor;—and, secondly, that, if invalid, still there had been a sufficient ratification by the lord's receipt of the fine, and the subsequent recognition of the admittance upon the rolls of the manor, to make it good.

Whatever doubts may formerly have existed on this point, we think it clear, since the case of *Leach v. Whitaker*, 5 B. & Ad. 409, that an admittance (previous to the act 4 & 5 Vict. c. 35) by the steward of a manor, as such, out of the manor, whether at a court or otherwise, was bad; but, as such an admittance would have been good if a special authority for that purpose had been given by the lord, so also it might have been rendered valid by his subsequent ratification and notification to the homage, so as to make it an admission by implication.

In the present case, the admittance in question was regularly entered in a book produced by the steward as containing the court-rolls of the manor; and, although not in form a court-roll, yet the entry is made in regular sequence with the court-rolls, in the same handwriting, and in a form very similar to the admittance of Mary Gutteridge in 1781. The fine (65l.) is stated in the entry to have been paid to the lord; and the case finds that it was in fact paid to the steward for his (the lord's) use. In the usual course of business, that fine would have been paid or accounted for [627] to the lord; and there is no evidence whatever to raise the slightest presumption of

(a) Williams, J., Byles, J., and Keating, J.

any departure from that course in the present instance. The lord had not only the legal custody of the book containing the court-rolls of the manor, but he had a direct interest in its contents; and there appears no reason to doubt that he received the fine upon the admittance in question with a full knowledge of the facts, and before the surrender to William Oakley in 1820. The entry of the admittance of 1810, although not in form a court-roll, appears from the book (which we have inspected) to have been made by the steward amongst the rolls of the manor. It is afterwards expressly referred to by the homage, at least as early as 1820, as being a valid admittance: and, looking to all these points, we think a jury, after the lapse of thirty-five years, during which time the property in question had been enjoyed, and more than once transmitted, upon the assumption that the admittance of 1810 was valid, would have been well warranted in finding, that, although at first invalid, for the reason assigned, it had been ratified by the lord and notified to the homage, so as to render it a good admittance.

Our decision upon this point makes it unnecessary that we should decide the further question, how far the surrender of 1782 was inoperative, by reason of its not having been presented at the next court-baron.

The judgment will be for the defendant.

Judgment for the defendant.

[628] YEATMAN v. DEMPSEY. Jan. 19th, 1860.

[Affirmed in Exchequer Chamber, 9 C. B. N. S. 881.]

The declaration in an action for not attending as a witness, stated, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary to collect and prepare the medical and other evidence necessary and material to a suit which the plaintiff was about to institute in the Divorce court, and to assist plaintiff in the management of the suit, and to attend and give evidence at the trial of the issues to be joined therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues; and the breach alleged was, that the defendant did not appear at the trial of the said issues, or tender himself to be a witness thereat, but refused and neglected so to do, by reason whereof the plaintiff was obliged to withdraw the record, and incurred costs, &c. Plea, non assumpsit.—To prove the contract alleged, evidence was given that the defendant had been engaged by the plaintiff to take care of and to watch his wife, with a view to the obtaining of proof of her insanity at the time of marriage,—upon the terms of his being paid from time to time his travelling and other expenses out of pocket, and for his fees and loss of time at or immediately after the trial; and several letters of the defendant's were put in, wherein he stated that there was ample evidence to support the plaintiff's case, and advised him to go into court at once, and promised to attend the trial on receiving a week's notice. In consequence of the absence of the defendant when the cause was called on for hearing, the plaintiff was obliged to withdraw the record.—The jury having found that there was a contract by the defendant to attend at the trial without a subpoena and without receiving conduct-money:—Held, that their finding was warranted by the evidence, and that the plaintiff was entitled to substantial damages, without shewing that he would have succeeded in the Divorce court with the aid of the defendant's evidence.

This was an action against the defendant for neglecting to attend as a witness in the Divorce court, pursuant to his promise.

The declaration stated that, before and at the time of making the promise therein-after mentioned, the plaintiff was about to institute a suit in Her Majesty's court for divorce and matrimonial causes, against Macgrathe Josephine Klothide his wife for the dissolution of their marriage, and that the defendant then was and still is a surgeon and apothecary, and exercising and carrying on the profession and business of a surgeon and apothecary: that thereupon, in consideration that the plaintiff, at the request of the defendant, would retain and employ the defendant in his capacity

of surgeon and apothecary aforesaid, to collect and prepare the medical and other evidence necessary and material to the said suit, and to assist the plaintiff in the management of the said suit, and to attend and give evidence at the trial of the issues to be joined therein, for certain reasonable fees and reward in that [629] behalf, the defendant then promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues: Averment of performance by the plaintiff of all conditions precedent to entitle him to bring the action; and that, relying upon the defendant's said promise, and his skill and experience in his profession or business as aforesaid, the plaintiff caused such proceedings to be had in the said suit that afterwards, before the Right Hon. Sir Cresswell Cresswell, Knt., at Westminster, a certain issue before then joined in the said suit came on to be tried before a jury then and there duly chosen for that purpose; and that the appearance and testimony of the now defendant, in the performance of his said promise, were necessary and material to the trial of the said issue, and without the evidence of the now defendant the plaintiff could not safely proceed to the trial of the said issue, yet the defendant broke his promise and contract in that behalf, and did not appear at the trial of the said issues, or tender himself to be a witness thereat, but wholly refused and neglected so to do, by reason whereof the plaintiff was obliged to withdraw the record at the said trial, and was compelled to pay certain great costs and expenses to the then defendant, and was hindered and delayed in the trial of the said issue.

The defendant pleaded, amongst other pleas, that he did not promise as alleged.

The cause was tried before Byles, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiff, who was married in 1852, being desirous of procuring a dissolution of his marriage on the ground that the lady was insane at the time of contracting it, employed the de-[630]-fendant, a medical practitioner under whose care she was placed in 1857, to collect evidence to establish his case before the Divorce court, and attend and give his testimony at the hearing of the cause, upon an understanding that he was to be paid from time to time the travelling and other expenses incurred by him, and his professional fees after the trial. On the 8th of December, 1858, the cause being in the list for the following day, the plaintiff informed the defendant that his attendance would be required on the following morning at 11 o'clock. The defendant asked for 10l. on account, stating that unless he obtained it he could not attend. The plaintiff declined to give him that sum, but told him that he would be paid as the other witnesses were, viz. at or immediately after the hearing of the cause. When the cause was called on, the defendant did not appear, and the plaintiff in consequence withdrew the record. The defendant was not subpoenaed.

Amongst other evidence given to shew the contract on the defendant's part to attend and support the plaintiff's case, and to shew that he was a material and necessary witness, a document under the hand of the defendant was put in, whereby he certified that he considered Mrs. Yeatman insane whilst under his care, and that he was inclined to think that such had been her state of mind very early in life, probably from her birth; and certain letters from the defendant to the plaintiff were also put in, amongst which were the following:—

“South House, Long Eaton, Derby,
“ March 26th, 1858.

“My Dear Sir,—I have sent you the inclosed facts. I could give you many more; but I think they are enough for judge and jury to give a verdict, if you go in for insanity. I should try adultery, if you think you [631] are not safe for insanity. She is incorrigible. Your brother informs me she is off again. Have you seen her or heard anything of her? If you could get her to go to the train with you, and bring her here, I would take care she never left here again without your brother wished it. If you look at the act 2 & 3 W. 4, c. 7, s. 28, you will find that my certificate, under the circumstances, would have done to have put her into an asylum. She is diseased.

“W. C. DEMPSEY.

“John P. Yeatman, Esq.”

“South House, Long Eaton, Derby,
“ May 14th, 1858.

“My Dear Sir,—Dr. Winslow can do no other than give a decisive opinion. You

are quite safe ; and I shall be glad to congratulate you. Dr. Pritchard is an authority ; he is a fellow-citizen of mine, and his son was a fellow-pupil. I should see Dr. Pritchard ; and, if you like, I will do so. I should go into court at once. You have sufficient evidence ; and I would not bother to get more.

“W. C. DEMPSEY.

“John P. Yeatman, Esq.”

“Tudor Villa, Canton Road, Cardiff,
“November 4th, 1858.

“Dear Sir,—I have sold up and left Long Eaton, and do not know where I shall be for two or three weeks. If you could let me have 10l. on account you would much oblige me. I hope that you will succeed in your wishes. I have not heard or seen anything of her since I saw you in London. What does Winslow say now ? Have you heard from or seen Pritchard ? I shall do my best for you, only I must have a week's notice, for I do not know where I shall be. You can send me a 10l. note or a P. O. order here, and [632] I will let you know from time to time where you can find me.

“W. C. DEMPSEY.

“John P. Yeatman, Esq.”

On the part of the defendant, it was submitted that there was no evidence to go to the jury of a contract by him to attend the trial of the cause in the Divorce court without a subpoena, that there was no consideration for such a promise, and no proof of damage from his non-attendance.

The learned judge was inclined to think that there was no evidence of the contract as alleged ; but he left it to the jury to say whether there was a promise by the defendant on a good consideration to attend as a witness, and a breach thereof.

The jury found that there was an absolute and unconditional promise and a breach, and they found for the plaintiff, damages 50l.

Pigott, Serjt., in Michaelmas Term, in pursuance of leave reserved to him at the trial, obtained a rule nisi for a new trial, on the ground that there was no evidence to sustain the declaration,—or to reduce the verdict to nominal damages, on the ground that there was no proof that the plaintiff had sustained any damage from the non-attendance of the defendant in the Divorce court.

Macleay, Q. C., and Phear, now shewed cause. The defendant's letters clearly shew that he was dealing with the plaintiff on the footing of a contract as alleged in the declaration : and his general conduct, coupled with his letter of the 4th of November, 1858, shew that the defendant dispensed with a subpoena. The jury must be taken to have found that he was not entitled to receive by anticipation more than [633] money for actual disbursements, and that he had been fully paid for all his disbursements. It was perfectly competent for the plaintiff to make such a contract ; and there can be no reason why he should not be held responsible for the breach of it. It is manifest that the evidence which the defendant upon his own shewing was prepared to give could not have been supplied by anybody else. As to the damages, it will be contended on the other side that the plaintiff was bound to prove that he had good ground for his suit in the Divorce court. But, whether he had or not, it does not lie in the mouth of the defendant to say that there was no probability of success in a suit which was mainly to depend upon his testimony. The plaintiff has, at all events, sustained damage to the extent of the costs which he has fruitlessly incurred. [Willes, J. By his failure to attend to give evidence, the defendant diminishes the plaintiff's chance of success. This is not like a case where the plaintiff has manifestly no cause of action at all. By the defendant's own admission, the plaintiff here had a cause of action,—a chance of obtaining that which he sought. He had a right to have the benefit of that chance. Williams, J. There is no averment in the declaration that the plaintiff would have succeeded in the Divorce court if the defendant had duly attended as a witness.] It was not necessary : *Davis v. Lovell*, 4 M. & W. 687, 7 Dowl. P. C. 178.

Pigott, Serjt., and Beresford, in support of the rule. The contract as alleged in the declaration is, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary, to collect and prepare the medical and other evidence necessary and material to the suit which the plaintiff was about to institute in the [634] Divorce court, and to assist the plaintiff in the management of the suit, and to attend and give evidence at the trial of the issues to be joined

therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues. There is no allegation and no proof that the defendant undertook to attend as a witness without a subpoena and without conduct-money. No doubt, he undertook to look after the lady, and to endeavour to make out a case of what in one of his letters he calls dementia before the marriage: but that is all. There was no contract to dispense with a subpoena. [Williams, J. The law gives no right to subpoena a man of science.] No doubt, each party contemplated the defendant's attending as a witness without being subpoenaed and without being paid conduct-money. But the question is, was there a contract to that effect? A contract such as this,—which almost amounts to a conspiracy to get up a case against the lady,—is manifestly contrary to public policy. [Erle, C. J. There is no plea of illegality: and no point of this sort was reserved; it therefore is not open to you.] Unless the damages are such as legally flow from a breach of some legal contract, the court will not lend its aid to enforce their recovery. The damages are a compensation or redress which the law awards to the plaintiff for a grievance which he has legitimately sustained. The substantial question, however, is, whether there is any evidence of the contract alleged in the declaration. Then, assuming that there was such a contract, and a breach of it, the plaintiff can only be entitled to nominal damages by shewing that his suit failed solely in consequence of the defendant's non-attendance. For anything that appeared [635] here, the plaintiff's case must have failed whether the defendant attended or not; and, if so, he ought not to have damages.

ERLE, C. J. I am of opinion that this rule should be discharged. The first question is whether there was any evidence to support the contract alleged in the declaration, which contract in effect was, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary to collect and prepare the medical and other evidence necessary and material to a suit which the plaintiff was about to institute in the Divorce court, and to assist the plaintiff in the management of the suit, and to attend and give evidence at the trial of the issues to be joined therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues. There was no precise and formal contract in writing or otherwise; but there was beyond all doubt to my mind conversation and correspondence between the parties which involve this, that the defendant was to get up evidence in support of the plaintiff's case, and to attend as a witness for him on the trial. The evidence which alone would support the plaintiff's case in the Divorce court would necessarily be such as the defendant might be expected to be prepared to give. It was testimony of a nature which probably no one else could have supplied. I think it was necessarily involved in what passed between the parties, that the defendant contracted to get together the evidence and to attend at the trial and prove the plaintiff's case. Every man has full power to contract to do that [636] which is not prohibited by law: and, if a party chooses to contract to attend and give evidence without a subpoena and without conduct-money, I see no reason why he should not be allowed to do so. Then arises the question whether the plaintiff is entitled to recover the damages which the jury have given him for the defendant's breach of contract. It is said that the plaintiff can only be entitled to nominal damages unless it be made appear that his testimony would have insured a successful termination of the divorce suit. I think, however, it is enough if there was a probability of success. It cannot be predicted of any person's testimony that it will to a certainty sustain the case of the party on whose behalf he is called. It is always open to contradiction and to all manner of failures. Success can in any case be only a matter of probability. But here I think the defendant has by his own conduct precluded himself from saying that the plaintiff had no probability of success from his testimony. The lady was for some months under his care: and he from time to time reported to the plaintiff her state of mind: and the suit was instituted entirely upon his representation that the facts which he had thus become master of would conduct the suit to a successful issue. I think, therefore, he was not at liberty to say that his non-attendance as a witness had done the plaintiff no damage. His own statements were in the nature of an estoppel.

WILLIAMS, J. I am of the same opinion. I think there was sufficient evidence for the consideration of the jury, that there was a contract such as that alleged in the declaration. I agree with my Brother Pigott, that, in order to support the declaration, the plaintiff was bound to make out that the defendant engaged to [637] attend and give evidence, and that without a subpoena and without conduct-money. But I think there was evidence of that here. In his letter of the 4th of November, 1858, the defendant stipulated for a week's notice. That shews that he was not to have a subpoena, which would have given him longer notice. As to the second point in the case, I must own I have entertained some doubt. But, upon consideration, I have come to the conclusion that the plaintiff was entitled to recover substantial damages. If this had been an action against the defendant for not attending in obedience to a subpoena, it would no doubt have been essential for the plaintiff to shew that he had a good cause of action (*u*). That rule was somewhat relaxed in *Cowling v. Core*, 6 C. B. 703. The court there held, that, since the statute 4 & 5 Ann. c. 16, where there are several issues, the absence of an allegation that the plaintiff had a good cause of action, generally, does not shew that the plaintiff has not sustained some damage from the absence of the witness, inasmuch as the witness's testimony might have insured the plaintiff's success as to some one issue. But it leaves the general principle untouched, that, to entitle the plaintiff to maintain an action against a witness for non-attendance, he must allege and prove that he has a good cause of action. I at first felt some difficulty as to whether that principle should not be applied to an action like this, for the breach of a contract to give evidence at the trial. It occurred to me at the moment, that, to entitle the plaintiff to more than nominal damages, it should have been shewn that the plaintiff would have succeeded by means of the witness's testimony if he had duly attended. But, upon reflection, I am satisfied that the plaintiff is entitled to substantial damages. If it had appeared [638] as a fact that the plaintiff could not have succeeded whether the defendant attended or not, it would clearly have been a case for nominal damages only. But that was not shewn here. The question is whether the plaintiff was bound to shew, that, with the defendant's testimony, he must have succeeded in the divorce suit. I think not. If the defendant had attended, the matter would at all events have been investigated and brought to an end. By the defendant's breach of contract the plaintiff has been deprived of that advantage. The amount of damages was for the jury.

WILLES, J., concurred.

Rule discharged.

BATEMAN AND WIFE v. LYALL AND WIFE. Jan. 12th, 1860.

In an action for verbal slander not actionable per se, the declaration alleged for special damage, that, in consequence of the speaking of the words, four of the plaintiff's customers had ceased to deal with him. Three of those persons proved only that they ceased to deal with the plaintiff in consequence of reports they had heard in the neighbourhood; but the fourth proved the speaking by the defendant of words substantially as charged, and stated that he did not deal with the plaintiff afterwards:—Held, some evidence of special damage.

This was an action for verbal slander of the female plaintiff by the female defendant, alleging by way of special damage loss of customers in the plaintiff's business of a baker,—the words not being in themselves actionable. The names of four persons were mentioned in the declaration as having ceased to deal with the plaintiff in consequence of the alleged slander.

At the trial before Keating, J., at the sittings in London after the last term, the four persons named in the declaration were called. Three of them stated that they had ceased to deal at the plaintiff's shop in [639] consequence of reports which they had heard in the neighbourhood; but neither of them stated that they had heard the defendant's wife use the words imputed to her. The fourth, one Hodgkiss, said that on a certain day he went into the defendant's shop, the defendant and his wife being both there, and that the male defendant said,—“I am surprised you should deal next door, for Mrs. Bateman,” &c. The words so spoken were substantially those charged

in the declaration. Hodgkiss further stated that he did not deal with the plaintiff afterwards: but he did not say that he had ceased to do so in consequence of the speaking of the words.

On the part of the defendants it was submitted that the special damage was not proved, more especially as the only words proved were said to have been spoken by the male defendant, who was only joined for conformity.

The learned judge, however, thought there was some evidence for the jury; and he accordingly left it to them, and they returned a verdict for the plaintiffs, damages 14l.

Barnard now moved to enter a nonsuit, on the ground that there was no evidence of special damage to go to the jury. [Keating, J. I certainly thought there was very slight evidence. The jury were evidently very strongly impressed by a good deal of evidence which I did not leave to them. Williams, J. In *Evans v. Harries*, 1 Hurlst. & N. 251, it was held, that, in an action of slander of the plaintiff in his business of an innkeeper, it is sufficient to allege and prove, as special damage, a general loss of custom, without stating the names of the customers who ceased to frequent the inn. Martin, B., said: "How is a public-house keeper whose only customers are persons passing [640] by, to shew a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom? Suppose a person falsely stated that an eating-house keeper sold unwholesome food, whereby he lost his business; how is he to know the names of all his customers who left?" That was a case of general damage, which would not entitle the plaintiff to maintain this action. [Willes, J. You rely upon *Ward v. Weeks*, 7 Bingh. 211, 4 M. & P. 796.] Yes. At all events, the damages were excessive.

ERLE, C. J. If the words were spoken by Mrs. Lyall of Mrs. Bateman, and those words were partly the cause of the witness's discontinuing to deal at the plaintiff's shop, surely it is evidence for the jury. There certainly was evidence here which the learned judge would not have been justified in withholding from the jury. The words were substantially proved, and there was some evidence of special damage. We cannot say the damages were excessive. That, as a general rule, is for the jury: and the case is not taken out of the general rule, even though the judge who tries the cause should think that he would not have given so much. There will be no rule.

The rest of the court concurring,

Rule refused.

[641] LARMAN MORDEN, *Appellant*; HENRY JOHN PORTER, *Respondent*. 1860.

[S. C. 29 L. J. M. C. 213; 1 L. T. 403; 8 W. R. 262. Explained, *Dickenson v. Fletcher*, 1873, L. R. 9 C. P. 5; *R. v. Prince*, 1875, L. R. 2 C. C. 164. Referred to, *Watkins v. Major*, 1875, L. R. 10 C. P. 666; *Shenas v. De Rutzen*, [1895] 1 Q. B. 922. Followed, *R. v. Tyrone JJ.*, [1902] 2 L. R. 79.]

A complaint of trespass in pursuit of game, under the statute 1 & 2 W. 4, c. 32, s. 30, need not be made by a person having an interest in the land.—The leave and licence of the occupier, to be an answer to such complaint, must precede the act of trespass.—And, semble, per Williams, J.,—Keating, J., dubitante,—that the party trespassing is not the less guilty of the offence because he bonâ fide believes that he has the licence of the occupier to shoot over the land.

At a petty sessions holden at Ely, in the Isle of Ely, on the 6th of October, 1859, before three justices of the peace for the said Isle of Ely, an information preferred by Larmen Morden, of the parish of Wilburton, in the said isle, gamekeeper (hereinafter called the appellant), against Henry John Porter, of the parish of Haddenham (hereinafter called the respondent), under the 30th section of the statute 1 & 2 W. 4, c. 32, charging "for that the said Henry John Porter, within three calendar months then last past, that is to say, on the 1st of October then instant, at the parish of Wilburton, in the said Isle of Ely, did unlawfully commit a certain trespass, by entering in the day-time of the same day upon certain land in the possession and occupation of John Everitt there, in search of game, without the licence or consent of the owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having the right to authorize the said Henry

John Porter to enter or be upon the said land for the purpose aforesaid, contrary to the statute in such case made and provided," was heard and determined by the said justices; and upon such hearing they dismissed the information.

The appellant being dissatisfied with this determination, as being erroneous in point of law, the following case was stated by way of appeal, pursuant to the statute 20 & 21 Vict. c. 43:—

At the hearing of the aforesaid information, it appeared that it was laid by the appellant in his character of gamekeeper to Lady Pell, who is lady of the manor of Wilburton, and that the land on which the [642] alleged trespass was committed, containing about nine acres, was situate in that parish, holden by copy of court-roll of that manor, and was the property of John Everitt, as stated in the information. The respondent admitted the fact of being on the land in search of game; but pleaded leave and licence from the owner and occupier, and denied the right of the appellant to prefer the information.

It appeared that the respondent, the son of a farmer and brewer in the adjoining parish, is duly certificated, and went to Wilburton on the day in question, on the invitation of one Albert Bailey, for a day's shooting; and, knowing that Lady Pell would not allow any one over her land, he from time to time inquired of Bailey, who accompanied him, but without a gun, whether they were at liberty to go into the land through which they passed, and was assured by Bailey that he had full liberty to go over the land in question.

John Everitt, in his examination, proved that he had not given specific permission to the respondent before the day in question: but it was proved, that, on the respondent's asking his permission the night previous to the hearing to go over his land, he had said "they might go over it and welcome, for he wished all the game in the parish was killed;" and that he also, at the same time, said, that, "if the respondent had asked him permission before this happened, he should have given it him." It was also proved by Bailey that he (Bailey) went at all times over Everitt's land, and Everitt went over his land, by mutual consent: but there was no evidence of that permission being expressly stated to extend to shooting; and Bailey did not take out a game certificate.

The justices being of opinion that the appellant had no such interest in the locus in quo as would support a prosecution for trespass, and that, if he had, the [643] respondent acted under the full impression of an implied licence from the owner and occupier of the land given to him through Bailey, gave their determination against the appellant, in the manner above mentioned.

The questions of law arising out of the above statement, therefore, were,—first, had the appellant, as gamekeeper of the manor of Wilburton, such an interest in all the copyhold land within the manor in the ownership and occupation of the several tenants of the manor, as would support the above information? If so,—secondly, was there in point of law evidence of such leave and licence as would be, under the 30th section of the statute 1 & 2 W. 4, c. 32, a defence to an action at law for trespass, or to the said information?—thirdly, would the ex post facto leave and licence form a condonation of the offence, and be held to revert back to the time of the alleged trespass?

Couch, for the appellant. The justices have decided erroneously upon the points reserved by the case. The first question submitted is, whether the appellant as gamekeeper of the manor had such an interest as to entitle him to lay the information. That point is disposed of by the decision of the court of Queen's Bench in *Middleton v. Gale*, 8 Ad. & E. 155, 3 Nev. & P. 372, where it was held, that, under the 1 & 2 W. 4, c. 32, s. 30, it is not necessary that a conviction for a trespass in search of game should purport to be, or should in fact be, at the instance or on the information of the owner or occupier of the land, or of a party interested in the game, or of a person authorized by such owner, occupier, or party. Lord Denman, after time taken for deliberation, says: "We do not find that any decision has taken place on the point: but we have considered it, and are of opinion that any person may make such complaint, and that the conviction was [644] therefore good." The next question is, whether there was in point of law evidence of such leave and licence as would, under the 30th section of the 1 & 2 W. 4, c. 32, be a defence to an action at law for trespass. That section, after reciting, that, "after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to

provide some more summary means than now by law exist for protecting the same from trespassers," enacts, "that, if any person whatsoever shall commit any trespass by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money not exceeding 2l., as to the justice shall seem meet, together with the costs of the conviction, &c.: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned; but such landlord, lessor, or other person, shall, for the purpose of prosecuting, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or licence." The facts stated in the case shew that there was no licence given by the occupier here. Bailey, who assumed to give leave, had himself no permission to shoot over the land. And, suppose he had, he clearly had no power to give any licence to another. The subsequent conversation with the occupier [645] amounts to nothing, and could not affect the right of the informer to a moiety of the penalty, under the 4 & 5 W. 4, c. 20, s. 21.

Phear, for the respondent. The case of *Middleton v. Gale* is not absolutely binding upon this court. [Willes, J. It is a decision precisely in point.] To constitute an offence under the 30th section of the 1 & 2 W. 4, c. 32, the trespass must be an invasion of the owner's proprietary rights. There was no such infringement here; for, though the occupier of the land said that he had not given the respondent express permission to shoot over it, he added, that, if he had asked permission, it would have been granted. [Williams, J. He clearly had not obtained permission at the time he went upon the land.] There was evidence of leave and licence given by Bailey, who may be assumed to have been the authorized agent of Everitt for that purpose. [Williams, J. It appears from the case that Bailey had permission to go over the land in Everitt's occupation; but there is no evidence that he had permission to take a companion with him. This is essentially a criminal proceeding; and, to constitute the offence, it appears that there was mens rea. In *The Queen v. Cridland*, 7 Ellis & B. 853, a bona fide claim of title to the land was held to be sufficient to oust the jurisdiction of the justices under the statute: Erle, J., saying,—"I strongly incline to the opinion that the true meaning of the statute is, that the justices ought to try whether the defendant entertained a honest belief that he had a title; and, if he had such belief, he ought not to be convicted. I think that in a criminal statute trespass means an intended trespass." Here, the respondent clearly was not guilty of an intentional trespass; he was expressly guarding himself from being a trespasser. That this is a [646] criminal offence, is clear from the case of *Cutell, App., Ineson, Resp.*, 4 Jurist, N. S. 560. Lord Campbell, referring to the 23rd and 38th sections of the statute, there says: "By these enactments the legislature have made it a crime to go in pursuit of game without a certificate, to be punished by fine and imprisonment. It is not like the case of a bastardy order, where the mother makes the application against the father, not for immorality or an offence against the public, but to compel him to maintain the child. Nor is it like a fiscal proceeding for a breach of the revenue laws; nor like a proceeding before magistrates to decide a civil right, or to obtain compensation for a wrong done; but it is a criminal proceeding for an offence against the game-laws."

Couch, in reply. The case of *The Queen v. Cridland*, 7 Ellis & B. 853, has no bearing whatever upon this case. Where a person goes upon land asserting title, he does not go with any criminal intention. [Williams, J. In *The Queen v. Pratt*, 4 Ellis & B. 860, the defendant was not an intentional trespasser: he, no doubt, thought he had a right to be upon the record.]

WILLIAMS, J. I am of opinion that our judgment in this case must be for the appellant. Several questions were raised upon the argument before us. The first was as to the authority of the appellant to institute the prosecution. As to this I think we are bound by the decision of the court of Queen's Bench in *Middleton v. Gale*, 8 Ad. & E. 155, 3 Nev. & P. 372: not that I doubt the propriety of that decision; but it is enough to say that we hold ourselves bound by it. The next question is whether

there was in point of law evidence of such leave and licence as would be, under the 30th section of the statute 1 & 2 W. 4, c. 32, a defence to [647] an action of trespass or to the information. I think that question must be answered in the negative. There was no evidence in point of law of any such leave and licence. The evidence was, that Everitt, the tenant, had not given specific permission to the defendant before the day in question: but that, on the defendant asking his permission on the night previous to the hearing to go over his land, Everitt said he might go over it, and welcome, for he wished all the game in the parish was killed: and he at the same time said, that, if the defendant had asked him permission before this happened, he should have given it him. That is, in fact, saying that the defendant had not permission at the time, and disposes of the alleged leave and licence. The third question is whether the *ex post facto* leave and licence would form a condonation of the offence, and be held to revert back to the time of the alleged trespass. That I think must also be answered in the negative. It raises the question whether the offence could be condoned by a subsequent ratification of any permission given by Bailey in the name of Everitt. Now, it seems doubtful whether any leave was given by Everitt to Bailey to shoot over the land in his occupation. But it is unnecessary to say anything about that: for, we ought not to look too scrupulously at the evidence in these cases. The meaning of the statement evidently is, that Bailey, assuming to have Everitt's authority, gave the defendant permission to shoot over the land. But there is not a word about ratification of that permission. What Everitt is represented to have said is, that, if the defendant had asked him permission, he would have given it to him. All these three questions therefore must, in my judgment, be answered against the defendant.

Another question was raised upon the argument, [648] viz. that we ought to affirm the decision, on the ground that, though the defendant had not the permission of the tenant to shoot over the land, it appears that he was acting under the impression that he had, and therefore was not conscious that he was a trespasser, and so the *mens rea*, which it said alone constitutes the offence, was absent. This point is not directly laid before us by the justices: but I think it right to express my own opinion upon it. I think it is quite clear that it is immaterial whether or not the party is conscious at the time that he is committing a trespass. The 30th section of the 1 & 2 Viet. c. 32, enacts, "that, if any person whatsoever shall commit any trespass by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction, &c.: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass: save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned: but such landlord, lessor, or other person shall, for the purpose of prosecuting for the offence, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or licence," &c. That clause begins with a recital, that, "after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide [649] some more summary means than now by law exist for protecting the same from trespassers." It contemplates that there will be an increased necessity for protecting from plunder that which was now for the first time become matter of property, and therefore provides that this summary proceeding may be taken by a common informer,—for such is the result of the decision in *Middleton v. Gale*: and then it goes on to provide that any person charged with any such trespass may prove by way of defence any matter which would have been a defence to an action at law for such trespass,—save and except that the leave and licence of the occupier shall not be a sufficient defence where the landlord or lessor shall have reserved the right of killing game on the land. The meaning of that is, that, there being a general provision that that which would be a defence to an action at law shall be a defence to an information under the statute, the legislature engraft thereon an exception by saying that the leave and licence of the occupier, though enough to bar an action of trespass at common law, shall be insufficient in the case of a reservation of the right of killing game by the landlord. I agree that this does

not afford any strong argument in the way of shewing that the party is guilty of the trespass whether there be mens rea or not: he is to be liable to the penalty, notwithstanding he has got the permission of a person to whom the game does not belong. Nor do I think it affords any argument the other way. It leaves the question precisely as it was. If a man knows that the landlord has the right to the game, the leave of the occupier of the land affords him no justification. Still, if he is ignorant of the fact, the absence of mens rea does not alter the measure of his liability. There are other clauses which are important in considering this matter. The 46th section enacts [650] "that nothing in this act contained shall prevent any person from proceeding by way of civil action to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of this act against any person for and in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence under the general issue." This appears to me to shew that the remedy in each case is cumulative, though there is to be no civil action afterwards at the suit of the party instituting or concurring in a proceeding upon the statute. It is evidently a trespass whether there be mens rea or not.

It now remains to consider the authorities which have been referred to. The dictum of Erle, J., in *The Queen v. Criddle*, 7 Q. B. 853, 869, is altogether distinguishable from this case; because all that was supposed to be decided in that case was, that the general rule is, that, in case of summary convictions, justices have jurisdiction to determine whether the claim of title to real property is bona fide: but, if it is bona fide set up, they have no jurisdiction to proceed further in the matter: and that the proviso in the statute 1 & 2 W. 4, c. 32, s. 30, does not give justices jurisdiction, upon a charge of trespass in pursuit of game, to determine a claim of title to land against the wish of the defendants. I do not think the expressions which fell from the learned judge referred to in that case are at all binding upon us here. In *The Queen v. Pratt*, 4 Ellis & B. 860, P. was in the day-time on a public road, carrying a gun, and accompanied by a dog. The land [651] on both sides of the road was the property of B., who was also lord of the manor; and on one side of the road was a cover in the actual occupation of B. P. waived his hand to the dog, which entered the cover: a pheasant flew out across the road; and P., being on the road, fired at it, and missed it. P. was convicted by two justices, under the 1 & 2 W. 4, c. 32, s. 30, of committing a trespass by being in the day time on land in the occupation of B. in search of game. On appeal, a case was reserved in which the question for the court of Queen's Bench was, whether the evidence supported the conviction. And it was held, that the road was land in the occupation of B., subject to the right of way in the public; and that there was evidence that P. was not on the road in the exercise of the right of way, but for another purpose, namely, in search of game, and so was a trespasser, — which was sufficient to support the conviction. There, the whole discussion was whether or not the defendant had been guilty of a trespass in pursuit of game on another person's land. Nobody for a moment suggested that he was not liable because he thought he had a right to be on the highway. And there is no hardship in this decision: for, a person who goes out to shoot should take care that he has the leave of the person who is authorized to give it; and we should go far to defeat the act of parliament if we gave way to any arguments as to inconvenience. At the same time, though I am of opinion that our decision must be in favour of the appellant, I cannot so decide without expressing great regret at being compelled to do so; nor can I refrain from expressing an opinion that the proper sum to be awarded against the respondent would be one farthing.

WILLES, J. I am entirely of the same opinion, and can add nothing to what has fallen from my Brother [652] Williams, except that, for the same reason that I think a farthing would be a sufficient penalty for the offence I think the costs of this appeal should not be allowed to the appellant.

KEATING, J. I am entirely of the same opinion with respect to the three questions which have been submitted to us by the justices, all of which I agree should be answered in favour of the appellant. If it were necessary to decide the question raised as to mens rea, I should require time for consideration before I assented to the

doctrine that it was not necessary that the trespass should be an intentional one. My present impression is, to deal with the compound offence of trespass in pursuit of game. And, although the statute provides that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass, yet, inasmuch as the offence includes a trespass, it might well be that the legislature intended that that which would be an answer to an action for the trespass should also be an answer to a proceeding of this sort.

Appeal allowed, without costs.

[653] MARSHALL, Clerk, *v.* THE BISHOP OF EXETER AND ANOTHER.
Feb. 25th, 1860.

[S. C. 29 L. J. C. P. 354; 6 Jur. N. S. 1301. Referred to, *Walsh v. Bishop of Lincoln*, 1875, L. R. 10 C. P. 531; *R. v. Archbishop of York*, 1888, 20 Q. B. D. 747.]

A bishop has no right to demand from the presentee of a benefice before he will institute him, a testimonial from the bishop of another diocese in which the party has had cure of souls, of his "honest conversation, ability, and conformity to the ecclesiastical laws of England."—Quære, how far the Canons of 1603 are binding on the laity?—Semble, that the 48th Canon of 1603 has no application to the institution of clerks to livings, but only to the service of cures and in churches and chapels by curates and ministers who are not the incumbents.

Quære impedit. The first count of the declaration stated, that Henry Bishop of Exeter and John Henry Coats Borwell, clerk, were summoned to answer Peter Charles Marshall, clerk, of a plea that they permit the said Peter Charles Marshall, clerk, to present a fit person to the parish church of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county of Cornwall, which is vacant, and belongs to his presentation; and thereupon the said Peter Charles Marshall, clerk, by Henry Dupleix, his attorney, complains. For that whereas he the said Peter Charles Marshall, to wit, on the 15th of November, 1855, was seised of the rectory and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, whereunto the advowson of the rectory and vicarage of the church aforesaid did and doth belong, in his demesne as of fee and right; and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, presented to the said church and rectory and vicarage himself the said Peter Charles Marshall, clerk, as his clerk, who, on the presentation of himself the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign Lady the now Queen of Great Britain and Ireland; and he the said Peter Charles Marshall, clerk, being so seised of the said rectory and vicarage, in the county aforesaid, whereunto the advowson of the said rectory and [654] vicarage of the church aforesaid did and doth belong, the said church and rectory and vicarage, to wit, on the 3rd of August, 1857, became vacant by the resignation of the said church and rectory and vicarage then duly made by him the said Peter Charles Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter and ordinary in that behalf, whereby it then and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid: But the said bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him.

The second count stated, that whereas also he the said Peter Charles Marshall, clerk, to wit, on the 15th of November, 1855, was seised of the advowson of the church, rectory, and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, as of gross by itself, as of fee and right; and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, presented to the said church and rectory and vicarage himself the said Peter Charles Marshall, clerk, as his clerk, who on the presentation of himself

the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign Lady the now Queen of Great Britain and Ireland: and, he the said Peter Charles Marshall, clerk, being so seised of the said advowson as in this count aforesaid, the said church and rectory and vicarage, to wit, on the 3rd of August, 1857, became vacant by the resignation of the said church, rectory, and vicarage then duly made by him the said Peter Charles [655] Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter and ordinary in that behalf, whereby it then and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid: But the said bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him: Wherefore he the said Peter Charles Marshall, clerk, saith that he is injured and hath sustained damage to the extent of 3000*l.*, and therefore he brings his suit, &c.

Plea. The said Henry Bishop of Exeter and John Henry Coats Borwell, clerk, by Frederick Sanders, their attorney, come and defend the wrong and injury when, &c.: And the said John Henry Coats Borwell says that he is parson impersonate of the said church in the declaration mentioned, by the collation of the said bishop: and the said bishop says that the said church is in his diocese, and that he hath not and doth not claim to have anything in the said church, except the admission, institution, and induction of parsons to the said church, and such other things as belong to the ordinary of the place as ordinary: And the defendants further say, that, after the said church became vacant and void by the resignation of the plaintiff, then and thence and still being a clerk in Holy Orders, and the acceptance of such resignation by the defendant Henry Bishop of Exeter in the declaration mentioned, to wit, on the 16th of January, 1858, the plaintiff, being so seised as in the declaration mentioned, by writing under his seal, bearing date, to wit, the day and year last aforesaid, presented to the said bishop, so being such ordinary as aforesaid, one John Reid as his clerk, and requested the said bishop to admit, institute, and induct the said John Reid as his clerk to [656] the said church so vacant and void as aforesaid: And the defendants further say that the said John Reid had not been ordained by the said Bishop of Exeter, or by any former or other bishop of the diocese of Exeter, and that, at the time the said John Reid was so as aforesaid presented to the said bishop, and of such presentation so being made, to wit, on the day and year last aforesaid, the said John Reid was a clerk in Holy Orders, and then came from a diocese in England other than the diocese of Exeter, to wit, from the diocese of Manchester, and not elsewhere or from any other diocese, and in which diocese he had then lately been a minister of the Church of England, and had then lately held a benefice and cure of souls: and the said John Reid was then wholly unknown to the said Henry Bishop of Exeter: And thereupon, afterwards, to wit, on the day and year last aforesaid, the said John Reid, so being presented upon such presentation as aforesaid, and so coming from such other diocese as aforesaid, applied to the said Bishop of Exeter to admit, institute, and induct him the said John Reid to the said church, so being vacant and void as aforesaid: but the said John Reid did not bring or produce to the said Henry Bishop of Exeter, from the bishop of the said diocese whence he came, and wherein he had lately held such benefice and cure of souls as aforesaid, and been a minister as aforesaid, to wit, from the Bishop of Manchester, any sufficient testimony, according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or any such testimony as he the said bishop was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the diocese from whence the said John Reid had come, and in which he so had [657] lately held a benefice, and cure as aforesaid: but the said John Reid then, to wit, on the day and year aforesaid, when he so applied to be admitted, instituted, and inducted as aforesaid, brought testimony from the bishop of the diocese aforesaid, to wit, from the Bishop of Manchester, which he the said Henry Bishop of Exeter held not to be, and which was not, sufficient testimony according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the said diocese from whence the said John Reid had come.

and in which he had so as aforesaid lately held a benefice and cure as aforesaid ; and thereupon then the said Henry Bishop of Exeter, to wit, on the day and year last aforesaid, informed the said John Reid that the testimony so brought by him from the said Bishop of Manchester was not testimony which he the said Henry Bishop of Exeter deemed and adjudged to be, and which was, sufficient testimony of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the diocese from whence he the said John Reid had come, and in which he had so lately held a benefice and cure of souls as aforesaid : and the said Bishop of Exeter required further and sufficient testimony from the said Bishop of Manchester according to the ecclesiastical laws in that behalf, to wit, testimony of his the said John Reid's honest conversation, ability, and conformity to the said ecclesiastical laws,—of which the said John Reid then had notice, to wit, from the said Henry [658] Bishop of Exeter ; and thereupon, to wit, on the day and year last aforesaid, the said John Reid departed and went away from the said Bishop of Exeter, and the said John Reid never returned or came to the said bishop again ; and such further and sufficient testimony as aforesaid from the said Bishop of Manchester never was obtained from such bishop, although a long space of time sufficient to enable the said John Reid to obtain such testimony, and to come again to the said Henry Bishop of Exeter, elapsed before such collation by the said Henry Bishop of Exeter, as hereinafter mentioned ; and the said Henry Bishop of Exeter, after the said John Reid so departed and went away from him the said bishop as aforesaid, not only never had or obtained or received from the said John Reid, or otherwise, any sufficient testimony from the said Bishop of Manchester, or any other testimony whatever, of the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England ; but, in fact, he the said Henry Bishop of Exeter, before such collation as hereinafter mentioned, had and received from the said Bishop of Manchester, and otherwise, further testimony, from which he the said Bishop of Exeter was induced to believe, and did believe, and had good and sufficient reason for believing, that the said John Reid had, whilst being a beneficed clergyman and having cure of souls within the diocese of the said Bishop of Manchester, been guilty of an attempt to commit the offence of simony, to wit, by soliciting a certain other clerk in Holy Orders, to wit, one Francis Minden Knollys, to enter into a simoniacal contract with the said John Reid touching a certain other benefice then held by the said John Reid, contrary to the ecclesiastical laws of England in that behalf, and that he was not a person of honest conversation, or a person who conformed to the ecclesiastical laws of [659] England, or a fit and proper person to be admitted, instituted, or inducted to the said church,—all which premises he the said John Reid long before the collation hereinafter mentioned well knew : and, by reason of the premises, the said Bishop of Exeter, as such ordinary as aforesaid, after the lapse of six months from the avoidance of the said living, and within six months from such lapse, to wit, on the 1st of March, 1858, the said church still being and remaining vacant and void, collated the said church to the said defendant John Henry Coats Borwell, his clerk, and put him in the corporeal possession thereof, as it was lawful for the said bishop as such ordinary to do : And thus the defendants are ready to verify ; whereupon they pray judgment if the plaintiff ought to have or maintain his aforesaid action against them.

The plaintiff joined issue on the plea, and further replied, that, at the time of the presentment to the said bishop of the said John Reid as his the plaintiff's clerk, and of the request to the said bishop to admit, institute, and induct the said John Reid as his the plaintiff's clerk to the said church, as in the plea mentioned, the said John Reid was, and theretofore had been, and thenceforth always continued to be, a person of honest conversation and sufficient ability, and one who conformed to the ecclesiastical laws of England, and a fit and proper person to be admitted, instituted, and inducted to the said church, and was not guilty of any attempt to commit the offence of simony as in the said plea mentioned : that the said testimony brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter when he the said John Reid so applied to be admitted, instituted, and inducted, and which the said Henry Bishop of Exeter held not to be, and which is alleged in the said plea not to have been, sufficient testimony, according to the ecclesiastical laws of England, of his [660] the said John Reid's honest conversation, ability, and conformity to the

ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the said diocese from which the said John Reid had come, and in which he had so as aforesaid lately held a benefice and cure as aforesaid, was and is in the words and figures following, that is to say,—

“To the Right Reverend Henry Lord Bishop of Exeter.

“We whose names are hereunder written testify and make known that the Rev. John Reid, M.A., clerk, formerly of St. John's College, Cambridge, and late of the rectory of Claughton, in the county of Lancaster, presented to the rectory of Tregony with the vicarage of Cuby annexed, in the county of Cornwall, in your Lordship's diocese, hath been personally known to us for the space of three years last past : that we have had opportunities of observing his conduct : that, during the whole of that time, we verily believe that he lived piously, soberly, and honestly, nor have we at any time heard anything to the contrary thereof ; nor hath he at any time, as far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the united Church of England and Ireland : and, moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be admitted to the said benefice. In witness whereof we have hereunto set our hands this day 9th of January, 1858.

“W. B. Grenside, M.A., vicar of Malling, in the county of Lancaster.

“J. M. Wright, rector of Tatham, in the county of Lancaster.

“R. J. Shields, incumbent of Hornby, in the county of Lancaster.

[661] “The subscribers are benefited in the diocese of Manchester. Mr. Reid was long resident on his benefice : but I know no reason why he should be legally hindered from his being allowed to take other duty. “J. P. MANCHESTER.”

which said testimony was duly signed by the said Bishop of Manchester : that, from the time of the said bringing of the said testimony from the said Bishop of Manchester to the time of the collation by the said Bishop of Exeter of the Rev. John Henry Coats Borwell, as by the said Bishop of Exeter in the said plea alleged, and which is the same and only collation by which the said defendant John Henry Coats Borwell became, was, or is parson impersonate of the said church in the declaration mentioned as by him alleged, the said Bishop of Exeter continued to require from the said John Reid a further testimony from the said Bishop of Manchester, satisfactory to the said Bishop of Exeter in those respects wherein the said testimony so brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter was held by him the said Bishop of Exeter not to be, and alleged by him in the said plea not to be, sufficient, and the said Bishop of Exeter never gave notice to the said John Reid or the plaintiff, nor ever gave them or either of them to understand or be informed or believe, that he the said bishop of Exeter required the said further testimony to be procured by the said John Reid, or brought by him to the said Bishop of Exeter within any fixed or specified time ; or that he the said Bishop of Exeter would not receive the same after the lapse of six months from the avoidance of the said living, or after any specified time, nor did the said Bishop of Exeter ever at any time or in any way notify to the said John Reid or to the plaintiff, nor did the said John Reid or the plaintiff ever know, that the said [662] Bishop of Exeter had finally determined not to wait any longer for or to receive any such further testimony from the said Bishop of Manchester, or that the said Bishop of Exeter had finally decided to persist in his objections to the said first testimony as insufficient : that, from the time of the bringing of the said first-mentioned testimony as aforesaid, and thence continually until and at the time of such collation as aforesaid, negotiations between the said Bishop of Exeter and the said John Reid as to whether the said Bishop would persist in requiring any further and what testimony to be procured by the said John Reid from the said Bishop of Manchester, in order to the admission, institution, and induction of the said John Reid by the said Bishop of Exeter to the said church, were pending, and neither the said John Reid nor the plaintiff ever had any notice from the said Bishop of Exeter, nor ever in fact knew, before the said collation, that he the said Bishop of Exeter would or did claim to collate the said John Henry Coats Borwell, or any clerk of him the said Bishop of Exeter, to the said church : and that, save and except as aforesaid, the said Bishop of Exeter never at any time before the

said collation by him of the said John Henry Coats Borwell, clerk, refused to admit, institute, and induct the said John Reid as the plaintiff's clerk to the said church.

The plaintiff also demurred to the plea, the ground stated in the margin being, "that the facts set forth in the plea do not shew any lapse entitling the said bishop to collate the defendant Borwell."

The defendants demurred to the plaintiff's second replication, the ground of demurrer stated in the margin being, "that the replication does not shew that lapse had not duly occurred." Joinder.

Coleridge (with whom was Collier, Q. C.), for the [663] plaintiff (*a*). The plea is

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"As to the plea,—That the plea shews no lapse entitling the bishop to collate the defendant Borwell: that it shews nothing to justify a refusal of the said bishop to admit, institute, and induct the said John Reid as the plaintiff's clerk: that it does not allege as a fact that the said John Reid was in any respect not of honest conversation, ability, or conformity to the ecclesiastical laws of England, or otherwise disqualified for being admitted, instituted, and inducted to the said church; but only alleges that the said bishop had and received testimony from which he was induced to believe and did believe, and had good and sufficient reason for believing, that the said John Reid had attempted to commit the offence of simony, and was not a person of honest conversation, or a person who conformed to the ecclesiastical laws of England, or a fit and proper person to be admitted, instituted, and inducted to the said church; and that the said John Reid knew that the said bishop had had and received such testimony from which he was so induced to believe and did believe, and had good and sufficient reason for so believing: which said mere belief of the said bishop, even for good and sufficient reason, did not justify a refusal to admit, institute, and induct the said John Reid to the said church: that the said testimony which the plea alleges that the said bishop required to be produced by the said John Reid, to his honest conversation, ability, and conformity to the ecclesiastical laws of England, was testimony which the said bishop was not in point of law entitled to require, and the non-production of which did not justify the said bishop in his refusal to admit, institute, and induct the said John Reid to the said church:

"That the said bishop was not in point of law entitled to require of the said John Reid any testimony as to the matters last aforesaid, but was bound to ascertain for himself the truth as to all such matters: that the plea does not shew any refusal by the said bishop to admit, institute, and induct the said John Reid, excepting by the actual collation of the defendant Borwell; and, for want of such refusal prior to such collation, no lapse had accrued entitling the said bishop so to collate the defendant Borwell:

"That the plea does not shew any absolute or final refusal of the said bishop before the said collation to admit, institute, and induct the said John Reid: that it is consistent with the plea, and is to be inferred from it, that the said bishop until the time of the said collation reserved his final decision as to a refusal to admit, institute, and induct the said John Reid, and continued merely to require further and sufficient testimony from the said Bishop of Manchester to the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, without any notification to the said John Reid, that, unless such further and sufficient testimony were procured, or were procured by any given time, he the said Bishop of Exeter should refuse to admit, institute, and induct the said John Reid: that the plea does not allege, otherwise than by the said collation, any final or absolute refusal at all by the said Bishop of Exeter to admit, institute, and induct the said John Reid, or any notification to the said John Reid or the plaintiff of any such refusal, but merely alleges facts which are consistent with the said Bishop of Exeter never having finally or absolutely refused, and never having refused at all, except by the said collation, to admit, institute, and induct the said John Reid: that, until a refusal and a final and absolute refusal, to admit, institute, and induct the said John Reid, no lapse could in point of law accrue to the said Bishop of Exeter entitling him to collate Borwell or any other clerk of him the said Bishop of Exeter:

"As to the replication,—That it shews that the said John Reid was in all respects qualified to be admitted, instituted, and inducted to the said church: that the testimony of the Bishop of Manchester set forth in the replication, was upon the face of it

bad, upon the following grounds,—first, that no letters testimonial at all are required by law—secondly, assuming that they are, the bishop is not the absolute judge of the sufficiency of letters testimonial, that a mere assertion by the [664] bishop that they are insufficient will not make the plea good, but that it ought to disclose some specific matter of insufficiency,—thirdly, that the plea contains no averment of a refusal on the part of the bishop to admit, institute, and induct Mr. Reid,—fourthly, [665] that the plea contains no averment of notice to the patron of the insufficiency of the letters testimonial,—fifthly, that the ground of refusal alleged by the bishop in the second part of his plea, viz. that he believed Mr. Reid to have been guilty of an attempt to commit simony, was no sufficient ground,—sixthly, that no issue can be taken on the plea as it stands. The last ground is probably involved in the second.

1. The bishop is not entitled to ask for letters testimonial at all. It is not contended that the bishop has not a right to examine a person who is presented to him for institution. That is placed beyond all doubt by the *Articuli Cleri*, c. 13, and Coke's commentary thereon, 2 Inst. 631. The right to examine "*de idoneitate persone*" is conceded: but the claim of letters testimonial rests upon a misconception of the law. The law upon the subject is laid down in Gibson's *Codex*, vol. 2, pp. 806, 807, where the learned author comments on the Canons of 1603. The 39th Canon is as follows:—"No bishop shall institute any to a benefice who hath been ordained by any other bishop, [666] except he first shew unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it, and, lastly, shall appear, upon due examination, to be worthy of his ministry." Dr. Gibson's comment upon that is,—"*By the ancient laws of the Church, and particularly of the Church of England, the four things in which the bishop was to have full satisfaction in order to institution, were, *etas, scientia, mores, et ordo*. And there is scarce one thing which the ancient Canons of the Church more peremptorily forbid than the admitting clergymen of one diocese to exercise their function in another, without first exhibiting the letters testimonial and commendatory of the bishop by whom they were ordained. And the constitutions of Archbishop Walter and Archbishop Arundell shew that the same was the known law of the English Church, viz. that none should be admitted to officiate (not so much as a chaplain or curate) in any diocese in quâ oriundus sive ordinatus non fuerit (as the latter expresses it), nisi deferat secum literas ordinum suorum, atque literas commendatitias diocesani sui. If, then, this is the common as well as canon law of the Church of England, and is not contradicted by any statute, and is a thing most reasonable in itself, the judgment given in the court of King's Bench, 33 Eliz., 'that the clerk is not bound to shew his letters or orders, or missive, to the bishop, and that his not shewing them is no good cause to stay the admittance,' (a) doth certainly deserve a second consideration."* The conclusion which Gibson draws is not warranted by the premises: and the letters testimonial which the bishop required in this case are essentially [667] different from the *litteras commendatitias* mentioned by Gibson. The authorities he relies on are two constitutions or decrees of Archbishop Walter and Archbishop Arundell, which are to be found in Lyndwood's *Provinciale*, pp. 47-49. It appears from these constitutions or decrees themselves, and from the somewhat voluminous glosses thereon, that they have nothing whatever to do with the presentation of an incumbent to a living, but they simply relate to the case of priests or deacons coming without leave of the bishop of one diocese to officiate and administer the sacraments in another diocese. The constitution of Walter is intitled "*De Clericis Peregrinis*," and is as follows:—"Ordinati

sufficient to entitle the said John Reid to be admitted, instituted, and inducted to the said church; and that the said Bishop of Exeter was not entitled to require any further or other testimony from the said Bishop of Manchester or from any other person whomsoever:

"That the facts disclosed in the replication shew, that, except by the collation of Borwell, there was no final or absolute refusal nor any refusal by the said Bishop of Exeter to admit, institute, and induct the said John Reid: and that the replication shews such conduct on the part of the Bishop of Exeter as prevented any lapse from accruing until a former refusal of the said Bishop of Exeter to admit, institute, and induct the said John Reid, and notice thereof to the said John Reid or the plaintiff, or until the negotiation disclosed in the replication had wholly ceased."

(a) *Palmes v. The Bishop of Peterborough*, 1 Leon. 230, Cro. Eliz. 241.

in Hibernia, Wallia, seu Scotia, vel alibi, sine literis ordinariorum suorum commendatitiis vel dimissoriis non admittantur à quocunq. infra provinciam nostram ad ordinis sic suscepti executionem, nisi magna necessitas inducat: et tunc quod cum eis auctoritate sufficienti fuerit dispensatum super executione ordinis memorati, vel aliis à suis ordinariis ordo sic susceptus ratificetur. Proviso nihilominus quod nullo modo admittantur, nisi prius constiterit de eorum legitimæ ordinatione, vitæ munditia, pariter et literatura. Item præcipimus ne sacerdotes ignoti, de quorum ordinatione non constat ad Divinorum celebrationem deserviendo ecclesiis admittantur; nisi de licentia episcopi diocesani cùm per literas testimoniales, vel testimonium hororum vinorum eis, de eorum verè constiterit ordinatione, et sufficienter fuerit facta fides." This clearly points only to the exercise of the spiritual functions of the clergy of that day. The next decree, that of Archbishop Arundell, is as follows: "Nullus capellanus mittatur ad celebrandum in aliqua diocesi nostræ Cantuariensis provincie, in qua oriundus sive ordinatus non fuerit, nisi deferat secum literas ordinum suorum atque literas commendatitias diocesani sui. Et nihil-[668]-ominus aliorum episcoporum, in quorum diocesis interim per magnum tempus conversatus est, in quibus expressi caveri volumus, et mandamus de moribus et conversatione ejusdem; et an sit diffamatus de et super aliquis novis opinionibus in fide catholica, aut bonis moribus male sapientibus; vel sit de eisdem omnino immunis. Alioquin tam ipse celebrans, quàm ipsum sic celebrare permittens, acriter puniatur." These latter words shew that the whole object of the constitution was the protection of the Divine officia in a parish supposed to be already supplied with a competent celebrant. Lyndwood's note on these words "Tam ipse celebrans" is as follows,— "Et nota, quoad iste celebrans punitur in casu isto propter inobedientiam, quia contra formam hujus ordinationis præsumit celebrare: licet enim constitutio hæc expresse non prohibeat talem celebrare, sed prohibeat eum admitti ad celebrandum. Tamen tacitè videtur hujus constitutionislator voluisse, quod absque ostensione literarum, de quibus hic dicitur, sicut nec debet admitti, sic nec ipse se debet ingerere ad celebrandum. Et puto quod ea quæ hic dicuntur intelligi debent de tali qui publicè celebrat: secus tamen esset, si in secreto hoc faciat ex devotione." There is nothing here to deprive patrons of their civil rights. All the Roman canon law authorities preserve an absolute silence about literæ commendatitiæ or literæ dimissoriæ. Neither Ferraris (*a*), nor Barbosa (*b*), nor Johannes Devotus (*c*), make any mention of them. The real origin of the literæ commendatitiæ or literæ dimissoriæ is probably to be found in the mode of election of bishops and priests, to which in ancient [669] times the consent of the laity was essential. It was a breach of ecclesiastical discipline of the gravest character for a priest or deacon ordained in one diocese to quit without the permission of his bishop, for the purpose of exercising his spiritual functions in another diocese. The subject is very fully gone into in Bingham's *Origines Ecclesiasticæ*, vol. i., pp. 135, 157, 222, 223, where mention is made of Origen, one of the ablest men the Christian Church ever produced, who was severely censured for quitting the diocese of Alexandria and going to Cæsarea. In truth, these constitutions were as much in restraint of the bishop himself as of the lower clergy. The bishop is impowered to examine in order to satisfy himself of the idoneity of the person presented to him,—that he is not a drunkard, an adulterer, or schismaticus inveteratus, &c.: but, if not satisfied, he must put the grounds of his dissatisfaction upon record. The bishop's discretion is limited where the rights of the patron are involved. Presumably a clerk in orders is a fit and proper person to be admitted, instituted, and inducted into a living; and there is no allegation in this plea that Mr. Reid was unfit, but merely that the bishop chose to be dissatisfied with his testimonials. Many cases might be suggested where a clerk would be unable to procure testimonials in the required technical form. For instance, he might have been resident abroad for eight or ten years; and, though a man of immaculate virtue, he might be unable to obtain a testimonial such as that set out in this replication. Is the bishop to take advantage of this, and to collate by lapse, and so deprive the patron of his right? If this power is to be conceded to bishops, knowing as we do that the more conscientious and in earnest men are the less tolerant they become, the scruples

(a) "Prompta Bibliotheca, Canonica, Juridica, Moralis, Theologica." Venet. 1782, 10 tom. fol.

(b) "De Officio et Potestate Episcopi." Lugduni, 1679, 3 tom. fol.

(c) "Institutionum Canoniarum, libri iv."

of two bishops may at any time render a presentment nugatory. [Willes, J. Are there any [670] means of compelling the bishop to countersign the letters testimonial?] None. *Palmer v. The Bishop of Peterborough*, 1 Leonard, 230, Cro. Eliz. 241, is precisely in point (a). That case is referred to in Gibson, 806, 807, and in Stephens's Law of the Clergy, 524, and is also commented upon in Dr. Stillingfleet's Ecclesiastical Cases, edit. 1702, vol. iii., p. 637. In the report in Cro. Eliz., Anderson, J., says: "The bishop might examine him on oath if he is in orders or not; but, as to letters testimonial of his good behaviour and sufficiency, the bishop ought to examine the same himself: and the bishop cannot refuse a clerk for want of letters testimonial." [Willes, J. In Burn's Ecclesiastical Law, Benefice, p. 156, where that case is referred to, it is said: "By the provincial constitutions at Oxford in the time of Henry II., the bishop is required to admit the clerk who is presented without opposition, within two months, 'dum tamen idoneus sit,' if he thinks him fit. So much time is allowed 'propter examinationem,' saith Lyndwood, even where there is no dispute about right of patronage. The main thing he is to be examined upon is, his ability to discharge his pastoral duty, as Coke calls it, or, as Lyndwood saith, whether he be 'commendandus scientiâ et moribus.' As to the former, the bishop may judge himself, but, as to the latter, he must take the testimony of others. If the bishop refuses to admit within the time (which by the modern Canons is limited to twenty-eight days after the presentation delivered,—Canon 95), he is liable to a duplex querela in the ecclesiastical courts and a quare impedit at common law, and then he must certify the reasons of his refusal: 5 Co. Rep. 57. In *Specol's case* it is said that, in 15 H. 7, 7, 8, all the [671] judges agreed that the bishop is judge in the examination, and therefore the law giveth faith and credit to his judgment. But, because great inconveniences might otherwise happen, the general allegation is not sufficient, but he must certify specially and directly: and the general rule is, and it was so resolved by the judges, that all such as are sufficient causes of deprivation of an incumbent are sufficient causes to refuse a presentee. But by the canon law more are allowed. In the constitutions of Othobon, the bishop is required to inquire particularly into the life and conversation of him that is presented; and afterwards, that, if a bishop admits another who is guilty of the same fault for which he rejected the former, his institution is declared null and void. By the canon law, if a bishop maliciously refuses to admit a fit person, he is bound to provide a proper benefice for him; but our ecclesiastical law, much better, puts him upon the proof of the cause of his refusal. But, if the bishop does not examine him, the canonists say that it is a proof sufficient that he did it maliciously. If a bishop once rejects a man for insufficiency, he cannot afterwards accept or admit of him, as was adjudged in *The Bishop of Hereford's case*, Moore, 26, Cro. Car. 27. If a man brings a presentation to a benefice, the bishop is not barely to examine him as to life and abilities, but he must be satisfied that he is in orders. How can he be satisfied unless the other produces them? How can he produce them, when it may be they are lost? The Canon is express that no bishop shall institute any to a benefice who hath been ordained by any other bishop,—Canon 39 (for, if he ordained himself, he cannot after reject him, because the law supposes him to have examined and approved him),—except he first shew unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it; and, lastly, shall appear upon [672] due examination to be worthy of the ministry. But yet, in *Palmer and The Bishop of Peterborough's case*, Cro. Eliz. 241, 1 Leon. 230, it was adjudged that no lapse did accrue by the clerk's not shewing his orders, for the bishop upon his not coming to him again collated after six months. But the court agreed that the clerk ought to make proof of his orders, but they differed about the manner of their proof. Anderson said that the bishop might give him his oath. But, if a proof were necessary, and the clerk did not come to make proof, it seems to me to be a very hard judgment."] In Godolphin's Repertorium Canonicum, which is a work of considerable authority, it is said (p. 273), that "none shall be made minister or admitted to preach or administer the sacraments under the age of twenty-four years, and unless he bring with him to the bishop a sufficient testimonial, and be able to render an account of his faith in latin; all which appears by the statute of the 13 Eliz. (c. 12), whereby it is likewise provided that none shall be admitted to any

(a) An examined copy of the roll in *Palmer v. The Bishop of Peterborough* was produced and handed to the court.

benefice with cure or above the yearly value of 30*l.* in the King's books, unless he shall be a bachelor of divinity or a preacher lawfully allowed by some bishop within this realm, or by one of the universities of Oxford or Cambridge; and that all admissions to benefices, institutions, inductions, tolerations, dispensations, qualifications, and licenses whatsoever made contrary to the premises shall be utterly void in law." The statute does not require that. The 1st section, "that the churches of the Queen's Majesty's dominions may be served with pastors of sound religion," enacts "that every person under the degree of a bishop which doth or shall pretend to be a priest or minister of God's Holy Word and sacraments by reason of any other form of institution, consecration, or ordering than the form set forth by parliament in the time [673] of the late King, of most worthy memory, King Edward the 6th, or now used in the reign of our most gracious sovereign Lady, before the feast of the Nativity of Christ next following, shall, in the presence of the bishop or guardian of the spiritualities of some one diocese where he hath or shall have ecclesiastical living, declare his assent and subscribe to all the articles of religion, which only concern the confession of the true Christian faith and the doctrine of the sacraments, comprised in a book imprinted, intituled 'Articles whereupon it was agreed by the archbishop and bishops of both provinces and the whole clergy in the convocation holden at London in the year of our Lord God, 1562, according to the computation of the Church of England, for the avoiding of diversities of opinions, and for the establishing of consent touching true religion, put forth by the Queen's authority:' and shall bring from such bishop or guardian of spiritualities, in writing under his seal authentic, a testimonial of such assent and subscription." That has no relation to the letters testimonial in question in the present case. The 5th section provides "that none shall be made minister, or admitted to preach or administer the sacraments, being under the age of twenty-four years; nor unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial both of his honest life and of his professing the doctrine expressed in the said articles, nor unless he be able to answer and render to the ordinary an account of his faith in latin according to the said articles, or have special gift or ability to be a preacher; nor shall be admitted to the order of deacon or ministry, unless he shall first subscribe to the said articles." That has reference only to the case of ordination and admission to preach. In Comyns's Digest, *Eglise* (I.), it is said that, "If a patron brings a *quare impedit* [674] against the bishop upon the refusal of his clerk, the plea of the bishop ought to shew a certain and particular cause of refusal: for, it is not sufficient to say generally '*quod non fuit idoneus*,' or '*quod fuit criminisus*,' &c.; or that he was a haunter of taverns, *ob quod et alia crimina*, &c. That he was a schismatic, without shewing how. But '*quod fuit minus sufficiens in literaturâ, et eâ ratione inhabilis*,' is sufficient; for, it is in the negative, and does not consist of a single instance, but general ignorance."

2. Assuming that letters testimonial are necessary, the bishop is not the absolute judge of their sufficiency. The plea is clearly bad for not shewing that the bishop's rejection of Mr. Reid's testimonials was founded upon sufficient reasons. In 2 Inst. 631, in Sir E. Coke's commentary upon the *Articuli Cleri*, it is said: "In a *quare impedit* brought against a bishop for refusal of the clerk, he must shew the cause of his refusal specially and directly (for, whether the cause thereof be spiritual or temporal, the examination of the bishop concludes not the plaintiff), to the intent the court, being judges of the principal cause, may consult with learned men in that profession, and resolve whether the cause be just or no; or the party may deny the same, and then the court shall write to the metropolitan to certify the same; or, if the cause be temporal, and sufficient in law (which the court must decide), the same may be traversed, and an issue thereupon joined, and tried by the country." Much learning upon this subject is to be found in Brooke's Abridgment, *Quare Impedit*, pl. 12, 64, and 119, where various causes of refusal are stated to be sufficient if pleaded. Thus, in pl. 12, it is said: "It was agreed that non-ability, non-age, and criminousness are sufficient causes for the ordinary to refuse the clerk." If the refusal be on the ground of non-ability, [675] the fact should be stated: so, non-age is a matter of fact which is traversable: so, criminousness is a matter of fact traversable by the clerk and the patron, and triable by a jury. In pl. 64, in *quare impedit* the bishop pleaded that the presentee had been perjured in a cause between the bishop and the chapter, and so criminous; and it was held a good plea: and reference is made to the Year Book, 38 E. 3, fo. 2, where all the circumstances under which the alleged

perjury took place are set out. So, in pl. 119, it is said by Keble, that "bastard, villenage, criminosus, non-age, and non-ability, are good causes for refusing a presentee." All the cases will be found in Viner's Abridgment, Presentation (Z. a.),—"In quare impedit, the bishop returned, that, at the time of the presentation of the presentee, and all the time of his commorancy within his diocese, he commonly haunted taverns and other places, and unlawful and prohibited games, ob quod et diversa consimilia crimina the said presentee was criminosus. And, by all the justices, the particular defects above do not make the presentee criminosus, because none of them deserve refusal; for, they are only mala prohibita. *Specot's case*, 5 Co. Rep. 57, cites this case to be adjudged; and that the words 'ob diversa crimina' are too general and uncertain." "It is good cause of refusal, because the presentee was perjured," &c., "because he is a villein," "that he has killed a man," "because he is simoniacus" in the same or another presentment. "Non-ability and criminosus are sufficient causes for the ordinary to refuse the clerk." "If a miscreant [a misbeliever or infidel] or schismatic be presented and inducted, this is good cause of deprivation. 5 Rep. 58, in *Specot's case*, cites 5 R. 2, tit. Tryal, 54, and says it was agreed to be good law: so, if he be irreligious, he may be refused, as it is said in 5 H. 7, fo. 6. But, when he is charged with [676] the one, or refused for the other, it must be alleged particularly, so that the party may answer thereto." The cause of refusal must be alleged with certainty. [Erle, C. J. Is not "schismaticus inveteratus" sufficiently certain?] It would seem so. *Specot's case* is commented on by Lord Ellenborough in *The King v. The Archbishop of Canterbury*, 15 East, 117. That was a mandamus to the Bishop of London to admit a lecturer, to which the bishop returned that he had examined the party, and conscientiously disapproved of him. Lord Ellenborough draws the distinction between that case and the case of a bishop refusing to collate. He says,—“A strict analogy does not hold between the means of obtaining a licence for a lectureship and the other situations in the church to which it has been compared: nor is a lectureship in point of right like the case of a temporal inheritance in an advowson or the like, where the patron is entitled to call upon the ordinary to institute his clerk, and to enforce that right by quare impedit, unless the bishop specifically states in his plea some reasonable cause wherefore the clerk presented is not fit. In the statute of Articuli Cleri, which is not merely an enacting statute, but, as Lord Coke says, declaratory of the common law and custom of the realm, the 13th chapter runs thus,—‘Also it is desired that spiritual persons whom our lord the King doth present unto benefices of the church (if the bishop will not admit them either for lack of learning or for other reasonable cause,) may not be under the examination of lay persons in the cases aforesaid, as it is in these times in fact attempted, contrary to canonical decrees; but that they may sue to an ecclesiastical judge, to whom it of right belongs, for the obtaining remedy as may be just.’ The answer is, ‘Of the fitness of a parson presented to an ecclesiastical benefice, the examination’ [677] (it will be recollected that examination is not the term in the statute 13 & 14 Car. 2, but approved, and the word examination, taken strictly, may be understood to mean a personal oral examination, such as usually takes place for the ascertaining a competence in literature),—‘the examination,’ it says, ‘belongs to the ecclesiastical judge; and so it has heretofore been used and shall be so in future.’ This statute relates in express terms to the case of the ecclesiastical benefices properly so called; and there I admit that the bishop must, if questioned for refusing institution to a clerk presented to him in a suit of quare impedit, in his plea state the cause of such his refusal.” That is a distinct recognition of the authority of *Specot's case* for the only purpose for which it is here cited. Lord Ellenborough says that the authority of *Specot's case* is very much shaken by *Hele v. The Bishop of Exeter*, 3 Levinz, 313, 1 Lutw. 348, 2 Lutw. 1094, Holt, 609, 4 Mod. 134, 2 Salk. 539, Comb. 239, Carthew, 311. The question there was, whether a general plea of “minus sufficiens in literatura” was sufficient: the courts of Common Pleas and Queen's Bench held that it was not, but that the bishop should state in what respect the clerk was “minus sufficiens;” but their judgments were reversed by the House of Lords, *The Bishop of Exeter v. Hele*, Show. P. C. 88. Although Shower gives the arguments of counsel at very great length, the report is altogether silent as to the ratio decidendi: but there are some observations at the end of the report in Carthew which would seem to shew the ground upon which the decision of the House of Lords proceeded:—"The bishop brought a writ of error in parliament, and there the judgment was reversed: all that was urged was, that

Hodder [the presentee] did not understand the latin tongue; for, upon the bishop's examination, he could not translate [678] the number thirty-nine into latin." There is nothing in that case which is inconsistent with the proposition here contended for, that, whether the bishop acts upon good or bad grounds, they ought to appear on the face of his plea, in order that there may be an opportunity given for contesting the fact. Sufficiency in literature seems to be the only matter in which the bishop is the sole and absolute judge. Doctrine is examinable by the archbishop. And, according to Lord Coke, where the ground of rejection is criminousness, bastardy, felony, &c., it must be specially stated, in order that the matter may be inquired into by the proper tribunal,—the courts of law in some cases, a jury in others.

3. There is no averment in the plea of a refusal on the part of the bishop to admit, institute, and induct Mr. Reid: and, until there was such distinct refusal, there could be no lapse. The plea appears to have been taken from an old precedent in the Year Book, H. 7, cited in 1 Leonard, 230, where the presentee went to the bishop and found him going out hunting, and asked him then to examine him, and the bishop told him he could not examine him at that time, but that if he would come in a week he would. The presentee never came again, and, six months having passed, the bishop presented on lapse (a). That case has no application here; for, the bishop in this case never appointed any time for the examination of Mr. Reid.

4. Then, the plea is further bad for want of an averment of notice to the patron of the insufficiency of the letters testimonial. As a general rule, there can be no lapse without notice to the patron. To this rule, there are doubtless some exceptions; but the present case does not form one of them. That there [679] must be notice to the patron before a lapse can occur, is distinctly laid down in Brooke's Abridgment, Quare Impedit, pl. 83, 90, 102, and in Fitzherbert's Abridgment, Quare Impedit. [Williams, J. A distinction is taken between a spiritual and a temporal cause.] Dr. Aylliffe, in the Parergon Juris Canonici Anglicani, p. 333, says: "I have before observed, that, according to Bernard de Compostella and others, when a patron presents a very unfit and unworthy person for institution to a living, a devolution is thereby made to the bishop. But the canonists say that this has a respect only to ecclesiastical patrons, and does not happen when a lay patron presents such an unfit person, though he should do it knowingly. And herein Hostiensis seems *primâ facie* to agree with Compostella, saying, that, when the first person presented is unworthy, a lay patron presenting such a clerk may (perhaps) repent thereof: yet he afterwards appears to contradict himself, by adding that the diocesan in admitting of a second presentation is said to gratify the patron, because he may repel the second presentee, since the patron has presented a clerk that is *minus idoneus*. But Johannes Andreas says, that, if a lay patron presents an unfit person, he has till the end of four months to present a fit one; and thus he may vary his presentation. But Hen. de Bowick will have it that a lay patron cannot, even within four months, vary his presentation, unless the bishop admits of such variation. And thus the doctors are divided in their opinions about this matter. But I think, that, even in the sense of the canon law, a lay patron may vary his presentation within four months, even without the bishop's consent; and, whether he presents an unfit person knowingly or ignorantly, such a presentation shall not hinder a second to be made, especially before such a presentation is tendered to the bishop. With [680] us here in England, no devolution happens on the account of the unfitness of the presentee: but the bishop ought to give notice to the patron of the unfitness of his clerk: and then, if the patron shall not present another within the six months, a lapse ensues thereupon." In Viner's Abridgment, Presentation (R. b.), it is said, pl. 1, —"If the ordinary refuse a clerk because he is criminous, he ought to give notice thereof to the patron; otherwise, no lapse shall incur." "If (pl. 2) the ordinary refuse a clerk for a private cause, as if the clerk upon the examination of the ordinary confesses himself to be a common adulterer, or that he comes to the presentation by usury and the like: in this case the ordinary is bound to give notice thereof to the patron, or otherwise no lapse shall incur." "So (pl. 3) notice ought to be given of a refusal for a notorious crime, as because he is a common adulterer or a common murderer." "If (pl. 4) a lay patron presents a clerk who is refused because he is not well lettered, no lapse shall incur without notice given to the patron of this refusal." "If (pl. 5) a spiritual patron presents a clerk who is refused for default of literature, there lapse

shall incur without notice, because the law intends that he might have sufficient knowledge of sufficiency before he presented him." Again, pl. 12, "If the bishop refuse a clerk because he is a villain, as he may do, he shall give notice thereof to the patron, whether he be lay or spiritual." It seems, therefore, that the lay patron is in all cases entitled to notice of refusal by the bishop, except in the case of a crime or a disability created by act of parliament; and that there is no distinction between the case of an ecclesiastical and a lay patron, except the refusal be for insufficiency of literature. [Williams, J. Do you understand a spiritual patron to mean simply a clerk in Holy Orders?] It means one who presents in right [681] of his spiritual position. Stephens's *Laws of the Clergy*, 523.

5. The ground of refusal alleged by the bishop in the second part of his plea, viz. that he believed Mr. Reid to have been guilty of an attempt to commit simony, was no sufficient ground of refusal. Bishop Stillingleet mentions the different causes of refusal of institution; but he no where suggests that an attempt to commit simony is one of them. These are also summed up in Burn's *Ecclesiastical Law*, tit. Benefice, III. "The most common and ordinary cause of refusal," it is said, "is, want of learning. But there are also many other causes for which a clerk presented may lawfully be refused; as if he be perjured before a lawful judge; or, if he be an heretic or schismatic, or irreligious; or (as it is said in the old books), if he is a bastard, and not dispensed withal; or, if he is within age; or, if he or his patron be excommunicated for the space of forty days; or, if he be outlawed, or guilty of forgery, or hath committed simony in the procuring the presentment he brings, or of another presentment to a former benefice; or hath committed manslaughter, that is, if he be attainted thereof, and not pardoned. And it is said that the ordinary may refuse a clerk upon his own knowledge, for an offence committed by him which is a good cause of refusal, although he be not convicted thereof by the law; and this shall be tried by issue whether it be true or not: and, generally, all such as are sufficient causes of deprivation are also sufficient causes of refusal." An attempt to commit simony, assuming the statement to be true, is clearly no ground of deprivation. Nothing is more obscure than the law as to simony. To amount to anything, the plea should shew the circumstances under which the attempt to commit simony was made. There is no allegation of any fact upon which issue could be taken.

[682] The sixth point is in reality included in the second.

The replication raises substantially the same questions as the plea does. The letters testimonial set out in the replication are *prima facie* sufficient. The authorities shew that the bishop's right to examine the presentee is limited to age, morals, doctrine, and sufficiency in literature. If he was entitled to ask for testimonials, the replication shews that he has had them.

Karslake (with whom was M. Smith, Q. C.), *contra* (a). [683] The plea is good,

(a) The points marked for argument on the part of the defendant were,—

"As to the plea,—That the plea is good, and affords a complete answer to the declaration: that, under the circumstances stated in the plea, there was no disturbance of the plaintiff, and that he was not hindered, as alleged:

"That the plea shews a good right to collate by lapse: that it shews that the plaintiff (who was himself a clerk in Holy Orders) presented a clerk who had not been ordained by the defendant, the bishop, or by any other bishop within the diocese of Exeter: that the presentee came from the diocese of Manchester, and applied to the defendant, the bishop, for institution and induction, but did not bring or produce to the said bishop sufficient testimony of his honest conversation, ability, and conformity with the ecclesiastical laws of England, the testimony which he brought being and having been held by the defendant, the bishop, to have been insufficient: that the bishop required further and sufficient testimony of the presentee's honest conversation, ability, and conformity with the ecclesiastical laws of England, which the presentee did not bring or produce; and that the presentee having notice of the requirement of the bishop, and having departed from the bishop, never returned to him, and never brought such sufficient testimony:

"That such further and sufficient testimony was never obtained, but the said bishop received from the Bishop of Manchester further testimony, from which he believed, and had good reason for believing, that the said presentee had been guilty of an attempt to commit simony, and was not a person of honest conversation, all

and the replication bad. The main question is, whether the Canons not only enable but make it imperative on the bishop to require to be furnished with letters testimonial or commendatory before he institutes a clerk coming from another diocese. It [684] is to be observed that all the actors in this case are ecclesiastics. One of the questions to be discussed is, whether the Canons of 1603, as they are called, assuming that they do not *proprio vigore* bind the laity, are not binding upon a clerk who comes to the

which the presentee, Reid, well knew : that a sufficient time to enable the presentee to obtain the further and sufficient testimony elapsed before collation by the defendant, the bishop, and, such testimony never having been furnished, the bishop as ordinary, after the lapse of six months from the avoidance, collated the other defendant :

“As to the replication,—The replication affords no answer to the plea. The replication, after alleging that Reid was of honest life and a fit person, and that he had not been guilty of attempt at simony, sets out at length the testimony which the plaintiff alleges was brought by John Reid, the presentee, to the defendant, the Bishop of Exeter, and which the said bishop held to be insufficient and such as he was not bound to accept. It states that the bishop, from the time of the bringing of the said testimony to the time of collation, continued to require from Reid, the presentee, a further testimony from the Bishop of Manchester : that the said bishop never gave notice to Reid or the plaintiff, nor ever gave them or either of them to understand or be informed or believe, that the said bishop required the said testimony to be procured within any fixed or specified time, or that the said bishop would not receive the same after the lapse of six months from the avoidance, or after any specified time, nor ever gave notice to Reid or the plaintiff, nor did either of them know, that the Bishop of Exeter had finally determined not to wait any longer for or to receive such further testimony, or that the said bishop had finally determined to persist in his objections to the first testimony as insufficient : that, from the time of bringing the first testimony up to the time of collation, negotiations between the defendant, the bishop, and Reid, as to whether the said bishop would persist in requiring any further and what testimony to be procured by the said John Reid, were pending, and that neither Reid nor the plaintiff had notice or knew that the bishop claimed to collate the other defendant or any clerk to the said church : that, save as aforesaid, the said bishop never before collation of the other defendant refused to institute the said John Reid as the plaintiff's clerk.

“The plaintiff therefore admits by his replication that the defendant, the bishop, held the testimony brought to be insufficient, and does not allege that it was sufficient :

“If the plaintiff intends to submit as matter of law that the testimony set forth was sufficient, and such as the bishop was bound to accept, the defendants contend that the court cannot decide as matter of law that the bishop was not justified in his decision, or that the testimony was such as the bishop was bound to receive :

“Further, the defendants contend that the testimony set out on the face of the replication was not such testimony as the bishop was bound to accept, or ought to have accepted :

“But, besides, the plea states, and the replication admits, that the defendant, the bishop before collation, received further testimony from the Bishop of Manchester leading to the belief that Reid was not a fit person (and shewing, therefore, that the said bishop was right in construing the testimony brought by Reid as an insufficient testimony and a testimonial couched in unusual and ambiguous language) ; and it is also admitted that Reid knew all this long before collation took place : the testimony received from the Bishop of Manchester was clearly unsatisfactory and insufficient :

“The allegation that the defendant, the bishop, did not give notice to the plaintiff or Reid, or give either of them to understand, that the bishop required the testimony within any fixed or specified time, or that the bishop would not receive the same after the lapse of six months, and the following allegations, are naught, and do not answer or affect the plea. The defendant, the bishop, required testimony sufficient and satisfactory to him ; and he was not bound nor ought he to have fixed a time within which the testimony should be procured, or to give any such notices or notifications as it is stated he did not give. Reid came to the bishop with an imperfect and insufficient testimony ; he was required to obtain a perfect and sufficient one ; and he went away and never came back or obtained any perfect or sufficient testimony,

bishop [685] for institution, as well as upon the bishop himself; and whether the patron, being himself a clerk in Holy Orders, is not equally bound. Before instituting, the bishop is bound to inquire and to ascertain whether the clerk who is presented to him is fit ecclesiastically as well as otherwise. Many of the Canons re-enacted in 1603 are antient Canons, and are merely declaratory of the antient usage and laws of the church. The first of these which was relied on on the other side is the 39th, which provides that "no bishop shall institute any to a benefice who hath been ordained by any other [686] bishop, except he first shew unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it: and, lastly, shall appear, upon due examination, to be worthy of his ministry." The 48th Canon (Gibson's Codex, 896), which was not cited, provides that "no curate or minister shall be permitted to serve in any place, without examination and admission of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the cure and meetness of the party. And the said curates and ministers, if they remove from one diocese to another, shall not be by any means admitted to serve without testimony of the bishop of the diocese, or ordinary of the place as aforesaid, whence they came, in writing, of their honesty, ability, and conformity to the ecclesiastical laws of the church of England. Nor any shall serve more than one church or chapel upon one day, except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel where such a minister shall serve in two places be not able in the judgment of the bishop or ordinary as aforesaid to maintain a curate." Idonity of the clerk is for the bishop in the first instance. The patron, whether a spiritual person or a layman, must present a clerk who can satisfy the bishop that he is idoneus. The history of these Canons is very fully gone into in the Preface to Burn's Ecclesiastical Law, p. 20 et seq., and also in Gibson's Codex, and Ayliffe's Parergon, in all of which they are assumed to be binding on the clergy. In *Middleton v. Croft*, 2 Stra. 1056, 2 Atk. 650, the plaintiff declared that by statute 7 & 8 W. 3, c. 35, a penalty of 10l. is inflicted on every man who marries without licence or banns, notwithstanding which he and his wife had [687] been cited into the spiritual court for being married before 8 in the morning, without licence or banns: contrary to the Canon, which fixes the time to be between 8 and 12, and requires a licence or banns; that they are lay persons, not bound by the Canon; and therefore pray a prohibition. Lord Hardwicke, in giving judgment, says: "In this case, three questions have been made,—first, whether by the Canons of 1603 lay persons are punishable for a clandestine marriage,—secondly, if not, whether by the canon law antiently received the spiritual court has a jurisdiction to proceed for a clandestine marriage,—and, thirdly, supposing they have a jurisdiction either way, whether that jurisdiction is taken away by the act of parliament, which has inflicted the penalty of 10l." His lordship refers to the 102nd, 103rd, and 104th Canons, and goes into the question of their binding effect: and certainly the conclusion he comes to is that the Canons of 1603 do not proprio vigore bind the

although he knew that the bishop had additional testimony of an unfavorable character. The right and duty of the defendant, the bishop, to collate on lapse was complete:

"The allegation as to negotiations pending is also naught. The defendant, the bishop, is not stated to have agreed to waive the right to collate upon lapse, if lapse accrued, or to institute Reid without favorable testimony, or to have induced the plaintiff or Reid to suppose that the bishop would not collate. Reid had to obtain sufficient testimony in his favor from the bishop of the diocese whence he came: he never did what was required, and never again came to the bishop with or obtained any further testimony. He had sufficient time to obtain it, and neglected to do so. He admits that he knew that the defendant, the bishop, not only had not favorable and sufficient testimony, but that he actually had unfavorable testimony from the Bishop of Manchester, and he obtains no better testimony:

"Refusal to admit, institute, or induct Reid was not under the circumstances necessary. Reid neglected and omitted to do that which the bishop properly and in compliance with law and his duty as the bishop required of him: therefore the defendant, the bishop, after the lapse of six months, rightfully collated the other defendant to the living."

laity. He then proceeds to discuss the authorities. "The first," he says, "is *The Prior of Leeds's case*, 2 H. 6, fo. 12 b. Brooke, Ordinary, 1, where it is expressly laid down that the ordinary has power to make holidays, fasting-days, and constitutions provincial, de lyer le clergy, mes nemy de lyer le temporalty. The next case, M. 24 E. 4, fo. 44 b., where though there is some difference in opinion upon the power of the convocation, yet as to the point now in question it is agreed on both sides. In 5 Co. 32 b., *Caudrie's case*, my Lord Coke lays it down that by general consent of the whole realm Canons may be made or altered. In Moore, 755, Plowd. 43, 2 Co. 37, the question proposed is, whether the deprivation of the puritan ministers was lawful; and the judges said it was, because the King had delegated them full power, as he might. That a parliamentary confirmation is necessary, see Carth. 485, 1 [688] Salk. 134 (a)¹. And I have seen two manuscript reports of that case in Carthew, by my Lord Raymond (b) and C. J. Eyre, both of which agree with the report. In Mod. Cas. 188 (c), in a suit for not coming to church, Holt says, if you have a Canon before 1603, it may bind (d): and in *Davie's case*, Mich. 5 G. 1, in C. B., King, C. J., laid it down as a prevailing opinion that the Canons of 1603 did not bind the laity. Having thus considered the cases which warrant our opinion, let us now take notice of the three cases relied on against it. The first is in Moore, 781 (e), a very extraordinary case, and no precedent, for there both were clerks; and though it is laid down pretty strongly as if a bishop could bind his diocese, yet it is not said that he could bind the laity therein. The second case is, Vaughan, 327 (f), and what he says there is certainly right, that a lawful Canon is the law of the kingdom as well as an act of parliament. But, does he define what is a lawful Canon, or that it will bind the laity without their consent? On the contrary, in the very next paragraph he speaks of a Canon, as warranted by [689] act of parliament. And as the case in 2 Ventris, 41 (a)², where Vaughan says, though no Canons are confirmed by parliament, yet they are the laws which govern in ecclesiastical affairs,—I observe that was only a dictum upon a motion, and was at the time expressly contradicted by J. Tyrrell, who holds that the King and convocation without the parliament cannot make any Canons which shall bind the laity." [Williams, J. Lord Hardwicke's judgment in that case is a prodigy of industry and learning. Willes, J. There are abundant instances in which the Canons would afford no answer to the action by one clergyman against another in the temporal courts. Many of them have fallen into desuetude,—that as to the wearing of copes, for instance.] In 4th Inst. 323, Sir E. Coke says: "Subscription required by the clergy is twofold,—one, by force both of an act of parliament confirming and establishing the thirty-nine articles of religion agreed upon at the convocation of the church of England, and ratified by Queen Elizabeth under the Great Seal of England,—another, by Canons made at a convocation of the church of England, and ratified by King James, as is aforesaid." He then proceeds to state what must be done by a clerk who comes for institution. "He must," he says, "also bring a testimonial from men known to the bishop to be of sound religion, a testimonial both of his private life and profession of the doctrine expressed in the said articles, and he ought to be able to answer and render to the ordinary an account of his faith in latin. Besides this subscription, when any clerk is admitted

(a)¹ *Bishop of St. David's v. Lucy*. "Tis' very plain that all the clergy are bound by the Canons confirmed only by the King, but they must be confirmed by the parliament to bind the laity." Per Holt, C. J., Carth. 485.

(b) See 1 Lord Raymond's Reports, 447.

(c) 6 Modern, 188, *Britton v. Standish*. The report says that Powell, J., differed "totis viribus" from Holt, C. J., and that Gould, J., agreed with Powell. The 6th, 7th, 8th, and 9th volumes of the Modern Reports are sometimes in the old books cited, as here by Holt, C. J., as "Modern Cases."

(d) The dictum of Holt, C. J., is as follows,—"A jurisdiction allowed to them (i.e. the ecclesiastical courts) time immemorial must be taken to belong to them by law; but what I doubt at present is, whether this be so: and, if there be any antient Canon for it, and received here before 1603, I will agree with you; but, if not, no Canon since, though in full convocation, can, proprio vigore, bind the laity."

(e) *Bird v. Smith*.

(f) *Hill v. Good*.

(a)² *Grove v. Dr. Elliott*.

and instituted to any benefice, he is sworn to canonical obedience to his diocesan." In *More v. More*, 2 Atk. 157, Lord Hardwicke, clearly holds the Canons of 1603 to be binding on the clergy. "It is very surprising," he says, "when Canons with respect to marriages have laid down directions so [690] plainly for the conduct of ecclesiastical officers and clergymen (which, though they have not the authority of an act of parliament, and consequently are not binding upon laymen, yet certainly are prescriptions to the ecclesiastical courts, and likewise to clergymen), that there should be such frequent instances of their departing from them, and introducing a practice entirely repugnant to them." [Williams, J. The expression he uses is, "prescriptions to the clergy."] In *Bird v. Smith*, F. Moore, 781, it is said (3rd resolution): "Ils resolve que les Canons del esglise fait per le convocacôn et le Roi sans parliament, lieront en tous matters ecclesiastical cy bien come acte de parliament, car ils dient que per le common ley chescun évesque en son diocess, archevesque en son province, convocation meason en le nacôn, poit faire Canons de lier deins leur limits." [Willes, J. The Canons only profess to be binding in causes ecclesiastical: this is a cause temporal. Williams, J. There is another objection to these Canons being held to be binding to the extent you are contending for, in the case of *Moor v. Moor*, as reported in Barnardiston, C. C. 404, 410, viz. that the King may dispense with them. Now, the King cannot dispense with the law of the land.]

The Canons of 1603, or at all events that one which requires the production of letters commendatory where the clerk comes from another diocese, have been adopted and are binding as part of the law of the land. The statute 25 H. 6, c. 19, referred to in the preface to Burn's Ecclesiastical Law, shows that these Canons were received and adopted as part of the law of England. In *Britton v. Standish*, 6 Mod. 188, Lord Holt says,—“If you have a Canon before 1603, it may bind: and Lord Hardwicke, referring to that, in *Middleton v. Croft*, says (2 Stra. 1060): “It has been already proved that the received Canons bind the laity: and this appears by our statute law, 25 H. 8, [691] c. 21, in the preamble, and 35 H. 8, c. 16, which continues the force of Canons accustomed and used: and here rests the ecclesiastical power.” In Dr. Burn's Preface, p. 30, after citing the case of *Middleton v. Croft*, it is said: “In the aforesaid case the point was not in question whether or how far the said Canons are obligatory upon the clergy. It seemeth generally to be understood that they are binding in that respect. And it is to be observed that there are very many particulars in those Canons which are taken from the antient Canon law received here before the said statute of 25 H. 8 (c. 19). And therefore, upon his head, it is to be inquired how much of those Canons is agreeable to the ancient canon law, and how much is added of new by the convocation of 1603; for, in the former case, the same will be obligatory both upon the clergy and laity, and in the latter case upon the laity only.” The antiquity of the Canons in question is vouched by Gibson, by Lyndwood, and by Watson. They are also referred to in Howel's Synopsis Canonum SS. Apostolorum, a work of great authority in the church; Vinnius, vol. 1, p. 1; Godolphin's Repertorium Canonicum, 591. It is said that these Canons applied only to wandering clerks going into a foreign diocese, and not to clerks presented for institution. Their language, however, is general, and applies to all clerks going from one diocese to another. If it be necessary that the clerk should be fortified with letters commendatory for the purpose of enabling him to perform Divine service and administer the sacraments in a foreign diocese, à fortiori must it be so where he comes to be instituted and inducted into a cure of souls there. The heading of the constitution of Archbishop Walter is as follows,—Lyndwood's Provinciale, p. 47,—“De Clericis Peregrinis;” and it begins, “Externi atque ignoti sine ordinariorum suorum literis commendatitiis vel dimissoriis non admittantur ad ordinis executionem, sine [692] sufficienti dispensatione, atque de ordinatione eorum habitâ approbatione, et per episcopum admissione.” It would be an unjustifiably narrow construction to hold that to apply only to wandering priests coming into the diocese for a temporary purpose. The constitution of Archbishop Arundell, which is to be found in Lyndwood, p. 48, is,—“Nullus capellanus admittatur ad celebrandum in aliqua diocesi nostre Cantuariensis provincie, in qua oriundus sive ordinatus non fuerit, nisi deferat secum literas ordinum suorum, atque literas commendatitias diocesani sui,” &c. In Bingham's Origines Ecclesiasticæ, edit. 1834, vol. 1, p. 562, edit. 1843, vol. 2, p. 181, book. vi., ch. iv. § 4, which is headed “No clergyman to remove from one diocese to another without the consent and letters dismissory of his own bishop,” it is said,—“Another rule, designed to keep all clergy-

men strictly to their duty, was, that no one should remove from his own church or diocese without the consent of the bishop to whose diocese he belonged. For, as no one at first could be ordained, but must be fixed to some church at his first ordination; so neither, by the rules and discipline of the church then prevailing, might he exchange his station at pleasure; but must have his own bishop's licence, or letters dismissory, to qualify him to remove from one diocese to another. For this was the ancient right, which every bishop had in the clergy of his own church, that he could not be deprived of them without his own consent: but as well the party that deserted him as the bishop that received him were liable to be censured upon such a transgression. 'If any presbyter, deacon, or other clerk,' say the Apostolical Canons, (a) 'forsake his own diocese to go to another, and there continue, without the consent of his own bishop, we decree that such an one shall no longer [693] minister as a clerk (especially if after admonition he refuse to return), but only be admitted to communicate as a layman; and if the bishop to whom they repair still entertain them in the quality of clergymen, he shall be excommunicated, as a master of disorder.' The same rule is frequently repeated in the ancient councils, as that of Antioch, the first and second of Arles, the first and fourth of Carthage, the first of Toledo, and the councils of Tours and Turin, and the great council of Nice, to whose Canons it may be sufficient to refer the reader. I only observe that this was the ancient use of letters dismissory, which were letters of licence granted by a bishop for a clergyman to remove from his diocese to another; though we now take letters dismissory in another sense. But the old Canons call those 'dismissory' letters which were given upon the occasion that I have mentioned." Many passages confirmatory of this view are to be found in Van Espen, *Commentarius in Canones Juris veteris ac novi*, vol. iii., pp. 56, 160, 228, &c.; and in Devotus, vol. ii., tit. 22, p. 211, "De clericis peregrinis" (Rome, 1837). In Spelman's *Concilia*, vol. i., 152, the *Concilium Herefordiense*, held on the 24th of September, 673, contains two decreta or Canons relating to *Clerici peregrini*,—"Quintum. Ut nullus clericorum relinquens proprium episcopum, passim quolibet discurrat, neque alienubi veniens absque commendatitiis literis sui præsulis suscipiatur. Quod si semel susceptus est, et noluit invitatus redire, et susceptor est is qui susceptus est excommunicationi subjacebet. Sextum. Ut episcopi atque clerici peregrini contenti sint hospitalitatis munere oblato, nullique eorum liceat ullum officium sacerdotale absque permisso episcopi, in cujus parochia esse cognoscitur, agere." In 2 Spelman's *Concilia*, p. 378, is set out the Synod of Exeter, held in 1287, the 37th chapter or Canon of which is headed [694] "Ne alienæ ordinationis presbyter sine examinatione et literis dimissoriis admittatur." The Canon is as follows:—"Quia clerici criminosi, vel in natalibus patientes defectum, aut vel inhabiles ad ordines suscipiendos, nonnunquam à suis diocesanis fugiunt, ut ab alienis episcopis ordines consequantur, quibus ne dum suos celant defectus, sed quod detestabilius est sæpe mentiuntur ordines se habere, vel majores habere quàm habeant. Sancti patres proinde statuerunt, ne quisquam episcoporum alterius diocesis clericos ordinaret absque sui episcopi licentiâ et literis commendatitiis: alioquin tam ordinatores quàm ordinatos ab executione sui officii suspenderunt. Hinc est, quod districtè prohibemus, ne archidiaconi vel quisquam alius clericum quemcunq. nostræ diocesis, ab alieno episcopo ordinatum, ad celebrandum in nostrâ diocesi prius admittant, donec literas commendatitias sui inspexerint ordinatores, per quas constat eis totaliter ordinatum, à nobis prius literas dimissorias habuisse: aliter etenim suspensus remaneat ordinatus quousque secum duxerimus dispensandum. Cum vero ordinatus fuerit alterius episcopatus, et ordinationis similiter alienæ: statuimus, ut absque literis commendatitiis sui episcopi, et examinatione diligenti super honestate et literatura, ad parochias custodiendas vel celebranda divina, peregrinando nullatenus admittatur, vel remissionis procedatur in ipsis sub penâ excommunicationis. Interdicimus ne à quocunque sacerdote quicquam detur vel recipiatur pro licentiâ celebrandi. Inhibemus etiam ut nullus sacerdos celebrare præsumat, donec loci ordinario fuerit presentatus, et per ipsum (ut convenit) approbatus." Gibson's commentary on the Canons of 1603 (*Codex*, vol., 2, p. 806) is also a strong authority in favor of the necessity for letters testimonial and commendatory. He says: "There is scarce any one thing which the ancient Canons of the church more [695] peremptorily forbid than the admitting clergymen of one diocese to exercise their function in another, without first exhibiting

(a) Can. Apost. c. xv. et xvi. (xiv., xv., tom. 1, Conc. Labbe, p. 28).

the letters testimonial and commendatory of the bishop by whom they were ordained. And the constitutions of Archbishop Walter and Archbishop Arundell shew that the same was the known law of the English church, viz. that none should be admitted to officiate (not so much as a chaplain or curate) in any diocese in quâ non oriundus sive ordinatus non fuerit (as the latter expresses it), nisi deferat se cum literas ordinum suorum, atque literas commendatitias diocesani sui." [Willes, J. Under this plea, you must shew that letters testimonial were requisite both as to scientia and mores.] A form of literas commendatitias is given in the Capitularia Regum Francorum, vol. 2, p. 443 (edit. 1677), and also in the Decretals, and in a letter from Archbishop Tenison to his Suffragans, written in 1678, upon the improper practice of promiscuously granting letters testimonial. *Palmer v. The Bishop of Peterborough*, 1 Leon. 230, Cro. Eliz. 241, is relied upon as an express authority that letters testimonial are not necessary. It was, however, sufficient for the decision of that case to say that the bishop had demanded something which he was not entitled to demand. Besides, it does not appear by the record of that case that the clerk came from another diocese. [Willes, J. The case of the bishop who was going out riding, referred to by Mr. Coleridge, is to be found in the Year Book, 15 H. 7, fo. 6. The judges there refer to "letters of orders," but not to "letters testimonial" from the bishop.] *Palmer v. The Bishop of Peterborough* is observed upon in Watson's Incumbent, 213.

The second and third objections are, that the bishop is not the sole judge of the sufficiency of the letters testimonial, that the plea should have disclosed some [696] specific matter of insufficiency, and that it contains no averment of a refusal on the part of the bishop to institute Mr. Reid. The plea is founded upon a neglect of the clerk to do something which he was lawfully required to do. The Canons already referred to require the clerk to bring with him when he comes for institution certain testimonials: the bishop adjudged the testimonials brought by Mr. Reid to be insufficient; and Mr. Reid went away, and did not return. The bishop therefore was entitled to collate by lapse. The same state of things arose in this case that occurred in the case in the Year Book, 15 H. 7, fo. 6, which is cited in 2 Leonard, 5, and also in 3 Leonard, 45. [Erle, C. J. There, the clerk presented himself to the bishop at an inconvenient time. The bishop was about to go out riding: the time was inconvenient, and the clerk was desired to come again, but neglected to do so; whereupon the bishop collated by lapse.] No reliance is placed upon that part of the plea which speaks of the attempt to commit simony. The plea would have been good without these averments: but, if true, they justify the bishop in the course he pursued in requiring further and better testimony. Minus sufficiens in literatura is a sufficient answer: *The Bishop of Exeter v. Hele*, Show. P. C. 88. The right of the bishop to examine is not contested, —see the Articuli Cleri, and Coke's commentary thereon, 1 Inst. 631,—subject perhaps to his judgment being reviewed by the archbishop.

Then it is said that the plea is bad for want of an averment of notice to the patron of the insufficiency of the letters testimonial. Notice to the patron, however, is only necessary where there is a refusal. Here there was none. As to whether notice is required in the case of a spiritual patron, there seems to be some diversity of opinion. It is not necessary to argue it; for, here, the clerk neglected to bring the sufficient [697] testimony which the Canons require. The bishop did not refuse to admit. He insisted on his right to have letters testimonials, and they were never brought; and therefore he collated by lapse. An abbess, because she is supposed not to know whether the clerk presented by her is sufficiens in literatura, is to have notice: but a spiritual clerk, it seems, is not.

As to the replication,—the letters testimonial are set out, by whatever tribunal their sufficiency is to be ultimately determined. It is unnecessary again to refer to the books in which the forms of letters testimonial and letters dismissory are to be found,—Van Espen, Hostiensis, Devotus, the Decretals, &c., and also in a more modern work, Hodgson's Instructor, 8th edit. p. 53. If the sufficiency of the testimonial is for the court, they will hold this to be insufficient; if for a jury, there is an issue taken upon the plea, and it may be submitted to them. As to the latter part of the replication, to avail anything it should have disclosed something amounting to an estoppel. The question is, whether upon the whole pleadings the bishop is shewn to be a disturber.

Coleridge, in reply. The authorities shew that the Canons have no authority whatever proprio vigore to control the decisions of the temporal courts, unless so far as

they agree with the common law, or unless so far as they have received the sanction of parliament. In *Westerton v. Liddell*, Moore's Eccl. Cas. P. C. 160, Lord Kingsdown seems to think it more than doubtful whether they are of any authority at all. "It was contended," he says, by Mr. Stephens, "in a very able argument, that the Canons passed in the reign of Henry the Eighth had no parliamentary authority in the reign of Edward the Sixth, for that the true meaning of the statutes relating to that subject passed in the reign of Henry [698] the Eighth is, that they provide for the review of the existing Canons by commissioners appointed by the King, and give authority to those Canons only in the meantime, i.e. during the continuance of the commission: that the commissioners never made any report; that the commissions determined by the death of King Henry the Eighth; and that the parliamentary sanction given to the Canons ended at the same time. If it were necessary to determine this point, their Lordships (the judicial committee of the Privy Council) think this argument might deserve serious consideration, although it is contrary to the general impression which has prevailed upon the subject." It is conceded that the bishop is to be satisfied of the identity of the clerk presented to him for institution, and of that he is the sole judge. But it is submitted that Gibson is not borne out in saying that *literæ commendatiæ* have anything to do with institution. [Willes, J. I have heard Lord Denman say that Gibson is of very questionable authority (a).] It by no means follows that technical expressions had the same signification at the time that Dr. Gibson wrote that they have now: see the judgment of the court of Queen's [699] Bench in *Mason v. Lambert*, 12 Q. B. 802. Among the constitutions of Stephen Langton, who was Archbishop of Canterbury in the time of King John, is one intituled "*De idoneis presentantibus ad vacanda beneficia*," 2 Spelman's Concilia, 157, which provides as follows,—"*Præcipimus omnibus patronis ecclesiasticum, sive sint seculares personæ sive regulares; quod cum ecclesiasticum vacaverit beneficium de eorum donatione viros idoneos nobis presentent, quibus morum honestos et literatura scientia suffragantur; sequentes judicium rationis, non affectum carnalitatis: alioquin pro officii nostri debito, de ecclesiis vacantibus, Deum habens præ oculis, ordinabimus.*" There is no recognition here of the right of one bishop to require from another *literæ commendatiæ*, which, if any such existed, one might expect to find noticed by the archbishop.

The learned counsel referred at considerable length to the various Canons cited on the part of the defendants, for the purpose of shewing that the *literæ commendatiæ* therein mentioned did not apply to clerks coming from another diocese for institution, and insisted that the case of *Palmer v. The Bishop of Peterborough*, 1 Leon. 230, Cro. Eliz. 241, was an authority expressly in point.

[700] ERLE, C. J. The court is much indebted to the learned counsel on both sides for the abundance of learning and industry they have displayed in arguing this case, and will take a little time for deliberation.

Cur. adv. vult.

(a) The learned judge at a subsequent period of the argument referred to the case of *Craen v. Sanderson*, 7 Ad. & E. 880, 894, 2 N. & P. 641, 653, where Lord Denman, speaking of Bishop Gibson says,—“It is needless to observe that that writer is not to be considered as an authority.” Mr. Justice Willes went on to say,—“Lord Denman, however, seems at a subsequent period to entertain more respect for the bishop: for, in delivering judgment in the case of *The Queen v. The Archbishop of Canterbury*, 12 Q. B. 483, 658, which has been handed to me by Mr. Grant, he says,—‘Bishop Gibson is a most remarkable authority in my opinion upon the subject [i.e. the power of the archbishop to inquire into objections as to the fitness of a bishop at the time of confirmation]. He was assailed by one of the most learned judges who ever sat in this court, Sir Michael Foster,* as one disposed to erect the Church into an imperium in imperio, a sacerdotal order which must in time absorb all the other powers in the state. Gibson wrote his invaluable treatise, the great store-house of ecclesiastical law; and from that, copying more antient works, we derive all the evidence in favor of this application. Yet neither in that work nor in the course of any proceedings taken by him does he assert the existence at any time of a power in the archbishop to defeat by such an inquiry as that suggested the nomination of the Crown.’”

* 1735. In a pamphlet intituled “An examination of the scheme of Church power laid down in the Codex,” &c. See Dodson's Life of Sir Michael Foster, p. 13.

ERLE, C. J., delivered the judgment of the court:—In this case there was a demurrer to a plea of the bishop in an action of *Quare impedit*. The plea alleges, that, after the living became vacant, the plaintiff presented Mr. Reid as his clerk to the bishop, and requested him to admit, institute, and induct Mr. Reid as the plaintiff's clerk; that Mr. Reid had not been ordained by the present or any former bishop of the diocese of Exeter; and at the time Mr. Reid was so presented he was a clerk in Holy Orders, and came from the diocese of Manchester, in which he had been then lately a minister of the church of England, and had held a benefice and cure of souls, and that he was wholly unknown to the bishop (the present defendant); that Mr. Reid applied to the bishop to admit, institute, and induct him, but did not bring or produce from the Bishop of Manchester any sufficient testimony of his (the said Mr. Reid's) "honest conversation, ability, and conformity to the ecclesiastical laws of England," or any such testimony as he the said Bishop of Exeter was bound and ought by the laws of England to require and have from the Bishop of Manchester, but brought testimony from the said last-mentioned bishop which the Bishop of Exeter held to be and which was not sufficient testimony, according to the laws ecclesiastical, of his, Mr. Reid's, honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as the Bishop of Exeter was bound and ought to require and have and receive from the [701] Bishop of Manchester; that the Bishop of Exeter required further and sufficient testimony from the Bishop of Manchester,—of which Mr. Reid had notice from the Bishop of Exeter. The plea then averred that thereupon Mr. Reid departed and went away from the Bishop of Exeter, and never returned to him; and such further testimony from the Bishop of Manchester was never obtained, although a long space of time sufficient to obtain it, and to come again to the Bishop of Exeter, had elapsed before the collation afterwards mentioned. The plea then proceeds to say, that, after Mr. Reid went away from the bishop, he not only never received from Mr. Reid, or otherwise, any sufficient testimony from the Bishop of Manchester, or any other testimony whatever, of Mr. Reid's honest conversation, ability, and conformity to the ecclesiastical laws; but that, in fact, before the said collation, he received from the Bishop of Manchester, and otherwise, further testimony, from which he believed, and had good reason for believing, that Mr. Reid, while he had a cure of souls in the diocese of Manchester, had been guilty of an attempt to commit the offence of simony, by soliciting another clergyman (who is named in the plea) to enter into a simoniacal contract about another benefice held by Mr. Reid; and that Mr. Reid was not a person of honest conversation, or a person who conformed to the ecclesiastical laws, or a fit or proper person to be admitted to the vacant living,—all which he well knew. The plea then concludes by stating, that, by reason of the premises, the Bishop of Exeter, after a lapse of six months from the living becoming vacant, collated the church to his own clerk, and put him into possession, as it was lawful of the said bishop to do.

The substance of this plea is, that, as Mr. Reid was a clerk coming from another diocese, the bishop had a right to demand from him before institution a testimonial from the Bishop of Manchester, as the bishop of such other diocese; and that, as Mr. Reid failed to procure such testimonial within due time, the bishop collated his own clerk, by lapse. And the only question is, whether the bishop had a right to refuse to institute, on the ground that no such testimonial was produced. And we are of opinion that he had no such right, and that therefore the plea is bad.

It should be observed that the imputations in the plea against Mr. Reid in respect of the Bishop of Exeter having good reason to believe, from testimony received from the Bishop of Manchester, and otherwise, that Mr. Reid had been guilty of an attempt to commit simony, and that he was not a person of honest conversation, or fit or proper to be admitted to the vacant living, are not alleged substantively as causes for the bishop's refusal to institute: but are employed as mere illustrations and arguments in support of the allegation that Mr. Reid did not produce in due time a sufficient testimonial from the Bishop of Manchester. And, inasmuch, therefore, as these averments are not traversable, they might have been spared. If the bishop had a right to require such a testimonial from Mr. Reid, there is a sufficient allegation, without these averments, that it was not duly produced: consequently, a traverse of them would have been disallowed, as leading to an immaterial issue.

The bishop's assertion of this right, or rather duty, appears to be based on the 48th of the Canons of 1603, the words of which are adopted in his plea. Whether

the authority of these Canons extends to such a matter as this, was one of the questions raised on the argument of this case, but one which it is unnecessary for us to decide, as, even admitting them to be binding either as prescriptions to the clergy or as declarations of the common law of the Church of England, we [703] should be of opinion, that, according to the true construction of them, no such right or duty is to be derived from their language as that on which the bishop relies in his plea.

The 48th Canon is, that "no curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese or ordinary of the place having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the cure and meetness of the party. And the said curates and ministers, if they remove from one diocese into another, shall not be by any means admitted to serve without testimony of the bishop of the diocese or ordinary of the place as aforesaid whence they came, in writing, of their honesty, ability, and conformity to the ecclesiastical laws of the Church of England. Nor any shall serve more than one church or chapel upon one day, except that chapel be a member of the parish church or united thereto, and unless the said church or chapel where such a minister shall serve in two places be not able, in the judgment of the bishop or ordinary as aforesaid, to maintain a curate."

It appears to us that this Canon has no application to the institution of clerks to livings, but only to the service of cures and in churches and chapels by curates and ministers who are not the incumbents.

This Canon is headed "None to be curates but allowed by the bishop:" and it is preceded by the 47th Canon, which is headed "Absence of beneficed men to be supplied by curates that are allowed preachers," and by which it is ordained that "every beneficed man licensed by the laws of this realm upon urgent occasions of other service not to reside on his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it."

[704] "The licence to preach, to which this canon refers," says Sir John Nicholl, in *Gates v. Chambers*, 2 Add. Ecl. R. 192, "is a distinct thing from the licence to a cure, which is the subject of the 48th Canon, being (the first) a licence to preach specially, without which ministers were forbidden by the 49th Canon to expound, as it is termed, i.e. to preach, in their own cures or elsewhere, or to do any more than read plainly and aptly, and without glossing or adding, the homilies (then) already set forth or in future to be published by lawful authority." "It is well known," continues the learned judge, "that such separate licences to preach were in use both before and for some time after the Reformation: but, for the last century or two, in consequence of the clergy being better educated, or for some other reason, they have fallen into desuetude and are now either included in letters of orders or in the licences of ministers to particular cures."

Again, by the 46th Canon it is ordained that every beneficed man not allowed to be a preacher, shall procure sermons to be preached in his cure once in every month, if his living, in the judgment of the ordinary, will be able to bear it.

It appears, then, that the two Canons, immediately preceding the 48th treat of services performed for beneficed men by curates and other ministers. And it should seem that these ordinances lead properly to the subject which we consider to be that of the 48th Canon, viz. the qualification of those who shall be permitted so to serve. Accordingly, in Watson's Clergyman's Law, ch. 31, p. 376 (of the edition of 1712) this Canon and the 47th in conjunction with it are mentioned as the chief Canons which prescribe the qualification and duty of curates. So, in *Rex v. The Archbishop of Canterbury and the Bishop of London*, 15 East, 145, Lord Ellenborough speaks of the 48th Canon [705] as one of the Canons for the authority and duty of the bishop in respect of curates, regarding that authority and duty as standing on totally different grounds from the authority and duty of the bishop in respect of clerks presented to him for institution to a benefice, and which that learned judge considers in an earlier part of his judgment, speaking of the right to institution, as "a temporal inheritance where the patron is entitled to call upon the ordinary to institute his clerk, and to enforce that right by Quare impedit, unless the bishop specifically states in his plea some reasonable cause wherefore the clerk presented is not fit." Again, in *Gates v. Chambers*, above cited, Sir John Nicholl regarded the 48th Canon as plainly having for its object the qualification of curates who are engaged to take charge of parishes

altogether or in part, though he doubted whether it applied to the case of one clergyman officiating out of his diocese, for the purpose of giving mere occasional assistance to another.

The Canon which really relates to the authority and duty of the bishop in respect of clerks presented to him for institution, is the 39th. It is headed "Cautions for Institution of Ministers into Benefices:" and it is in these words,—“No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first shew unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it, and lastly, shall appear, upon due examination, to be worthy of his ministry.”

There can be little doubt that the language of this Canon has reference to the case of *Palmer v. The Bishop of Peterborough*, 1 Leon. 230, Cro. Eliz. 241, which had occurred a few years before, and which, by some persons at least, had been regarded as having decided that the bishop had no right to require a pre-[706]-sentee for institution to shew his letters of orders or to produce any testimonial. The object of the Canon appears to be to proclaim what the real rights and duties of the bishop are notwithstanding that decision.

Although the roll of that case has been searched, and we have been favored with a copy of it, and although we have the two reports of it in Leonard and Croke, it is not easy to find on what ground the judgment proceeded, or whether what is reported to have fallen from the court was to any, and what, extent the ratio decidendi, or whether the case was decided on a mere point of pleading. The authority of the case, or at least of these judicial dicta, has been doubted by several respectable writers on ecclesiastical law. And it may be questioned whether the Canon now under consideration does not faithfully declare the common law of the Church, if it be construed as meaning that the presentee for institution must produce his letters of orders or give other satisfactory proof that he has obtained them, and also produce testimonials of his character, if the bishop requires them. With respect to this latter branch of the Canon, it is certainly very reasonable that the presentee, when a stranger to the bishop, should produce some testimonial of his former good life and behaviour. It appears from Hodgson's Instructions for the Clergy, 8th edit. p. 31, that, among the papers to be sent to the bishop by the clergyman who is to be instituted, one should be a testimonial by three beneficed clergymen,—to be countersigned, if they are not beneficed in the bishop's diocese to whom the testimonial is given, by the bishop of the diocese in which their benefices respectively are situate—that the presentee has been personally known to them for three years last past; that they have had opportunities of observing his conduct: that, during the whole of that time, they verily believe that he lived piously, soberly, [707] and honestly; and that they have not heard anything to the contrary thereof, nor that he has at any time held, written, or taught anything contrary to the doctrine or discipline of the Church of England; and ending with an expression of their belief that he is, as to his moral conduct, a person worthy to be admitted to the benefice. This is, in fact, the testimonial, totidem verbis, which the replication in the present case avers to have been produced by Mr^r Reid to the bishop of Exeter.

We should be sorry to decide anything in this case which would tend to dispense with the necessity of producing some such testimonial, or that would enable any one who is presented to a bishop for institution to refuse to comply with a requisition so long established and so reasonable, and which, in substance, is at all events prescribed to the clergy by this Canon. But neither the language of the Canon nor the general usage of the prelates, as far as we can learn, at least in modern times, makes it requisite that the presentee who comes from another diocese shall produce a testimonial from the bishop of that diocese,—still less a testimonial from him in the language of the Bishop of Exeter's plea and the 48th Canon “of honesty, ability, and conformity to the ecclesiastical laws.”

All the authorities which were cited in the able and elaborate argument before us in support of such a proposition, appear to us, with one exception, to be, like that Canon itself, applicable only to the case of non-beneficed curates, and other ministers serving cures and churches and chapels of which they are not the incumbents, and not to the institution of clerks to benefices. That exception is, a passage in Gibson's Codex, p. 809, note (c), adopted in Burn's Ecclesiastical Law, tit. Benefice, § ii.,—and which is in the following words:—“By the antient law of the Church, and par-[708]-

ticularly of the Church of England, the four things in which the bishop was to have full satisfaction, in order to institution, were *Ætas, scientia, mores et ordo*. And there is scarce any one thing which the antient Canons of the Church more peremptorily forbid than the admitting clergymen of one diocese to exercise their functions in another, without first exhibiting the letters testimonial and commendatory of the bishop by whom they were ordained. And the constitutions of Archbishop Walter and Archbishop Arundell shew that the same was the known law of the English Church, viz. that none should be allowed to officiate (not so much as a chaplain or curate) in any diocese, in *qua oriundus sive ordinatus non fuerit, nisi deferat secum literas commendatitias diocesani sui*. If, then, this is the common as well as the canon law of the Church of England, and is not contradicted by any statute, and is a thing most reasonable in itself, the judgment in the court of K. B. 33 Eliz. (*Palmes v. The Bishop of Peterborough*), that the clerk is not bound to shew his letters of orders or missive to the bishop, and that his not shewing them is no good cause to stay his admittance, does certainly deserve a second consideration."

It may be observed that the constitutions of the two archbishops here cited and relied on, as to the officiating by any one in a diocese "*in qua oriundus non fuerit*," point at a qualification not to be found in the Canons of 1603, and which can hardly be regarded by any one at this day as part of the existing common or canon law. The circumstance of a man having been born in any particular diocese would surely not be allowed now to make any difference as to his qualification for officiating there, whatever may have been the case in the earlier times of the Church; and it may be remarked that the bishop's plea in the present case abandons this part of the supposed common law of the [709] Church; for, though it negatives Mr. Reid's having been ordained in the diocese of Exeter, it does not aver that he was not born there.

It is further to be considered how far this supposed law of the English Church is consistent with the established doctrines of the common law of the land.

Now, it is said by Lord Coke, 2 Inst. 631, that, in a *Quare impedit* brought against the bishop for refusal of the clerk, the bishop must shew the cause of his refusal specially and directly; for, whether the cause thereof be spiritual or temporal, the examination of the bishop concludes not the plaintiff: and, if the cause be temporal, and sufficient in law (which the court must decide), the same may be traversed, and an issue joined, and tried by the country. The law thus laid down has never been doubted, but it has been regarded as indisputable by all subsequent authorities: see Watson's Clergyman's Law, ch. 26, pp. 497, 498 (edition of 1712), Comyns's Digest, tit. *Esglise* (I.), 1 Burn's Ecclesiastical Law, 163, tit. *Benefice*, § 3, 1 Bla. Comm. 390.

If, however, it be a good cause of refusal that the bishop of the diocese from which the clerk comes will not furnish him with a testimonial to the bishop to whom the clerk is presented, it is obvious, that, in such a case, this right of the patron to have the cause explicitly stated why his clerk was refused institution, is frustrated. The bishop who declines to give the testimonial must be supposed to be influenced in so doing by his belief that the clerk is unworthy of the benefice to which he is presented, either by reason of want of ability, or by reason of some misconduct. Now, if the bishop declines to give his testimonial on the former ground, it is plain that he is prejudging, without appeal, a question which it is the duty of the bishop to whom the clerk is presented to decide upon his own [710] examination. If the testimonial is refused on the latter ground, it is equally plain that this absolute refusal has the effect of debarring the court of the right to decide whether the surmised misconduct constitutes a sufficient ground of refusal, and the patron of the right to have the truth of the alleged misconduct tried by the country. In other words, the doctrine laid down by Lord Coke must be qualified, by adding to it, that it is inapplicable to a case where the clerk comes from another diocese, unless he was originally ordained in that in which the living is situate. We can find no authority whatever for such a qualification of the law of the land; and we do not think it is called for by any principle of good sense or justice.

On these grounds, we are of opinion that the right or duty which is the foundation of the plea, has no legal existence, and that, consequently, the plea is bad.

We wish it to be understood that nothing which has fallen from the court is meant to throw any doubt on the doctrine laid down by Lord Hardwicke in *Middleton v. Croft*, 2 Stra., 2 Atk. 659, that the Canons of 1603 do not bind the laity *proprio vigore*, i.e. by their own force and authority, though there are many provisions contained in them

which are declaratory of the antient usage and law of the Church received and allowed here, which, in that respect, and by virtue of such antient allowance, will bind the laity. How far they are to govern such a case as this, by reason of their binding the clergy, is a question which, for the reasons above given, it is unnecessary to decide. But we think it right to say that it seems to us very difficult to maintain that they can in any case be binding on patrons of livings seeking to enforce their common law rights.

Judgment for the plaintiff.

[711] HOPKINS v. THOMAS. Jan. 31st, 1860.

[S. C. 29 L. J. C. P. 187; 6 Jur. N. S. 301; 8 W. R. 262.]

Bankruptcy during the currency of a quarter (and subsequent certificate) is no bar to an action by a school-master for board and tuition of the bankrupt's son under a quarterly contract,—the demand not being a debt “not payable at the time of the bankruptcy,” within s. 172 of the 12 & 13 Vict. c. 106, or “a liability to pay money upon a contingency,” within s. 178.

This was an action to recover the amount of a school-master's bill. The cause was tried in the Mayor's Court, London, before the Common Serjeant, the declaration being in the usual form of a *concessit solvere*. By his particulars the plaintiff claimed 37l. 0s. 7d., for five quarters' tuition and board of the defendant's son, from Michaelmas, 1857, to Christmas, 1858.

As to 12l. 4s. 8d., the defendant pleaded a tender, and paid that sum into court, and as to 8l. 17s. 9d. he pleaded his bankruptcy and certificate.

The only question at the trial was as to this latter sum,—the contract being proved to be a quarterly contract, and the sum tendered being enough to satisfy the plaintiff's claim from Midsummer to Christmas, 1858, and the defendant's certificate being admitted to be a bar to the plaintiff's claim up to Christmas, 1857.

It appeared that the petition upon which the defendant was adjudicated bankrupt was filed on the 19th of March, 1858, and that he obtained his certificate on the 29th of July: and it was contended on the part of the defendant that his liability to pay for the quarter ending on the 25th of March, 1858, was a liability to pay money upon a contingency, for which the plaintiff might have proved under the fiat, and therefore that the certificate was a bar.

For the plaintiff it was insisted that there was no debt due until the end of the quarter, and consequently that the certificate was no bar to that portion of the demand.

The Common Serjeant directed a verdict to be entered for the defendant, reserving leave to the plaintiff [712] to move to enter a verdict for him for 8l. 17s. 9d., if the court should be of opinion that the plaintiff's claim *quoad* that sum was not barred by the certificate.

Henry James, in Michaelmas Term last, obtained a rule nisi accordingly.

Robinson, on a subsequent day in the same term, shewed cause. The sum in question was a debt provable under the 172nd section of the 12 & 13 Vict. c. 106, which enacts “that any person who shall have given credit to the bankrupt upon valuable consideration for any money or other matter or thing whatsoever which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such debt, bill, bond, note, or other security as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of 5l. per centum per annum, to be computed from the declaration of a dividend to the time such debt became payable according to the terms upon which it was contracted,”—or it was a contingent liability within the 178th section, which enacts, “that, if any trader who shall become bankrupt after the commencement of this act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum

as [713] the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends; provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed: provided also, that, where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees, at any time after the expiration of such time, and if the court shall think fit, be expunged either in whole or in part from the proceedings." This was a debt contracted before, but not payable until after the bankruptcy: but it is a debt which must be paid, and one which is susceptible of valuation. [Williams, J. Suppose the pupil were withdrawn from the school or died in the middle of a quarter, would the whole quarter be payable?] No doubt. In *Parslow v. Dearlove*, 4 East, 438,—where it was held that school-money for the education, &c., of the defendant's son, payable half-yearly, was not a debt due till the end of the half-year, so as to be provable under a commission of bankrupt against the parent, who became bankrupt a few days before the end of the half-year, though he had just before his bankruptcy taken his son home for the holidays: the contract not being thereby put an end to; and consequently that the bankrupt's certificate under the 5 G. 2, c. 30, was no bar to an action against him for the half-year's education, &c.,—the decision proceeded upon the ground that the 31st section of the statute was confined to written securities. If not a [714] debt due within the 172nd section, this clearly was a sum payable upon a contingency within the 178th section of the existing Bankrupt Act. The death of either master or pupil, or the removal of the latter, would be a contingency. The case of *Warburn v. Tucker*, 5 Ellis & B. 384, was decided upon its own special circumstances (*a*). [Williams, J. In *The South Staffordshire Railway Company v. Burnside*, 5 Exch. 129, 6 Railway Cases, 611, the defendant, a railway shareholder, became bankrupt on the 8th of February, 1848: on the 18th of the same month a call was made, and three other calls were subsequently made: on the 24th of April, the defendant obtained his certificate: the assignee not having accepted the shares,—it was held that, the property in them continuing in the bankrupt, the claim was not barred by his certificate, inasmuch as a debt due in future under the 51st section of the 6 G. 4, c. 16, or as a debt payable on a contingency within the meaning of the 56th section.] Non constat that any call would be made there. [Williams, J. Non constat that the schoolmaster or the pupil will die during a quarter.] The 178th section contemplates two species of contingency,—one, the happening of a certain event, there being no existing debt until the event happens,—the other, the case of a debt existing, but liable to be defeated by the happening of a contingency: the former is not within the section, the latter is. Here, the only contingency that could arise, is one which would defeat the claim. It is difficult to see what description of claim can satisfy the words of the 178th section, if this does not. [William, J. Servants' wages.] There is a special provision in the act for those: 12 & 13 Vict. c. 106, [715] s. 168. A liability on a guarantee is susceptible of valuation and proof,—*Ex parte Downman*, 2 Glyn & J. 241: *In re Willis*, 4 Exch. 530. There is no greater difficulty in ascertaining the value of the liability here than there is in the case of a guarantee. [Erle, C. J. What is a liability to pay money which is not a debt? Williams, J. Under the 56th section of the 6 G. 4, c. 16, which corresponds with the 177th section of the present act, to constitute a contingency, the bankrupt must have contracted a debt before his bankruptcy: the object of the 178th section was, to extend the former provisions to cases of contingent liability where there was no existing debt.]

H. James, in support of his rule. To satisfy the words of the 172nd section, there must be a debt absolutely due, payable at a future day. To call this a present debt, it must be contended that the whole quarter was a debt due on the 1st of January. [Erle, C. J. You need not waste your strength on that section.] *Boyd v. Robins*, ante, vol. v., p. 597, is almost identical with this case. In July, 1850, A. and B. gave C. a guarantee (continuing) for 200l., for goods to be supplied to D., with a stipulation

(a) And see the decision in the court of error in a second action between the same parties in respect of subsequent premiums, 1 Ellis, B. & Ellis, 914.

that the security should subsist "until C. received a notice in writing to the contrary : " goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200l. was due in respect thereof: in June, 1853, B. became bankrupt, and duly obtained his certificate: and it was held by the Exchequer Chamber,—reversing the judgment of this court, ante, vol. iv., p. 749,—that B.'s liability upon this guarantee was not a "contingent liability" within the 178th section, and consequently that his certificate was no bar to a claim in respect of goods supplied to D. after the bankruptcy of B. There is no contingency here. The death of one of the par-[716]-ties during a quarter is not the sort of contingency which the statute contemplated. The contingency must be in the contract itself, and not a contingency of life or death. If the pupil were taken away during the quarter, perhaps the whole quarter would become due: but, upon the facts here, nothing was due in respect of the current quarter until after the bankruptcy. In *Thomas v. Williams*, 1 Ad. & E. 685, 3 N. & M. 545, it was held, that, if a clerk, being hired for a year, continue in his master's office after his bankruptcy, and then in the middle of the year, by mutual consent, the contract is rescinded, upon an understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding,—no part of such wages being provable under the commission. [Williams, J. This matter was a good deal considered in *Maples, App., Pepper, Resp.*, 18 C. B. 177. Ten years ago, A. let to B., as tenant from year to year, premises adjoining other premises occupied by B. About seven years ago, A. permitted B. to make a communication through the party-wall, and to make other alterations, upon condition that B. should at the termination of his tenancy, restore the premises to their original state. In April, 1855, B. became bankrupt; and, on the 17th of May, B. gave notice to A. that he would deliver up possession of the premises, under the 12 & 13 Vict. c. 106, s. 145, the assignees having declined to take them: and it was held that the "damages resulting from the non-compliance with the condition upon which the permission to alter was given," did not constitute a "liability to pay money upon a contingency," within s. 178; and that the condition or agreement above specified, to restore the premises to their pre-[717]-vious state was not a condition or agreement within s. 145. My Brother Willes there says,—“It is true that the defendant, if he failed to perform his agreement, might be liable to pay money in the shape of damages. But, is that a liability to pay money upon a contingency? Certainly not. It is not a liability to pay money until it results in damages; and then it is a liability to pay money absolutely, and not upon any contingency.”] The decision there turned upon the absolute impossibility of proving the amount of repairs which would be necessary to be done at the end of the term. At all events, there could be no proof here in respect of the six days between the 19th and the 25th of March.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court (a):—

In this case the question was whether the plaintiff's claim was barred by the defendant's certificate. The facts were, that the defendant's son had been placed at the plaintiff's school, and had continued there during the quarter ending on the 25th of March, 1858. By the terms of the contract the payment for that quarter was not due until the quarter-day. On the 19th of March, the petition for adjudication in bankruptcy was filed under which the certificate was obtained. The defendant contended that the liability to pay on the 25th of March, 1858, if the son continued at the school to that day, was "a liability to pay money on a contingency" within the 178th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and that the plaintiff might have proved under the fiat for his demand, and so the certificate was a bar. But we are [718] of the contrary opinion. Until the 25th of March, no debt was due. On the 19th of March the contract was not put an end to by the bankruptcy: and, if the plaintiff had sent the son away from the school, he would not have had a right to recover for the portion of the quarter then elapsed. Where a plaintiff had contracted to serve a defendant as clerk, for wages payable yearly, and during the service the defendant became bankrupt, and the plaintiff continued in the service afterwards, and then the contract was dissolved by mutual

(a) The judges present at the argument were, Erle, C. J., Williams, J., Crowder, J., and Willes, J.

consent, it was decided that the contract was not put an end to by the bankruptcy; that, at the date of the bankruptcy, nothing was due for the current year; that therefore the plaintiff could not recover for his service during the year up to the time of the dissolution of the contract, as well before as after the bankruptcy; and that the certificate was no bar,—*Thomas v. Williams*, 1 Ad. & E. 685, 3 N. & M. 545. It is clear, that, in the present case, there was no debt payable in future, or on a contingency, at the time of the defendant's bankruptcy: and we are of opinion that there was no liability within the meaning of the 178th section, though there was a contract to pay if the contract was continued until that day. No case was cited shewing that the 178th section had ever been held applicable in such a case: and, although the section has undergone much discussion in all the courts, no judicial opinion has been found which supports the defendant's case. Our judgment, therefore, is for the plaintiff.

Rule absolute.

[719] STUBBS v. TWYNAM AND ANOTHER. July 8th, 1859.

[S. C. 30 L. J. C. P. 8.]

The trade-assignee under a fiat in bankruptcy is not personally liable to the messenger for work done in his time, unless there is either an express contract or an express employment of the messenger by the trade-assignee.

This was an action by a messenger of the court of bankruptcy against trade-assignees under a fiat against one Webb, for fees and expenses necessarily incurred by the plaintiff in the execution of his duty.

The particulars indorsed on the writ were as follows:—"36l. 3s. 3d., the amount of plaintiff's taxed bill of costs as messenger of Her Majesty's court of bankruptcy, in the matter of Edmund Webb, a bankrupt. The full particulars have already been delivered. The plaintiff claims the like amount for work, labor, and materials, and for money paid, and upon accounts stated."

The declaration was in the common form: the defendants pleaded never indebted.

The cause was tried before Williams, J., at the first sitting in London in Easter Term, 1859. The plaintiff having given his evidence, the learned judge asked the plaintiff's counsel whether he was in a condition to prove a special contract on the part of the defendants to pay the plaintiff his charges; whereupon the plaintiff's counsel stated that he was prepared to prove that the defendants had continually given to the plaintiff directions as to the course he was to pursue and the property he was to seize. Ultimately the following admissions were made between the counsel:—

"That the plaintiff had acted as messenger under the direction of the defendants as trade-assignees, but they (the defendants) only did what was requisite and proper in discharge of their duty; that the defendants had paid over all the moneys they had received (78l.) to the official assignee; and that there were no assets in the hands of the official assignee at the commence-[720]ment of this suit, beyond what was sufficient to pay the petitioning-creditor's costs,—17l. 8s. 6d. only being in hand."

The learned judge thereupon observed that the question resolved itself into one of law, and he directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit, if the court should be of opinion that there was no evidence to go to a jury in support of the plaintiff's claim.

Manisty, Q. C., in Easter Term, 1859, accordingly obtained a rule nisi to enter a nonsuit, contending, upon the authority of *Hamber v. Hall*, 10 C. B. 780, that the trade-assignees, who, under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, were precluded from the possession of any part of the bankrupt's estate, were not liable for the messenger's expenses, in the absence of any express contract. [Willes, J., referred to *Robson v. Jonassohn*, 8 Scott, N. R. 35, 7 M. & G. 351.]

Skinner, Q. C., and Henry James, in Trinity Term, shewed cause. The case of *Hamber v. Hall*, 10 C. B. 780,—which arose under the insolvent debtors acts, 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4,—is said to have decided that the trade-assignee of the petitioner is not personally liable for the messenger's fees and expenses, in the absence of an express contract. But the judgment shews that that is not quite

accurate, but that he may be liable upon a contract to be implied from his acts and conduct. In that case there was no interference whatever on the part of the trade-assignee: here the defendant did interfere. [Byles, J. The rule is well stated by Jervis, C. J., in that case. The costs of prosecuting the petition are cast upon the petitioning-creditor in the first instance: beyond that, [721] the statute seems to make no special provision.] The moment the trade-assignees are appointed, they have the sole control over the bankrupt's estate. They are obliged to pay every one else: why not the messenger? [Erle, C. J. Do you say that the trade-assignees are bound to pay out of their own pockets, where the estate yields no funds?] Yes. The messenger has no official duty after the appointment of the trade-assignees. By the 23rd section of the 17 & 18 Vict. c. 119, it is provided, that, "after the appointment of an official assignee to act in any bankruptcy, and before the choice of assignees by the creditors, the messenger shall follow the instructions of the official assignee, subject to the directions and control of the court, with respect to the taking possession of any part of the defendant's estate or effects of which the messenger shall not have then already taken possession, and the keeping possession of any part thereof of which he shall then already have taken or shall at any time thereafter take possession." [Erle, C. J. Not a word as to who shall pay him.] In *Robson v. Jonassohn*, 8 Scott, N. R. 35, 7 M. & G. 351, it was held that the assignees are not bound to continue the services of a messenger appointed by the commissioner: Tindal, C. J., saying,— "The law having vested in the assignees the property in the goods, it would be singular indeed if they had not authority to appoint a person in whom they could have confidence to take care of them." In *Hamber v. Purser*, 2 C. & M. 209, in an action by a messenger against the sole assignee of a commission of bankrupt under the 6 G. 4, c. 16, for the costs of advertizing a meeting of creditors, and for the hire of the room in which the meeting was held,—it was held that it was not necessary for him to prove an employment by the assignee, nor any express recognition of him as messenger, as the fact of his having acted as mes-[722]-senger, and of the expenses being incurred, must have been known to the assignee. Lord Lyndhurst, C. B., there says,— "The assignee must have been cognizant of what was done by the plaintiff as messenger; and the taxation shews that these expenses were properly incurred." Bayley, J., says,— "the assignee is liable for costs necessarily incurred; and the acts in respect of which the plaintiff claims must of necessity have been done. They must also have been within the knowledge of the assignee; and, if he did not prohibit the messenger from incurring them, he is liable." And Gurney, B., adds,— "These were necessary expenses, and the assignee must have known of them." [Willes, J. That was under the old system, where the trade assignees had the sole control and disposal of the bankrupt's estate. Byles, J. What implied contract do you rely on here?] In *Hamber v. Purser*, the mere not restraining the messenger,— the acquiescence in his beneficial exertions,—was held to be enough to raise an implied contract on the part of the assignee to pay him. Here, the admissions shew something more; they shew that the messenger acted under the direction of the defendants, and that money came to their hands more than sufficient to pay the messenger's demand. [Willes, J. In *Ex parte Hartop*, 9 Ves. 109, assignees were ordered to reimburse the messenger the expenses incurred by him subsequently to the choice of assignees.] *Burwood v. Felton*, 3 B. & C. 43, 4 D. & R. 621, decided that the assignee is not liable to the messenger for fees due to him before the choice of assignees. The official assignee is protected from liability by s. 41. [Erle, C. J. Before the institution of official assignees, the court of bankruptcy exercised its functions through the messenger. When the trade-assignees are chosen, that portion of the court's duty ceases. There is no neces-[723]-sity for a messenger, except to take possession of the bankrupt's estate in aid of the assignees.] The trade-assignees are mere trustees for the creditors. The 150th, 151st, 152nd, and 153rd sections point out the things as to which the trade-assignee must receive the directions of the court. Except as to these, the trade-assignees are altogether uncontrolled. For all that is material here, there is no difference between the provisions of the statute upon which the case of *Hamber v. Purser* was decided (6 G. 4, c. 16), and that now in force. [Willes, J. Having an admission of an employment of the messenger by the trade-assignees, you need not rely upon *Hamber v. Purser*; nor need you distinguish *Hamber v. Hall*.] It is quite immaterial in whom the property is vested. The messenger having been employed by the defendants, the expenses in question having been properly

and necessarily incurred, and the messenger being without remedy against any one else, it is submitted the action is properly brought against the trade-assignees.

Manisty, Q. C., and Garth, in support of the rule. The appointment of the messenger and the seizure of the property by him took place before the appointment of the defendants as trade-assignees. The messenger, unless removed, continues to exercise his functions throughout the whole of the proceedings. [Erle, C. J. In practice, no doubt, it is usual for the assignees to continue the services of the messenger. But they may, it seems, remove him and put another person in his place: *Robson v. Jonassohn*, 8 Scott, N. R. 35, 7 M. & G. 351. If the trade-assignees remove the messenger, and appoint a person of their own selection, they must pay him. If so, I do not see why they should not pay the messenger originally appointed, if they avail themselves of his subsequent services. The [724] messenger is the officer of the court up to the appointment of assignees. But, when there is some one in whom the estate vests, is not the messenger there in the character of servant to the owner of the estate?] That would apply to the official assignee, in whom the property vests until the appointment of the trade-assignees. There is no difference between the official and the trade-assignees, except that the former holds the purse. Unless the court is prepared to say that *Hamber v. Hall*, is not law, the defendant cannot be held liable in this case. There, there was a direct notice to the trade-assignee that the messenger would look to him for payment; and, although he still allowed the messenger to continue to act, he was held not to be personally liable. [Willes, J. In that case, Cresswell, J., assumes that nothing was done by the messenger under the authority of the trade-assignee. Here, the trade-assignees knew of and assented to all that had been done by the messenger. That is the distinction between the two cases.] By the 134th of the bankruptcy rules,—Arch. B. L. 619,—the official assignee may require the trade-assignees to pay into the Bank of England every farthing they receive. The trade-assignee is but the creature of the court. [Willes, J. He is the representative of the body of creditors, for whom the messenger acts.] If the defendants as assignees did no more than their duty, they are, upon the authority of *Hamber v. Hall*, absolved from all responsibility. In a case of *Cooper v. Headley and Gretnacre*, Guildhall Sittings after Hilary Term, 1857, where a similar action was brought, the Lord Chief Baron nonsuited the plaintiff on the ground that no special contract on the part of the trade-assignees to pay the messenger's expenses was proved; and, although there was evidence that one of the assignees knew of the fact of the plaintiff's man having carried [725] on the bankrupt's business (a brewery) for the benefit of the estate, and that he sanctioned it, inasmuch as the supply of malt for the purpose had been obtained from him, his Lordship refused to allow the record to be amended by striking out the name of the other defendant.

ERLE, C. J. This case involves a question of considerable public importance in the administration of the bankrupt laws, and therefore we will take time to consider our judgment.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

We are of opinion that the rule in this case must be discharged.

It appears from the case of *Hamber v. Purser*, 2 C. & M. 209, that, before the institution of official assignees, the mere knowledge on the part of the trade-assignees that the messenger was employed for the benefit of the estate after their appointment, would be sufficient evidence of an implied promise by them to pay him.

But, since the custody and possession of the bankrupt's estate has been vested in the official assignees, the mere relative position of trade-assignees and messenger will no longer suffice to create a liability in the trade-assignees, without an express promise to pay, or an express employment of the messenger; for, the messenger, in receiving the property, and taking care of it, *primâ facie* represents the official assignee. So this court held in *Hamber v. Hall*, 10 C. B. 780. But in that case the marginal note goes beyond the judgment. The effect of the judgment of the court is, that the trade-assignee is not liable to the messenger for [726] work done in the time of the trade-assignee, unless there were either an express contract or an express employment by the trade-assignee.

There was here evidence to go to the jury of an express employment of the plaintiff by the defendants, and therefore the rule must be discharged.

Rule discharged (a).

(a) See *Burwood v. Kant*, 2 C. & P. 123, *Ex parte Burwood*, 2 Glyn & J. 70.

WARNE v. HILL. Jan. 30th, 1860.

[S. C. 29 L. J. C. P. 201; 6 Jur. N. S. 959.]

A cause being called on at the Assizes, the plaintiff, in consequence of some misapprehension on his part as to the order in which the judge had proposed to take the list, was absent: the defendant was present with his counsel, and, after some delay, a nonsuit was entered. It being subsequently discovered that the jury had not been sworn, the judge (the defendant having gone away) directed that the entry of the nonsuit should be expunged, and the cause struck out. Upon an application by the defendant for the costs of the day, the court,—thinking that both parties were in default,—directed that the costs of the day and of the motion should be costs in the cause.

This was an action against an attorney for alleged negligence. The cause was entered for trial at the last Summer Assizes at Croydon, and was called on at the sitting of the court at 9 o'clock on the morning of the 18th of August: but, in consequence of some misunderstanding as to the judge's arrangement of the course of business, neither the plaintiff nor his counsel or attorney or witnesses appeared. The defendant was present with his counsel. After waiting a few minutes, and the plaintiff not appearing, the learned judge directed a nonsuit to be entered, which was accordingly done. The defendant with his witnesses then left the court, and returned to town.

Shortly afterwards the plaintiff came into court, when it was for the first time discovered that the jury had not been sworn. The judge thereupon, after some [727] delay, to give the defendant a chance of appearing, ordered, that, instead of a nonsuit, the cause should be struck out.

The defendant claimed, under these circumstances, to be entitled to the costs of the day; but the master declined to tax them without the order of the court.

Parry, Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the master should not be at liberty to tax and allow the defendant his costs of the day. He referred to Archbold's Practice, 10th edit. pp. 1399, 1424.

Prentice and Pearce now shewed cause. The defendant is not entitled to any costs. He ought to have taken care that the jury were sworn. *Sleeman v. The Copper-Miners of England*, 5 D. & L. 151, shews that the court has a discretion with regard to these costs; and, the defendant himself being in fault here in not seeing that the jury were sworn before asking for a nonsuit, the court will not exercise its discretion in his favour. In *Pope v. Fleming*, 5 Exch. 249, a plaintiff having entered his cause on the commission day for trial at the Assizes, on the following day caused it to be called on out of its turn, in order that a witness might be called on his subpoena: that was accordingly done, and, the witness not appearing, the plaintiff withdrew the record, having been told by the judge's clerk that he might re-enter it before 12 o'clock: the defendant then delivered a *ne recipiatur*, on the ground that a record could not be entered after the sitting of the court; and the judge so ruled: the witness afterwards came into court, and the plaintiff then offered to try, or that the cause should stand at the bottom of the list, but the defendant refused: it was held that the defendant was not entitled to the costs of the day, [728] since it was through his own default that the cause was not tried.

Parry, Serjt., and Murray, were called upon to support the rule. The question is, who was in default on the morning of the 18th of August, the plaintiff or the defendant. The defendant having got a rule under the 99th section of the Common Law Procedure Act, 1852 (a), the master declined to tax his costs, but referred the matter to the court. [Willes, J. The 99th section does nothing more than alter the form of the rule.] In *Allott v. Beaucroft*, 4 D. & L. 327, it was held that a defendant is entitled to move for judgment as in a case of a nonsuit,—for which this proceeding is a substitute,—although the cause, on being called on for trial, was struck out of

(a) Which enacts that "a rule for costs of the day for not proceeding to trial pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit, without motion."

the list in consequence of neither plaintiff nor defendant appearing. Parke, B., there said: "The plaintiff has not proceeded to trial according to the course and practice of the court, but has been guilty of default; and the defendant might either have instructed counsel to appear and have the plaintiff called, or he might, as he has done, apply to this court for judgment as in case of a nonsuit. The affidavit, however, discloses a sufficient excuse to induce us to discharge the rule on a peremptory undertaking. If the defendant can shew by affidavit that any costs of the day have been incurred in consequence of the default, he ought to have them." [Williams, J. *Morgan v. Fernyhough*, 11 Exch. 205, rather shakes that case. It was there held that a defendant is not entitled to the costs of the day for not proceeding to trial pursuant to notice, where no one appeared on his [729] behalf when the case was called on. Pollock, C. B., in giving judgment, says: "A case was cited by the defendant's counsel of *Allott v. Bearcroft*, on which I remarked during the argument that the question whether the party was entitled to costs was not then before the court: and what the learned judge is reported to have said, namely, that, if the defendant could shew that any costs of the day have been incurred in consequence of that default, he ought to have them, could hardly be taken to have reference to a case in which the default was one in which the defendant himself participated."] In *Powell v. James*, 12 M. & W. 100, it was held to be sufficient for the affidavit on a rule for costs of the day for not proceeding to trial, to shew a default in not proceeding to trial, pursuant to notice, and not countermanding in due time, and that it need not shew that costs have actually been incurred by the defendant. The present case is distinguishable from *Morgan v. Fernyhough*, because here the defendant was ready to try, and all the expenses of a trial had been incurred.

ERLE, C. J. I am of opinion that this rule should be discharged. I think there is no strict right in the defendant to the costs he claims, but that the matter is entirely in our discretion. It is contended that the defendant ought to be in the same position as if he had obtained a nonsuit. But he has not got a nonsuit; and his failure arises from his own neglect to see that the jury were properly sworn. I do not find that any blame is attributable to either of the parties: the plaintiff's absence was owing to a misapprehension of what the judge had said on the previous day as to the course of business. There was some degree of default on both sides; and I think the justice of the case will [730] be met by discharging this rule, and directing that the costs of the day and of this rule should be costs in the cause.

WILLIAMS, J. I am entirely of the same opinion. I think the law was correctly stated by Parke, B., in *Allott v. Bearcroft*, 4 D. & L. 327; and I think there is nothing in the decision in *Morgan v. Fernyhough*, 11 Exch. 205,—where it was held that a defendant cannot come to the court and ask for costs which result from his own neglect,—to shake that dictum. Taking, then, the law to be as laid down by Parke, B., in *Allott v. Bearcroft*, the plaintiff in this case failing to appear when the cause was called on, it was competent to the defendant to pursue one of two courses: either he might have got the cause struck out, and then come to the court and asked for costs of the day, or he might have insisted upon a nonsuit. If he adopted the latter course, it was incumbent on him to see that all things were regular. Here, the defendant was not in a situation to ask for a nonsuit, because the jury were not sworn. I therefore think that the observation of Pollock, C. B., in *Morgan v. Fernyhough* applies here, viz. that, if the defendant had exercised due care in the matter, the costs of the day would not have been thrown away, but that the defendant might have had a nonsuit entered, with the usual consequences attendant thereon. On the other hand, it is impossible not to see that the plaintiff was also in default. Although he swears that he understood the learned judge to have intimated on the previous day that he would not take common jury causes on the morrow, I think he must have laboured under some misapprehension as to what passed; for, if any such announcement had been made, the learned judge would not have adopted the course he did. Both parties, therefore, being in some [731] degree in fault, I think justice will be done by discharging this rule upon the terms mentioned by my Lord.

WILLES, J., and KEATING, J., concurring,

Rule discharged accordingly.

GEORGE COLLINS HOUNSELL, an Infant, by HERBERT EUSTACE HOUNSELL, his Next Friend, v. SIR JOHN HENRY GREVILLE SMYTH, BART., AND OTHERS.
Feb. 1st, 1860.

[S. C. 29 L. J. C. P. 203; 1 L. T. 440; 6 Jur. N. S. 897; 8 W. R. 277. Followed, *Binks v. South Yorkshire Railway*, 1864, 3 B. & S. 252. Referred to, *Indermaur v. Dames*, 1866-67, L. R. 1 C. P. 285; L. R. 2 C. P. 311; *Lowery v. Walker*, [1910] 1 K. B. 199; [1911] A. C. 10. Adopted, *Latham v. Johnson*, [1913] 1 K. B. 404.]

An owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance.—A declaration stated that the defendants were seised of certain waste land upon which was a quarry that was worked by a certain person subject to the payment of certain royalties to the defendants; that the waste-land upon which the quarry was situate was uninclosed and open to the public, and that all persons having occasion to pass over the waste had been used and accustomed to go upon and across the same without interruption or hindrance from and with the licence and permission of the owners of the waste; that the quarry was situate near to and between two public highways leading over the waste, and was precipitous, &c., and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one of such roads to the other beside or near the quarry; that the defendants, knowing the premises, negligently and contrary to their duty left the quarry unfenced, and took no care and used no means for protecting the public or any person so accidentally deviating from the said roads, or passing over the waste, from falling into the quarry; and that the plaintiff, having occasion to pass along one of the said roads, and having by reason of the darkness of the night accidentally taken the wrong road, was crossing the waste for the purpose of getting into the other, and, not being aware of the existence or locality of the quarry, and being unable by reason of the darkness to perceive the same, fell in and was injured:—Held, that the declaration disclosed no legal ground of complaint.

The declaration stated, that, before the time of committing the grievance therein-after mentioned, the defendants were seised in their demesne as of fee, as tenants in common, and possessed of certain waste-land, parcel of the manor of Henbury, in the county of Gloucester, and that, long before the time of committing the said grievance, a quarry had been and was opened upon and within the said land for the getting of stone, which quarry, before and at the time aforesaid, was being actually worked by a certain person with the licence and permission of the defendants, and [732] upon the terms of payment to the defendants of certain rents and royalties for the licence and privilege of working the same, and of getting and taking away the stone thereof: That the said waste-land upon and within which the said quarry was and is situate, was and is wholly uninclosed and open to the public, and that all persons having occasion to cross and pass over the said waste-land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the licence and permission of, the owners of such waste-land, and that the said quarry was and is situated near to and between two public highways leading over the said waste-land, and was and is precipitous and of great depth and width, and dangerous to persons who might accidentally deviate or stray respectively, or who might have occasion to cross over the said waste-land for the purpose of passing from one of such roads to the other of them beside or near the said quarry: That the defendants, well knowing the premises, negligently and improperly, and contrary to their duty in that behalf, left the said quarry wholly unfenced and unguarded, and took no care, and used no means whatever for guarding or protecting the public or any person so accidentally deviating from the said roads respectively, or passing over the said waste-land, from falling into the said quarry and being thereby killed or greatly hurt and disabled: That, on the night of the 9th of January, 1859, having occasion to pass along one of the said roads, and having by reason of the darkness of the night accidentally taken and proceeded along the wrong road, the plaintiff was crossing the said waste-land so lying open and uninclosed, towards and for the purpose of getting into the other of them, which he had so occasion to use as aforesaid, and, not being aware of

the existence or locality of the said quarry, and being unable by reason [733] of the darkness to perceive the same, or the edge or brink thereof, and the same being as aforesaid wholly unfenced and unguarded, he, by reason thereof, and of the negligence of the defendants in that behalf, was precipitated down and into the said quarry to a great depth, and thereby was seriously bruised, hurt, wounded, and disabled, and his leg was broken, and he suffered great pain and anguish, and had sustained permanent injury, and incurred great expence in endeavouring to get cured of the said injuries, and had been and was otherwise greatly damaged. Claim, 100l.

The defendants pleaded, amongst other pleas,—thirdly, that the waste-land on which the said quarry was and is situate, was not and is not wholly uninclosed and open to the public, as alleged,—fifthly, that the said quarry was not and is not situate near to and between two public highways leading over the said waste-land, in manner and form as alleged.

The defendants also demurred to the declaration, the ground of the demurrer stated in the margin being,—“that the facts stated shew no duty on the part of the defendants as against the plaintiff to fence or guard the quarry, or to guard or protect the public from falling into the quarry: and that no cause of action is disclosed by the declaration.” Joinder.

The plaintiff demurred to the third and fifth pleas, the grounds of demurrer stated in the margin thereof respectively being:—“that it is not essential to the plaintiff’s right to recover, that the waste-land should be wholly uninclosed;” and “that it is not essential to the plaintiff’s right to recover, that the quarry should be situate near to and between two public highways.” Joinder.

Karslake, in support of the demurrer (*a*). The declaration discloses no cause of action. The only pretence for saying that any obligation to fence the quarry is cast upon the defendants as the owners of the waste is, the allegation that “all persons having occasion to cross or pass over the said waste-land have been used and accustomed to go along, upon, and across the same without interruption or hindrance from, and with the licence and permission of the owners of such [735] waste-land.” But even an express licence given to a man to go over the land of another creates no such obligation. [Byles, J. When I first knew the county of Cambridge, the greater part of the land was open and uninclosed; and, save where the growing crops offered an impediment, any person might ride or walk all over it.

(*a*) The points marked for argument on the part of the defendants were as follows:—

“That the declaration discloses no cause of action against the defendants:

“That the facts stated in the declaration do not shew that any duty to guard the quarry rested or was imposed upon the defendants, and that no facts or state of circumstances imposing such duty is shewn to have existed:

“That it is shewn by, or at all events is to be inferred from, the declaration, that the quarry was in the possession of a third person, who was working the same, and the duty of fencing or guarding it rested, if on any one, on such third person: the defendants at all events are not alleged to have been in possession or occupation of the quarry:

“The declaration shews that the plaintiff himself was guilty of such acts of negligence as disentitle him to sue the defendants:

“The third plea is good in substance: it traverses an allegation in the declaration:

“The allegation is made for the purpose of shewing a duty on the part of the defendants to fence or guard the quarry:

“The plaintiff has made the statement which is traversed material, and the statement is made for the purpose of shewing that the quarry was in such a position, and situated on ground of such a character, as to render it the duty of the defendants to guard it: he cannot reject the allegation so traversed as immaterial:

“The fifth plea is good in substance, and mainly on the same grounds as are relied upon in support of the third plea: the plaintiff has made it essential to his right to maintain his action that the quarry should be situated as described by him:

“There is one connected statement of facts from which the plaintiff seeks to contend that a duty was imposed on the defendants to guard the quarry, and the plaintiff cannot now reject a part of the statement of facts so made, and contend that such part of the statement is not material.”

It could hardly, I apprehend, be contended that the owners were bound to fence every dangerous spot, at the peril of being sued if one of the public should meet with any mischance.] Any person availing himself of the supposed permission to cross over this waste-land, must accept it subject to the perils attending it. This is very much the case that is put by Abbott, C. J., in *Blundell v. Catterall*, 5 B. & Ald. 315. "Many of those persons," he says, "who reside in the vicinity of wastes and commons walk or ride on horseback in all directions over them for their health or recreation, and sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering-places this practice prevails to a very great degree; and yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil." The true principle is that laid down in *Blithe v. Topham*, 1 Roll. Abr. Action sur Case (N.), translated, 1 Vin. Abr. 554, pl. 4, Cro. Jac. 158. It is there said that, if A., being seised of a waste adjoining a highway, digs a pit in the waste, within thirty-six feet of the way, and the mare of B. escapes into the waste, and falls into the pit and is killed, yet B. shall not have any action against A.; because the making of the pit in the waste, and not in the highway, was no wrong to B., but it was by the default of B. himself that his mare escaped into the waste. In *Jordin v. Crump*, 8 M. & W. 782, where the case is put [736] of a man, who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it, Alderson, B., says: "The party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for, the falling into it would be the act of the injured party himself." In *Seymour v. Muddor*, 16 Q. B. 326, the declaration stated that the defendant was possessed of a theatre, and of a stage therein, on which dramatic entertainments were given, and of a dressing-room for chorus-singers, and of a floor underneath the stage, in which floor was a cut or hole, and along which floor the performers at the theatre were accustomed to pass from the said dressing-room to the back of the stage; that the plaintiff was hired by the defendant to sing on the stage as a chorus-singer; that it then became the defendant's duty to cause the floor to be so sufficiently lighted and the hole so fenced as to prevent accidents to persons passing from the dressing-room to the stage; that the defendant, well knowing the premises, suffered the floor to be insufficiently lighted, and the hole to be open without any sufficient fence, so that the plaintiff by falling therein was injured. It was held that the declaration was bad, in arrest of judgment, because the facts stated did not raise the duty a breach of which was complained of. So, in *Southcott v. Stanley*, 1 Hurlst. & N. 247, the declaration alleged that the defendant was possessed of an hotel into which he had invited the plaintiff to come as a visitor, and in which there was a glass-door which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant, and with his knowledge, and without any warning from him, lawfully opened for the purpose [737] aforesaid, as a door which was in a proper condition to be opened; nevertheless, that, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition, and unfit to be opened, and by reason of the said door being in such insecure and dangerous condition, and of the carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff: and it was held that the declaration disclosed no cause of action against the defendant. In *Deane v. Clayton*, 7 Taunt. 522, Dallas, C. J., says: "If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public or individuals having a right over it, an action will lie, because there is a right in others to pass along without interruption: but if there be no right of way, I may, with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained." In *Barnes v. Ward*, 9 C. B. 392, the excavation was immediately adjoining a public footway, and so amounted to a public nuisance. And in *Hardcastle v. The South Yorkshire Railway Company*, 4 Hurlst. & N. 67, it was held that, where an excavation is made near to, but not substantially adjoining a public highway, at common law, no action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation. Pollock, C. B., delivering the judgment of the court in that case, lays down the true principle which

must govern the present. "When," he says, "an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in case of a horse or carriage-way, might, by the sudden [738] starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences: but, when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different."

Kingslake, Serjt., *contra* (a). The declaration is so framed as to bring the case precisely within the principle of *Barnes v. Ward*, 9 C. B. 392. It alleges that the waste-land upon and within which the quarry is situate is wholly uninclosed and open to the public, [739] and that all persons having occasion to cross or pass over the waste land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the licence and permission of, the owners of such waste-land, and that the quarry is situate near to and between two public highways leading over the said waste-land, and is precipitous and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the said waste-land for the purpose of passing from one of such roads to the other of them beside or near the said quarry. In *Corby v. Hill*, ante, vol. iv., p. 556, the owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage. It was held that A. was liable to an action for such injury. Cockburn, C. J., there says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. Could they have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not." And Willes, J., says: "One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it." *Seymour v. Maddox* and *Southcote v. Stanley* do not touch the question. In *Chapman v. Rothwell*, 1 Ellis, B. & E. 168, the plaintiff, as admin-[740]-istrator to his deceased wife, declared that the defendant was in the occupation of a brewery and office, and a passage leading thereto from the public street used by the defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street: yet that the defendant wrongfully and negligently permitted a trap-door in the floor of the passage to be and open remain without being properly guarded and lighted; and that the wife, who had been to the office as a customer of the defendant, and

(a) The points marked for argument on the part of the plaintiff, were as follows:—

"1. That the declaration is good, because the plaintiff passed over and across the waste-land with the licence and permission of the defendants, and was not a trespasser in so doing: he was entitled to protection from dangerous excavations made by the defendants or others for them near the line of his course,—*Barnes v. Ward*, 9 C. B. 392; and the defendants were the persons bound to afford this protection, by fencing or otherwise, as the owners of the dangerous land immediately adjoining the quarry, and of the quarry itself, which was worked for their benefit:

"2. That the third plea is bad, because what is essential to the plaintiff's right is, that all persons were used and accustomed to pass over and across the waste-land without interruption or hindrance, and with the licence and permission of the owners; and, if this be so, it is immaterial whether the waste-land be wholly and in every part uninclosed and open:

"3. That the fifth plea is bad, because the declaration shews a duty in the defendants to fence or protect, arising from the plaintiff's being upon the waste-land by the defendants' licence and permission, and not being a trespasser when upon and crossing the waste-land; and, if so, it is immaterial in what part of the waste-land the quarry was situate; and the allegation of its being situate near to and between two public highways, was immaterial.

otherwise in the defendant's business, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open and not properly guarded and lighted, whereby she was killed: and it was held, on demurrer, that the duty of the defendant, and breach, sufficiently appeared. [Keating, J. That case falls within the class of cases where the liability results from an invitation being held out to third persons to go upon the premises.] The real question is whether the plaintiff was lawfully upon the waste, or there as a trespasser. If the former, the defendants are clearly responsible: and, even if the latter be the true state of things, the defendants will be responsible if they have omitted the reasonable precautions which the law requires of all owners of lands adjoining a public way. This is consistent with the ruling of Lord Kenyon in *Brock v. Copeland*, 1 Esp. N. P. C. 303, and of Tindal, C. J., in *Sarch v. Blackburn*, 4 C. & P. 297, M. & M. 505. In *Furnton v. Wheeley*, 2 D. & L. 203, 208, Pollock, C. B., in the course of the argument, puts this case,—“Suppose,” he says, a “person digs so near a highway as to render it dangerous, unless fenced by day and lighted by night, that might be a trespass to the soil for which the lord of the manor, or owner of the land, [741] could maintain trespass; but, there being also a duty to guard the public, a person injured would have a right to sue in case.”

Karslake was not called upon to reply.

WILLIAMS, J. I am of opinion that the defendants in this case are entitled to judgment. I will first consider the declaration as if it were without the allegation “that all persons having occasion to cross or pass over the said waste-land have been used and accustomed to go upon, along and across the same without interruption or hindrance from, and with the licence and permission of, the owners of such waste-land:” and upon authority, as well as upon the reason of the thing, I think the declaration is bad. So reading the declaration, the averments are, that the defendants were possessed of a waste upon which a stone-quarry was opened and was being worked with their licence; that the waste was uninclosed and open to the public, and the quarry was situate near to and between two public highways leading over the waste, and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one of such roads to the other of them beside or near to the quarry; that the defendants negligently, and contrary to their duty, left the quarry unfenced and unguarded, and used no means to protect the public or any person so accidentally deviating from the said roads, or passing over the waste, from falling into the quarry, and being thereby killed or hurt; and that the plaintiff, having occasion to pass along one of the roads, and having by reason of the darkness taken the wrong one, was crossing the waste for the purpose of getting into the other road, and not being aware of the existence or locality of the [742] quarry, fell in and was hurt. Now, it is not alleged that the quarry adjoined the public highway, but that it was situate near to and between two public highways leading over the waste, and that it is “dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one road to the other.” It seems to me that, under these circumstances, the law imposes no duty upon the proprietors of the waste to fence the quarry, nor does it render them responsible to persons who may deviate from one or other of the roads and stray upon the waste. The law as to this was long ago settled in *Blith v. Topham*, Cro. Jac. 158, which has been confirmed and acted upon in many subsequent cases. It was there held, that, if A., seised of a waste adjacent to a highway, digs a pit within thirty-six feet of the highway, and the mare of B. escapes into the waste and falls into the pit, and dies there, yet B. shall not have an action against A.; because the making of the pit in the waste, and not in the highway, was not any wrong to B., but it was the default of B. himself that his mare escaped into the waste. The authority of that case is confirmed by the distinction drawn by this court in *Barnes v. Ward*, 9 C. B. 392, and pointed out by the court of Exchequer in *Hardcastle v. The South Yorkshire Railway Company*, 4 Hurlst. & N. 67. The general doctrine as to the non-liability of owners of land to fence excavations therein was qualified to this extent by those amongst other cases, that the excavation must not be made so near to a public road as to amount to a public nuisance, and that, if it do amount to a public nuisance, and a particular injury result therefrom to an individual, an action will lie,—on the well-established principle of law, that, where a particular injury results from a public nuisance, it is the subject of

compensation in damages to [743] the individual by whom such injury is sustained. The allegation here amounts to no more than this, that there was a pit or quarry upon the waste somewhere between two public roads,—not so near to either as to constitute a public nuisance, but so near as to be dangerous, not to persons passing along either of the public ways, but to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from the one road to the other. This state of things clearly gives no right of action, unless it be shewn that the excavation is so near to the road as to amount to a public nuisance,—a limitation of the rule which is clearly founded upon reason and good sense; for, if the public have a right to the undisturbed user of a way, the owner of the adjoining land cannot deprive them of the enjoyment of that right, which he would substantially do by digging a precipice by the side of it. That would be a public nuisance, which is not charged here. Assuming, therefore, that the declaration had been framed as I have above suggested, I am clearly of opinion that it would not have disclosed any cause of action. Then, how is the case altered by the introduction of the allegation “that all persons having occasion to cross or pass over the said waste-land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the licence and permission of, the owners of such waste-land?” No right is alleged: it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint,—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils. Suppose the [744] owner of land near the sea gives another leave to walk on the edge of a cliff, surely it would be absurd to contend that such permission cast upon the former the burthen of fencing. Can it make any difference that there is a public highway open to but at some distance from the cliff? A resemblance has been suggested between this case and that of *Corby v. Hill*, ante, vol. iv., p. 556; but there is really no analogy between them. In that case the defendant held out an inducement to persons to come upon the land, by permitting it to be used as the means of access to his house, and therefore he was bound to warn persons so using the road of the obstruction which had been placed there. The principle upon which that case was decided very closely approximates to that which is stated in *Barnes v. Ward*. All that can be said in this case is, that the plaintiff had a tacit permission to cross the waste. It was not the fault of the defendants that he was ignorant of the existence and locality of the quarry, and of the danger he incurred by crossing the same in the dark. Upon the whole, it seems to me that this case is not distinguishable from *Blyth v. Topham*, and does not fall within the exception established by *Barnes v. Ward*, and acted upon in *Harlecastle v. The South Yorkshire Railway Company*. I therefore think our judgment must be for the defendants.

KEATING, J.(a). I also think this declaration cannot be sustained. My Brother Kinglake has contended that the allegations as to the proximity of the quarry to the roads, and the danger arising therefrom, are tantamount to the allegations which were held to entitle the plaintiff in *Barnes v. Ward* to recover. But there the allegation was, that the defendant was possessed of a [745] messuage, with the appurtenances, near to a common and public footway, in front of and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said footway, and abutting upon and opening into the same, there then was a large hole, &c.,—which is very different from that which is alleged here. It is not alleged here that the quarry was so near to the public roads as to be dangerous to persons passing along them, but only that it was “dangerous to persons who might accidentally deviate or stray respectively, or who might have occasion to cross over the said waste-land for the purpose of passing from one of such roads to the other of them, beside or near the said quarry.” In *Barnes v. Ward*, the excavation was so near the public footway as to interfere with the rights of the public, and so was a public nuisance. The relative rights of the public and of the owner of the land are thus dealt with by Pollock, C. B., in *Harlecastle v. The South Yorkshire Railway Company*, 4 Hurlst. & N. 67, 74,—“When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness,

(a) Byles, J., had gone to Chambers.

or, in the case of a horse or carriage-way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but, when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent; and, if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that [746] the proper and true test of legal liability is, whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise,—if in every case it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous. When a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself in the use of his land adjoining, to any extent, further than that he should not make the use of the way dangerous to the persons who are upon it and using it; to do so would be derogating from his grant: but he gives no liberty or licence to the persons using the way to trespass upon his adjoining land; and, if they in so doing come to misfortune, we think they must bear it, and the owner of the land is not responsible." So, here, I think, that, to throw upon the owners the obligation of fencing this excavation in their waste-land adjoining the roads, it ought to be shewn that the excavation was so near to the roads as to be dangerous to persons lawfully using them. There is no obligation cast upon the owner of land to fence a pit or excavation which is dangerous only to those who deviate from the road and so become trespassers. For these reasons, I concur with my Brother Williams in giving judgment for the defendants.

Judgment for the defendants.

[747] GREEN v. SICHEL AND OTHERS. Feb. 25th, 1860.

[S. C. 29 L. J. C. P. 213; 6 Jur. N. S. 827; 8 W. R. 663.]

A. sold goods to B., to be delivered "free on board" at Liverpool, for Trieste. The goods were placed by A. on board a steamer, to be delivered to the order of B. By the custom of the trade, where goods are sold, to be delivered free on board, the price is not payable until production of a bill of lading or some other document giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly increased amount of freight was paid, and B., when informed of that fact, declining to have anything to do with the matter A., (who the jury found had not contracted to pay the freight) was unable to comply with the custom by producing the bill of lading:—Held, that B. by his conduct dispensed with the strict compliance with the custom, and that consequently A. was entitled to maintain an action for the price of the iron without producing a bill of lading.

This was an action brought by the plaintiff to recover 243l. 14s. 10d., the price of certain iron sold by him to the defendants in March, 1859, to be delivered "free on board" at Liverpool, for Trieste.

The cause was tried in the Mayor's court, London, before the recorder. It appeared that no shipping instructions were given at the time the contract was entered into; but eventually the plaintiff was directed to put the iron on board the first steam-vessel for Trieste, deliverable to the defendants' order. There being at this time war between France and Sardinia and Austria, there were no sailing vessels trading between Liverpool and Trieste, and in consequence of the great demand for tonnage steam freights had risen considerably. It was proved to be the usage at Liverpool to pre-pay freight for goods sent by steam-vessels: and Messrs. Bibby & Son, who were the sole steam-carriers between that port and Trieste, never gave a mate's receipt, and, having received the iron on board, refused to give a bill of lading for it without being paid a much higher freight than had theretofore been charged. The plaintiff's agent shewed the defendants the correspondence he had with Bibby & Son upon the subject, and asked them if he should pay the increased freight; but the defendants said they would have nothing to do with it. The plaintiff's agent at the time of shipping the

iron made out a bill of lading stating it to have been shipped by the defendants, and making it deliverable to their order; and he directed Bibby & Son to hold the iron for the plaintiff, but [748] telling them at the same time that it was to be at the disposal of the defendants.

It was contended on the part of the defendants that there was an implied contract on the part of the plaintiff to pay the freight; and they gave evidence of a custom in the trade, that, where goods are sold, as the iron in question was, to be delivered free on board, the seller was not entitled to be paid the price without producing a bill of lading or mate's receipt to shew that the goods are actually shipped.

For the plaintiff it was insisted that there was no contract on his part, express or implied, to pay the freight; that the circumstances which prevented his obtaining a bill of lading or mate's receipt dispensed with the obligation to produce it before demanding payment for the goods; and that, as the goods were shipped and were placed at the disposal of the defendants, they were bound to pay the price of them.

The learned recorder, after telling the jury, that, in order to make it available, a custom must be so general and well known that both buyer and seller must be presumed to have been cognizant of it, and to have contracted with reference to it, left the following questions to them,—first, whether by the custom of the trade the price of goods which are sold to be delivered free on board is payable to the seller before production of a bill of lading or some other document giving evidence of such goods being on board,—secondly, whether the plaintiff in the present case undertook to pay the freight and to obtain a bill of lading,—thirdly, whether, if he did so undertake, he was subsequently released from such undertaking,—fourthly, whether the plaintiff or his agent parted with the control over the goods,—fifthly, whether the plaintiff or his agent placed the goods under the control of the defendants,—sixthly, whether, when the goods [749] were placed on board by the plaintiff or his agent, it was done with the intention of delivering them to the defendants.

The jury answered the first and second questions in the negative (as to the latter saying that there was no contract on the part of the plaintiff to pay the freight, but he undertook to do it as a matter of courtesy), and the fourth, fifth, and sixth in the affirmative.

The learned recorder directed that a verdict be entered for the defendants; but he reserved leave to the plaintiff to move to enter a verdict for him for 243l. 14s. 10d., if the court should be of opinion that he was entitled to recover notwithstanding the finding of the jury upon the first two questions submitted to them.

O'Malley, Q. C., on a former day in this term, accordingly obtained a rule nisi to enter a verdict for the plaintiff, on the grounds,—first, that, upon the finding of the jury, the verdict ought to be entered for the plaintiff,—secondly, that the finding of the jury on the first question put to them was not material,—thirdly, that the judge ought, upon that finding, to have asked the jury whether the delivery of such document shewing that the goods had been placed on board had been virtually dispensed with,—fourthly, that the finding of the jury upon that point was against the evidence. It was at the same time reserved to the defendants to contend, upon the argument of the rule, that the findings of the jury were not warranted by the evidence.

James Wilde, Q. C., and H. James, on a subsequent day, shewed cause. There was no evidence to warrant the finding of the jury upon the fourth, fifth, and sixth questions which were submitted to them by the learned recorder. It was insisted for the defendants [750] at the trial, that there was one invariable and uniform custom; that, upon a contract for the sale of goods to be delivered "free on board," the buyer was not liable to be called upon for payment until a bill of lading or a mate's receipt was handed over to him. The finding of the jury upon the first question put to them distinctly affirmed that custom. It was proved that Bibby & Son never gave mates' receipts, and that it was not the practice for the masters of steam-vessels to give out bills of lading until the freight was paid. It was contended on the part of the plaintiff that the goods were under the control of the defendants from the moment they were put on board: but it was not shewn that they had any notice that the goods were on board until after the vessel had left Liverpool. If the contract was as the jury have found, the time for payment of the price of the iron had not then arrived. The plaintiff was bound to hand the defendants some document of title before he was entitled to insist upon payment: *Schuster v. McKellar*, 7 Ellis & B. 704. [Erle, C. J.

The mere putting the goods on board was not enough to pass the property in them to the buyers.] The plaintiff should have paid the freight, and then he might have recovered it from the buyers.

O'Malley, Q. C., and C. Robinson, in support of the rule. It was never contested at the trial that the iron was put on board in fulfilment of the plaintiff's contract. There was no question as to the propriety of the shipment at the time it was made. When the fact of the excessive freight being demanded was communicated to the defendants, and they declined to have anything to do with the matter, if the plaintiff had paid it, he could not have been said to have done so at the request of the defendants. The iron was by the bill of lading [751] made deliverable to the defendants' order, and was completely under their control. In *Browne v. Hare*, 4 Hurlst. & N. 822, the defendants, merchants at Bristol, through a broker, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam in September, 1857, at 48l. 15s. per ton, to be paid for on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship trading between Rotterdam and Bristol five tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shippers' order," and the plaintiffs indorsed it specially to the defendants. On the same day, the plaintiffs inclosed in a letter to the broker the bill of lading, invoice, and bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th the ship with the oil on board was run down in the Bristol Channel, and the oil totally lost. The plaintiff's letter of the 8th arrived at Bristol on the afternoon of the 10th, in due course of post, but after business hours. On the morning of the 11th the broker left with the defendants the bill of lading, invoice, and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered, the jury stated, that, in their opinion, according to mercantile usage, the risk of the [752] loss of the oil was on the defendants. It was held by the Exchequer Chamber (affirming the judgment of the court of Exchequer), that the property in the oil passed to the defendants when it was placed "free on board," in performance of the contract; and that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it "free on board," or for the purpose of retaining a control over it and continuing to be owners, contrary to the contract. Crompton, J., in the course of the argument, says: "The law is correctly stated by Lord Brougham in his judgment in *Cowas-jee v. Thompson*, 5 Moore's P. C. 165, viz. 'that, when goods are sold in London, free on board, the cost of shipping them falls on the seller, but the buyer is considered as the shipper.'" In *Cowas-jee v. Thompson*, goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn was duly accepted by the purchasers. The sellers retained the mate's receipt for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. It was held by the judicial committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at Bombay) that trover would not lie for the goods at the suit of the vendors, for that, on their delivery on board the vessel, they were no longer in transitu, so as to be stopped by the sellers; and that the retention of the mate's receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the [753] mate were not essential to the transaction between the seller and purchaser. Lord Brougham there said: "Numberless reasons occur to shew that no such doctrine can have any foundation as the one on which the judgment below proceeded. The lighterman may, and generally does, take one receipt for all the goods he delivers, without specifying any parcel. Then, how can the complete delivery of each person's goods, and their property finally vesting in him, depend on the possession of a document which only one of them can by possibility hold? But the best answer to the position

contended for, and the best removal of it from the case is, the obvious consideration that the taking a receipt is a mere accident, not essential to the transaction between the buyer and seller, however good for binding a third party, the ship-owner or his captain or mate; and, no receipt being necessary, no non-delivery of it can affect the proceeding." The first question, therefore, which was put to the jury was immaterial and irrelevant. It is clear that the property in the iron passed to the defendants upon the shipment, and the custom has nothing to do with the question.

Cur adv. vult.

ERLE, C. J., now delivered the judgment of the court :

In this case we are of opinion that the rule for entering a verdict for the plaintiff ought to be made absolute, with costs. It appears by the answers given by the jury to the fourth, fifth, and sixth questions put to them by the learned Recorder, that the plaintiff parted with the control over the goods,—that they were placed under the control of the defendants,—and that, when they were placed on board by the plaintiff, it was done with the intention of delivering them to the defendants.

[754] According to the case of *Brown v. Hare*, 4 Hurlst. & N. 822, these facts would establish the plaintiff's right to recover the price of the iron as sold and delivered, were they not qualified by the answer given to the first question put by the Recorder to the jury, finding that by the custom of trade the price of goods to be delivered F. O. B. is not payable before production of the bill of lading or some other document giving evidence of their being on board.

The objection to the plaintiff's recovering which this answer raises is, that, as he did not in fact produce any such document, he did not entitle himself to the price. But we are of opinion that the defendants cannot be allowed to take this ground. The sole purpose of the custom is obviously to certify the purchaser that the goods have been duly put on board pursuant to the vendor's contract.

In the present case, the defendants resisted payment, on the ground, that, notwithstanding the goods had been so put on board, the price was not payable till the bill of lading was obtained and handed to them, insisting that it was the plaintiff's duty as vendor to procure it, and refusing, for that cause, by their agent, when informed that the ship-owners declined to hand over the bill of lading till the freight was paid, to have anything to do with the matter. The only contest, therefore, between the parties was, whether, besides putting the goods on board, it was the duty of the vendor, under the contract of sale, to procure the bill of lading, and to pre-pay the freight, at all events if that should be necessary in order to obtain the bill of lading. But the jury have found, in answer to the second question put to them, that the plaintiff did not undertake to pay freight or take out a bill of lading.

It appears, therefore, to us, that the defendants, having turned out to be in the wrong as to the excuse [755] they put forward for not paying the price, cannot now be allowed to set up the custom, and say they were not duly certified that the iron had been properly put on board; but that they must be taken to have discharged the plaintiff from the strict observance of it.

Rule absolute accordingly.

IN THE MATTER OF THE COMPLAINT OF THOMAS NICHOLSON THE YOUNGER AND ISALAH BIRT NICHOLSON AGAINST THE GREAT WESTERN RAILWAY COMPANY.
Feb. 25th, 1860.

Decision in *Nicholson v. The Great Western Railway Company*, ante, vol. v., p. 366,
reviewed and upheld.

In Michaelmas Term, 1858, Manisty, Q. C., obtained a rule on behalf of Messrs. Nicholson, coal-dealers in the Forest of Dean, calling upon the Great Western Railway Company to shew cause why a writ of injunction should not issue against them, pursuant to the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, injoining the said company to desist from giving an undue preference to the Ruabon Coal Company (Limited) for or in respect of the carriage of coals on their line of railway, and injoining them not to charge the complainants for the carriage of coals at a higher rate than they charge the Ruabon Coal Company, having a due regard to the circumstances, if any, which render the cost to the railway company of carrying for the one party less than the cost of carrying for the other,—with costs.

The motion was founded upon an affidavit of Thomas Nicholson, which stated in substance as follows :—

1. The complainants are dealers in coal raised in the [756] Forest of Dean, transmitting many thousand tons a year from Bullo and Lydney, by means of the Great Western railway, to their customers or agents for sale at or near the various stations of the railway and its branches.

2. Aaron Goold and John Heyworth are lessees under the Crown and proprietors of extensive mines and collieries in the Forest of Dean, and are engaged as partners in working the same ; and, in the course of such business, they raise annually many thousand tons of coal, the greater portion of which they transmit to Bullo, and there deliver to the Great Western Railway Company for the purpose of being carried by them, by means of their railway, either for the traders in coal who purchase the same from them deliverable by them there, or on their account to their customers or agents for sale thereof at or near the various stations of the railway and its branches.

4. Grange Court, the point of the Great Western railway nearest to Bullo and Lydney, which are both on the South Wales railway, is about five miles from the former and twelve from the latter.

5. The Great Western Railway Company is entitled to one fourth of the capital and one third of the revenue of the South Wales Railway Company, and to nominate one third of the directors thereof, with the privilege to supply all rolling stock ; and, by arrangement with the South Wales Railway Company, the whole of the coals of Bullo and Lydney intended to pass on to or over any portion of the Great Western Railway are there received by the Great Western Railway Company ; and that company charges freight as shewn on Table B. (ante, vol. v., p. 418) ; and Table C. (ante, vol. v., p. 413) shews the rates of carriage from Bullo and Lydney, and the Great Western and South Wales companies' proportions respectively,—the rate of charge to the Ruabon Coal Company (hereinafter [757] mentioned) being for a ton of 21 cwt. of 112 lbs., but to the complainants and other coal-traders in and from the Forest of Dean for a ton of 20 cwt. of 112 lbs.

7. The Great Western railway is the only railway by which the coal raised in the Forest of Dean can be forwarded to London, and the southern, eastern, and western parts of England, and the various stations of the Great Western railway and its branches.

8. Bullo and Lydney are the nearest points on the said line of railway to coal-mines in the forest ; and, since the opening of the South Wales railway to those stations, the complainants and Goold and Heyworth have been accustomed to deliver or purchase to be delivered at Bullo and Lydney respectively large quantities of coal for the purpose of being put on the railway there, and conveyed by the Great Western Railway Company to various stations on the said lines of railway for sale as aforesaid.

9. For the purpose of establishing the said trade, and promoting the sale of the coal at or near such stations, and conducting the said traffic, the complainants and Goold and Heyworth have expended very considerable sums of money, besides personal labour ; and, until the arrangement with the Ruabon Coal Company hereinafter complained of was entered into, a prosperous business was carried on by them ; but, since the said arrangement was entered into, their trade and that of the other coal-traders in the Forest of Dean has been and is thereby seriously injured.

10. Finding that the Great Western Railway Company did not afford them all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from the said line of railway to the various stations on their railways and branches, the complainants and other persons in the Forest of Dean have incurred a very considerable expense in providing a [758] large number of trucks to assist in the conveyance of the said coals from Bullo and Lydney to the stations of the Great Western railway.

11. Upwards of two years since, a joint-stock company was established for the working of certain mines of coal at Ruabon ; and the formation of the said company was mainly promoted by the directors and officials connected with the Great Western Railway Company.

12. The Ruabon Coal Company was duly registered pursuant to the 17 & 18 Vict. c. 31. [A copy of the memorandum of association, with the names and addresses of the subscribers, was set out.]

13, 14. The whole of the said persons are either officers of or persons immediately

connected with the Great Western Railway Company,—one being locomotive superintendent thereof, and having great power and influence over the supply of engine power and the various officers and servants of the railway, another being a director of the Great Western Railway Company, another the son of the secretary, another a clerk in the registration office of the company, and others clerks at the Paddington terminus.

15. The whole paid-up capital of the said company as registered amounts to 28,700l., and the whole has been subscribed by persons in the service of or connected with the Great Western Railway Company.

16. The Ruabon Coal Company has been actively engaged in raising and getting coal ever since its establishment, and sending it along and over the Great Western Railway Company's lines to the various stations thereon.

17. Ever since it commenced operations in July, 1856, most undue preference and partiality have been exhibited to and in favor of the Ruabon Coal Company, to the prejudice of the complainants and other persons interested in the Forest of Dean coal-trade.

[759] 18. The Great Western Railway Company, contrary to and in violation of their own acts, and of the statute 17 & 18 Vict. c. 31, make and give an undue or unreasonable preference or advantage to and in favor of the traffic in Ruabon coal, and subject the traffic of the Forest of Dean coal to undue or unreasonable prejudice or disadvantage.

19. The Great Western Railway Company also, in violation of the said acts, make and give an undue or unreasonable preference or advantage to or in favor of the Ruabon Coal Company in the same description of goods as those in which the complainants trade and traffic, and subject the complainants and their goods or traffic to undue or unreasonable prejudice or disadvantage.

20. The table marked B. (ante, p. 756) is a statement of charges made for the conveyance of coal by the Great Western Railway Company, and is in every respect correct, and shews a very great and undue advantage and preference afforded by the Great Western Railway Company in favor of the Ruabon Coal Company,—the whole of the coal brought from or sent on to the said line at Ruabon or its neighbourhood being sent by the Ruabon Coal Company.

21. An agreement was entered into on the 31st of July, 1856, between the Great Western Railway Company of the one part, and the Ruabon Coal Company of the other part,—see the agreement, ante, vol. v., p. 383 (a).

23. The contents of the agreement were not known to the Forest of Dean traders until after June, 1857.

24. When the agreement was made, the Great Western Railway Company and the Ruabon Coal Company knew that a very small part of the Forest of Dean coal was or would be sent to London (which is beyond 100 miles from Grange Court), or to places [760] beyond 100 miles from Grange Court; and the fact is that nine tenths of it, or thereabouts, has been and is sent to stations on the Great Western railway which are within 100 miles from Grange Court and above 100 miles from Ruabon, and to which stations large quantities of the Ruabon coal are sent, and which come into unfair competition with the Forest of Dean coal, to the great prejudice of the complainants and the coal-traders and owners of collieries in the Forest of Dean; and the complainants verily believed that such agreement was framed by the railway company for the express purpose of bringing the coal of the Ruabon company into unfair and unreasonable competition with coals coming from the Forest of Dean.

25. There are at least seventy stations which are within 100 miles of Grange Court, to which nearly the whole of the Forest of Dean coal has gone and now goes, every one of which stations is more than 100 miles from Ruabon, and at a great number of which stations the Ruabon Coal Company have brought and bring their coals into undue and unfair competition with the coals of the complainants and of other coal-dealers in the Forest of Dean: and Mr. Saunders, the secretary of the Great Western Railway Company, has admitted, as the fact is, that the average receipts per ton for the tonnage and terminals of all coals sent from Bullo and Lydney to stations on the Great Western railway is 4s., which is equal to 8,16ths of a penny per ton per mile and terminals for a distance of sixty miles.

26, 27. South of Banbury there are only twenty-four stations which are beyond 100 miles from Grange Court, to ten of which the complainants have never sent any

coals from the Forest of Dean : and north of Banbury the district is not accessible to Forest of Dean coal, in consequence of its proximity to northern coal-fields, with narrow guage communications.

[761] 28. The offer to dealers in Forest of Dean coal of an agreement similar to the Ruabon coal agreement is manifestly delusive and a mere cloak for concealing undue favor and partiality to the Ruabon Coal Company in their coal-traffic.

29. The circumstances herein appearing, coupled with the position of the stations, sufficiently prove that the agreement with the Ruabon Coal Company must of necessity be unduly advantageous and preferential to that company, and that it is a mere mockery to offer a similar agreement to the complainants and to traders in coal raised in the Forest of Dean.

30. The said agreement contains many provisions which give advantages and preferences to the Ruabon Coal Company, none of which could be enjoyed by the complainants, which are undue and unreasonable.

31. The complainants and Goold and Heyworth and their customers are only allowed twenty-four hours for unloading their goods from the trucks ; and, if they fail to unload within that time, they are charged demurrage, while the Ruabon Coal Company are only charged at the unloading place after forty-eight hours from the time of notice in writing being given, and they are not charged with any demurrage whatever at those stations where the railway company have provided depots and conveniences, and where the business of the Ruabon Coal Company is conducted by a manager appointed by the railway company or by the superintendents and station-masters, as set forth in paragraph 9 of the agreement.

32. It is impossible, for the reasons herein appearing, for any trader in Forest of Dean coal to enter into an agreement similar to that made by the Ruabon company ; and, so far from the agreement being in accordance with any usual or well-known principle, the [762] complainants believe such an agreement (taking into consideration the whole of its powers) was never before entered into by or with any railway company.

33. There is a provision in the agreement for full train-loads ; but, in practice, this is not and never has been carried out, and it is impossible practically to carry it out : for, full train-loads cannot be sent throughout from Ruabon, on account of the gradients between Ruabon and West Bromwich (which is upwards of a distance of 60 miles), and coals sent by the Ruabon Coal Company are delivered at many stations, and of necessity the train is and must be broken up for that purpose.

34. The coal from the Forest of Dean is carried by special trains, as arranged and directed by the Great Western Railway Company, and practically it is carried in as advantageous a manner to the Great Western Railway Company as that which is carried for the Ruabon company : and for some time Goold and Heyworth and the complainants were in the habit of sending loads which the Great Western Railway Company called full train-loads, but the practice ceased and was discontinued at the request of the Great Western Railway Company, on account of the inconvenience which they alleged that they thereby sustained.

35. The trade of the complainants and of Goold and Heyworth, and the trade in coal from Bullo and Lydney upon the Great Western railway is large, regular, and constant, and, to the best of the deponent's belief, exceeds in quantity the coal sent by the Ruabon Coal Company : and the complainants verily believe that the low rates charged to the Ruabon Coal Company, taken in conjunction with the other advantages afforded to the said company by the agreement, are not remunerative to the railway company, or, if they are in any degree remunerative, they [763] are not nearly so much so as the higher rates charged to the complainants and the other traders in Forest of Dean coal, all circumstances being taken into consideration ; and the complainants believe, that, if the matter was submitted to a detailed investigation by an experienced traffic-manager, it would be found that the allegations of the deponent are true.

36. The rates charged on Forest of Dean coals without agreement are not fair and reasonable, but, on the contrary, are unfair, unreasonable, and disproportional as compared with the lower rates charged under the agreement with the Ruabon company : and there is not any difference, as affecting in favor of the Ruabon Coal Company the cost of carriage, between the circumstances under which the Great Western Railway Company have carried or carry coals for the Ruabon company and the circumstances under which they have carried or carry coals for the complainants and Goold and Heyworth and any other traders from Bullo and Lydney.

37. For distances under 50 miles, the ordinary rates are charged to the Ruabon Coal Company, and, for distances exceeding 50 but less than 100 miles, higher rates are charged than for distances exceeding 100 miles; but this is not a well-known or usual principle of charge adopted by the Great Western Railway Company: on the contrary, the complainants and Goold and Heyworth and other traders from Bullo and Lydney, are charged by the Great Western Railway Company one and the same rate per ton per mile without regard to distance; and the same rate per ton per mile is charged for the Forest of Dean coal whether it is sent 50 or 150 miles, or any other greater distance.

38. Forest of Dean coals consigned to stations of the Great Western railway on the Wilts and Somerset branch are taken from Swindon with coals from [764] Ruabon consigned to the same stations, by the same trains, and delivered in the same manner: and Forest of Dean coal is charged 8/16ths of a penny per ton per mile, while Ruabon coal is charged 7/16ths of a penny per ton per mile for a distance they travel together.

39. Forest of Dean coal sent to stations east of Didcot, is taken from that place with coal from Ruabon consigned to the same stations by the same trains, and delivered in the same manner: and Forest of Dean coal is charged 8/16ths of a penny per ton per mile, while Ruabon coal is charged 7/16ths of a penny per ton per mile.

40. Forest of Dean coal sent to stations on the Wycombe branch is taken from Maidenhead with coal from Ruabon consigned to the same stations by the same trains, and delivered in the same manner: and Forest of Dean coal is charged 1s. 6d. per ton for conveyance from Maidenhead to any Wycombe branch station, while Ruabon coal is charged only 7/16ths of a penny per ton per mile, which amounts to a varied charge of from 2d. to 5d. per ton only, according to distance.

42. The effect of the said agreement, if supported, will be, to do incalculable injury to the Forest of Dean coal-owners and coal-dealers, and to give the Ruabon Company undue and unfair advantages over them, and is not only calculated, but manifestly intended, to protect the Ruabon Coal Company from fair competition.

44. The collieries in the Forest of Dean have been established at great cost, and they afford employment to thousands of persons; and, unless the Great Western Railway Company are compelled to carry the coals gotten therefrom upon equal terms with the Ruabon coal (all circumstances being considered), it will be impossible to carry on a fair trade in the Forest of Dean coal.

Montague Smith, Q. C., and Phipson, shewed cause, [765] upon the affidavits of James Grierson, the general manager of the goods, coal, and mineral traffic of the Great Western Railway Company, Mr. Seymour Clarke, the general manager and superintendent of the company, Edward Wheeler Mills, and Henry Simonds, directors of the company, Matthew Kirtley, civil engineer, and superintendent of the locomotive department of the Midland Railway Company, William Lister Newcombe, general manager of the goods, coal, and mineral traffic of the Midland Railway Company, Archibald Sturrock, civil engineer, and superintendent of the locomotive department of the Great Northern Railway Company, Charles Alexander Saunders, secretary to the Great Western Railway Company, and Joseph Beattie, superintendent of the locomotive department of the South Western Railway Company.

Grierson's affidavit was to the following effect:—

1. I have had large experience in the coal and mineral traffic of the Great Western railway: the details of such traffic, including the coal-traffic from the Forest of Dean, Ruabon, and elsewhere, is under my general superintendence.

2. In nearly all places where the Forest of Dean coal competes with the Ruabon coal, the charges made by the Great Western Railway Company for carriage are as high in the aggregate to the Ruabon Coal Company as they are to the complainants, though they may be less per ton per mile, and very often they are higher.

3. For instance, the charge made to the complainants for coal carried to Paddington from Bullo in owners' waggons is stated to be 6s. 9d. per ton, and from Lydney 7s. 1d. per ton, while the charges to the Ruabon Coal Company are 7s. 6d. per ton. The charges made to the complainants for coal carried to Bull's Bridge in owners' waggons are stated to be 6s. 4d. and [766] 6s. 8d. per ton from Bullo and Lydney respectively, while the charge made to the Ruabon Coal Company would be 7s. 1d. per ton. The charges made for coal carried to Reading in owners' waggons from Bullo and Lydney respectively are said to be 5s. 4d. and 5s. 8d. per ton, while the Ruabon company are charged 6s. 2d. a ton. The charges made by the company for coal carried to Swindon in

owners' waggons from Bullo and Lydney respectively are said to be 3s. 7d. and 3s. 11d. a ton, while the Ruabon Company pays 6s. 5d. a ton.

4. In regard to Oxford, the Ruabon Coal Company have a small advantage of 2d. a ton over coal sent in owners' waggons from Lydney; but the charges to Reading from Bullo shew a sum of 2d. a ton in favor of the Forest of Dean coal; and, on the other hand, at Didcot, where the coals compete, the Forest of Dean coal-owners have an advantage over the Ruabon Coal Company of 11d. per ton if the coal is sent from Bullo, and 7d. a ton from Lydney; and at Maidenhead, where the coal also competes, the Forest of Dean coal-owners have an advantage of 8d. and 6d. a ton respectively.

5. The Forest of Dean coal-owners are, as I believe, under a disadvantage in respect of their coal in competition with the Ruabon coal, partly because the quality is not so good for household purposes, and partly because, as I am informed, a much higher price is charged for the Forest of Dean coal at the collieries than is charged for the Ruabon coal.

6. The coal-traffic from the Forest of Dean generally, and from the complainants, is an irregular and uncertain, as well as a small traffic. From the absence of any guarantee as to quantity, and the uncertainty and irregularity of the traffic, it is impracticable, and would be most expensive to the railway company, to appropriate engines and trucks for such traffic, as is done [767] for the Ruabon coal: and I believe the agreement with the Ruabon Coal Company is remunerative to the Great Western Railway Company, and that the conveyance of coal under it, taking the whole of the provisions, is more profitable to the railway company than the coal-traffic from the Forest of Dean.

7. There is a large number of trucks constantly and regularly employed for the Ruabon coal-traffic under the agreement, by which a very considerable saving of expense and gain are obtained by the railway company: and, as the Great Western Railway Company provide trucks under the Ruabon coal agreement, they are sometimes enabled to send and do send down back-loads of manure and other materials in some of the trucks, and thus collaterally the Ruabon company gain advantage and save expense, so that the railway company can afford to make charges for trucks to the Ruabon company less than their ordinary charges.

8. It is a recognized principle in the business of the railway companies generally, and more especially as to coal and mineral traffic, that the longer the distance and the fuller the loads, within certain limits, the greater the gain to the railway company in proportion over shorter distances and smaller loads, the saving as regards locomotive power and trucks being great on the longer distance. The reduction in the rate of carriage to the Ruabon Coal Company by their agreement, and the other advantages they are allowed for coal carried beyond 100 miles, is fair, and to the benefit of the railway company. The coal going to places at short distances from the colliery always pays higher rates than coal going long distances. The railway companies generally secure such traffic without special inducement; and the price paid for such coal will allow of a larger charge for the carriage.

9. The Ruabon Coal Company have been invariably [768] required to send their coal in full train-loads, and have done so accordingly: and in those cases where the full trains of coal sent by the said company have been broken up, it has been done after they have been received by the railway company, and by the railway company for their own convenience.

10. A strict account of the times of arrival and unloading the coal trains has been made out at the various stations, and the Ruabon Coal Company or the consignees charged with any demurrage which according to the said agreement has arisen or may arise in consequence of the detention of the trucks at any of the stations on the Great Western railway; and no allowance or deduction has been or is permitted by the Ruabon Coal Company from the railway company's charge for such demurrage.

11. In consequence of the stiff gradients between the Gloucester and Swindon stations of the Great Western railway, coal coming from the Forest of Dean or other places on the South Wales railway cannot be carried in such heavy train loads as coal can from West Bromwich, through which the Ruabon coal comes. The coal coming from the South Wales railway has been and is carried in the most advantageous way for the railway company, either by being sent on in a train by itself, or, if there is not enough to form a full train, then it is attached to an ordinary train. If, in consequence of the Ruabon Coal Company's full train-load having been broken up by the Great Western Railway Company, any South Wales coal can be sent on by the train from

Ruabon, it is so sent from Didcot as a matter of economy and convenience to the railway company.

12. In October, 1858, I had a correspondence with the complainants respecting the rates at which the Great Western Railway Company would carry coals [769] for them for guaranteed quantities for distances over 100 miles, and also for distances over 50 miles and under 100; and, on the 1st of that month, I forwarded to them a copy of the following terms, as those on which the Ruabon Coal Company were willing to enter into an agreement with them,—

“Contract coal-rates.

“For guaranteed quantities sent in owners’ trucks over distances exceeding 100 miles, yearly payment not to be less than 5000l., freight to be uniformly 7 16ths of a penny per ton per mile; with the following terminals,—freight exceeding per annum 40,000l., 3d.; 30,000l., 6d.; 20,000l., 9d.; 15,000l., 1s.; 10,000l. 1s. 3d.; 5000l. 1s. 6d.

“For guaranteed quantities sent in owners’ trucks distances over 50 miles and under 100, freight to be uniformly ½d. per ton per mile; with the following terminals,—per annum 15,000l., 4d.; 10,000l., 6d.; 7500l., 8d.; 5000l., 10d.; 2500l., 1s.”

13. The railway company are ready and willing to enter into an agreement with the complainants on the terms of that minute; and several letters passed between me on behalf of the company and the complainants on the subject; but, in November, 1858, the negotiation terminated, as to the distance beyond 100 miles, in consequence of difficulties created by the South Wales Railway Company, and as to the shorter distance in consequence of the complainants requiring that all coals paid for as carried 50 miles should have the advantage of and be charged according to the said scale of prices, though such coals were not in fact carried 50 miles upon the railway.

14. In reference to the statements made by the complainants in the 34th paragraph of their affidavit, it is in reference to the small, irregular, and uncertain traffic coming from the Forest of Dean that full train-[770]-loads are not obtained for that traffic; but the complainants’ coal is attached to some of the ordinary trains of the company; not only could there be no saving of expense gained by only occasional full train-loads, but it would increase the expense to the company to provide for occasional full train-loads, unless a certain and constant number could be provided.

15. In practice, the Ruabon Coal Company are kept strictly to the terms of their agreement, not only as to the charge for demurrage of trucks, but as to all other matters.

Mr. Seymour Clarke’s affidavit stated that he had had considerable experience in coal, mineral, and other traffic, and in the rates and charges for the same in reference to the cost and expense to the company; that the Great Northern Railway Company have a very large coal traffic on their lines of railway; that it is an universal rule that a railway company can afford to carry coals and minerals at a less rate for a long distance than for a short distance, and the company would gain as much by coals going for a long distance, say 100 miles and upwards, at low rates, as they would gain on short distances at considerably higher rates; that it is also important to secure full train-loads for an engine, and constant and regular traffic, for, thereby the trade can be more economically carried on by the railway company, in consequence of a certain number of engines and trucks being capable of being appropriated to such traffic and kept in constant and regular employment; that the rates given to the Ruabon Coal Company under their agreement with the Great Western Railway Company, and the other advantages given to them under that agreement, are fair, and are remunerative to the railway company, in consideration of the guarantee of the large and regular traffic to be sent in full train-loads over a distance of 100 miles and upwards; and that, taking a year’s traffic, the agreement with the Ruabon company for their guarantee traffic is far more remunerative to the railway company than the traffic coming from the general coal trade of the Forest of Dean, at the prices charged by the railway company to the dealer for the carriage of such coal without any guarantee of quantity, or for the regularity or for distance, or for coal being carried in full train-loads.

The affidavit of Messrs. Mills and Simonds, the two directors, stated that, in

1855, the directors of the Great Western Railway Company fully investigated the affairs of the company generally, in order to see whether the traffic could be increased and the revenue of the company improved, and to determine upon the best mode of effecting this object; that it came before them in the course of investigation that the collieries at Ruabon had never been properly developed, on account of the insufficiency of capital employed in them, although they had a description of coal peculiarly adapted for the London consumption, and negotiations were had with the owners of the collieries in that district with the view of increasing the traffic; that, in consequence of the failure of attempts to obtain such capital, a company was formed, with a considerable capital, embracing certain officers of the Great Western Railway Company, with the full sanction of the directors, and with the approval of the shareholders, under a distinct resolution to that effect passed at a general meeting of the company, and with this view an arrangement was made for the carriage of coals; that the sole object of the directors in entering into that agreement with the Ruabon Coal Company was, to increase the revenue of the railway company by a fair development of the coal-traffic on their lines of rail-[772]-way; that, in regard to the distance of 100 miles, at which the reduced rates or advantages of the Ruabon company were to come into operation, this was arranged without reference to the South Wales or Forest of Dean coal or the coal-owners of those or any other districts, but solely because the directors were advised by competent persons whom they consulted, that it was necessary to secure a "lead" or distance of 100 miles and upwards, in order that the railway company might afford to carry coal at lower rates than they could for uncertain distances and for uncertain loads under 100 miles; that the directors were advised this generally in consequence of the company being able to work the trains at much less cost to the railway company over a long distance and with regular and full train-loads, and that, as the railway company would have a guarantee for a considerable amount of yearly increase to be obtained from a minimum of coal sent in full train-loads, under these circumstances they could afford to make reduced rates for carriage beyond 100 miles, and generally to grant fair facilities and advantages, and that the agreement with the Ruabon Coal Company was ultimately arranged on those principles; that the Great Western directors uniformly insisted upon a condition that such agreement should be open alike to all other parties who would be willing to enter into the same agreement for a like amount of traffic upon equal terms and conditions, and they had been most anxious, and had invariably offered to all coal-proprietors who had applied to them, and, among others, to the complainants, an agreement for the conveyance of their coals upon those terms and conditions; that the trade in South Wales and Forest of Dean coal was at the date of this agreement considered to be comparatively of a local character; and that, in making the agreement, the directors had no intention of favoring [773] the Ruabon Coal Company over the plaintiffs or any other company or persons, or to subject the coal of the Forest of Dean to any unfair competition or disadvantage.

The affidavit of Mr. Kirtley stated, that the principal item of expense to the railway company in the cost of running a coal or mineral train is, the expense for locomotive power, which is made up of a per-centage on capital for original cost, the cost of fuel, wages for engine-men and drivers, and a per-centage for wear and tear, and that this expense is very much proportionately decreased when the engine performs a long journey in one day, by having what is called a long and continuous lead, and also when the full power of the engine is employed by having full train-loads provided; that, where there is an ascertained number of trains in each week, each carrying an ascertained load and requiring a fixed and certain number of trucks, the railway company are enabled, from their knowledge of the number of trucks and of the times at which they will be required, to effect a great saving in expense, by devoting certain engines exclusively to such traffic, and that more work at the same cost can be got out of such engines at a regular and certain traffic than if employed in a fluctuating or uncertain traffic, for the carriage of which the company may often be obliged to send specially to their depot for engines; that the cost, calculated per ton per mile on the load drawn, of an engine which has as great a load as it can fairly carry, is very much less to the company than the cost of an engine having only a light load, and that the increased consumption of fuel and the wear and tear of the engine caused by the greater load are by no means in proportion to the

difference in the load, and that in fact an engine running without any load at all would cost nearly as much to the company as one having a full load; that it is a [774] recognized principle, borne out by every day's experience, that the greater the load, up to the power of the engine, the more economically will it work out per ton per mile; that an engine taking a train 100 miles at one lead can be worked much more economically than one getting only a short lead, and a train going 200 miles on one consecutive lead can be worked still more economically, the rule being, that, after a certain distance, the longer the journey made by one engine, up to twelve or fourteen hours a day, the less expense it is to the company; that, in the cost of an engine is included the wages of the engine-driver and fireman, who always are appointed to and stay with the same engine, and that the wages of such driver and fireman are paid at a fixed rate for a day of so many hours, and do not vary according to the number of miles travelled or work performed by the engine to which they are attached; that every engine requires a certain and considerable expense to get it into steam before it begins to work, and again to put it out of steam at the end of its day's work, and the time of the driver and fireman is occupied in both operations, so that the greater the amount of work done by such engine whilst it is in full steam the cheaper will be its working, and the cost to the company per ton per mile considerably less; that a long lead with trucks is also important, as lessening the cost to the company, as at the beginning and end of every journey time is lost while the trucks are loaded and unloaded, during which time the company earn nothing, as they only gain while the trucks are travelling loaded at so much per mile; that, for these reasons, a lower rate of freight for a long distance, with a constant trade, is more remunerative to a railway company than a higher rate for short distances with traffic no certain amount of which is guaranteed or ascertained; that the rates [775] charged by the Great Western Railway Company to the Ruabon company for distances beyond 100 miles, and the other advantages gained by them under their agreement with the Great Western Railway Company, are justified by the length of the lead and the stipulations for full train-loads and guaranteed quantities which they agree to provide; that, taking a year's traffic, the terms agreed to be given to the Ruabon company for their guaranteed traffic are far more remunerative to the railway company than the traffic arising from the general coal-trade of the Forest of Dean at the prices charged by the railway company to the dealers for the carriage of such coal without any guarantee of quantity, or for regularity, or for distance, is for the coal being carried in full train-loads; that the rates granted to the Ruabon Coal Company would not be sufficiently remunerative to the railway company without a guarantee of full train-loads, nor for a less distance than 100 miles; that the scale for shorter distances than 100 miles, as published by the company, is very moderate and fair; and that no material saving of expense would be obtained by the railway company by carrying only occasional full train-loads from the Forest of Dean, as an engine would in all probability be required to be sent from the depot at Swindon to bring away the load, and as the cost of running an engine without a load is nearly the same as with a load.

The affidavits of Messrs. Newcombe, Sturrock, and Beattie, were substantially corroborative of that of Mr. Kirtley.

The affidavit of Mr. Saunders, in addition to the facts deposed to by him on the former occasion (ante, vol. v., p. 380), contained a general denial of intention on the part of the Great Western Railway Company to favor the Ruabon Coal Company, or that the table [776] referred to afforded any undue advantage or preference to that company; that the arrangement was in all respects fair and equitable, and was made solely with a view to the advantage of the railway company; that the distance of 100 miles was fixed expressly against the wish of the promoters of the Ruabon Coal Company, it having been considered and contended, in the interest of the railway company, that coal destined for short distances must necessarily be carried over their lines of railway, and moreover that such coal would bear to pay a higher freight than coal carried for longer distances; that, in making a small difference as to coal to be sent by the Ruabon Coal Company between 50 and 100 miles, they were actuated only by the same principle, of gaining revenue to the railway company and allowing some equivalent for the saving in cost of carriage over the comparatively longer lead, but the coal carried between these distances did not form any portion of the guaranteed freight; that the object of the directors of the Great Western Railway Company in

making the agreement with the Ruabon Coal Company had been fully and completely answered by the operation of that agreement, for that such agreement was a remunerative one to the railway company, and the conveyance of coals under it, taking into consideration the whole of the provisions, was more profitable to the railway company than the coal-traffic from the Forest of Dean, at the prices charged upon such traffic, without any agreement as to a stipulated regular quantity or a stipulated annual payment, or as to full train-loads; that the principal cost of all coal or mineral trains is, the expense of locomotive power, and where there is constant, regular, and ascertained traffic, certain engines can be exclusively devoted to it at a great saving to the company, and much more work can be done by such engines under [777] such circumstances than for ordinary traffic of the same character; that there is a very considerable saving of expense to the railway company, where trucks are provided by them, if there is a known and stipulated traffic to be conveyed for a long distance and at certain agreed times, the average number of trucks required per week being ascertained, the same trucks, or nearly so, do the whole work; that a very large capital is invested by the Great Western Railway Company in trucks, and that the longer mileage distance they run with loads, in other words, the more work they do, the greater the gain to the company, the cost of wear and tear being by no means in proportion to the extra gain; that the coal trade of the complainants is not of that constant, uniform, and ascertained character as to enable the Great Western Railway Company to work the same with the regularity and economy which they would be able to do were a fixed and stipulated quantity agreed to be sent from the Forest of Dean along the railway in full and regular train-loads, or with the regularity and economy with which the railway company do work the Ruabon coal-traffic under the agreement; that practically the coal from the Forest of Dean is not carried in so advantageous a manner to the railway company as that which is carried for the Ruabon Coal Company, and that the rates charged on Forest of Dean coals without agreement are fair and reasonable as compared with the lower rates charged to the Ruabon Coal Company under the agreement, regard being had to the whole stipulations of that agreement; that the principle of a graduated charge according to distance, and on trucks with full train-loads, is a well-known principle of charge adopted by the railway companies generally; that the stipulations in the agreement with the Ruabon Coal Company as to the full train-loads [778] were uniformly and strictly enforced, and that, although the trains were occasionally broken up for dispatch to different stations, yet the Ruabon Coal Company are required to send, and do send, full train-loads away from the colliery, and this breaking up of the trains, when it occurs, is done solely for the convenience of the Great Western Railway Company, and the coal company have no concern or part in it; that the Ruabon Coal Company are held strictly to the period of forty-eight hours allowed for unloading, and a demurrage-account is kept against them or their consignees for any excess or delay; that the effect of the agreement with the Ruabon coal company is not to injure the Forest of Dean coal-owners and coal-dealers, or to give the Ruabon Coal Company undue and unfair advantages over them; that the coal from the Forest of Dean, considering the quality and the price charged at the collieries, cannot come to any great distance from the collieries, or to London, in competition with other descriptions of coal, so long as the owners of those collieries require so large a profit on their coals, and that the agreement with the Ruabon Coal Company is not in fact any cause for the want of demand for consumption of the Forest of Dean coals; that, in March, 1857, the complainants were informed that the Forest of Dean coal-owners, as well as the Somersetshire coal-owners, might combine among several firms to agree jointly so as to make up a guaranteed quantity, and get the benefit of reduced rates, and that such an agreement would be entered into by the company the same as if the agreement were with one coal-owner, and that thus each of the parties thus entering into such an agreement would get the benefit of the reduced scale on the quantities jointly guaranteed by the united coal-owners; that it would be expedient and unjustifiable, as respects the inte-[779]-rests of the Great Western Railway Company itself, that any impediment or obstruction should be imposed on the traffic of coals from any district because it may compete with some other district, the object and interest of the railway company being to encourage such traffic to the utmost extent, and to give all reasonable aid to its increase and development to all persons, and from whatever

district it may be derived; and that the Great Western Railway Company have not, and never had, any interest in the success or failure of the Ruabon Coal Company, except as regards the freight upon the conveyance of such coal, and that their only object in promoting the coal-traffic from the collieries in the Ruabon district was, to benefit their own proprietors by means of a profit to be derived from such traffic.

The learned counsel submitted, that the complainants had ample opportunity of bringing forward all their causes of complaint on the former occasion, and were fully heard; that there was no ground for impeaching the judgment at which the court then arrived, nor any new materials now brought forward to justify the court in reversing that decision. [Willes, J. This rule was granted for the purpose of enabling the complainants to shew that the special agreement with the Ruabon Coal Company was colorable and afforded no justification for the difference of charge. There was no allegation on the former occasion that the agreement was not perfectly bonâ fide, or that the benefits derived under it by the Great Western Railway Company were not a full equivalent for the decrease of charge and other advantages allowed to the Ruabon Coal Company.] In giving judgment there, the court say,—ante, vol. v., p. 441,—“If we could clearly see that a scale of rates with reference to distance had been framed with the view, and having [780] the effect, of favoring the Ruabon coal-traffic, and prejudicing the Forest of Dean coal-traffic, we should hold it to be an undue preference within the act, in accordance with the decision of the court in *Ransome v. The Eastern Counties Railway Company*, ante, vol. iv., p. 135. But we have no sufficient evidence to lead us to such a conclusion: and, although the complainants may suffer by this scale of rates, in consequence of their local position, that is a matter which the court cannot interpose to remedy.” The question is, whether that is made out now. The affidavits in answer shew that the contract with the Ruabon Coal Company was made solely for the purpose of bringing increased traffic on the Shrewsbury branch of the railway, which the Great Western company had possessed themselves of. [Williams, J. The judgment of the court upon the former occasion implies that there must be a just and due proportion between the facilities afforded to the party said to be preferred and the advantages secured to the company.] The only affidavit now produced is that of one of the complainants. He does not suggest that there is any disproportion in that respect; nor do the complainants produce the affidavits of any traffic-manager, engineer, or other person conversant with railway affairs, to shew that the terms of the agreement are not fair and reasonable, regard being had to the interests of the railway company. The new matter which is introduced wholly fails in that respect. [Erle, C. J. We certainly have no idea of impeaching or dissenting from the judgment pronounced on the former occasion.] The present affidavit discloses no new facts: and it is distinctly and conclusively answered by the affidavits filed in answer, and especially by that of Mr. Saunders, who shews the origin and growth of the Ruabon Coal Company, and who is corroborated by persons who [781] have had great experience upon the subject. [Erle, C. J. Confining it to the new matter, Mr. Nicholson's suggestion is certainly answered by persons who have every means of forming a correct judgment on the subject, and who have all the figures before them.] The complainants should at least have mentioned in their affidavit the fact of similar agreements having been offered to and rejected by them. [Williams, J., referred to *Harris v. The Cuckermouth and Workington Railway Company*, ante, vol. iii., p. 693.]

Manisty, Q. C., and C. Pollock, in support of the rule. If the affidavit upon which the rule was granted is not sufficient to warrant the court in coming to the conclusion that the charges made to the coal-owners of the Forest of Dean are unreasonable as compared with those made to the Ruabon Coal Company, enough at all events appears to induce them to put the matter in a train for investigation in the mode pointed out by the statute. The affidavits now produced by the Great Western Railway Company failed to shew that their agreement with the Ruabon Coal Company is a remunerative one to them. The main, indeed the only, ground upon which they seek to uphold its propriety is, that the “continuous lead” of 100 miles is more remunerative than a shorter run. But they altogether suppress the fact that at Wolverhampton there is a break of gauge, which necessitates the employment of two sets of trucks and two engines, and for which a charge of 1d. per ton only is made. The fact upon which

they rely for their justification of the difference of charge fails them. [Erle, C. J. They state positively that the agreement is remunerative.] True; but the ground upon which they rest that conclusion is not correctly stated. To justify a difference of charge, the advantage to the railway company must at least equal the amount of [782] that difference. Now, the difference in charge for the conveyance of coals from Ruabon to Reading and from Lydney to Reading, is 2d. only, though the former distance is 65 miles more than the latter: again, from Lydney to London the distance is 133½ miles, and from Ruabon so London, 198 miles, and yet the charge for both is 8s. 6d. per ton, and trucks are charged to the complainants 1s. 5d., and to the Ruabon company 1s. only per ton, and yet they have to break the gauge at Wolverhampton. The affidavits do not shew a corresponding advantage to the railway company from the lower rates charged to the Ruabon Coal Company, as compared with those charged to the Forest of Dean coal-owners. [Erle, C. J. The continuous lead is not the only advantage secured to the Great Western Railway Company by their agreement with the Ruabon Coal Company: they rely also upon the regularity and full train-loads. All this was disposed of on the former rule. What you have now to do is, to shew that that decision was come to on imperfect materials.] Upon the whole facts taken together, the statements in all the affidavits, new and old, it is submitted that a case for inquiry is fully made out. [Erle, C. J. The old affidavits are disposed of. The only new feature imported into the case is, that, in the opinion of Messrs. Nicholson, the agreement with the Ruabon Coal Company is not so remunerative to the Great Western Railway Company as to justify their entering into or continuing it.] The amended state of facts necessarily involves very much of what was before the court on the last occasion. The court then held that a difference of charge called for an answer. Whether the remuneration which the company derive from the special agreement be more or less, is not the sole question to be determined. The real question is, whether the excessive charge to the complainants is warranted [783] by any of the circumstances relied on for its justification by the railway company. Profit and remuneration in the ordinary commercial sense can have no reference to cases arising under this statute, where the only inquiry is whether or not an undue or unreasonable preference is given to one individual over another, or an undue prejudice imposed. In the course of the former argument in this case, Mr. Justice Willes threw out a suggestion that it is for the applicant to make out a *prima facie* case of inequality; but that, the *prima facie* case being made out, the onus is cast upon the company to justify the charge.

Cur. adv. vult.

ERLE, C. J. This rule was in substance an application by the complainants to the court to review the judgment which was given against them in the year 1858,—ante, vol. v., p. 366.

Upon that occasion there was the most ample investigation. Affidavits were filed in reply: questions were referred to the master for report: and judgment was given after full consideration, affirming a principle which has been repeatedly recognized, viz. that a railway company may lawfully make a difference in their rate of charges in regard to a contract for a large quantity of goods, to be supplied in constant regularity, and to be carried a long distance. Any company may on this ground make an abatement from their prices in proportion to the advantages they derive from the contract, without being liable either for an undue preference or for causing an undue prejudice.

In the judgment it was observed, that, if the complainants had disputed “that the rates charged without agreement are fair and reasonable as compared with the lower rates charged under the special agreement [784] with the Ruabon Coal Company, regard being had to the different rate of cost of carriage to the railway company, the court would have felt bound to submit these matters to a detailed investigation by an engineer or traffic-manager;” and the complainants renew their application, with many of the former materials, adding their own affidavit disputing the point as suggested in the judgment.

The affidavits in answer give a distinct denial to this affidavit of the complainants. The officers of the company state that the advantages in the contract are found by experience to compensate the abatement in price; and their statement of the fact is corroborated by the opinions of men of skill in railway traffic.

This would be to me a sufficient ground for discharging the rule. But we have been pressed with the argument that Messrs. Nicholson are moving for a reference of the questions arising on the contract, and that such reference may more certainly discover the truth, and therefore should be granted: and, as two of my Brethren, for whom I have the highest respect, are of this opinion, I add my reasons for not coinciding with them.

First, I understand the affidavits on both sides so far as to be confident that Messrs. Nicholson's case is answered in fact and in law, unless the principal officers of the defendants and the principal traffic-managers of three important railways have sworn falsely. I do not doubt the veracity of these deponents, and I see no reason for putting on them the indignity of referring the question whether they ought to be believed, or on the company the peril of protracted litigation and indefinite risk.

Secondly, the defendants have offered not only the same terms of contract to all persons equally, but also analogous terms for smaller quantities.

[785] I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as free as any merchants, subject only (as to this court) to the duty of acting impartially, without respect of persons: and this duty is performed, when the offer of the contract is made to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district: but the power of the railway company to contract is not restricted by these considerations.

If it were necessary to go into the inquiry, I am not satisfied that Lydney can claim the same accommodation as Ruabon because it happens to be on the same railway. The two places are on two distinct branches, situate many miles apart; and the circumstances of the two branches do not appear to me to be the same. Moreover, the first application of the complainants was argued on the ground of disadvantage to them in competing for traffic to the neighbourhood of London; and particular attention was drawn to Cookham, near Reading. On the second application, they object that the hundred mile clause is an unjust bar to them, because their traffic is for the most part confined to a district nearer home than one hundred miles. If so, all the grievances relating to London and other distant places are unreal: and, if Ruabon coal can be carried up to Didcot and down to the neighbourhood of Gloucester, so as to compete with Lydney coal, it probably is a different article, and in demand irrespective of the price charged for carriage; for, Ruabon coal under those circumstances would pay 7s. or 8s. per ton, and Lydney coal only 3s. or 4s. per ton.

It is said in the affidavits that Ruabon is good hearth coal, and Lydney is in great part good furnace [786] coal. If this be so, it may account for a different demand. In *The Caterham case*, ante, vol. i., p. 410, the court declared the necessity for caution in controlling rights on so vague a ground as undue disadvantage to others: and certainly extreme caution is necessary in ascertaining that there is a real grievance, requiring a remedy, before the court interferes so as to annul a very important contract, and to destroy very valuable interests, and to take away the power of making any contracts in future with security.

Thirdly, in order to adopt a reference with advantage, it is necessary to decide what is to be referred, to whom, and how he is to make his inquiry, and what is to be the effect of his answer. I think that no practical question can be suggested for reference. The dispute is, whether a certain profit for carrying at seven sixteenths of a penny per ton per mile is greater than some unknown profit or loss for carrying at eight sixteenths of a penny per ton per mile. The engine costs a certain sum per day. That cost can be earned only by drawing a weight a distance per day. The Ruabon engine by the contract may be taken to draw 200 tons one hundred miles at seven sixteenths of a penny, and the cost of the engine may be paid by thirty miles, and then the seventy miles would be the profit. What the Lydney engine is to draw is by the hypothesis uncertain. Messrs. Nicholson and their party refuse to contract, and require to send what they choose, and when they choose,—it may be nothing on one day, fifty tons fifty miles on another day, four hundred tons one hundred miles on another day, and so on. If these be the facts, it seems impossible to tell the proportion which the known sum bears to the unknown. But the advantage derived from a regular supply is not confined to profit from the engine: and a reference limited

to that point would be imperfect. By regu-[787]-larity, the line may be utilized to the utmost, by arranging time for motion of heavy traffic, and time when the line is to be cleared for fast trains; and all the provisions for deposit and distribution at the terminus of arrival can be used to the most advantage, and the danger of collision and the danger of litigation about delay can be better guarded against. All these latter considerations are a value to the company in their contract; but they cannot be compared, to ascertain it by a reference, without defining the subject to be compared: and, for the reasons above given in respect of the engine, it seems to me that that cannot be done. I would add, that, if a contract was bona fide made for profit on each side, and the profit on one side turned out greater than was expected, I do not think that this court should declare the contract void on such a ground.

Furthermore, supposing the question for reference to be settled, then the difficulty about naming the referee would arise: the parties would not agree; and the court has no judicial knowledge of competency for the office. This duty of deciding was cast on the court as an impartial tribunal of sufficient intelligence; and it ought not to depute that duty to another, unless it could be better performed by him. Where the validity of a contract involving 40,000*l.* per annum to the carriers, and probably more to the coal-owners, and 100,000 tons of coal per week to London and its vicinity, is at stake, the danger of bias is very great; and the court has no means of insuring the parties against its effect on a referee. Although the legislature has impowered the court to take advice, I do not think that power would be properly exercised upon the questions raised here.

Furthermore, supposing the question and the referee were settled, then, how is he to inquire? Is it by [788] reading affidavits? If so, why is not the court as competent to appreciate them? Is it by examining witnesses? If so, by what authority are they to be examined or sworn? And how are the parties to be represented at the trial? As here, by counsel and attorneys? Or, is it by his own preconceived opinions? If so, would that be satisfactory?

Lastly, if the question, and the referee, and the mode of trial were settled, and the answer is given: what is to be the effect? Is it to bind the court as an award? I should say, certainly not: and, if not, I see no reason why it should be thought superior to the opinion of the traffic-managers in the affidavits now before us.

For these reasons, I dissent from the proposal for referring any questions in this case to a referee, and I think the rule should be discharged: but, as the court is equally divided in opinion, the rule drops.

WILLIAMS, J. I am of opinion that the rule ought to be made absolute for the reference sought. By the 3rd section of the statute 17 & 18 Vict. c. 31, under which the rule was obtained, the court is expressly impowered, for the purpose of determining the matters as to which the complaint is made, to direct, in such mode, and by such engineers, barristers, or other persons as they shall think proper, all such inquiries as may be deemed necessary to enable the court to form a just judgment on the matters of complaint.

The present complaint appears to me to call for the exercise of this power, which was doubtless conferred upon the court because it was deemed to be a tribunal unsuited, without such assistance, to dispose of various questions of fact which may be brought before it of such a nature that men of practical experience in matters of that kind alone can properly inquire into them.

[789] In the present case, after considering the affidavits, I feel that certain questions of fact require further investigation in order to decide justly on the matter of the complaint; and I think those questions are of such a nature that no one but a practical man can properly investigate them.

This opinion is fortified by the anxiety of the applicants that the matters should be sent to such an inquiry, and the strenuous resistance of the company,—seeing that there is no suggestion of insolvency, and that the inquiry must take place at the peril of the applicants' being made liable to all the costs of it, if it should turn out that they are in the wrong in asking for it.

I think it right to add, in consequence of what has been said, that it would, in my opinion, go far to frustrate this act of parliament, if the ordinary rule that the court must dismiss the application if the matters on which it is founded are met by counter-affidavits in denial, were to be enforced.

We should not be bound to adopt the report made by the person to whom the investigation was intrusted. We might decline to act on it, if we thought it was founded on any mistake or misapprehension, or was for any other reason unsatisfactory.

On the whole, therefore, I can see no harm which can arise from our granting the inquiry; whilst, by refusing it, my own mind at all events is left in doubt whether we are doing justice; and we are perhaps shutting out such a knowledge of the truth as would altogether reverse our view of the merits of the contest between these parties.

WILLES, J. In this case I think the reference asked for ought to be made. It is true that the statements in the affidavits of the applicants are vehemently contradicted by the officers of the company and the other [790] persons whose affidavits they have brought forward: but this, after all, is nothing more than taking issue upon those statements with circumstances the truth of which the applicants have not had the opportunity of contesting. In my opinion it would be unfair to the applicants to decide upon a trial on affidavits, in which the company have the advantage of swearing last as to circumstances within their peculiar knowledge, without any opportunity for cross-examination: and, to insure a proper investigation, we ought to refer it to a traffic-manager to determine, upon hearing evidence on each side, with the means of testing its correctness, whether or not the advantages which the company derive from the special contract are fairly worth the difference of charge made: in other words, —to adopt the language of my Brother Crowder, when this case was formerly before this court, 5 C. B. (N. S.) 439,—whether the rates charged without agreement are fair and reasonable as compared with the lower rates charged under the special agreement with the Ruabon company, regard being had to the different rate of cost of carriage to the railway company.

No difference of charge has ever been held justified in this court by the circumstance of its being part of a transaction in which the company has a commercial advantage, if, as is alleged here, they obtain it by an undue preference of the complainant's rivals, or by putting him to an unfair disadvantage.

Upon the affidavits now before the court, an inquiry would unquestionably have been directed upon the former hearing: and, in deciding without it, I cannot but apprehend that the court may unwittingly sanction iniquity.

The court being thus equally divided, the rule dropped.

[791] BURDETT AND ANOTHER v. LEWIS. Jan. 26th, 1860.

Service of a notice or rule by putting it under the door of the attorney's office, is not good service, without some evidence that it has duly come to hand.

Gates, on a former day in this term, obtained a rule calling upon the plaintiffs to shew cause why the verdict in this case, which was tried as an undefended cause at the first sitting at Westminster in this term, should not be set aside, and a new trial had, on the ground that no issue or notice of trial had been delivered,—with costs.

The affidavits upon which the motion was founded,—in which the defendant's attorneys and all their clerks joined, —stated, that, on the 9th of January, one of the deponents accidentally meeting a clerk of the plaintiffs' attorney, was informed by him that he was about to set down the cause for trial for the first sitting in this term, and subsequently recollecting that he had not received the issue and notice of trial, he on his return to his employer's office wrote to the plaintiffs' attorney to say so; that, on the 10th of January, the managing clerk of the plaintiffs' attorney called at the office of the defendant's attorneys, and stated that the issue and notice of trial had been delivered at the office by a lad in the employ of the plaintiffs' attorney about 5 o'clock in the afternoon, but he did not remember the day of such delivery; that, on the same day, the defendant's attorneys received from the plaintiffs' attorney a letter, in which the latter wrote,—“I am sorry you have not received the issue. From the inquiries I have made, I have no doubt whatever it was duly delivered at your office on the 20th of December. The witnesses are all subpoenaed, and everything ready for trial on Thursday morning; and, being only agent in the matter, I

must proceed in pursuance of my notice [792] of trial,"—to which letter the defendant's attorneys replied as follows: "If you persist in carrying this cause down to trial, we shall be prepared both by ourselves and our clerks to swear that no issue and notice of trial in this cause has ever been received by us, and shall apply to set aside your judgment, with costs." The deponents then severally swore that they had not received or seen the issue and notice of trial, and averred that if such had ever been delivered in office hours, viz. between half-past nine in the morning and six o'clock in the evening, they must have seen it, as they or some of them were in the office the whole day throughout.

R. E. Turner, on a subsequent day, shewed cause, upon an affidavit of a clerk in the employ of the plaintiffs' attorney, who swore that he put the issue and notice of trial under the door of the office of the defendant's attorneys between six and seven o'clock in the evening of the 20th of December last. He referred to *Warren v. Thompson*, 2 Dowl. N. S. 224, where it was held that service of a rule to compute by putting it through the door of the chambers of the defendant's attorney was sufficient.

Gates, in support of the rule. Putting a notice or other paper under the door of an attorney's office is clearly not a proper mode of service. In *Strutton v. Hawkes*, 3 Dowl. P. C. 25, it was held that the service of a rule nisi to compute, by putting it under the door of the defendant's chambers, was not sufficient, although the laundress stated that the defendant would most probably have the rule in the course of the day. Littledale, J., said: "Putting the rule under the door is not of itself sufficient. It does not appear here that the deponent might not have gone to the [793] chambers another time and found them open." In *Warren v. Thompson*, there was a notice on the door directing that all messages might be put through. The rule is thus stated in 1 Arch. Pr., 9th edit., p. 143,—“Service at the chambers of an attorney on his laundress will not suffice, unless she act as his servant, and the affidavit of service state that fact, or the deponent's belief of it, and also his belief that the attorney has received the proceeding. Putting a copy of a rule under the door of the attorney's chambers or place of business (*Strutton v. Hawkes*), or into a letter-box (*Brahm v. Sawyer*, 1 D. & L. 446), unless there is a notice requesting papers, &c. to be so left (*Warren v. Thompson*), or unless you ascertain that it has been received, and can swear to the belief of such receipt, will not suffice.” [Erle, C. J. I certainly have always understood that the service by merely putting the paper under the door was not complete.]

The learned counsel further submitted, that, if there were any doubt as to the practice, he should have an opportunity of filing further affidavits, inasmuch as the affidavits on which he had moved the rule, in consequence of the clerk of the plaintiffs' attorney having stated that the notice was left about five o'clock in the evening, had confined the denial to six o'clock. And he tendered for this purpose an affidavit of the housekeeper,—referring to *Wood v. Cox*, 16 C. B. 194.

ERLE, C. J. I think there should be a new trial, the defendant accepting notice for the next sitting, and that the costs should abide the event.

Gates submitted, that, as it was not denied that the defendant's attorneys had been misled by the statement made to them by the clerk of the plain-[794] tiffs' attorney as to the time of the alleged service, he ought to have the costs of his rule.

ERLE, C. J. We will take the proposed affidavit, and will inquire into the practice, and on the result of our inquiry will depend whether the rule will be made absolute with costs or not.

Cur. adv. vult.

ERLE, C. J., now said:—Upon inquiry, we find the rule to be perfectly well settled, that service of a notice or rule by putting it under the door of the attorney's office or chambers would be made complete by calling the next morning to ascertain that it had been received, or by some other evidence that it had duly come to hand; but that, without some such evidence, it would not be good service. The defendant, therefore, is entitled to the costs of this rule. But, under the circumstances, we think the proper course will be, to say, that, if the plaintiff obtains a verdict, those costs shall be matter of set-off.

Rule absolute accordingly.

[795] THE WOLVERHAMPTON NEW WATERWORKS COMPANY *v.* HAWKSFORD.
Nov. 25th, 1860.

[S. C. 29 L. J. C. P. 121. Affirmed in Exchequer Chamber, 11 C. B. N. S. 456. Discussed, *Irish Peat Company v. Phillips*, 1861, 1 B. & S. 627, 638. Distinguished, *East Gloucestershire Railway v. Bartholomew*, 1867, L. R. 3 Ex. 22. Followed, *Burke v. Lechmere*, 1871, L. R. 6 Q. B. 304. Discussed and distinguished, *Portal v. Emmens*, 1876, 1 C. P. D. 215, 664.]

The time within which by the 9th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) a register of shareholders is to be made, is merely directory; and a register containing the several particulars required by the act, and *bonâ fide* intended to be a register, may be valid though made at a subsequent period.—But the mere placing the name of a party with others as shareholders of a company on a sheet of paper, and sealing it, and calling it a register of shareholders, no shares being numbered or specifically appropriated, and the paper containing none of the essentials required by the act, does not constitute sufficient evidence under the 27th section, of the parties being shareholders.

This was an action brought by the Wolverhampton New Waterworks Company to recover from the defendant the sum of 375*l.*, the amount of six several calls of 12*s.* 6*d.* each upon 100 shares of which the defendant was alleged to be the holder, and which calls were respectively made on the 2nd of September, 1856, the 1st of February, 1857, the 1st of May, 1857, the 1st of September, 1857, the 5th of January, 1858, and the 11th May, 1858.

The first count of the declaration stated that the defendant was the holder of 100 shares in the Wolverhampton New Waterworks Company, and was indebted to the said company in 375*l.* in respect of six calls of 12*s.* 6*d.* each upon each of the said shares, whereby an action had accrued to the said company, by virtue of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.), to demand and have of and from the defendant the sum of 375*l.*: yet the defendant had not yet paid the said sum of 375*l.*, or any part thereof.

There was a second count, to which there was a demurrer: vide ante, vol. v., p. 703.

Pleas, to the first count, never indebted, and that the defendant was not the holder of the said shares, or any of them, as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term, when the following evidence was given,—that the plaintiffs were a joint-stock company incorporated by an act of parlia-[796]ment passed on the 16th of July, 1855 (18 & 19 Vict. c. cli.), in which was incorporated the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16): that, by the 14th section of the first-mentioned act, it was enacted that the first general meeting of the company should be held within two months after the passing of that act, and a general meeting of the company should be held in the month of January in every year, or at such other times as should be from time to time appointed by any general meeting; that no other time than the month of January was ever so appointed: that the shares in the plaintiff's company were divided into 20,000 of 5*l.* each; that 100 shares were appropriated by the company for the defendant: that before the act was obtained the defendant executed the subscription-contract of the company for 600*l.*: that the defendant, when he executed the subscription-contract gave to the promoters of the company a cheque for 600*l.*, but that, after the act was obtained, this cheque was returned to him: that the defendant had voted as a proprietor at a meeting of the company: and that he was the person mentioned in the 7th and 17th sections of the act.

There was conflicting evidence as to whether the defendant had assented to become a shareholder in the said company: but the jury found that he had previously to the 1st of January, 1857, assented to become the holder of 100 shares: and on that point there was no attempt to disturb the verdict.

It was proved that the first general ordinary meeting of the company was held on the 1st of January, 1857: at which meeting a loose half-sheet of paper was sealed with the seal of the company, and which was in the following form:—

[797] *Darlington Street,
Wolverhampton.*

Mr. Henry Beckett	3	2	6	Pd.	5
J. F. Bateman					200
James Walker	2	10	0	Pd.	4
Mrs. C. S. Symes					5
Mr. C. F. Clark					25
Mr. E. York	25	0	0	Pd.	40
Mr. F. R. Griffiths					50
Mr. J. Holland, jun.	12	10	0	Pd.	20
The Earl of Dartmouth	15	12	6	Pd.	25
Mr. J. Underhill	3	2	6	Pd.	5
Mr. W. Underhill					5
Mr. G. L. Underhill	6	5	0	Pd.	10
The Earl of Powis	12	10	0	Pd.	20
Mr. W. L. Underhill	3	2	6	Pd.	5
Mr E Coeser	62	10	0	Pd.	100
Mr. Holyoake	62	10	0	Pd.	100
Mr. S. Leveridge	62	10	0	Pd.	100
Sir F. L. H. Goodricke	62	10	0	Pd.	100
Mr. H. Heane					100
Mr. C. Clark	62	10	0	Pd.	100
Mr. F. Simpson					10
Mr. T. T. Kesteven					50
Mr. W. P. Roebuck					50
Mr. R. S. Key					20
Mr. J. Thorneycroft					100
Mr. J. Sidney					10
Mr. W. Clark					5
Mrs. H. Newbury	31	5	0	Pd.	50
Mr. H. Robertson					200
Mr. T. W. Giffard					20
Miss C. J. Giffard					5
Mr. J. Wyley					10
Mr. J. Durham					50
Miss Augusta Eliza Marshall					5
Mr. F. C. Perry					100
Mr. H. Underhill					100
Mr. J. E. Underhill					50
Mr. Hawksford					100
Mr. S. Edwards					10
Mr. R. Heane					100
					2059

[798] At this time the shares of the company had not been numbered, nor had any specific shares been appropriated to the defendant.

On the 15th of July, 1857, there was held a general half yearly meeting of the shareholders of the company, at which a book was produced by the secretary as and for a register of the shareholders therein; and the following is a copy of the only entry in such book which relates to the defendant:—

No. of share.	Amount of call per share paid up.	Name of proprietor.	Addition	Residence.
2461 to 2560	—	John Hawksford.	—	Wolverhampton.

The seal of the company was at this meeting affixed to this book as the register of shareholders of the company.

On the 27th of January, 1858, there was a general meeting of the shareholders of the company, at which a book was sealed as the register of shareholders, which as far as respects the defendant was in the following form :—

No. of shares.	Amount of calls per share paid up.	Name of proprietor.	Share Numbers.	Residence.
100	Nil.	Hawksford, John.	{ 2461 to 2560 }	Whpton.

The following calls of 12s. 6d. per share each were made by the directors of the company upon the defendant,—Six calls of 12s. 6d. per share on 100 shares in the said company, due respectively the 2nd of September, 1856, 1st of February, 1857, 1st of May, 1857, 1st of September, 1857, 5th of January, 1858, and 11th of May, 1858.

[799] The plaintiffs abandoned the first call at the trial: and it was proved that due notice of all the calls was given to the defendant, and that the time fixed for payment of the several calls had elapsed before the suit.

On the part of the defendant it was submitted that he was upon this evidence entitled to a verdict, on the ground that there was no sealed register within the time required by the company's act; that the paper sealed as a register on the 1st of January, 1857, was not sealed within the time mentioned in the 14th section of the company's act, or the 9th section of the Companies Clauses Consolidation Act, 1845; that the paper sealed as a register on the 15th of July, 1857, was invalid, as not being sealed at any meeting at which it properly could be sealed: and that there was no consent by the defendant to take shares in the company after either of those papers was sealed.

The defendant's counsel further submitted, that, at all events, the defendant was only liable to the call made on the 14th of April, 1858, as the alleged registers of the 1st of January, 1857, and the 15th of July, 1857, were not either of them sealed registers within the Companies Clauses Consolidation Act, 1845, and the company's act, the provisions of these acts not having been complied with either in respect of the time of sealing or the contents of the papers so sealed: or, if the last-mentioned register of the 15th of July, 1857, were not invalid, then that the defendant was only liable to the calls made subsequently to the 15th of July, 1857, as the first register, of the 1st of January, 1857, was invalid on the grounds above stated.

The Lord Chief Justice reserved these points for the opinion of the court; and the jury found a verdict for the plaintiffs for 340l. 11s. 6d., being the amount of all the calls, with interest, except the first.

[800] Shee, Serjt., in the following term, in pursuance of the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant, "on the ground that the paper first sealed as a register was not sealed within the time limited by the 8 & 9 Vict. c. 16, and the 18 & 19 Vict. c. cli. (the company's act); and that the paper secondly sealed as a register was not sealed at a meeting at which it could be properly sealed under those acts; and that there was no consent by the defendant to take shares after either of those papers was sealed,"—or to reduce the damages to the amount of the calls, with interest, made after the date of the 7th of January, 1858, or to the amount of the calls, and interest, made after the date of the 15th of July, 1857, on the ground that the paper sealed on the 1st of January, 1857, and the paper sealed on the 15th of July, 1857, were not either of them sealed registers within the 8 & 9 Vict. c. 16, and the 18 & 19 Vict. c. cli. (the company's act), the provisions of these acts not having been complied with either in respect of the time of sealing or the contents of the papers so sealed. He referred to the case of *The Nury and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118, and to the 9th section of the 8 & 9 Vict. c. 16, and the 14th section of the 18 & 19 Vict. c. cli.

Montague Smith, Q. C., and Mellish, on a subsequent day in the same term, shewed cause. The jury found that Mr. Hawksford was a shareholder. The

register is *prima facie* evidence, if perfect, that the parties named therein are shareholders; and, if unanswered, it is conclusive. If the court be satisfied that it is unnecessary to shew the defendant to be upon the register provided it be shewn aliunde that he is a shareholder, the questions raised by the rule become immaterial. [Crowder, J. Non constat that the jury would have come to [801] the conclusion that the defendant was a shareholder if the so-called registers had not been put in. The question is whether it is sufficient, to render a party liable for calls, to shew him to have assented to be a shareholder, without also shewing that his name appears in a valid register.] The 8th section of the 8 & 9 Vict. c. 16, enacts, that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company." It does not follow that a party may not be a shareholder without strictly complying with this, which is a mere enabling clause. The 9th section enacts "that the company shall keep a book, to be called the 'register of shareholders;' and in such book shall be fairly and distinctly entered from time to time the names of the several corporations and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company." In *The Newry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118,—where it was held that a purchaser of scrip-certificates for shares in a railway company is not liable for calls until his name is inserted on a sealed register of shares,—Parke, B., [802] says: "By the 8th section of the general act (8 & 9 Vict. c. 16), all persons who have subscribed to the company, or have otherwise become entitled to a share in it, are to be deemed shareholders, which the interpretation clause explains to mean 'shareholders, proprietors, or members of the company.' Then, by the 9th section, the company are required to enter in a book, to be called 'The register of shareholders,' the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the company. By the 28th section, this register is made *prima facie* evidence of a party therein named being a shareholder: it is not, however, conclusive: for, he may, notwithstanding, shew that his name has been put there without his consent. By the 27th section, the company, in actions for calls, must prove that the defendant was a shareholder in the undertaking at the time the call was made; that is, a shareholder in the sense of the 8th and 9th sections. The result is, that there is no register until after it is sealed: and no person who was not an original subscriber can be liable as a shareholder, unless his name is on a sealed register. Probably that is required both in the case of an original subscriber and a transferee of scrip. It is only necessary in this case to say that a transferee is not liable for calls until after his name is entered on a sealed register." That, however, does not decide the point now before the court. The learned Baron there refers, not to a transferee of shares, but to a transferee of scrip. The transfer of shares is provided for by s. 14, which enacts, that, "subject to the regulations herein or in the special act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company, in case such shares shall, under the provision hereinafter con-[803]tained, be consolidated into capital stock; and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated," &c.: and s. 15 provides for the registering of transfers. It is not essential to the power to transfer shares, that the party's name should be on the register. Shares may be transmitted by other means than by transfer; for instance, the 18th section provides, that, "if the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing as hereinafter mentioned,

or in such other manner as the directors shall require; and every such declaration shall state the manner in which the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a justice, or before a master or master extraordinary of the high court of Chancery; and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders; and, until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof." And the 19th section enacts, that, "if such transmission be by virtue of the marriage of a female shareholder, the said declaration shall contain a copy of the register of such marriage, or other particulars of the celebration thereof, and shall declare the identity of the wife with the holder of such share; and, if such transmission have taken place by virtue of any testamentary [804] instrument, or by intestacy, the probate of the will or the letters of administration, or an official extract therefrom, shall, together with such declaration, be produced to the secretary; and, upon such production, in either of the cases aforesaid, the secretary shall make an entry of the declaration in the said register of transfers." The language of these sections is somewhat inconsistent; the legislature evidently meant the "register of transfers" in s. 18. The 7th section of the special act incorporates the subscribers by name, the defendant being one of them; and in the 19th section he is named as one of the first directors of the company. By the 145th section of the London Grand Junction Railway Act, 6 & 7 W. 4, c. civ., the company were required to cause "the names of the several corporations, and the names and additions of the several persons who shall then be or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and after such entry made to cause their common seal to be affixed thereto." By s. 147, it is enacted that the company shall, in some proper book to be provided by them for that purpose, "enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein. And by s. 152 it is enacted, that, in any action to be brought by the company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call,—“in order to prove that [805] the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the said company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein.” [Crowder, J. Is the company bound to register a transfer of scrip-certificates?] The argument would undoubtedly be strengthened if it were so. That a shareholder who is not upon the register may transfer, is clear. The business of these companies would be very much impeded if it were to be held that no one can be liable to calls who is not registered as a shareholder. The register can only be sealed at the ordinary half-yearly meetings of the company: 8 & 9 Vict. c. 16, s. 64. Suppose a transfer of shares to take place immediately after a meeting, there would be no means of registering it until the next half-yearly meeting. Who then would be liable? The transferor's liability ceases on the delivery of the deed of transfer to the secretary to be registered: s. 15. The 21st section enacts that "the several persons who have subscribed any money towards the undertaking, or their legal representative respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company." Nothing is said there about the party being registered. In *The Birkenhead, Lancashire, and Cheshire Junction [806] Railway Company v. Brownrigg*, 4 Exch. 426, the court of Exchequer seem to assume

that there may be other modes of proof of proprietorship besides the fact of the party's name being on the register.

Assuming that it was essential that the party's name should appear upon a sealed register of shareholders under s. 8, it is submitted that the documents produced afforded abundant evidence of that fact. That a literal and strict compliance with the act is unnecessary, is clear from the case of *The London Grand Junction Railway Company v. Freeman*, 2 Scott, N. R. 707, 2 M. & G. 606, where it was held that the book thus referred to and made *prima facie* evidence of the proprietorship by the 152nd section was, the book which the company were required by the 145th section to keep; and that a book kept by them, containing the names and additions of all the persons whom the company supposed to be the persons entitled to shares, together with the number of those shares (though not in all cases the amount of subscription paid thereon), and the proper number by which each share was distinguished, and sealed from time to time with the common seal of the company, was a book substantially kept in compliance with the act, and admissible in evidence, though it contained the names of persons not entitled, and omitted those of others who were entitled to shares, and though there were some entries therein to which there was no seal properly applicable. Lord Denman, in delivering the judgment of the court of error, after referring to the several clauses of the act, says,—"To what book, then, does the 152nd section refer when it speaks of the book directed to be kept, containing names, additions, number of shares, and places of abode? We think it refers to the book in s. 145. It is essential for the purpose of the action for calls that the names and number of shares should [807] be shewn in evidence: that appears from the book mentioned in s. 145, and not from that mentioned in s. 147. The place of abode can very rarely, if ever, be important in such actions. One of these two books must have been intended; and, as [that mentioned in] s. 145 is clearly sufficient to shew what is wanted to be shewn, and the other is not, we think the words in s. 152, as to the places of abode, must be rejected, as being in the nature of a *falsa demonstratio, quæ non nocet*. If, then, the book referred to in s. 145 be the book which by s. 152 is made *prima facie* evidence, the next inquiry is, whether the book which was in fact produced was the book kept pursuant to the 145th section. Now, the evidence clearly shews it was the book intended to be kept under the provisions of that section. It contained the names and additions of all the persons whom the company supposed to be the persons entitled to shares, together with the number of those shares, though not in all cases the amount of subscription paid thereon, and also the proper number by which each share was distinguished; and the common seal was from time to time affixed, as required by the section. This appears to us, on principle, as well as on the authority of *The Southampton Dock Company v. Richards*, 1 Scott, N. R. 219, 1 M. & G. 448, to be a sufficient compliance with the act to render the book admissible." So, in *The Birmingham, Bristol, and Thames Junction Railway Company v. Locke*, 1 Q. B. 256, the register book kept in pursuance of the local act (6 & 7 W. 4, c. lxxix.) was held to be *prima facie* evidence of the defendant's being a proprietor of shares, although it did not contain the amounts of subscriptions paid on the respective shares. [Erle, C. J. There must at all events be a substantial compliance with the statute. You can hardly bring the paper of the 1st of January, 1857, within the principle of those decisions. It does not purport to be [808] a register, nor does it contain any of the particulars required in s. 9. It seems to have been intended as a mere memorandum.] It must be conceded that there is some difficulty as to that. But the other two, it is submitted, are good. The registers of the 1st of July, 1857, and 27th of January, 1858, were sealed at general half-yearly meetings of the shareholders of the company, and contain the names and residences of the parties, and the number of shares each was entitled to. All that was wanted to make them perfect was, the amount of the subscriptions. These substantially comply with the provisions of the general and the special act.

Shee, Serjt., and Milward, in support of the rule. It never has been yet held that a person can be a shareholder in a joint-stock company unless he is on the register of shareholders or register of transfers. In *The Newry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118, it was expressly decided that a transferee of scrip was not liable for calls until his name had been entered on the sealed register. And Parke, B., says: "No person who was not an original subscriber can be liable as a shareholder, unless his name is on the sealed register. Probably that is required both in the case of an original subscriber and a transferee of scrip. It is only necessary in this case to say

that a transferee is not liable for calls until after his name is entered on a sealed register." That is the nearest approach to an expression of opinion upon the point which is to be found in any of the books. But it is in accordance with the plain common sense of the thing. A man is not a shareholder, either for the purpose of acquiring any rights or of incurring any responsibility, until he is registered. The liability can only be co-extensive with the right acquired. [809] [Erle, C. J. The question is, whether the statute has made registration essential to the party's being a shareholder.] It is submitted that it has. There is a manifest distinction between a proprietorship by act and operation of law and a proprietorship by act of the party, — just as under the ship-registry acts. The 6th section of the 8 & 9 Vict. c. 16, provides for the distribution of the capital of the company into shares. The 8th section defines who shall be shareholders: it enacts that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or who shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company." The 9th section describes the book which is to be called the "register of shareholders;" and it enacts that, "in such book shall be fairly and distinctly entered from time to time the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company." The very form of the certificate shews that the shares must be identified with the register. The 14th section enables a registered shareholder to transfer his shares; and the 15th section requires the transfer to be registered, and provides [810] that until the deed of transfer has been delivered to the secretary of the company for the purpose of being registered, the transferor is to remain liable for calls, and the transferee is to claim no dividend. [Crowder, J. Who is to be liable for a call made in the interval between the delivery of the transfer to the secretary and the placing the name of the transferee upon the register?] The statute certainly has not said that the vendor shall continue liable; nor does it in terms provide that the vendee shall become so. [Erle, C. J. If the transferee is not liable for a call until his name appears on the register of transfers, and the transferor is discharged from the delivery of the transfer to the secretary, how is the company to get the amount of the call?] The only consequence would be that the transferee could not be sued for the call until registered. The call is made upon the shares generally. [Williams, J. The call is to be made upon the respective shareholders.] In respect of the shares held by them. The 16th section prohibits the making of a transfer until all previous calls have been paid. Until the act of parliament has been obtained, no shares can exist. The signature of the subscription-contract has no relation to shares: but is merely required to satisfy the legislature that there is a *bonâ fide* intention to prosecute the undertaking. It is all preliminary. The defendant, it appears, subscribed for 600*l.*, and the company allot him 100 shares of 5*l.* each. [Erle, C. J. When did he become a shareholder? All those things which the jury find constituted him a shareholder took place before any shares were called into existence. The jury have found that the defendant was a holder of 100 shares, if it be possible that he could be a shareholder.] All that he does to constitute him a shareholder took place in August, 1856. Anything which he then did in the way of assenting to become a share-[811]-holder must be taken subject to a due compliance with the provisions of the general and the special acts. He is not to have an indefinite liability imposed upon him from the time of the passing of the special act.

The documents put in clearly were not registers within the meaning of the 9th section of the 8 & 9 Vict. c. 16. As to that produced at the meeting of the 1st of January, 1857, it was a mere loose memorandum, and never was intended to be a register at all. It has no one of the requisites of a register. [Erle, C. J. We are all agreed about that document.] The document of the 15th of July, 1857, is no better. The meeting which then took place was not one at which it was competent to seal a register. It was not shewn to have been a meeting convened pursuant to the 14th

section of the special act, which provides that "the first general meeting of the shareholders of the company shall be held within two months after the passing of the act; and a general meeting of the company shall be held in the month of January in every year, or at such other times as shall be from time to time appointed by any general meeting." [Erle, C. J. Had there not been any such special appointment?] None appeared. [Mellish. It professes to be an ordinary meeting; and these are regulated by the 64th section of the general act.] It is not competent to the company to hold an ordinary meeting otherwise than in January, unless it be specially appointed at the meeting in January: and of this there was no evidence. In *Westoby v. The Galvanized Iron Company*, 8 Exch. 17, the defendant obtained an allotment of shares in a joint-stock company completely registered under the 8 & 9 Vict. c. 110. He paid the deposit and his name was inserted in the register of shareholders, but he never executed the deed of settlement. The proposed amount of capital was never subscribed, but the company commenced business with less; and, having become embarrassed, an act of parliament (11 & 12 Vict. c. ciii.) passed for winding up the affairs of the company. This act, after reciting the deed of settlement, and that certain shares were unpaid, empowered the directors to sue for calls, and enacted that, in such action, the register should be *prima facie* evidence of the defendant's being a shareholder, and of the number of his shares, provided that such calls should be made according to the provisions of the deed of settlement, and, as regarded the liability of shareholders, should be deemed to have been made under such provisions; and also provided that nothing in that act contained, except as therein expressly enacted, should render liable to calls any shareholder or other person who would not have been liable thereto if that act had not passed. The defendant having been sued for calls,—it was held, that the private act applied to shareholders only, and that the defendant was not liable as a shareholder, inasmuch as he had never executed the deed of settlement.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

Upon this rule, the defendant has raised three questions,—first, whether he is liable for calls made after January, 1857,—secondly, for calls made after July, 1857,—thirdly, for calls made after January, 1858.

As to the first question, the facts proposed must be taken to be, that the company had assented to appropriate one hundred shares to the defendant, and that he assented to take them; but no shares had been numbered, and no specific shares had been appropriated. The defendant's name with others had been put [813] down on a sheet of paper, and this had been sealed as a register of shareholders: but we have already expressed our opinion that it was not a register, not having any of the essentials required under the act, and not appearing to have been intended to be a register. Upon these facts, we think that the defendant is not liable to the calls made after January, 1857. He is not shewn to be the holder of any specific share, within the meaning of s. 27, giving the action for calls; for, the shares of this company were not created within the meaning of that section, but were in process of formation only.

With respect to the calls made after July, 1857, the evidence must be taken to shew that the shares had been numbered, and one hundred shares so numbered appropriated to the defendant: and a book had been prepared which purported to be a register of shareholders, and was *bona fide* intended so to be, and which contained all essential requisites. But it appeared to have been sealed at a meeting held in July 1857: and, as the special act directed the ordinary meetings to be held in January, and as the Companies Clauses Consolidation Act, 1845, authorized ordinary meetings at the time specified in the special act, and at any other times specified in a resolution come to at a general meeting, the objection of the defendant was that this was no register unless there was a resolution at a January meeting authorizing the meeting in July.

In deciding on this objection, we assume that there was no resolution in January authorizing the meeting in July, although, if the point had been more distinctly understood at the trial, the fact might have turned out differently, regard being had to the section (26) defining the proof required from a plaintiff in an action for calls. Thus, the question is raised, whether there can be a holder of a share within the 27th section, [814] without a register of shareholders authenticated by the seal of the company affixed at an ordinary meeting. This question we answer in the affirmative.

We consider that all requisites to make a shareholder are complied with except the sealing; so that the question is, whether it is impossible to hold a share unless the name of the holder is in a register of shareholders lawfully sealed. We find no such enactment: and, in respect of transferees, we think they may be holders without this requisite: and, although, as above said, the shares must be numbered and specifically appropriated, and this process requires the formation of a book analogous to a register, still it may be done without authentication by sealing at an ordinary meeting.

The argument for the defendant rests on section 8, which describes a shareholder to be, every person who shall have subscribed, &c., or who shall have otherwise become entitled, &c., and whose name shall have been entered on the register of shareholders. This is description rather than definition, as it is clear that a transferee is entitled to a share, and may be a shareholder without his name being on the register of shareholders, if it is on the register of transfers. We think the statute contemplated the process above described of numbering and appropriating, and may well have intended that an inchoate register book *bonâ fide* intended to be valid might be taken for this purpose as a register *de facto*, although not properly sealed; and also that the act probably intended names to be added from time to time in intervals between the meetings for sealing.

There is no decision on the point in respect of an original shareholder: the dictum relating thereto in *The Nerry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118, is extrajudicial. The principle laid down in *The Southampton Dock Company v. [815] Richards*, 1 Scott, N. R. 219, 1 M. & G. 448, and adopted in *The London Grand Junction Railway Company v. Freeman*, 2 Scott, N. R. 705, 2 M. & G. 606, that a book *bonâ fide* intended to be a register, though materially defective, should operate as a register in an action for calls, on account of the inconvenience which would arise if a debtor could defeat the claim upon him by resorting to formal defects in the register of shareholders, supports our decision.

For these reasons, we think the defendant is liable to the calls after July, 1857.

With respect to the calls after January, 1858, it was objected that this register, as well as the last, ought to have been made in a shorter time after the passing of the special act. But we are of opinion that the time directed is not an essential condition, and that a register made after that time may be valid.

The rule, therefore, will be absolute, to reduce the verdict by the amount of the calls made before July, 1857, and discharged as to the residue.

Rule accordingly.

[816] THE PENARTH HARBOUR, DOCK, AND RAILWAY COMPANY v. THE CARDIFF WATERWORKS COMPANY. Jan. 26th, 1860.

Since the Common Law Procedure Act, 1852 (s. 55), abolishing profert, the court will order inspection of a deed relied on by a defendant in his plea, though it be a disclosure of the defendant's title.—Therefore, where, in an action, for diverting water from a stream, the defendants pleaded a prior grant by the owners of the soil of liberty to take the water, the court allowed the plaintiffs to inspect and take a copy of the deed.

The declaration stated that the plaintiffs, before and at the time of the committing of the grievances thereafter mentioned, were possessed of certain lands on both sides of the river Ely, and of the bed of the stream of the river Ely, for the purpose of carrying out the undertaking authorized in and by the Ely Tidal Harbour and Railway Act, 1856: yet the defendants, on divers days and times, wrongfully and unlawfully by divers ways and means took from the said river Ely, higher up in the course of the said river than the said lands of the plaintiffs, divers large quantities of water beyond and in addition to those quantities of water which the defendants were authorized to take from the river Ely under the Cardiff Waterworks Act, 1853, or otherwise howsoever, and used the same for the purpose of supplying with water the inhabitants, buildings, and lands within the limits in the said last mentioned act mentioned, &c. &c.

Fifth plea, that, before the plaintiffs became possessed of any part of the said lands as in the declaration mentioned, one William Pitt, Earl of Amherst, and one John Drummond, were at one and the same time seised in fee of the said lands and of the

other lands, tenements, and hereditaments thereafter mentioned, which other lands were on both sides of the said river Ely, and through which other lands the said river flowed, and were seised in fee of the ground, soil, and bed of the river Ely so between the said last mentioned lands, and of parts of the ground, soil, and bed of the said river Ely adjoining thereto; and the said Earl of Amherst and John Drummond then were im-[817]-powered and invested with a power to sell in fee-simple, by the direction of one Harriett Clive, all the said lands in the declaration alleged to be in possession of the plaintiffs, and all the said other lands, tenements, and hereditaments, and the said parts of the ground, soil, and bed of the said river Ely, as well as all right, title, interest, benefit, and advantage in, to, or arising from the stream of the said river, and the flow thereof, so passing through the said lands so alleged to be in the possession of the plaintiffs, and through the said other lands, and in and upon the said ground, soil, and bed of the said river Ely; and, being so seised and impowered, by a deed dated the 22nd of August, 1854, and made between the said Earl of Amherst and John Drummond of the first part, the said Lady Harriett Clive of the second part, and the defendants of the third part, they the said Earl of Amherst and John Drummond, by the direction of the said Lady Harriett Clive, granted, bargained, sold, and released to the defendants and their successors, certain lands, tenements, and hereditaments, and, amongst other things, the said other lands, together with the said ground, soil, and bed of the said part of the said river Ely so between the said other lands, and of the said part so adjoining thereto, and so much of the said river Ely as was so situate between the said lands as aforesaid, and in and upon the said parts of the said ground, soil, and bed of the said river: and the said Earl of Amherst and John Drummond and Lady Harriett Clive by the said deed parted with and granted and conveyed to the defendants all their right, title, interest, benefit, and advantages in, to, or arising from the water of the said river, and the flow thereof, and granted to the defendants an irrevocable licence to take and use the waters of the said river in the manner and to the extent mentioned in [818] the declaration; and the plaintiffs afterwards contracted with the said Earl of Amherst and John Drummond, that they, by the like direction of the said Lady Harriett Clive, should sell and convey to the plaintiffs and their successors the said land so in possession of the plaintiffs; under and by virtue of which contract, and by the leave and licence of the said Earl of Amherst and Lady Harriett Clive afterwards given and granted, the plaintiffs were let into possession and became so possessed of the said lands as in the declaration mentioned, and the plaintiffs have no claim or interest to or in the said lands so in the possession of the plaintiffs, or to their said possession thereof, other than by such supposed right and title subsequent to the said title of the said defendants as aforesaid.

Mellish, on a former day in this term, obtained a rule calling on the defendants to shew cause why the plaintiffs should not be allowed to inspect and take a copy of the deed of the 22nd of August, 1854, referred to in the fifth plea. The question proposed to be raised was, whether, where the defendant justifies under a deed, and the plaintiff has no copy of it, the latter is not entitled to have inspection of it for the purpose of replying, though it is no part of the plaintiff's case. The 55th and 56th sections of the Common Law Procedure Act, 1852, abolishing profert and oyer, and the case of *Sim v. Edmunds*, 15 C. B. 240, were cited. [Williams, J., referred to *Webb v. Adkins*, 14 C. B. 401.]

R. Clarke shewed cause. It may be conceded, that, before the passing of the Common Law Procedure Act, 1852, the defendants must have made profert of the deed in question, and then the plaintiffs would have been entitled to a copy of it. [Willes, J. Those [819] who framed that act were evidently under the impression that in a case like this the opposite party would be entitled to an inspection of the deed referred to at common law.] The framers of an act of parliament are not always the persons best fitted to construe it; for, they are too apt to import into its consideration their own pre-conceived notions of the subject matter. All that the Common Law Procedure Act has done is, to enact in s. 55, that "it shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and, if profert shall be made, it shall not entitle the opposite party to crave oyer of or set out upon oyer such deed or other document;" and in s. 56, that "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is

set out." The intention of the act was, to put an end to a party's having a right as a matter of course to inspect his opponent's title-deeds,—to abolish the distinction which prevailed in this respect between deeds and other instruments. If the document in question had been a mere agreement, the plaintiffs would have had no right to inspect or take a copy of it. [Erle, C. J. Unless there was but one copy of it.] And that copy were held under such circumstances as to make the party holding it a trustee for the party seeking to inspect. In general, the rule of law, as well as of equity, is, that, if my opponent seeks to attack my title, he must come prepared, and must not rely upon documents in my possession in order to aid him. [Erle, C. J. The plaintiffs sue the defendants for diverting from a stream water which ought, as they say, of right to flow to their harbour and works. The defendants set up in answer a [820] prior right derived from the owners of the soil by deed. Why should not the plaintiffs be at liberty to inspect the deed upon which the defendants rest their justification?] The plaintiffs are seeking a disclosure of the defendants' title, and not merely to compel the production of a document in which they have an interest or which will aid them in establishing their case. *Webb v. Atkins*, 14 C. B. 401, is a totally different case. [Williams, J. That case is an authority to this extent, that the court will take care that a party who would before the Common Law Procedure Act have been entitled to have a deed set out upon oyer, shall not be prejudiced by the abolition of that antiquated form.] Apart from oyer, the court would never impose upon a defendant the hardship of exposing his title to his adversary. In Taylor on Evidence, 3rd edit. §§ 1605, 1606, the rule in equity is thus stated: "As in all cases where a discovery of the contents of papers is prayed, the onus is upon the plaintiff to prove his right thereto, and the only evidence on which he can rely is the defendant's admission, it follows, that, with a single exception, to be presently mentioned, a court of equity will not make an order for inspection of documents, unless the plaintiff can shew from the defendant's answer, or from his affidavit in the nature of a supplemental answer, first, that the writings in question are in the possession of the defendant, and next, that they are relevant to his own case, or, in other words, that he has an interest in their production for the purpose of the trial about to take place, either as affording affirmative evidence of some right or title belonging to him, or as tending to disprove the title or case of his opponent, by shewing some specific defect therein. The exception just alluded to is recognized where the defendant, admitting the documents to be in his possession, so incorporates them by general or special reference with his answer as to make [821] them form a substantial part of it. In this case the plaintiff will be entitled to their production, whether they constitute his title or the exclusive title of the defendant; because the latter, by thus dealing with the documents, will have waived any objection to their production; and this, too, although in a subsequent part of his answer he should expressly claim the privilege of withholding them, either as forming no part of his opponent's case, or as confidential communications. The same doctrine would apply, if a petitioner were to refer in his petition to a document in his possession. In short, neither party to a suit will be allowed to set out a document in part and then refer to it, and afterwards tell his opponent that he shall not see it, because he himself was not bound originally to furnish any information respecting it. Either he must abstain from referring to any part of it, or he must permit his opponent to examine every part of it." [Erle, C. J. That has no very immediate bearing upon the question we have to consider, which is, whether the legislature, in abolishing profert and oyer, did not intend that the party who would have had a copy of a deed referred to in the pleadings before, shall now have an inspection under the common law jurisdiction of the court.] If the legislature had so intended, they would have said so in terms, and would not have left a matter of such importance to speculation and conjecture. The cases of *Hardman v. Ellames*, 2 Mylne & K. 732, and *Mackintosh v. The Great Western Railway Company*, 18 Law J. Ch. 169, shew the ground upon which the doctrine of equity rests. In the last-mentioned case, Lord Cottenham says: "Both in this case and in *Hardman v. Ellames*, circumstances existed which, if it had not been for the general reference, would have protected the defendants from producing the documents. In *Hardman v. Ellames*, the documents went to prove the [822] defendant's title; here, the ground is, confidential communications. After a general reference, the defendant cannot turn round and say, 'I told you something I was not bound to tell you; I will now claim my privilege, and tell you no more.'" In *Shadwell v. Shadwell*, ante, vol. vi., p. 679, in an action against executors upon an agreement under which

the plaintiff claimed certain arrears of an annuity alleged to be due to him from the testator, the defendants pleaded, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof. The court refused to grant the plaintiff a rule to inspect a supposed letter upon which the plea was founded,—upon a mere affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made,—the inspection being sought, not in order to support the plaintiff's own case, but in order to see whether and by what means a defence could be made out against him. [Williams, J. The plea there did not say that the agreement upon which it professed to be founded was in writing.]

Mellish was not called upon to support his rule.

ERLE, C. J. I am of opinion that this rule must be made absolute. The question is whether or not the plaintiffs are entitled to inspect the deed which is the foundation of the defence set up by the fifth plea, and [823] of which, if it had been set out upon oyer according to the old practice, he would have had a copy. The Common Law Procedure Act, 1852, having abolished profert and oyer, the question is whether it has taken away the right of the opposite party to have inspection. I am of opinion that the act did not intend to take away the right, but only to abolish the inconvenient proceeding by which inspection was formerly obtained, leaving the right as it was before. It seems to me that there was abundant reason in law for giving inspection in respect of deeds, and for withholding it in respect of parol contracts. In the latter case, the evidence in support of it may be drawn from several different sources: but, where the party pleading relies upon a deed, the opposite party may ascertain by an inspection of it whether or not it is set out according to its true legal effect, and may at once be satisfied as to whether or not the party pleading it has the right he claims. It seems to me, therefore, that there was abundance of good reason for the law as it stood before the Common Law Procedure Act; and that rule has not in my opinion been abolished. The general principle of equity is laid down in broad terms in Taylor on Evidence, § 1605, that “a court of equity will not make an order for inspection of documents, unless the plaintiff can shew from the defendant's answer, or from his affidavit in the nature of a supplemental answer, first, that the writings in question are in the possession or power of the defendant, and next that they are relevant to his own case, or, in other words, that he has an interest in their production for the purpose of the trial about to take place, either as affording affirmative evidence of some right or title belonging to him, or as tending to disprove the title or case of his opponent, by shewing some specific defect therein.” And the doctrine is laid [824] down in quite as general terms in Daniel's Chancery Practice. All these rules of practice are capable of modification. If the object of the party seeking the inspection appeared to be merely to find a defect in the title of his opponent, the court would mould the rule so as to frustrate such an abuse of its practice. But, as matters stand in this case, I think the old rule ought to apply, and that the plaintiffs should have an opportunity to inspect the deed referred to.

WILLIAMS, J. I am of the same opinion. Before the passing of the Common Law Procedure Act, 1852, a party to a cause, by reason of the necessity of his opponent's making profert of a deed upon which he relied in pleading, acquired a right to know its contents by claiming oyer. I think it clearly was not the intention of that act, by abolishing profert and oyer, to put parties in a more disadvantageous position in this respect than they stood in before. And, if we find that the abolition of profert and oyer will have that effect in any case, I think we are bound, in exercise of the powers we possess to do justice between suitors in the conduct of the pleadings, to grant inspection. The courts have for a long period been in the habit of allowing parties to inspect and take copies of deeds. This appears from the case of *Jerons v. Harridge*, in 18 Car. 2, 1 Wms. Saund. 9 d. From that time to the present it has been the established practice of the court to do so, whenever it has been thought necessary for the equitable conduct of a cause. That being so, I think we are bound to see that the 55th section of the Common Law Procedure Act, 1852, does not deprive a party of the rights he had before, and to grant inspection where it is

essential to put him in the position which justice and equity demand. It has been said that there is no distinction in good sense and reason [825] between the case of a plea relying upon an instrument under seal and one setting up an agreement not under seal: and that, with respect to agreements not under seal, there is no rule which enables the court to grant inspection. Assuming that to be so, it does not appear to me to be decisive of the question. Before the passing of the Common Law Procedure Act, a party was always entitled to inspect a deed set out in his opponent's pleading: and I think we are bound to take care that he shall not incidentally be prejudiced by a provision which has, *diverso intuitu*, by abolishing *proferat*, deprived him of that advantage. I do not agree that a different rule prevails where the instrument relied on is not under seal. It is not necessary to give any opinion upon that point: but I wish to guard myself against being understood to give way to the notion that in such a case inspection would not be allowed. I protest against the case of *Shadwell v. Shadwell* being considered as an authority for that position. The plea there did not rely on any agreement in writing at all: the plaintiff sought an inspection, upon a suggestion of the possibility of there being some letter in existence upon which the defendant meant to rely as an agreement. The majority of the court thought it was a mere fishing application, and that the plaintiff had no right to put his opponent to an affidavit in answer. That case, therefore, does not in the least affect the legal question now before us. Where a pleading purports to rely on an agreement not under seal, authorities are to be found to shew that the other party may come to the court and under its equitable jurisdiction obtain an inspection of the instrument so relied on.

WILLES, J. I am entirely of the same opinion. It appears to me that the rule of the common law is pre-[826]-cisely in accordance with what is said by Lord Cottenham in *Mackintosh v. The Great Western Railway Company*, 18 Law J. Ch. 169, to be the rule in equity: and I think his words may be read with advantage. Speaking of *Hardman v. Ellames*, 2 Mylne & K. 732, his Lordship says: "What took place in that case at the Rolls is not reported: but, according to my recollection, I went upon this ground, —that, when a party sets out a document in part, and then refers to it, he cannot after that tell the plaintiff he shall not see the document, because he (the defendant) was not bound originally to give any information about it." In that case, therefore, the plaintiff was held to be entitled to inspection because the defendant had made the document a part of his answer, and not because the plaintiff had an interest in it. That dispels a great portion of Mr. Clarke's argument. The principle upon which the court of equity proceeds in ordering documents to be produced is, that they are by reference incorporated in the answer, and become a part of it: *Evans v. Richard*, 1 Swanston, 7. In *Hardman v. Ellames*, 2 Mylne & K. 758, Lord Commissioner Shadwell says: "It appears, upon a review of the cases, to be perfectly settled, that, where a defendant in his answer states a document shortly or partially, and for the sake of greater caution refers to the document in order to shew that the effect of the document has been accurately stated, in such a case the court will order the document to be produced. It was said, in the present case, that the document ought not to be produced, because it only manifests the defendant's title: but the answer to that is, in the first place, that it may by possibility do something more than merely manifest the defendant's title. It would be a strange thing to say that the defendant should at the hearing have the advantage of other parts of the deed than [827] those set forth in the answer, and that the plaintiff, who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that, if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the defendant's answer as he thinks fit." I apprehend that rule applies to the case of any instrument upon which the plaintiff in his declaration really founds his claim. For this there is authority. In *Charnock v. Lumley*, 5 Scott, 438, in an action for money had and received, the court allowed the defendant, after he had pleaded, to inspect and take a copy of an agreement upon which the plaintiff's claim was founded. Tindal, C. J., there says: "This case clearly comes within the spirit, though not within the strict letter of the rule (a). Had the action

(a) The rule contended for there was, that the party was entitled to have inspection because there was but one copy of the agreement, because the applicant had an interest in it, and because it was held by the plaintiff as trustee for him.

been founded upon the special agreement, the defendant's right to inspect the agreement could not have been questioned. Although in form this is an action for money had and received, inasmuch as the rights of the parties will be controlled by the agreement, it is in effect the same as if it were brought upon the agreement itself. I therefore think the defendant is entitled to have the inspection." And Vaughan, J., says: "I am also of opinion that this comes within the range of the numerous cases by which I conceived the rule as to the production of documents for inspection was long since settled." So much as to the common law. As to the case *Shadwell v. Shadwell*, ante, vol. vi., p. 679, it hardly becomes me to say anything, as I dissented from [828] the judgment pronounced by the court. But I would say a word upon the Common Law Procedure Act, 1852. The 55th section, which abolishes profert and oyer, is not the material one, but the 56th, which provides that "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material." That appears to me to give precisely the same right as the party before had at common law. It gives him the right to set out any document mentioned or referred to in his opponent's pleading,—whether under seal or not,—and, by necessary implication, it gives him a right to apply to the court for inspection and a copy, in order to enable himself to do so. For these reasons, I concur with the rest of the court in thinking that this rule should be made absolute.

Rule absolute (a)¹.

[829] DAVIES v. WESTMACOTT. Jan. 26th, 1860.

To entitle a plaintiff to an order for leave to proceed as if personal service had been effected, under the 17th section of the 15 & 16 Vict. c. 76, where the writ has been served by leaving a copy for him at a club-house of which the defendant is a member, it is not enough to shew that the copy has come to his hands. The affidavit should distinctly state that efforts had been made to discover the defendant's place of abode, and that the person seeking to serve the writ had been unable to discover it.

C. Pollock moved, under the 17th section of the Common Law Procedure Act, 1852 (a)², for leave to proceed as if personal service of the writ of summons had been effected.

The writ of summons described the defendant as of "the Junior United Service Club, Charles Street, St. James's;" and the affidavit of the person entrusted with the service of the writ stated, that the deponent attended on the 3rd of December last at the Junior United Service Club-house for the purpose of serving the defendant, when he was informed by the hall-porter there that he did not know the defendant's address, but that he had been to the club that morning; that the deponent called several times at the club-house for the purpose of effecting service, but without success; that, on the 6th of December, he delivered to the hall-porter a copy of the writ

(a)¹ In *Doe d. Child v. Roe*, 1 Ellis & B. 297, Lord Campbell says: "This common law jurisdiction of the court is likely in future to be of much greater practical importance than formerly. In a large number of cases to which it would have applied, the necessity for its exercise was superseded by profert. Now that, by the statute 15 & 16 Vict. c. 76, s. 55, the legislature has abolished profert, without providing any substitute, it becomes highly important to lay down the rule, that, where an action is brought on an instrument, the court has power to order an inspection of it."

(a)² The 17th section of the 15 & 16 Vict. c. 76, provides, that "the service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge: and, in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit."

inclosed in an envelope addressed to the defendant, with a request that it might be delivered to him: that the deponent called [830] again at the club-house on the 13th of December, and saw the hall-porter, who informed him that the defendant had been there on the previous Saturday, and that he had given the letter to him: and that, from these circumstances, as well as from a letter which the defendant had sent to the plaintiff's attorneys, the deponent believed that the writ had come to the knowledge of the defendant. The letter referred to was as follows:—

“J. U. S. Club, Dec. 12th, 1859.

“Gentlemen,—Upon visiting the club this day, after an absence of some time, it was with much surprise I found a letter from your office, inclosing a writ on account of Mr. Davies's bill. I called at your office, and thought I had fully explained my present position, &c., &c.

“R. M. WESTMACOTT.”

An application for leave to proceed, founded upon this affidavit, had previously (on the 20th of December, 1859), been made to Williams, J., at Chambers, without success: that learned judge being of opinion that the affidavit did not sufficiently shew that reasonable efforts had been made to discover the defendant's residence.

Pollock submitted that there was enough upon the face of the affidavit to satisfy the court that the writ had duly come to the defendant's hands. [Williams, J. Every word in the affidavit may be true, and yet the process-server might without any difficulty have ascertained the defendant's dwelling. Willes, J. It is a very offensive thing to serve a writ upon a defendant at his club-house, and ought not to be tolerated without a very sufficient reason.]

ERLE, C. J. I am of opinion that we ought not to interfere in these cases unless we see clearly that the [831] affidavit is such as ought to have satisfied the judge that the person employed to serve the writ had done all that could reasonably be expected of him to serve the defendant personally or to ascertain his dwelling-place. All that appears upon this affidavit is, that he called on the 3rd of December at the defendant's club-house and asked the hall-porter for his address, and that on the 6th he left a copy of the writ there for him inclosed in an envelope, which seems to have reached the defendant's hands: and on the 20th application is made to the learned judge for leave to proceed as if personal service had been effected. I think the learned judge was quite right in refusing the application. I should not have been satisfied with such an affidavit. The deponent should have shewn that he had made some reasonable exertion to discover the defendant's dwelling. As this is a course which very much increases the expense, I think it is a very salutable rule of practice to hold these affidavits to great strictness.

WILLES, J. I am of the same opinion. I proceed upon the ground that there is no statement in the affidavit that the defendant's residence was unknown, or that any inquiry had been made to discover it, or that it might not readily have been ascertained by a little exertion.

The rest of the court concurring,

Rule refused.

[832] JONES v. JONES. Jan. 28th, 1860.

[S. C. 29 L. J. C. P. 151; 1 L. T. 373; 6 Jur. N. S. 826; 8 W. R. 243. Distinguished, *Robertson v. Sterne*, 1862, 13 C. B. N. S. 252. Overruled, *Cowell v. Amman Colliery Company*, 1865, 6 B. & S. 338; *Fergusson v. Davison*, 1882, 8 Q. B. D. 473.]

A cause was referred by judge's order before verdict,—the costs of the cause and of the reference and award to abide the event: the arbitrator found for the plaintiff upon certain issues, damages 12l. 12s., and that there was due to the defendant on a plea of set-off 9l. 7s. 9d.; and he awarded that the defendant should forthwith pay to the plaintiff the balance of 3l. 4s. 3d.:—Held, that, the event of the cause being in favor of the plaintiff, he was entitled to the costs.

This was an action brought by the plaintiff in the county-court of Flintshire to recover a balance of 41l. 12s. The cause having been removed into this court by certiorari at the instance of the defendant, the plaintiff declared for money had and

received and for money due upon an account stated. The defendant pleaded, —first, never indebted, —secondly, payment before action, —thirdly, set-off, —fourthly, a sale by unlawful weights and measures.

By a judge's order, made by consent, the cause was referred to an arbitrator, —the costs of the cause, and of the reference and award, to abide the event. The arbitrator by his award found that 12l. 12s. were due from the defendant to the plaintiff upon the issue on never indebted, and that there was due from the plaintiff to the defendant 9l. 7s. 9d. on the plea of set-off. The second and fourth issues were found for the plaintiff: and the arbitrator ordered that the difference, 3l. 4s. 3d., should be paid by the defendant to the plaintiff forthwith.

The plaintiff afterwards applied to a judge at Chambers for an order for costs, and the learned judge (Byles, J.) made an order that the plaintiff should have the costs of the reference and award, but not the costs of the cause.

J. Brown, on a former day, obtained a rule calling upon the defendant to shew cause why the master should not be at liberty to tax the plaintiff his costs of the cause, and why the order of Byles, J., should not be amended in that respect. He referred to the 13 & 14 Vict. c. 61, ss. 11, 12, 15 & 16 Vict. c. 54, s. 4, [833] and the 19 & 20 Vict. c. 108, s. 30, and to the case of *Day v. Mearns*, 1 Chitt. Rep. 156.

Morgan Lloyd now shewed cause. The defendant, under the 39th section of the 19 & 20 Vict. c. 108, objected to the cause being tried in the county-court, and accordingly it was moved by certiorari into this court; and, upon the reference, the arbitrator found no part of the claim which the plaintiff made in the county-court in his favour. [Erle, C. J. The certiorari gave the plaintiff the right of joining any cause of action he pleased when he came to declare here. Williams, J. The question is, whether the event of the cause is not in favour of the plaintiff. *Wigens v. Cook*, ante, vol. vi., p. 784, is against you. There, the declaration contained seven counts, one of which was a count in trover for two deeds and two authorities for the delivery of deeds. By an order of nisi prius, it was agreed that the record should be withdrawn, and the cause and all matters in difference be referred to an arbitrator, who was to have 'all the powers as to certifying of a judge at nisi prius,' —the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator made his award in favour of the plaintiff as to the two authorities referred to in the count in trover, with a farthing damages, and found all the other issues for the defendant; and he gave the defendant the costs of the reference and award: and this court held that, as the event of the award was in favour of the plaintiff, he was entitled to the costs of the cause, —the 3 & 4 Vict. c. 24, s. 2, being inapplicable, inasmuch as there was no verdict.] The language of the order here is different. The question is, what is the event of the cause as it originally stood [Erle, C. J. Strike out "as it originally stood," and the [834] event is in favour of the plaintiff.] *Cooper v. Pegg*, 16 C. B. 451, is more like this case. There, by an order of reference in an action for an injury to the plaintiff's reversion by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim 500l., costs 40s., subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper, —the arbitrator to have all the same powers as the court or a judge sitting at nisi prius, and the costs of the suit to abide the event of the award. The arbitrator by his award found all the issues in the action in favour of the plaintiff except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to a farthing; and he further ordered the defendant to pay the plaintiff 5l., and that the plaintiff should at his own expense make a certain drain: and the court held that the plaintiff was not, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, entitled to the costs of the cause. [Williams, J. There, the arbitrator was substituted for the jury.]

Brown, contra, was not called upon.

ERLE, C. J. I am of opinion that this rule must be made absolute. The event of the action is in favour of the plaintiff, and the costs are consequently due to him by the terms of the reference. The enactment in the County Court Act, 13 & 14 Vict. c. 61, s. 11, has no application to the case of a sum given by an award made under a reference with a stipulation that the costs of the cause shall abide the event.

The case of [835] *Wiggins v. Cook*, ante, vol. iv., p. 784, though not identical in its circumstances, in principle governs this case. The plaintiff is clearly entitled to his costs of the cause, and the order of my Brother Byles must be amended accordingly. But, as this is an appeal against a decision of a judge at Chambers, and we think the defendant was justified in taking the opinion of the court, the rule will be absolutely without costs.

WILLIAMS, J., and WILLES, J., concurring,
Rule absolute accordingly (a).

DURIE v. HOPWOOD. Jan. 27th, 1860.

[S. C. 29 L. J. C. P. 151 ; 6 Jur. N. S. 705.]

The court will not change the venue from the place where the plaintiff has thought fit to lay it, unless there be some great and obvious preponderance of convenience in trying the cause elsewhere.—Therefore, in an action for the breach of a warranty on a sale of horses at Liverpool, the court refused to change the venue from Middlesex to South Lancashire, upon affidavits stating that the defendant's witnesses all resided at Liverpool and in Ireland, —the affidavits in answer stating that the plaintiff's witnesses, scientific men and others, all resided in or near to the place where the venue was originally laid.

This was an action for a breach of warranty on a sale of two horses bought of the defendant, a dealer at Liverpool, for the price of 134l. 10s. There was a plea denying the unsoundness.

Edward James, Q. C., after an unsuccessful attempt had been made at Chambers, moved for a rule nisi to change the venue from Middlesex to South Lancashire, upon affidavits shewing that the cause of action arose at Liverpool and not elsewhere, and that the defendant had material and necessary witnesses all residing there and in Ireland. [Erle, C. J. It is important that a [836] cause should be tried where the cause of action arose : and I think it is advisable to act upon that principle so far as the interests of justice can be made to coincide with that course.]

Edwin James, Q. C., and Needham shewed cause. According to the old practice, the plaintiff had the option of laying the venue where he pleased ; the defendant might always remove it upon an affidavit that the cause of action arose in the county to which the venue was sought to be moved, and not elsewhere ; and the plaintiff might come and have it restored upon an undertaking to give material evidence in the original county. Now, it is entirely in the discretion of the court to order the venue to be changed where the substantial interests of justice require it. Here the inconvenience of a trial at Liverpool would be very great, seeing that the plaintiff's witnesses, veterinary surgeons and others, are all residing in or near London, and the expense of their conveyance to and detention at Liverpool would be very great. Besides, the cause has been already entered for trial by a special jury at the sittings in Middlesex after this term, and notice of trial given. A further answer to the application is, that there has been unreasonable delay. Issue was joined on the 2nd instant ; no application to change the venue was made until the 11th, when a summons was taken out to be heard before Byles, J., on the 13th ; and this rule was not moved for until the 19th. A previous application had been made at Chambers on the 21st of December last.

Edward James, Q. C., in support of the rule. The only question at issue between the parties was as to the soundness or unsoundness of the horses,—whether at the time of the sale on the 14th of October, 1859, at [837] Liverpool, the horses were sound. [Erle, C. J. We are always most anxious that causes shall if possible be tried where the matter in contest arose. We are against you also on the ground of delay : the defendant first applies to a judge at Chambers on the 21st of December, and again on the 13th of January ; and he afterwards delays his application to the court until the 19th.] The delay is only from the 13th to the 19th of January.

ERLE, C. J. This is not a case in which I feel justified in interfering to prevent the plaintiff from trying his cause in the county in which he has elected to lay the

(a) See the 23 & 24 Vict. c. 16, s. 34, ante, p. 560 (b).

venue. I therefore think the rule should be discharged, the costs of the motion to be plaintiff's costs in the cause.

WILLES, J. In *Helliwell v. Hobson*, ante, vol. iii., p. 761, it was held that the court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue. When the question arises again perhaps that case may require some consideration.

The rest of the court concurring,
Rule discharged accordingly.

[838] GLEAVES v. MARY PARFITT, Executrix of Peter Lewis Parfitt,
Deceased. 1860.

[S. C. 29 L. J. C. P. 216; 6 Jur. N. S. 805. Referred to, *Ford v. Harington*,
1869, L. R. 5 C. P. 287.]

A vicar choral of the cathedral church of Wells, in the county of Somerset, is a "corporation sole," and his personal representative is liable to an action at the suit of his successor in the vicarage, for dilapidations of the house held by him as such vicar choral.—And, even if he were not strictly a "corporation sole,"—Sembles, per Erle, C. J., that he still has such a sole estate in the house as to create the liability.

This was an action brought against the executrix of a deceased vicar choral of the cathedral church of Wells, in the county of Somerset, for dilapidations of a house and premises in the Vicars' Close, which the deceased as such vicar choral had occupied during his life-time and down to the time of his death. The plaintiff was the successor of the deceased in the vicarship.

The declaration stated, that all and singular the prebendaries, rectors, and vicars of England for the time being are bound to sustain and repair all and singular the houses and edifices belonging to their prebendaries, rectories, vicarages or vicarships, and to leave the same so sustained and repaired to their successors: that the testator, during his life-time, and at the time of his death, was vicar, that is to say, a vicar choral of the cathedral church of St. Andrew, in Wells, in the diocese of Bath and Wells, in the county of Somerset; that, while he was such vicar, he was seised in right of his said vicarage or vicarship of a certain dwelling-house and edifices belonging to the said vicarage or vicarship, which he ought to have sustained and repaired, and to have left the same so sustained and repaired to his successors, being vicars as aforesaid of the said cathedral church, and seised in succession to him, in right of the vicarage or vicarship, of the said dwelling-house and edifices; that the testator, while he was so seised, died; that the plaintiff, who during the life of the testator had been duly presented, nominated, admitted, and instituted, and had become and was a vicar as aforesaid of the said cathedral church, was after the death of the testator duly inducted and collated into, and became and was seised, [839] in succession to the said testator, in right of the said vicarage or vicarship of the plaintiff, of the said dwelling-house and edifices, and the next successor of the said testator of and to the same; yet that the said testator, while he was such vicar and so seised, wasted, spoiled, and destroyed the said dwelling-house and edifices, and at the time of his death the dwelling-house and edifices were not repaired and sustained, and were out of repair and dilapidated, and were so left by the testator at his death to the plaintiff as and being such successor to him as aforesaid; and that the sums of money then and still necessary for the due repairing of the same dwelling house and edifices amounted and still amount to the sum of 88l. 2s. 8d.

Pleas,—first, not guilty,—secondly, that the said testator while he was such vicar was not seised in right of his said vicarage or vicarship of the said dwelling house and edifices, or any of them, belonging to the said vicarage or vicarship, as alleged,—thirdly, that the said testator ought not to have sustained and repaired the said dwelling-house and edifices, or any of them, and to have left the same or any of them so sustained or repaired to his successors, being vicars as aforesaid of the said cathedral church and seised in succession to him, in right of the said vicarage or vicarship, of the said dwelling-house and edifices, as alleged.

The cause was tried before Bramwell, B., at the last Summer Assizes at Wells. It appeared that the title of the vicars choral was regulated by certain documents which were produced in evidence, viz. a charter of King Edward the Third, in 1347,—a grant by the then Bishop of Bath and Wells, dated in the year 1420, with confirmations by the dean and chapter of Wells and by the prior and chapter of Bath,—the statutes of the founder,—a charter of Queen Elizabeth,—and a collation by the bishop of a vicar choral to a house

[840] The charter of Edward the Third granted that the bishop may assign to the vicars choral a certain place of the soil of the church of St. Andrew in Wells, and of the bishop of the same place, to have and to hold to them and their successors, vicars choral, for their habitation, and that the bishop may charge his lands with two annuities in augmentation of the sustenance of the said vicars, and of divine service,—with a licence to the vicars choral to receive in mortmain.

The grant of the bishop of Bath and Wells assigned the same land, together with the houses in the same place by us newly built and to be built, “to the use of our vicars of our church aforesaid, under this manner and form, that is to say, every chamber, with its appurtenances, to be had and enjoyed so long as they shall be vicars of the same church, and make their personal abode in the same, so that it shall be to us and our successors to confer and assign the said chambers when they shall be void to such vicars of the said church as shall please us, at the free will of us and our successors, and that the vicars not residing in their chambers shall be deprived.” It further ordained that the vicars of the said church inhabiting the said chambers and living together at meat and drink might have to their common use the hall, &c. It then granted to the vicars choral two annuities, “to have and to hold to the said vicars inhabiting the said chambers, and living together as aforesaid.” Lastly, it ordained that every vicar shall say the Lord’s prayer and the Salutation of the Angel for the bishop and his successors every time he shall pass to or from the church of St. Andrew.

From the statutes of the founder, regulating the vicars choral, it appeared, amongst other things, that each vicar had the duty of keeping the house he inhabited in repair.

[841] The charter of Elizabeth, reciting doubts about the incorporation, incorporates the vicars choral, and grants that the corporation may receive, appropriate, and have the common lands, tenements, &c. It then provides for filling up vacancies by the dean and chapter, subject to rejection by the corporation; and, after a year of probation, the new vicar is to be admitted and instituted to the perpetuities of the vicarship, to hold for life, and all the place, privileges, hereditaments, &c., as his last predecessor or incumbent of the same vicarship theretofore had or held. It further provides that the corporation, during vacancy of a vicarship, may hold such vicarship, and all the proceeds and profits to such vicarship belonging or appertaining; and then it grants to the corporation all that college, close, or mansion-house which the vicars choral now possess, and all the buildings to the college belonging. It then commands obedience to the statutes of the founder, and ordains that the bishop for ever shall have all jurisdictions, authorities, powers of visiting and doing other things belonging to the office of bishop, and also the patronage, placing, donation, and collation of the houses within the college, in as ample manner as the founder or any of his predecessors ever had.

The collation of the vicar was conditioned for continuance as vicar, and for inhabitancy, and for repair, and gave the vicar an estate in severalty therein.

Of late years the number of vicars choral in the cathedral church of Wells has been eleven, two of whom are priests, the rest lay vicars. When a vacancy occurred amongst the vicars choral, his successor was nominated by the dean and chapter, and, after one year of probation, if approved, he became vicar perpetuate; and, if a house were vacant, the bishop collated him thereto at his discretion. The widow of a [842] deceased vicar was allowed to remain in the house for twelve months after the death of the vicar.

The Rev. Peter Lewis Parfitt was nominated a (priest) vicar choral in October, 1801, and became vicar perpetuate in October, 1802. He subsequently took a house, and was collated thereto, and continued in possession down to the time of his death in 1857.

The plaintiff became a lay vicar on the 1st of April, 1851, and vicar perpetuate on

the 1st of April, 1852. After the death of the Rev. Peter Lewis Parfitt, he was collated to the house which had down to the time of his death been occupied by him.

On the part of the defendant it was insisted that the preferment in question was not a "benefice" so as to render the representative of a deceased vicar choral liable to the successor for dilapidations; and that, even if it were a "benefice," the plaintiff was not a successor to the office which had been held by the Rev. Mr. Parfitt, and therefore his situation was in no way altered by his death.

Under the direction of the learned baron, a verdict was found for the plaintiff for 74l. 10s. 10d., the amount of dilapidations proved; and leave was reserved to the defendant to move to enter a verdict for him, if the court should think the action not maintainable.

Kinglake, Serjt., in Michaelmas Term last, obtained a rule nisi accordingly, and also to arrest the judgment. He referred to *Wise v. Metcalf*, 10 B. & C. 299, 5 M. & R. 235, Burn's Ecclesiastical Law, title Dilapidations, p. 148, and Digge's Parson's Counsellor, p. 94.

Montague Smith, Q. C., and Bullar, shewed cause, contending that vicars choral were a corporation sole as much as a prebendary or other spiritual person, and [843] liable by the common law for dilapidations. The following authorities were referred to:—*Dr. Sand's case*, Skinner, 121, *Salkard v. Beckwith*, 1 Lutw. 116, *Anonymous*, 2 Vent. 349, *Sellers v. Lawrence*, Willes, 413, *Weldon v. Green*, 2 Burn's Eccl. Law, 55, *Rudcliffe v. D'Oyley*, 2 T. R. 630, *Repton v. Hodgson*, 7 Q. B. 84, 96, *Mason v. Lambert*, 12 Q. B. 795, *Bryan v. Clay*, 1 Ellis & B. 38, 2 Gibson's Codex, p. 143, Co. Litt. 4 a., 1 Burn's Ecclesiastical Law, p. 284, 2 Burn's Ecclesiastical Law, pp. 88, 89, 150, and the statutes 13 Eliz. c. 10, and 1 G. 1, stat. 2, c. 10.

Kinglake, Serjt., and Karlake, in support of the rule, submitted that a vicar choral is not a corporation sole, not being endowed as such or seised of any particular house in right of his vicarage, but the whole property being vested in the aggregate corporation of the vicars choral; and that the liability for dilapidations is limited to the case of a spiritual corporation sole. They referred to *Dr. Sand's case*, Skinner, 121, *Salkard v. Beckwith*, 1 Lutw. 116, *Jones v. Hill*, 3 Levinz, 268, *Browne v. Ramsden*, 8 Taunt. 559, 2 J. B. Moore, 612, *Wise v. Metcalf*, 10 B. & C. 299, 5 M. & R. 235, *Bird v. Relph*, 2 Ad. & E. 773, 4 N. & M. 876, *Shaw v. Woods*, 5 Irish Com. Law Rep. 156, *Heath, App.*, *Haynes, Resp.*, ante, vol. iii., p. 389, 1 Kean & G. 99, 2 Roll. Abr. Parson (A.), Vicaridge, Constitutions of Othobon, 2 Gibson's Codex, 751, Watson's Clergyman's Law, c. 38, Digge's Parson's Counsellor, 138, pl. 94, Cripps's Laws of the Clergy, 127, 1 Burn's Ecclesiastical Law, Appropriation, p. 76, Benefice, p. 136, Dilapidations, p. 148, 2 Burn's Ecclesiastical Law, p. 92, 3 Stephen's Commentaries, 4th edit. book iv., part iii., c. i., p. 127, and the statute 13 Eliz. c. 10.

Cur. adv. vult.

[844] ERLE, C. J., now delivered the judgment of the court:—

In this case the question has been whether a vicar choral of Wells succeeding to one of the houses of the vicars choral under the circumstances after mentioned, can sue the representative of his predecessor in that house for dilapidations.

It was conceded by the defendant, that, if vicars choral were sole corporations, as rectors, vicars, and prebendaries are, the action would lie: but she contended that the vicars choral are a corporation aggregate, and that the houses belonged to that corporation, and that each vicar choral had no greater interest in one of the houses than a fellow of a college has in his chambers, and has no other liability.

But we are all of opinion that a vicar choral is a corporation sole: and I am further of opinion, that, if he is not, he still takes such a sole estate in the house as to make him or his representatives liable.

The title of each vicar succeeding to a house appears by the documents in evidence. The first is a charter of Edward the Third (of 1347), which after reciting an inquisition on an *ad quod damnum*, grants that the bishop may assign to the vicars choral a certain place of the soil of the church of St. Andrew in Wells, and of the bishop of the same place, to have and to hold to them and their successors, vicars choral, for their habitation, and that the bishop may charge his lands with two annuities in augmentation of the sustenance of the said vicars choral and of divine service, with a licence to the vicars choral to receive in mortmain.

This charter proves that the vicars choral were a spiritual corporation aggregate, and therefore capable of receiving property by appropriation or otherwise.

The second document is a grant by the bishop, with separate confirmations, the one by the Dean and [845] Chapter of Wells, and the other by the Prior and Chapter of Bath, which assigns the same land, together with the houses in the same place by us newly built and to be built, to the use of our vicars of our church aforesaid, under this manner and form, that is to say, every chamber with its appurtenances to be had and enjoyed so long as they shall be vicars of the same church and make their personal abode in the same, so that it shall be to us and our successors to confer and assign the said chambers when they shall be void to such vicars of the said church as shall please us, at the free will of us and our successors; and that the vicars not residing in their chambers shall be deprived. It also ordains that the vicars choral of the said church inhabiting the said chambers and living together at meat and drink, may have to their common use the hall, the kitchen, the bakehouse, and all other houses in the same place. It then grants to the vicars choral two annuities, to have and to hold to said vicars inhabiting said chambers and living together as aforesaid. And, lastly, it ordains that every vicar shall say the Lord's prayer and the Salutation of the Angel for the bishop and his successors every time he shall pass to or from the church of St. Andrew.

This instrument must be construed according to the laws ecclesiastical relating to appropriations to and endowments of spiritual bodies, and not according to the rules of the common law relating to the conveyance of freeholds, either absolutely or to uses and trusts. The corporation aggregate takes the property in the houses, &c., granted in common, but takes no other interest in the chambers there than the right to claim that the bishop shall collate one of their body whom he may choose to each chamber as it becomes vacant. Each vicar who is collated to a chamber must be a member of the corporation aggregate [846] while he holds the chamber; but he takes nothing by being such member, without collation by the bishop. After collation, he holds in severalty a spiritual benefice without cure of souls. There is a corporate succession in the holding as it passes from one corporator to another; but each corporator holds in severalty.

The third document in evidence contained the statutes of the founder regulating the vicars choral. It appears from them, among other things, that each vicar had the duty of keeping the house he inhabited in repair.

The fourth document is the charter of Elizabeth, which, reciting doubts about the corporation, incorporates the vicars choral, and grants that the corporation may receive, appropriate, and have the commons, lands, tenements, pannages, &c. It then provides for filling up vacancies by the dean and chapter, subject to rejection by the corporation; and, after a year of probation, the new vicar is to be admitted and instituted to the perpetuities of the vicarship, to hold for life, and all the place, privileges, hereditaments, &c., as his last predecessor or incumbent of the same vicarship therebefore had or held. It then provides that the corporation during vacancy of a vicarship may hold such vicarship and all the proceeds and profits to such vicarship belonging or appertaining. It then grants to the corporation all that college, close, or mansion-house which the vicars choral now possess, and all the buildings to the college belonging. It then commands obedience to the statutes of the founder, and ordains that the bishop for ever shall have all jurisdictions, authorities, powers of visiting and doing other things belonging to the office of bishop, and also the patronage, placing, donation, and collation of the houses within the college in as ample manner as the founder or any of his predecessors ever had.

[847] This charter appears to have been intended to give express legal confirmation to many matters affecting the corporation theretofore depending upon custom. It confirms the right of the bishop to collate to the houses, and the duties created by the statutes of the founder, and therefore the duty of each vicar to repair the house he inhabits. It uses language denoting that each vicarship was a corporation sole for some purposes; and it subjects the whole to the jurisdiction of the bishop.

The fifth document was, a collation by the bishop of a vicar to a house conditioned for continuance as vicar, and for inhabitaney, and for repair, and giving an estate in severalty therein, derived from the bishop, not from the corporation, though the donee must be qualified by being a corporator. This document, together with the clauses of the charter above recited speaking of the incumbents of the vicarships taking in succession, is good ground for deciding that each vicar takes the house as annexed to his vicarship as a sole corporation, by the act of the bishop, and therefore for holding

that the plaintiff is entitled to recover ; and on this ground all my Brethren concur in judgment for the plaintiff.

But I am further of opinion, that, if each vicar is not a corporation sole, the custom appears to extend to a house so taken by a member of a spiritual corporation, bound in duty to repair, and subject to ecclesiastical jurisdiction if he neglected his duties.

In *Jones v. Hill*, 3 Levinz, 268, it was held, that, by custom, the rule of the ecclesiastical courts as to dilapidations, &c., had been adopted at common law : and the documents above recited expressly create the duty, and give the bishop jurisdiction to enforce it. The existence of a corporation sole does not seem to me essential for the application of the custom. It is true [848] that it has most frequently been in fact applied in the case of spiritual corporations sole ; but such application is accidental, not essential. It is confined to spiritual corporations, because tenants for life of estates created according to temporal law are regulated either by known incidents attached by law to their estates, as in the case of dower or courtesy, or according to the will of the grantor where created through his will. It is brought to bear for the most part on corporations sole among spiritual corporations, because there can be no succession in the case of property held and occupied by a corporation aggregate ; but there are cases where a member of a corporation aggregate is qualified because he is a corporator, to take a freehold estate in severalty in property appropriated or granted to the corporation aggregate. In these cases, the reason for the application of the custom is the same as in the case of corporations sole. The words evidencing the applicability of the custom are extensive enough to comprise them ; and, where the case has been brought into judgment, the decision has been that the custom applies.

The facts of the present case exemplify the reason for the application of the custom. The late tenant-for-life was guilty of a clear breach of express duty, according to the grant of his estate : he has left in his assets the profits of his wrong ; and, unless the defendant is answerable out of those assets, the loss from the wrong will be thrown on the plaintiff. It is clear that in reason the plaintiff has good right to recover from the defendant.

As to the evidence by which the application of the custom is to be tested, I notice those authorities cited in the argument which are to be found in Burn's Ecclesiastical Law, and observe generally that none expressly excludes from the custom the property of a [849] corporation aggregate held by a corporator in severalty, and none gives any reason for the custom leading to such a conclusion.

Taking the authorities from 2 Burn, 146, title Dilapidations,—The rule of Archbishop Edmund expresses that a rector shall be liable : but there the word "rector" is for example only, and is to be extended by construction, as the statute relating to the warden of the Fleet has been applied by construction to all gaolers. The constitution of Othobon recites the mischief from the avarice of divers persons (quemdam), and ordains that all clerks shall repair : this has no reference to a corporation sole. The 13 Eliz. c. 10, in its recital relates to divers ecclesiastical persons, and in its enactment, among others, to provosts, chancellors, and any others having dignity or office in any cathedral or collegiate church, and is not limited to corporations sole. In *Salkard v. Beckwith*, 1 Lutw. 116, the cause of action arose upon a vicarage, and the custom is recited as relating to prebendaries, rectors, vicars, masters of free chapels, and chaplains ; and, though all may be corporations sole, there is nothing said that so confines it ; and sufficient is stated for the plaintiff's case there. *Dr. Sand's case*, Skinner, 121, appears to be in point for the plaintiff. There, each prebendary of Wells took by appointment from the bishop one of eight houses, with power to move from one to a better ; and it was objected that there was no liability, because the house was not part of the corpse of the prebend. But the objection was overruled. The title to the houses and the tenure appear to have been the same as in this case : the only difference is, that there the question was between prebendaries ; here it is between vicars choral : but the decision turned on the title to the house, not on the corporate capacity of the occupier. In *Radcliffe v. D'Oyley*, 2 T. R. 635, the question [850] arose respecting the houses of the prebendaries of Ely, where by the statutes the chapter was bound to inspect the houses and provide materials for repairs. The argument was that the houses were in the nature of chambers in colleges : but the decision was for the liability, as the reason of the law applied as much to prebendaries as to rectors. In *Mason v. Lambert*, 12 Q. B. 798, the liability of a perpetual curate is affirmed : the

objection that seisin of the church endowments in a corporate character was essential, was held untenable; and the reason of the rule is given so as to extend to such a case as the present.

No direct authority against the plaintiff has been found. In *Shaw v. Woods*, 5 Irish Common Law Rep. 160, the question was whether the vicars choral of Waterford held the vicarage of Lismore so as to be a vicarage with cure of souls to each vicar; and the contrary was decided, on the ground that the vicarage was an appropriation ad mensam in utroque jure to the corporation aggregate of vicars choral, and not a separate interest in any individual member of that body. The decision, upon the facts there in evidence, that the corporation aggregate held the whole, has no relevancy to the present case, resting upon a different state of facts.

Upon this second ground, therefore, in addition to the former, I think the plaintiff can maintain this action. The rule for a nonsuit is discharged.

Rule discharged.

[851] RAMAZOTTI v. BOWRING AND ARUNDELL. Nov. 25, 1859.

[S. C. 29 L. J. C. P. 30; 6 Jur. N. S. 172. Referred to, *Drakeford v. Piercy*, 1866, 7 B. & S. 521.]

N, representing himself to be the proprietor of a certain business carried on under the name of the Continental Wine Company, induced the defendants to receive from him certain wines and spirits in part satisfaction of a debt previously contracted by him with them. N. was in truth only clerk to R., who was the real proprietor of the establishment. The name of R. appeared over the entrance to the cellar, but it was not visible to persons going to the counting-house. R.'s name also appeared (though in an ambiguous manner) upon a receipt signed by one of the defendants on the delivery of some of the goods. In an action brought by R. for the price of the goods, it was left to the jury simply to say whether R. or N. was the real proprietor of the business:—Held, a misdirection,—the proper question being whether R. had so conducted himself as to enable N. to hold himself out as the proprietor, and whether the defendants dealt with him upon that footing.

This was an action brought by the plaintiff in the Mayor's court, London, to recover the sum of 6l. for wine and spirits alleged to have been sold and delivered to them. Plea, never indebted.

The cause was tried before the Common Serjeant on the 12th of June, 1859. The plaintiff stated that he carried on the business of a wine and spirit merchant in Birch Lane, under the name of the Continental Wine Company, and that the goods the price of which was sought to be recovered consisted of wine and brandy which had been delivered to the defendants by his agent.

On the part of the defendants, it was proved that the business in Birch Lane was conducted by one Nixon, the plaintiff's son-in-law; that Nixon was indebted to the defendants to the amount of 18l., and, representing himself to be the proprietor of the Continental Wine Company, induced the defendants to take the goods in question in part satisfaction of his debt to them; that the first parcel was accompanied by a document in the form of a receipt, which was signed by the defendant Arundell, as follows:—

"Mr. Bowring.

"18th October, 1858.

"Please receive twelve bottles Martell's brandy.

"R. A. ARUNDELL.

"From the Continental Wine Company, 23 Birch Lane.

"J. Ramazotti."

[852] The rest of the goods (wine) were ordered by the defendant Bowring upon two other occasions, on both of which the plaintiff was present in the counting-house, though the defendants were unaware of his having any interest in the business. The invoices which were sent with the goods did not bear the plaintiff's name, but were headed "The Continental Wine Company;" and at the foot of one of them was written "J. Nixon, Manager."

The plaintiff relied also upon the fact of his name being written over the entrance to the cellar: but this, it appeared, would not be seen by persons going to the counting-house, and there was no evidence that either of the defendants had ever been in the cellar.

On the part of the defendants, it was submitted that the goods having been sold by Nixon, the agent, without disclosing his principal, the contract could not be enforced by the latter, discharged of the defendants' right of set-off.

The Common Serjeant left it to the jury to say whether the plaintiff or Nixon was the real owner of the business conducted under the name of the Continental Wine Company, telling them that, if they were of opinion that Nixon was the real owner, they must find their verdict for the defendants, but that, if they thought the plaintiff was the owner, they must find for him.

The jury having returned a verdict for the plaintiff for the sum claimed,

F. Lloyd, in Trinity Term last, obtained a rule nisi for a new trial on the grounds of misdirection and that the verdict was against the evidence.

Laxton shewed cause. The direction of the learned Common Serjeant was perfectly right. The real and only question was, who was the proprietor of the concern known by the name of the Continental Wine Company. [Erle, C. J. Was not the question whether the plaintiff had allowed Nixon to hold himself out as the Continental Wine Company, and so induced the defendants to deal with him?] There was nothing to warrant the defendants in assuming that Nixon was the proprietor of that establishment. Nixon was not the general agent of the plaintiff: and, if he were, his dealing with the defendants was not within the scope of an agent's authority. In *Guerriero v. Peile*, 3 B. & Ald. 616, it was held that a factor has an authority to sell for money, but not to barter: therefore, where a factor bartered the goods of his principal, it was held that no property passed, and that the principal might maintain trover against the party with whom the goods were bartered, although the latter were wholly ignorant that he had been dealing with a factor only. In *Cornish v. Abington*, 4 Hurlst. & N. 549, it was laid down, that, if any person, by actual expressions or by a course of conduct so deports himself that another may reasonably infer the existence of an agreement or licence, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. But here there was no evidence to shew that the plaintiff did anything to induce the defendants to suppose that they were dealing with a principal.

F. Lloyd, in support of the rule. The direction was clearly wrong. An undisclosed principal may, no doubt, sue upon a contract made with his agent: but his right to do so is subject to any equitable right, such as a set-off, of the defendant against the agent. [Williams, J., referred to *Pratt v. Willey*, 2 C. & P. 350, [854] where it was held that, if an agent employed to sell coals make a bargain in his own name with a tradesman to furnish him with coals on credit, for which in return he is to receive goods on credit, and the coals and the goods be both delivered, the real seller of the goods may recover the price from the tradesman, if his name be in the ticket sent with the coals as the seller; because the tradesman after that was bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal.] Here, the name of the plaintiff was never mentioned from first to last, but merely that of the Continental Wine Company: and, though the name of Ramazotti was written up over the way down to the cellar, it was shewn that that was not visible to those who went to the countinghouse, and that neither of the defendants ever visited the cellar. In *Sims v. Bond*, 5 B. & Ad. 389, it was held that, where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, and was received as such. Therefore, where A. as the managing-owner of a vessel was permitted by the other owners to have the possession of the warrants or orders of the East India Company, to pay to the said owners or bearer the sum of money therein mentioned for freight; and A. deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it in account,—it was held, on assumpsit brought after A.'s death by the surviving partners against the bankers, that, on proof of the above facts, they could not recover the money, because it was not shewn that the loan was upon

their account; for, the fact of the warrants being the property of all the part-owners, when placed in the [855] bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan. In delivering the judgment of the court, Lord Denman said: "It is a well-established rule of law, that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it: the defendant in this latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases: and we do not say, that, where a person lends money nominally on his own account, but really on account of and as the loan of another, the real lender may not sue for the money. But, where money is lent by another in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He must shew that the loan, though nominally that of another, was really intended to be his own. It was incumbent, therefore, in this case, upon the plaintiffs to prove, that, when Charles Gribble lent the proceeds of the freight-warrants to the defendants, and had them placed to his credit in an account kept in his own name, he was acting in that respect as the agent of the plaintiffs, as well as on his own account, and really lending the money to the defendants on the plaintiffs' account as well as his own." Here, the Common Serjeant ought to have left it to the jury to say whether the plaintiff had so conducted himself as to induce the defendants to believe they were dealing with the principal when they dealt with Nixon: whereas, all he left to them was, whether Ramazotti or [856] Nixon was in truth the Continental Wine Company. That clearly was incorrect. If the plaintiff affirms the contract made by his agent, he must take it with all its incidents.

ERLE, C. J. I am of opinion that this rule should be made absolute. I think the proper question was not put to the jury. It was left to them by the learned Common Serjeant to say whether Ramazotti or Nixon was the real owner of the business; whereas, the proper question, under the circumstances, would have been whether Ramazotti so conducted himself as to enable Nixon to hold himself out to be the true owner of the goods, whether Nixon did so hold himself out, and whether the defendants in dealing with Nixon believed him to be the owner. Then, if the jury had found those questions in the affirmative and that the contract between Nixon and the defendants was entered into upon that footing, I am of opinion that the undisclosed principal, adopting the contract made by his agent, must adopt in omnibus, and, if it were coupled with an agreement that the defendant should have a right to set off a debt due to him from the agent, the principal must take the contract subject to that agreement of set-off. There is yet a further question. If the jury were of opinion that the act of Nixon was so far to be considered as the act of his principal, and that the delivery of the goods was to be in satisfaction of a debt due from the agent to the defendants, there would be no contract of sale whatever; and that would leave undetermined the question whether or not the unauthorized appropriation by the agent of the property of the principal would not leave the defendants so receiving the goods liable in trover. That, however, is not the form of action here. Upon these grounds, I am of opinion that there ought to be a new trial.

[857] WILLIAMS, J. I am of the same opinion, with this difference, that I doubt the principal's being bound to adopt the contract of his agent with all its incidents. I think, however, it would be monstrous to allow the plaintiff, after having waived the tort, and sought to adopt the contract made by Nixon, to resort afterwards to the general contract implied by law from the delivery and acceptance of the goods.

CROWDER, J. I entirely agree with the view taken by my Lord upon both points. Looking at the manner in which the goods got into the possession of the defendants, I cannot help thinking that there was no contract of sale at all upon which the plaintiff could be entitled to sue. The proper question to leave to the jury was, as suggested by my Lord, whether the plaintiff had allowed Nixon to hold himself out as the proprietor of the business, and whether Nixon had done so, and the defendants had dealt with him upon that footing. There was no contract of sale, but a delivery of the goods by Nixon to the defendants in satisfaction of a debt due to them from him. Whatever, therefore, might have been the result if trover had been brought, it is clear that the plaintiff could not upon these facts maintain an action against the defendants

for goods sold and delivered. In either view, the proper question was not left to the jury, and therefore there must be a new trial.

Rule absolute, without costs.

[858] BAKER v. SAUNDERS. Jan. 31st, 1860.

[S. C. 29 L. J. C. P. 158; 2 L. T. 403; 6 Jur. N. S. 637; 8 W. R. 190.]

The plaintiff having obtained judgment in ejectment, and executed a writ of possession,—Held, that the defendant was entitled to call upon him to deliver a bill of costs.

This was an action of ejectment. The cause was tried at the last Assizes, when a verdict was found for the plaintiff, and a writ of possession was afterwards issued and executed. The defendant, being desirous of taking the benefit of the insolvent debtors act, took out a summons calling upon the plaintiff to shew cause why he should not deliver his bill of costs. This was opposed on the part of the plaintiff, on the ground that the delivery of a bill of costs was entirely optional. Byles, J., however, made an order.

Kemplay, on a former day, moved to set aside the order, on the ground that the learned judge had no power to compel the plaintiff to deliver a bill. [Willes, J., the only judge in court. Has the plaintiff signed judgment for costs?] No. [Willes, J. Then, what authority have we to compel him to deliver a bill?] The only semblance of an authority for this order is found in a suggestion thrown out by Parke, B., in a case of *Dodd v. Fuller*, 11 M. & W. 80, where that learned judge says,—“I think that the defendant should try the experiment of an application for a judge’s order upon the lessor of the plaintiff to deliver his bill of costs.” A rule nisi having been granted,

Denny now shewed cause, submitting that the defendant was entitled to have the costs of the action taxed, in order that he might ascertain the amount to be inserted in his schedule.

Kemplay, in support of his rule. The court has no authority to compel a plaintiff to deliver his bill of [859] costs in order that it may be taxed. [Willes, J. If the plaintiff does not choose to deliver a bill, I do not see how we can interfere. Williams, J. Suppose there are issues found for the defendant, the costs of which will overtop the plaintiff’s costs, surely the former ought to have some means of compelling the latter to bring in the record.] The simple question is, whether the defendant has a right to call upon the plaintiff to deliver his bill in order that it may be taxed. [Willes, J. I remember a case in the Exchequer, where I moved to compel the plaintiff to sign judgment on demurrer, in order to enable the defendant to go to a court of error. But Mr. Badeley, having no confidence in the decision in his favour, opposed it, and the court refused to compel him to take his judgment.] That is a far stronger case than this: for, here the defendant cannot bring a writ of error.

ERLE, C. J. Upon the best consideration I am able to bring to this case, I am of opinion that this rule should be discharged. The case seems to me to fall within the rule whereby a defendant, in order that he may not be embarrassed in his proceeding, may call upon the plaintiff to go on. There are many cases where the course pursued by the plaintiff here would be very embarrassing to the defendant, by preventing him from effecting an arrangement with his creditors. Dealing with the case upon general principles, and adopting the suggestion thrown out by Parke, B., in the case referred to, I see no sound reason for holding that the view taken by my Brother Byles was wrong. I therefore think the rule should be discharged, but without costs.

WILLIAMS, J. I am of the same opinion. I think this is a step in the right direction.

[860] WILLES, J. I must confess I have entertained some doubt: but, upon the whole, I think the view taken by the Lord Chief Justice is the correct one. It is certainly a novelty, and therefore there should be no costs.

Rule discharged, without costs.

End of Hilary Term.

[861] IN THE EXCHEQUER CHAMBER.

TRINITY VACATION, 23 VICTORIA.

BECKH v. PAGE AND ANOTHER. 1860.

[S. C. 28 L. J. C. P. 341 ; 5 Jur. N. S. 1405.]

The defendants contracted to buy of the plaintiff "115 bales, containing 18,440 (or any less number that may arrive) East India hides, shipped per 'Ontario,' Calcutta to Hamburg, and to be delivered in London, at 11½d. per lb. round, but the wrappers to be charged at 8d. per lb." The ship having been compelled by stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, and were sold. The remaining 97 bales arrived, but the defendants refused to accept them:—Held, on appeal,—affirming the judgment of the court below,—that the words "or any less number that may arrive," applied to the number of bales, and not merely to the number of hides, and consequently that the defendants were liable for not accepting the 97 bales.

This was an action upon a contract entered into by the defendants with the plaintiffs for the purchase of certain East India hides. The contract was as follows:—

"Messrs. Page & Welch.

"London, 21st February, 1857.

"Gentlemen,—We have this day bought, by your orders and for your account, of Messrs. E. Beckh & Co.,

"P. B. 326/425, 100 bales, containing 15,600,

H. B. 1/15, 15 bales, containing 2,340,

(or any less number that may arrive) East India hides, said to be very good Patna, shipped per 'Ontario,' Calcutta to Hamburg, and to be delivered in London, at 11½d. per lb. round ; but the wrappers to be charged at 8d. per lb. The hides to be taken with all faults and defects, but the buyers to have the benefit of any claim that may be recovered on the original policy of insurance between Calcutta and Hamburg, or on the policy to be effected between Hamburg and London ; to be invoiced at the landing weights from the Queen's beam, and to be at the buyers' risk and expense from the time of being weighed : the weight of wrappers to be averaged by weighing those from a few bales. Tare for ropes to be estimated by stripping a few bales. Usual draft to be allowed.

[862] "Should the above-mentioned vessel be lost, or should the ship bringing the hides from Hamburg be lost, this contract to be null and void.

"Any question or dispute that may arise upon this contract, to be settled and decided by the selling brokers."

The pleadings and facts are set out in the report of the case in the court below,—ante, vol. v., p. 708,—where it was held that the words "or any less number that may arrive" applied to the number of bales, and not merely to the number of hides, and consequently that the defendants were liable for not accepting a smaller number of bales (viz. 97) than the number mentioned in the contract.

The defendants appealed against this decision, and the appeal came on for argument before Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., Channell, B., and Watson, B.

J. Wilde, Q. C. (with whom was Honyman), for the appellants, the defendants below, submitted, that, upon the true construction of the contract set out in the case, the defendants were not bound to accept less than 115 bales, and consequently were not bound to take the 97 bales ; and that the words "or any less number that may arrive" applied to the number of hides, and not to the number of bales,—the purchasers being obliged to take the 115 bales, though some or all of them should contain less than the proper number of hides, but not to take the hides if the number of bales should be short of the stipulated number.

Montague Smith, Q. C. (with whom was Blackburn), was not called upon (a).

[863] WIGHTMAN, J. We are all of opinion that the judgment of the court of Common Pleas is right. The question is, whether the words in the contract "or any less number that may arrive" are applicable only to the hides, or to the bales, or to both hides and bales. I think the meaning and intention of the parties was that these words should apply to the bales as well as to the hides. It is difficult to see what difference it could make to the purchasers whether the number of bales should be short or the number of bales right and the number of hides therein short of that specified in the contract. None has been suggested: and, upon the best consideration I can give to the matter, I think the language of the contract is equally applicable to both.

BRAMWELL, B. I am entirely of the same opinion. If the purchasers had intended to insist upon having the full number of 115 bales, I think they would have used language very different from that which we find in this contract.

The rest of the court concurring,

Judgment affirmed.

[864] THE HON. GEORGE CHARLES MARQUIS CAMDEN v. BATTERBURY. 1860.

[S. C. 28 L. J. C. P. 335; 5 Jur. N. S. 1405; 7 W. R. 616. Followed, *Holland v. Kensington Vestry*, 1867, L. R. 2 C. P. 567; *Adams v. Hagger*, 1879, 4 Q. B. D. 482. See *Driscoll v. Battersea Borough Council*, [1903] 1 K. B. 881.]

By articles of agreement under seal, the plaintiff covenanted with one E. that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereafter agreed and covenanted to be built by him upon the land thereafter described and agreed to be demised, &c., by indenture, demise and lease unto E., his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th September then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of a pepper corn only. The articles then contained a covenant by E. with the plaintiff to pay the rent thereinbefore agreed to be reserved, and to pay rates, &c.; to erect the messuages; and also a covenant, that, until the land, and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E., his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff, in case the whole or any part of the said yearly rent or rents thereby or by the said leases so to be granted as aforesaid to be reserved, should be behind or unpaid for twenty-one days. In January, 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W.:—Held,—affirming the judgment of the court of Common Pleas,—that neither E. nor the defendant acquired any estate in the premises under the building agreement, nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums.

This was an action for money payable by the defendant to the plaintiff for the defendant's use by the plaintiff's permission of certain lands, messuages, tenements,

(a) The point intended to be argued on the part of the respondent, was, "That upon the true construction of the contract, the purchasers were bound to accept any number of the bales specified in the contract that might arrive, though less than the whole number."

and premises of the plaintiff, and for money due from the defendant to the plaintiff on accounts stated between them. Plea, never indebted.

The cause was tried before Willes, J., at the Summer Assizes for Surrey in 1853, when the following facts and documents were given in evidence:—

On the 4th of February, 1853, an indenture of agreement was entered into by and between the plaintiff of the first part, the Rev. Thomas Randolph of the second part, and John Watts Elliott of the third part, in the words and figures following, that is to say,—

[865] “This indenture of agreement, made, &c., between, &c., witnesseth, that, in pursuance of an act of parliament passed in the 53rd year of the reign of King George the Third, intituled ‘An act for enabling the prebendary of Cantlowes, in the cathedral church of St. Paul, in London, to grant a lease, with powers of renewal, of the prebendal lands of Kentish Town, in the county of Middlesex,’ and in consideration of the expense which the said J. W. Elliott, his executors, administrators, or assigns, will be at in erecting the messuages or tenements and buildings hereinafter covenanted to be erected and built upon the ground hereinafter described and agreed to be demised, and also in consideration of the yearly rents, covenants, and agreements hereinafter reserved and contained on the part of the said J. W. Elliott, his executors, administrators, and assigns, he the said Charles Marquis Camden, with the privity, consent, and approbation of the said Thomas Randolph (testified by his being a party to and signing, sealing, and delivering these presents), doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said J. W. Elliott, his executors, administrators, and assigns, that he the said Marquis, his executors, administrators, and assigns, shall and will, at the costs and charges of the said J. W. Elliott, his executors, administrators, or assigns, from time to time, when and so soon as he the said J. W. Elliott, his executors, &c., shall have erected and covered in one or more of the messuages or tenements hereinafter agreed and covenanted to be built by him upon the piece or parcel of ground hereinafter described and agreed to be demised, and laid the gutters with lead or iron, and fixed up iron pipes to carry off the water, and made the areas and the fence and garden walls nine inches in thickness at the least to divide and separate each house and the ground [866] to be thereto allotted for yards or gardens from the yards or gardens of the premises adjoining on each side, by indenture or indentures of lease demise and lease unto the said J. W. Elliott, his executors, administrators, nominees, or assigns, the whole or such part or parts whereon one or more of the said messuages or tenements shall be built and covered in and such other things thereon done as aforesaid, of All that piece or parcel of ground situate, lying, and being at Camden Town, in the county of Middlesex aforesaid, fronting, &c. &c., Together with the several brick messuages or tenements and buildings which shall be erected and built on the pieces or parcels of ground hereinbefore described and hereby agreed to be demised pursuant to the covenants for that purpose hereinafter contained (except and always reserved unto the said Marquis Camden, his executors, &c., and his and their tenants of the adjoining property, the free passage and running for water and soil through the sewers and drains made or to be made upon, through, or under the said several pieces or parcels of ground and other the premises hereby agreed to be demised: to hold the said piece or parcel of ground and other the premises hereby agreed to be demised, with their appurtenances (except as aforesaid), unto the said J. W. Elliott, his executors, &c., from the 29th day of September now last past (1852), for and during and unto the full end and term of ninety-eight years thence next ensuing and fully to be complete and ended: Yielding and paying therefor, for and during the first year of the said term the rent or sum of 30l., and for and during the second year of the said term the rent or sum of 60l., and for and during the third year of the said term the rent or sum of 120l., and for and during the fourth year of the said term the rent or sum of 200l., and for and during the fifth year and the remainder of the said term the yearly [867] rent or sum of 285l., and that in the several proportions and manner following, that is to say, one equal third part of the said several rents unto the said Thomas Randolph and his successors, prebendaries of the prebend aforesaid, and the remaining two equal third parts thereof respectively unto the said George Charles Marquis Camden, his executors, &c.,—the said several yearly rents to be paid and payable in lawful money of Great Britain, and that by equal quarterly payments on the 25th of March, &c., in every year, free and clear of and from all present and future rates,

taxes, assessments, impositions, and other deductions and abatements whatsoever, whether parliamentary, parochial, or otherwise, the first quarterly payment of which rent became due on the 25th day of December now last past : and the said rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid shall not exceed one sixteenth part of the clear yearly rack-rent or annual value of the land and buildings to be thereby demised, reckoning such rack-rent or annual value upon the said land and buildings when the same shall be completely finished and fit for habitation, and be not less than 40s : Provided, nevertheless, that, if the yearly rent or rents to be reserved upon or by the lease or leases to be granted of any part or parts only of the piece or parcel of ground hereinbefore described and agreed to be demised shall amount to or make up the full yearly rent or rents hereby agreed to be reserved and made payable, then and in such case the remainder of the said piece or parcel of ground, or any part or parts thereof, shall, from time to time when and as the same shall be built upon in the manner aforesaid, be demised and leased, together with the said houses and buildings thereupon erected, at the yearly rent of a peppercorn only : And it is agreed, [868] that, in every such lease to be granted as aforesaid, shall be contained on the part of the said J. W. Elliott, his executors, administrators, nominees, or assigns, such covenants and agreements as are usually inserted in leases granted on the same estate, and also in particular that no art, trade, or business whatsoever shall be carried on in or upon the said pieces or parcels of ground hereinbefore described or in or upon any of the messuages or tenements or buildings to be erected as hereinafter agreed, except on the messuages or tenements to be built on the north-east frontage of the said pieces or parcels of ground next to the York Road, and which may be converted into shops, so that there be not among the said shops more than two bakers' shops, two butchers' shops, and two chemists' shops : Provided always, that there shall not be carried on upon any of the houses or premises thereto belonging so allowed to be converted into shops as aforesaid any of the trades aforesaid, that is to say, a slaughterman, tallow-chandler, &c., &c., or any noisome or offensive art, trade, or business whatsoever : and all the rest of the said messuages or tenements to be built upon the said pieces or parcels of ground are to be private residences, except the messuage or tenement being the corner house to be built upon the said second-mentioned piece or parcel of ground facing the said York Road and Camden Park Road, which may be converted into a public house, not being a beer-shop, unless with the consent in writing of the said Marquis, his executors, &c., first had and obtained ; and that the insurance against fire shall be effected and kept up in the joint names of the said George Charles Marquis Camden, his executors, &c., and the said J. W. Elliott, his executors, administrators, nominees, or assigns, and shall be effected and kept on foot by and at the expense of the said J. W. Elliott, his [869] executors, administrators, nominees, or assigns, in an office in London or Westminster to be approved by the said George Charles Marquis Camden, his executors, &c., and shall and will from time to time, upon the requisition of the said Marquis, his executors, &c., or his or their surveyor or agent of the said Camden Town estate, produce and shew the policy or policies of every such insurance, and the receipt or receipts for the premium or premiums paid thereon : and it is agreed, that, in every such lease, there shall be contained on the part of the said Marquis the usual covenant entered into by him for quiet enjoyment by the lessee or lessees therein, on payment of the rent and observance and performance of the covenants and agreements therein to be reserved and contained : And the said J. W. Elliott doth hereby, for himself, his heirs, &c., covenant and agree with the said George Charles Marquis Camden, his executors, &c., in manner following, that is to say, — to pay the several yearly rents, — to pay all rates and taxes : And further, that he the said J. W. Elliott, his executors, &c., shall and will, at his and their own costs and charges, with such materials, and of such quality or description as hereinafter specified, in a good and workmanlike manner, and within the period or periods hereinafter mentioned, erect and completely finish fit for habitation, according to the plan drawn in the margin of the first skin of these presents, the following brick messuages or dwelling-houses of not less than the full sized third rate or class of buildings, so that each house or residence shall be of the full net annual value of 50l., that is to say, &c., &c. : And it is hereby expressly stipulated and agreed between and by the said several parties hereto, and particularly by or on the part of the said J. W. Elliott, his executors, &c., that the brickwork to be used in the said buildings shall be of good sound stock bricks ; [870]

that the fronts of the said messuages or dwelling-houses shall be faced with seconds, &c., &c.; that plans and elevations shewing thereon the height of the stories, the scantlings of the timbers, the thickness of the floors and doors, and generally the intended disposition of all the said messuages or dwelling-houses and buildings hereby agreed to be demised shall be previously to the commencement thereof submitted by the said J. W. Elliott, his executors, &c., to the said Marquis, his executors, &c., or to his or their surveyor for the time being; and be approved of by him or them; and that the whole of the same buildings shall afterwards be erected and finished according to such approved plans and elevations, and in a substantial and workman-like manner, to the entire satisfaction of the said Marquis, his executors, &c., or his or their surveyor for the time being: And it is hereby expressly provided and agreed that no art, trade, or business whatsoever shall be carried on in or upon the messuages or tenements and premises aforesaid, or any of them, or any part thereof, except as hereinbefore stated, nor any other buildings be erected upon the said piece or parcel of ground hereby agreed to be demised, or any part or parts thereof, other than such as are hereinbefore expressly covenanted or agreed to be erected thereon (except stables for private occupation when and where approved by the said Marquis, his executors, &c., or his or their surveyor), unless with the license or consent in writing of the said Marquis Camden, his executors, &c., for any such purpose as aforesaid first had and obtained under his or their hand or hands: And it is hereby further stipulated and agreed by and between the said parties hereto, and the said J. W. Elliott doth, for himself, his heirs, &c., covenant, promise, and agree with and to the said George Charles Marquis Camden, his executors, &c., [871] that he the said J. W. Elliott, his executors, &c., shall and will erect and build and completely finish fit for habitation, in manner and according to the stipulations or agreements aforesaid, upon the said two several pieces or parcels of ground hereby agreed to be demised, twenty-four single or twelve semi-detached at least of the said messuages or dwelling-houses so agreed to be erected as aforesaid, within the first two years of the term hereby agreed to be granted, and the whole remainder of the said messuages or dwelling-houses within the three following years of the said term: [Then followed a covenant by Elliott, his executors, &c., to make foot and carriage ways and sewers: and a covenant not to dig the said piece or parcel of ground thereby agreed to be demised, or any part thereof, further or otherwise than should be necessary for the foundation of the houses and making the areas, vaults, privies, and drains, or otherwise laying out the same, nor make or burn any bricks, tiles, or lime thereon:] And further, that he the said J. W. Elliott, his executors, &c., shall and will always accept and take such lease or leases as is or are hereinbefore agreed to be granted, at the rents and under the terms and conditions aforesaid, and execute and deliver two counterparts thereof respectively, the expense of each lease and of one of the counterparts thereof and the registration thereof, as well as the expense of and relating to these presents and the counterpart and registration thereof, to be paid by the said J. W. Elliott, his executors, &c., and the expense of the other counterpart to be paid by the said George Charles Marquis Camden, his executors, &c., by whose solicitors all such leases and the counterparts and registration thereof, as also the duplicate and registration of these presents, shall be prepared and effected: Provided, nevertheless, and it is hereby declared and agreed by and between [872] the parties hereto, that in each and every lease to be granted by virtue and in pursuance of these presents, there shall be comprised two messuages or tenements at least, with the ground, out-offices, and appurtenances thereto belonging, unless the said J. W. Elliott, his executors, administrators, nominees, or assigns, shall be desirous of having only one messuage or tenement, with the ground, out-offices, and appurtenances belonging thereto, comprised in any such lease,—in which case the said J. W. Elliott, his executors, administrators, nominees, or assigns, shall also pay the expense of the second counterpart of every additional lease which shall be granted by the said Marquis Camden, his executors, &c., in consequence of and in compliance with such desire; anything herein contained to the contrary thereof in anywise notwithstanding: And the said J. W. Elliott doth hereby, for himself his heirs, executors, and administrators, further covenant and agree with the said Marquis Camden, his executors, &c., and also (as a separate covenant) with the said Thomas Randolph and his successors, prebendaries of the prebend aforesaid, that henceforth until the said piece or parcel of ground and the buildings to be erected as aforesaid, shall be leased in execution of the covenant or agreement in that behalf

hereinbefore contained, he the said J. W. Elliott, his executors, &c., shall and will pay for the same the several yearly rents or sums hereinbefore stipulated or agreed to be reserved and made payable in the leases to be granted as aforesaid, to such persons and in such manner and proportions, and at such times as the same would be payable in case such lease or leases reserving such rents were actually granted pursuant to the agreement hereinbefore in that behalf contained; and also that he the said J. W. Elliott, his executors, &c., shall and will in the meantime until the granting of such lease or leases well [873] and truly perform, fulfil, and keep all and every the covenants and agreements hereinbefore stipulated and agreed to be inserted and contained in such lease or leases on his and their part, in like manner as he or they would be bound to do if such lease or leases had been actually granted to him or them, so far as the nature of the case will admit: Provided always, and it is hereby declared and agreed, that, if the whole or any part of the said yearly rent or rents hereby or by the said leases so to be granted as aforesaid to be reserved, shall be behind or unpaid for the space of twenty-one days next over or after any or either of the days or times whereon the same ought to be paid as aforesaid, or if the said J. W. Elliott, his executors, &c., shall make default in erecting, building, and finishing the several messuages or tenements, erections, and buildings aforesaid, within the times or in the manner hereinbefore stipulated for those purposes, or if, when the said messuages or tenements and buildings shall be so far finished as according to the stipulations aforesaid would entitle the said J. W. Elliott, his executors, &c., to have a lease or leases thereof, he or they shall refuse to accept such lease or leases and duly execute and deliver counterparts thereof, or on breach or non-performance of all or any of the covenants, clauses, conditions, and agreements herein contained or referred unto, and which by or on the part of the said J. W. Elliott, his executors, &c., are or ought to be observed, performed, and kept according to the true intent and meaning of these presents, then and from thenceforth and in any of the said cases, and at any time then afterwards, it shall and may be lawful for the said George Charles Marquis Camden, his executors, &c., into and upon the same premises, or any part thereof in the name of the whole, wholly to re-enter, and the said J. W. Elliott, his executors, &c., and all other [874] tenants and occupiers of the same premises, therout and from thence utterly to expel and remove, and all and singular the same premises, or so much thereof as shall not then have been actually leased, to have again, retain, re-possess, and enjoy as in his and their first and former estate, anything hereinbefore contained to the contrary thereof in any wise notwithstanding: Provided also, and it is hereby further declared and agreed that the said George Charles Marquis Camden, his executors, &c., shall not be bound to grant any lease or leases as aforesaid until all arrears of the said yearly rents hereinbefore covenanted and agreed to be paid in the meantime shall have been fully paid and satisfied up to the quarter-day immediately preceding the granting thereof respectively, if the same shall be executed before the last day of the then current quarter: Provided also, that the reservation of rent in any lease or leases so to be granted as aforesaid shall not comprehend any rent which shall have been paid in the meantime, according to the covenant in that behalf hereinbefore contained, which payment or payments shall be accepted in satisfaction pro tanto of the rent or rents hereinbefore stipulated or agreed to be reserved in any such lease or leases respectively. In witness," &c.

Until the 31st of January, 1834, Elliott paid the several sums of money covenanted in the articles to be paid by him; and also between the 4th of February, 1853, and the 31st of December, 1853, erected and built in pursuance of and according to the covenant therein, and upon the ground mentioned therein, a tavern and premises and also four other houses, being five of the messuages covenanted to be built; and the several messuages so built by Elliott were duly demised to him by the plaintiff by him by six several indentures of lease, at several rents, amounting to the yearly rent of 35l.

[875] The case then set forth the evidence of one Booth, an auctioneer and estate-agent, to the effect that he had been employed from about the end of the year 1853 to let the houses upon the land in question for the defendant.

On the 31st of January, 1854, Elliott, by an indenture reciting the agreement of the 4th of February, 1853, that Elliott had erected certain houses upon the land therein agreed to be demised, and that leases thereof had been granted to him, Elliott, in consideration of a certain debt of 250l. due from him to the defendant, and of 1250l. paid to him by the defendant, assigned to the defendant, his executors, &c.,

the said articles of agreement, and all the right, title, &c., which he had in the premises,—"subject to the observance and performance by and on the part of the defendant, his executors, &c., to be performed, of all such of the covenants, agreements, and stipulations as were then unperformed or capable of taking effect;" with a covenant by Elliott, his executors, &c., to use his and their best endeavours to induce and procure the marquis to grant to the defendant, his executors, &c., a lease or leases of so much of the said land of which no lease or leases had yet been granted: and a covenant by the defendant to perform and fulfil all the covenants and stipulations which remained subsisting and unperformed or capable of taking effect, and to indemnify Elliott, his executors, &c., from and against the same covenants, &c.

From the said 4th of February, 1854, up to the 25th of March, 1857, the defendant paid Mr. Shaw, the plaintiff's agent, the several yearly sums covenanted to be paid by the articles of agreement: and Mr. Shaw on those occasions gave him receipts for the same, describing the sums received as having been received for "so many quarters' rent due to the Marquis Camden [876] and the Prebendary of Cantlowes." On three occasions the receipt was given by the plaintiff's attorneys, and the money was therein expressed to be received as "a further instalment on account of arrears of rent under his building agreement due to the Marquis of Camden," "a further instalment of the amount due under the building agreement to the Marquis of Camden," and "the balance due Lady Day last under your building agreement to the Marquis Camden."

In the years 1854 and 1856, the defendant erected and built certain stables and a dwelling-house and shop on a part of the land, and obtained from the plaintiff, who then granted to him, two leases of the same according to the provisions of the articles of agreement, reserving to the plaintiff for the stables a rent of 5l. per annum, and for the house and shop 4l. per annum.

The two last-mentioned rents, added to the rents reserved on the leases to Elliott as before mentioned, amounted to 44l., which sum, deducted from the sum of 285l., the yearly sum payable according to the articles of agreement for the year ending at Lady-day, 1858, left the sum of 241l., the sum indorsed upon the writ of summons.

No payments were made by the defendant or by Elliott to the plaintiff subsequently to the 25th of March, 1857, except the rents reserved by the several indentures of lease, amounting to 44l. as aforesaid.

On the 23rd of May, 1857, the defendant, by indenture, assigned all his interest in the premises to one George White.

At the trial it was arranged that a verdict should be found for the plaintiff for 241l., with leave for the defendant to move to enter a nonsuit, or a verdict for the defendant,—the court to be in place of a jury, and all amendments which a judge could have made to be [877] made by the court. Accordingly, in Michaelmas Term, 1858, a rule nisi was obtained to enter a verdict for the defendant, pursuant to the leave reserved, on the grounds,—first, that the building articles amounted to an actual demise,—secondly, that the defendant never took any interest except under the building agreement, and was not tenant from year to year,—thirdly, that, if there was any tenancy from year to year, Elliott became such tenant, and that tenancy was assigned to the defendant, and by him assigned over,—fourthly, that, if any rent was recoverable, it would be due to the plaintiff and Randolph or the prebendary of St. Paul's.

The rule was made absolute for a nonsuit in Hilary Term following,—see ante, vol. v., p. 808.

The plaintiff appealed, and the case was argued in the Exchequer Chamber in Trinity Vacation, 1859, before Wightman, J., Erle, J., Crompton, J., Martin, B., Bramwell, B., Channell, B., and Watson, B.

Lush, Q. C. (with whom was Malcolm), for the plaintiff, submitted,—as was urged in the court below, — that the building agreement was a mere agreement for future leases, with a stipulation for payment of rent in the meantime till the leases were granted; that, by the occupation of the land and payment of rent under that agreement, Elliott, and subsequently the defendant, became tenants from year to year; and that that relation could only be determined by a notice to quit. He cited *Buckworth v. Simpson*, 1 C. M. & R. 834.

Bovill, Q. C. (with whom was Honyman), contra, was not called upon.

WIGHTMAN, J. I am of opinion that the judgment of the court of Common Pleas is correct, and there is no [878] ground whatever for implying a tenancy from year

to year in the defendant. The payments which have been made by him appear to have been made under a collateral liability, viz. payments of moneys under the building contract, under which it was stipulated that Elliott should have the possession of the land for the purpose of building certain houses thereon. No contract of tenancy, in my judgment, was created by that agreement. The receipts given from time to time very clearly shew what was the nature of the dealing between the parties. They are called, not simply "arrear of rent," but "arrear of rent under your building agreement." The defendant stood in the place of Elliott as his assignee under that building agreement. There is nothing to shew that Elliott is not still liable under his covenant in that agreement to pay the very sum which it is now sought to enforce against the defendant.

ERLE, J. I also am of opinion, that, looking at the facts of this case, they do not entitle the plaintiff to maintain that there was a determination of Elliott's liability, or that the defendant became the plaintiff's tenant.

MARTIN, B. I am entirely of the same opinion. By the agreement, Elliott was to have leases of the land as the houses were built. It is insisted, on the part of the plaintiff, that by paying rent Elliott became tenant from year to year. Assuming for a moment that that was so,—there is a contract in writing between Elliott and the defendant, whereby all Elliott's interest in the building agreement is assigned to the defendant. It is urged that that was not an assignment of the lease from year to year between the plaintiff and Elliott; but that a new tenancy was created as between the [879] plaintiff and the defendant by the subsequent payment of rent. But there is no evidence whatever that the plaintiff was ever party to any agreement for a tenancy as between himself and the defendant. The moneys the plaintiff received were received as moneys due under the building agreement. If there ever was any tenancy from year to year, it was an original tenancy by Elliott, which was assigned by him to the defendant, and by the defendant to White before the alleged claim of the plaintiff accrued. *Buckworth v. Simpson*, 1 C. M. & R. 834, which was relied on for the plaintiff, was no doubt correctly decided, but it has no bearing upon this case.

CROMPTON, J. I also am of opinion that this action will not lie. The plaintiff is in this dilemma: either the payments made under the building agreement are payments of rent, or they are not. If they are collateral sums, and not rent, the now defendant could not be liable as a tenant from year to year, for then there would be no payment of rent by him; and there is nothing else from which it has been suggested that a tenancy can be implied. But, supposing that they were payments of rent under a tenancy from year to year,—or upon an original demise, if the agreement with Elliott amounts to a demise,—still the defendant is not liable. The case is distinguishable from that suggested, of the landlord and the original tenant and the assignee meeting, and mutually agreeing that there shall be a surrender of the old lease and a fresh demise made to the assignee. The question then would be, whether the original tenancy was determined. In the present case, I do not perceive that the liability of Elliott has been in any way put an end to. I cannot agree with Mr. Lush that we can sever the liability of Elliott as tenant from his liability to pay money under the [880] stipulations contained in the building agreement. That agreement must be looked at to see, as a matter of fact, whether or not it was intended to create a tenancy. I think it is impossible to suppose that the plaintiff could have intended to release Elliott and to create a new tenancy as between himself and the defendant. There was nothing from which, in point of law,—or looking at it as a matter of fact, as I think we must do,—from which we can imply the creation of a new tenancy in the defendant. All the payments made by him were payments in discharge of the liability of Elliott under the building agreement. I think we cannot imply a new tenancy, whilst the old liability is still subsisting.

BRAMWELL, B. I am of the same opinion. The plaintiff does not shew any agreement under which the defendant was to pay rent for the occupation of this land. Had nothing appeared in the case but the annual payments, perhaps a tenancy from year to year might have been inferred. But it turns out that the defendant occupied under the permission originally given to Elliott,—whether that created a tenancy in him or not. To my mind, it is clear that Elliott still remains liable for the very sums in respect of which this action is brought. There is no evidence whatever of any contract or promise by the defendant to pay rent to the plaintiff.

Judgment affirmed.

COMMON BENCH REPORTS. New Series. CASES
 ARGUED and DETERMINED in the COURT of
 COMMON PLEAS, and in the EXCHEQUER
 CHAMBER, in Easter and Trinity Terms and
 Vacations, 1860. By JOHN SCOTT, Esq., of
 the Inner Temple, Barrister-at-Law. Vol. VIII.
 London, 1861.

[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN
 EASTER TERM, IN THE TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banco in this term, were,—Erle, C. J., Williams, J.,
 Willes, J., and Keating, J.

CASTRIQUE *v.* IMRIE AND ANOTHER. Feb. 25th, 1860.

[S. C. 29 L. J. C. P. 321; 6 Jur. N. S. 1058. Reversed in Exchequer Chamber,
 8 C. B. N. S. 405: the latter decision affirmed in the House of Lords, L. R.
 4 H. L. 414.]

A., a British subject, and the owner of a British ship, whilst she was on a voyage transferred her to B. by a bill of sale. The master had in the meantime, while at Melbourne, drawn a bill for necessities upon his owner in England, which the latter declined to accept, and which was dishonoured at maturity. The ship having in the course of her voyage touched at Havre, the holder of the dishonoured bill indorsed it to a French subject residing there, and the latter commenced proceedings against the master in the civil tribunal of that place, and against the ship, under the judgment of which court (affirmed on appeal) the vessel was sold,—B.'s claim to intervene as mortgagee being disallowed:—Held, that, inasmuch as the proceedings in the French court were in personam, and the liability of the ship only brought incidentally in question, the decision was not binding upon the English transferee.—Quære, whether the courts of this country will give effect to a judgment in rem of a foreign court, which appears upon the face of it to have proceeded upon an erroneous notion of the English law?—Quære, to what extent the ship-registry act, 8 & 9 Vict. c. 89, is repealed by the 4th section of the 17 & 18 Vict. c. 120, so as to affect the title of a mortgagee whose bill of sale was not registered pursuant to the 37th section of the former act?

This was an action brought by the plaintiff against the defendants for the recovery of a vessel called the “Ann Martin,” together with the rigging, gearing, tackle, munitions, boats, and other furniture belonging thereto, and which said vessel, together with her said rigging, [2] &c., are described in this case by the name and description of “a ship called the ‘Ann Martin’ and her appurtenances.”

The following case was, pursuant to a judge's order under the Common Law Procedure Act, 1852, stated for the opinion of this court:—

During the year 1853, and from thence until the 30th of November, 1854, John George Claus, a British subject, was the sole owner, and duly registered as such

under the statute then in force relative to the registering of British vessels, of a ship called the "Ann Martin" and her appurtenances. The said ship, during the time aforesaid was, and from thence continually has been and is, a British ship (except so far as the facts hereinafter stated may in the opinion of the court have at any time deprived her of the right to be considered a British ship), and duly registered as such in pursuance of the statutes for the time being in force relating to the registering of British vessels.

In December, 1853, the ship sailed on a voyage to Melbourne, in Australia, and from thence to Madras, in the East Indies; and William Benson, who was the master of the said ship during the said voyage, in course thereof, at Melbourne, drew a bill on the said J. G. Claus, by the name and designation of George Claus & Co., in favour of certain persons resident at Melbourne, and carrying on business at Melbourne by and under the name and designation of Levien & Stenitz, of which bill the following is a copy,—

"£601 16 6.

"Melbourne, 8th June, 1854.

"At eight days sight pay this first of exchange (the second and third of same tenor and date unpaid) to the order of Messrs. Levien & Stenitz, the sum of six hundred and one pounds, sixteen shillings, and sixpence, for value received, and which place to account [3] of disbursements of the ship 'Ann Martin,' under my command.

"W. BENSON.

"To Messrs. Geo. Claus & Co., Liverpool."

This bill was never accepted by the said J. G. Claus, and was dishonoured at maturity, and remained unpaid at the time of the sale of the ship, as hereinafter mentioned.

On the 30th of November, 1854, and whilst J. G. Claus was such owner and so duly registered as owner as aforesaid, J. G. Claus, by bill of sale under seal, made and executed in conformity with the provisions of the statute then in force relating to the transfer and registering of British vessels, and reciting that one Thomas Harrison had agreed to discount for the said J. G. Claus a bill of exchange dated the 25th of November, 1854, drawn by the said Thomas Harrison upon and accepted by J. G. Claus, payable six months after date, for 4000l., and that it had been agreed that the payment thereof, or any renewal or renewals thereof which should be thereafter made, should be secured in the manner thereinafter mentioned, duly assigned and transferred all his J. G. Claus's estate and interest in the said ship and her appurtenances to the said Thomas Harrison, his executors, administrators, and assigns, absolutely to and for his own use and benefit, subject to a proviso contained in the said deed, that, if the said J. G. Claus should at maturity pay the said bill, or any renewal or renewals thereof, that then the said deed should absolutely cease and be void, but, if default should be made in payment as aforesaid, that then it should be lawful for the said Thomas Harrison, his executors, &c., and he was thereby empowered, without any further concurrence of the said J. G. Claus, to absolutely dispose of the said ship and her appurtenances, and out of the proceeds thereof to [4] pay in the first place certain expenses in the said deed mentioned, and in the next place to retain the amount of the said bill, or such part thereof as might remain unpaid, and certain interest and commission in the said deed mentioned, and to pay the residue of the said premises to the said J. G. Claus; and subject also to a further proviso, that, until default should be made by the said J. G. Claus in payment as aforesaid, it should be lawful for the said J. G. Claus to hold and enjoy the said ship for his own use, and to receive the profits of the same, without any interruption from the said Thomas Harrison.

At the time of the execution of the said deed, the said Thomas Harrison discounted the said bill of exchange for 4000l., in pursuance of the agreement recited in the said deed. The said bill of sale was duly registered at Liverpool on the 2nd of December, 1854, and the said Thomas Harrison became and was registered as the mortgagee of the said ship and her appurtenances according to the provisions of the statute then in force relating to the transfer and registering of British vessels.

On the 2nd of February, 1855, and whilst Thomas Harrison was such registered mortgagee as aforesaid, Thomas Harrison, by bill of sale under seal, made and executed in conformity with the provisions of the statute then in force relating to

the transfer and registering of British vessels, and made in consideration that one Richard Emley discounted the said bill of exchange for 4000l. for the said Thomas Harrison, duly assigned and transferred all his estate and interest in the said ship and her appurtenances to Richard Emley to and for his the said Richard Emley's own use and benefit; and the said transfer to Emley was duly registered on the 3rd of February, 1855, and Emley became and was registered as the mortgagee of the ship and her appur-[5]-tenances according to the provisions of the statute then in force relating to the transfer and registering of British vessels.

Richard Emley on the 9th of April, 1855, and whilst he was such registered mortgagee as aforesaid, by bill of sale under seal made and executed according to the provisions of the statute then in force relating to the transfer and registering of British vessels, and in consideration of 4000l. stated to have been paid by him to the said Richard Emley, assigned and transferred all his estate and interest in the said ship and her appurtenances to the plaintiff: but the same transfer to the plaintiff was not registered until the 13th of April, 1857, when the same was registered; and the plaintiff then became and was registered as the mortgagee of the said ship and her appurtenances, according to the provisions of the statute then in force relating to the transfer and registering of British vessels.

On the 11th of May, 1855, the said J. G. Claus became and was duly adjudged a bankrupt; and the said bill of exchange for 4000l. was dishonoured at maturity, has never been renewed, and is still unpaid.

On the 4th of May, 1855, the said ship with her appurtenances arrived at the port of Havre, in the French empire; and thereupon, and after the said bill for 601l. 16s. 6d. had become due and dishonoured, Edward L. Behrends, then residing and domiciled in England, and the then holder of the said bill, indorsed the said bill to certain persons, being French subjects, residing and domiciled in the empire of France, and carrying on business under the name and style of Troteux & Co.; and thereupon and whilst the said ship was and remained in the said port of Havre, a suit was commenced and prosecuted by them against the said William Benson on the said bill in the court of the Tribunal of Commerce et Havre, and against the said [6] ship. The said William Benson was cited in and had due notice of the said suit, and appeared in the said court, but did not defend the said suit, but allowed judgment to go therein by consent: and thereupon such proceedings were had in the said court of the Tribunal of Commerce et Havre in the said suit, that afterwards, on the 15th of May, 1855, the judgment of the said court in the said suit was delivered and recorded in the said court,—of which judgment the following is a translation:—

“At the suit of Troteux on a bill for 601l. 16s. 6d. drawn by Captain Benson of the ‘Ann Martin’ at Melbourne, the 8th day of June, 1854, at eight days sight, on George Claus & Co., Liverpool, and indorsed to the plaintiff on the 7th day of May, 1855: Whereas the claim of Troteux is founded upon a regular document emanating from Benson himself, and undisputed by him: And whereas the bill in question was drawn by Benson in his capacity of captain of the ship ‘Ann Martin,’ in payment for necessaries supplied to that vessel, and that there is occasion to grant his prayer to be perfected from personal arrest. The tribunal condemns Benson in his capacity of captain of the vessel ‘Ann Martin,’ and by privilege on that vessel, to pay to the plaintiff the sum of 601l. 16s. 6d., being in French money fr. 15,135, 75c., the amount of the bill drawn at Melbourne on the 8th June last by William Benson, payable at Liverpool eight days after sight. Signified and registered at the office (registry) of Havre. Condemns him moreover to pay the interest * as of right, with costs (a).”

* “Damages”?

(a) The original document was as follows:—

“Tribunal de Commerce du Havre.

“Audience du 15 Mai, 1855.

“Entre Mons. Etienne Troteux négociant au Havre, demandeur, et le Capitaine William Benson, commandant le navire Anglais ‘Ann Martin,’ défendeur, comparent pour contester la contrainte par corps demandée contre lui.

“Le Tribunal,

“Considérant que l'action de Troteux est fondée sur un titre régulier émanant de Benson lui-même, et non contesté par lui :

“Considérant que la traite en question a été tirée par Benson en sa qualité de

[7] And thereupon and in consequence of the said judgment, the said ship and her said appurtenances were seized in the said port of Havre in pursuance of the said judgment by the said Court of Commerce, and detained in the custody of the said court.

Neither the said J. G. Claus, the said Thomas Harrison, the said Richard Emley, nor the plaintiff, was at any time before the recovery of the said judgment served with any summons or process whatsoever to appear to or defend the said suit: nor had they or either of them any opportunity whatever of appearing to the said suit, or of objecting to the said judgment; nor was it necessary by the law of France that they should be served with any such summons, or have any such opportunity afforded them.

According to the law of France, a sale of the said ship could only take place after the judgment of the Court of Commerce was confirmed, and the sale of the ship ordered by a judgment of the civil tribunal of the [8] district in which the said Court of Commerce was situated: and the sale would have to take place at the said civil tribunal, and in the presence of one of the judges of such court delegated to receive the biddings and pronounce the adjudication. And the persons appearing to be the owners of the ship, by the ship's papers, were entitled to be summoned and to be heard before the said civil tribunal. And the said Troteux & Co. accordingly caused the said J. G. Claus, who appeared by the ship's papers and the certificate of registry to be the sole owner of the said ship, and William Bird, the official assignee of Claus, to be personally summoned to appear before the civil tribunal of Havre (being the civil tribunal of the district in which the said Court of Commerce was situate), and two months were given to them after they were summoned to appear; and such proceedings were instituted by Troteux & Co. against the said William Benson, the said J. G. Claus, and the said William Bird as such assignee in bankruptcy of the said J. G. Claus, that, by and in default of the appearance of the said William Benson, and the said J. G. Claus, and the said William Bird, or either of them, in or to the said proceedings, a judgment by default was given by and duly recorded in the said civil tribunal of Havre on the 16th of August, 1855, by which the said seizure of the said ship and her appurtenances was confirmed, and it was ordered that the said ship, &c., should be sold by public auction to the highest bidder at the sittings for sales of the said civil tribunal, in the presence of one of the judges of the said civil tribunal duly delegated by the said judgment to receive the biddings at such sale of the said ship, and to pronounce the adjudication in respect thereof.

Neither the said Troteux & Co. nor the said civil tribunal had any notice, either by the ship's papers or otherwise, until the plaintiff commenced the suit here-[9]inafter mentioned, that either the said Thomas Harrison, or the said Richard Emley, or the plaintiff, had any interest in the said ship; and neither the said Thomas Harrison, nor the said Richard Emley, nor the plaintiff, was at any time before the said obtaining and recording of the said last-mentioned judgment served with any summons or process whatsoever to appear to or oppose the said proceedings before the said civil tribunal, nor had they or either of them any opportunity whatever of appearing or objecting to the said proceedings or the said judgment, or of defending their or his title to or property in the said ship and her appurtenances, except by bringing such a suit as is hereinafter mentioned to have been brought by the plaintiff.

Notice of this judgment having been given, was again served upon the said William Bird; and he had another opportunity given him to appear to oppose the sale of the said ship.

After the delivery of the last-mentioned judgment by the said civil tribunal, the now plaintiff, on the 22nd of September, 1855, duly and according to the law of

capitaine de 'l'Ann Martin' en paiement de fournitures faites à ce navire, qu'il y a lieu de faire droit à sa demande d'être déchargé de la contrainte par corps:

"Le Tribunal condamne Benson en sa qualité de capitaine de 'l'Ann Martin,' et par privilège sur ce navire, à payer au demandeur la somme de six cent une livres, seize shillings, et six pence, sterling, faisant en argent de France quinze mille trente-cinq francs, soixante-quinze centimes montant, de la traite tirée à Melbourne le 8 Juin dernier par William Benson sur George Claus et comp., payable à Liverpool à huit jours de vue. Signifiée et enregistrée au bureau du Havre. Le condamne en outre aux intérêts de droit, et aux dépens."

France, commenced and prosecuted in the civil tribunal of Havre a suit in the nature of a suit to replevy the said ship and her appurtenances, to release the said ship and her appurtenances from such custody and detention as aforesaid: and, upon the hearing of the said suit before the said civil tribunal, the several facts and documents hereinbefore stated or recited were duly proved before the said civil tribunal; and the following evidence was given respecting the law of England: and thereupon the said civil tribunal gave judgment in the last-mentioned suit, of which judgment the following is a translation (a):—

[10] “THE CIVIL TRIBUNAL OF HAVRE,
the 19th April, 1856.

“The Tribunal.

“Whereas, Troteux and others (joints), bearers of bills drawn by Benson, master of the English vessel [11] the ‘Ann Martin,’ on Claus & Co., who alone appeared as owners of that vessel on the certificate of registry in the possession of the captain, have caused the said captain to be condemned to pay those bills, and have [12] in consequence caused the vessel to be seized in the port of Havre:

“That the replevy of that process is demanded by Castrique & Co., bearers of

(a) The original document was as follows:—

“Tribunal Civil du Havre.

“Audience du 19 Avril, 1856.

“Le Tribunal.

“Attendu que Troteux et joints, porteurs de traites tirées par Benson, capitaine du navire Anglais ‘Ann Martin,’ sur Claus et comp., qui seuls figuraient comme propriétaires de ce navire, sur l’acte de nationalité dont était saisi le capitaine, ont fait condamner le dit Benson au paiement de ces traites, et ont fait par suite saisir le navire dans le port du Havre:

“Que le mainlevée de cette poursuite est demandé par Castrique et comp., porteurs d’un contrat qui pendant le cours du voyage de ‘l’Ann Martin,’ a été consenti par Claus et comp. au profit de Harrison, transmis par Harrison à Emley, et par ce dernier à Castrique et comp.:

“Attendu que la nature de ce contrat qu’on a qualifié de mortgage d’après la loi Anglaise est peu importante au procès; que soit qu’il constitue une simple vente réelle ou une simple vente apparente, ou un nantissement accompagné de certains privilèges particuliers dérivant de la législation étrangère sous l’empire de laquelle il a été souscrit, la décision doit être la même:

“Qu’il s’agit en effet de la propriété d’un navire navigant sous le nom de Claus et comp., qu’il est impossible d’admettre que sous une législation commerciale quelconque il soit reçu, qu’en cours de voyage cette propriété puisse être transmise à un tiers, ou lui être engagée à titre de nantissement, sans qu’aucune trace de cette mutation ou de cette modification de la propriété soit imprimée aux papiers du bord, que la bonne foi, qui est l’âme du commerce, répugne à une semblable idée:

“Que la législation Française le prescrit, en déclarant que la vente volontaire d’un navire en cours de voyage ne préjudice pas aux créanciers du vendeur: Art. 196 du Code de Commerce:

“Que la législation Anglaise contient une disposition analogue, puis qu’une semblable vente ne produit d’effet qu’autant qu’elle a été mentionnée par endossement sur l’acte de nationalité, et enregistrée dans un bref délai à la douane du port d’armement au retour du dit navire:

“Que l’endossement dans l’espèce n’a pas eu lieu:

“Qu’une des conditions prescrites pour la validité de la vente ou du contrat inimmuable dont excipent Castrique et comp., n’a pas été accomplie:

“Que ce contrat n’est donc opposable aux tiers qui ont traités avec Benson représentant Claus et comp.:

“Que la demande de Castrique et comp. n’est donc pas admissible:

“Qu’ils n’ont pas dès lors qualité pour critiquer le poursuite de Troteux et joints, et les titres dont ceux se sont armés:

“Que les véritables contradicteurs de Troteux et joints, c’est à savoir les syndics de

a deed which during the voyage of the 'Ann Martin' was entered into by Claus & Co. in favour of Harrison, assigned by Harrison to Emley, and by the latter to Castrique & Co. :

"Whereas, the nature of that deed, which has been called 'mortgage,' according to English law, is of little importance in the case ; whether it constitutes a real sale, or only an apparent sale, or a security surrounded by certain particular privilege derived from the foreign law under the authority of which it was executed, the decision must be the same :

"That the question at issue really concerns the property of a vessel sailing under the name of Claus & Co. (as owners), that it is impossible to believe that under any commercial law whatsoever it could be allowed that in the course of a voyage such property may be conveyed to a third party, or be mortgaged to him by way of security, without there appearing on the papers of the vessel any trace of that conveyance or modification of the property : that good faith, which is the soul of commerce, is contrary to such an idea :

"That the French law orders it by enacting that the voluntary sale of a vessel in the course of a voyage does not prejudice the rights of the creditors of the vendor : Article 196 of the Code de Commerce :

"That the English law contains an analogous enactment, since that a similar sale is only effective when it has been recorded by indorsement on the certificate of registry, and entered at the port of registry shortly after the said ship's return :

"That the indorsement in this case has not been made :

"That one of the conditions required for the validity [13] of the sale, or of the unnamed deed upon which Castrique & Co. found their right, has not been fulfilled :

"That a deed cannot therefore be opposed to the parties who have treated with Benson, representing Claus & Co. :

"That the claim of Castrique & Co. is therefore not allowable :

"That they consequently have no right to question the acts of Troteux and others (joints), and the documents with which they are armed :

"That the true opponents of Troteux & Co. (joints), viz. the assignees of Claus & Co., have been called in the cause ; that they do not appear ; which facts lead to presumption that they have no objection to raise to those acts :

"Whereas, as to the damages claimed by Troteux and others, that none will be due, unless the price of the sale of the vessel should prove insufficient to pay them :

"That, on the other hand, they would take their origin in the diminution in

Claus et comp., sont en clause qu'ils font défaut, ce qui fait présumer qu'ils n'ont aucune contestation à soulever contre cette poursuite :

"Attendu, quant aux dommages intérêts réclamés par Troteux et joints, qu'ils ne pourront être dus que si le prix de vente du navire sera insuffisant pour les payer :

"Qu'ils puiseraient d'ailleurs leurs origine dans la diminution de valeur qu'aurait pu éprouver le navire pendant la poursuite, et dans une augmentation de frais à prélever sur le prix :

"Attendu, à ce qui concerne la diminution de valeur, que depuis la saisie une loi ayant permis aux français d'acheter et de franciser des navires étrangers, la vente de 'l'Ann Martin' fait aujourd'hui attirer beaucoup plus de concurrents :

"Qu'il n'y aura donc pas de préjudice :

"Que, quant à l'augmentation de frais, on peut la fixer à cinq cents francs.

"Par ces motifs,

"Statuant en premier ressort et matière ordinaire, en continuant à prononcer défaut contre Bird, Chilton, Rigge, Forget, Higgins, et Claus et comp.,

"Reçoit Troteux et joints incidemment demandeurs,

"Joint la demande incidente à la principale, et, faisant droit sur le tout,

"Juge Castrique et comp. non recevables et mal fondés dans leur action, les en déboute, et sans qu'il soit besoin d'ordonner l'expertise demandée, les condamne en cinq cents francs de dommages intérêts, et aux dépens, que Troteux et joints seront dans tous les cas autorisés à employer comme frais de poursuite,

"Juge que les cinq cents francs de dommages, intérêts ne seront acquis à Troteux et joints qu'autant que le prix à prévenir de la vente de ce navire serait insuffisant pour les désintéresser."

value suffered by the vessel during the suit, and in an increase in the expenses to be deducted from the price.

"Whereas, respecting diminution in value, that, since the seizure, a law having allowed French subjects to buy and naturalize foreign vessels, the sale of the 'Ann Martin' made at the present time will draw many more bidders :

"That there will consequently be no loss :

"That, as to the increase of the expenses, it may be fixed at 500 francs.

"For these reasons,

"Deciding in first resort and ordinary matter, in continuing to pronounce default against Bird, Chilton, Rigge, Forget, Higgins, and Claus & Co.

"Receives Troteux and others (jointly) incidentally plaintiffs :

[14] "Joins the incidental suit to the principal one, and, deciding on the whole, adjudges Castrique & Co. not receivable, and unfounded in their action, and rejects the same and, without there being occasion to order the valuation (expertise), condemns them to pay 500 francs as damages, and to the costs, which Troteux and others (jointly) are authorized to use in any cases as expenses to suit :

"Directs that the 500 francs shall be payable to Troteux and others in the event only of a sale of the vessel not realizing sufficient amount to satisfy them."

And thereupon the plaintiff duly appealed according to the law of France against the said judgment of the said civil tribunal of Havre, to the Court of Appeal at Rouen : upon the hearing of which appeal, besides the facts, documents, and evidence given before the civil tribunal of Havre, the following case and opinion of the then Attorney-General for England thereon were produced before and admitted and received as evidence by the said Court of Appeal :—

"Case for the opinion of the Attorney-General.

"Messrs. Claus & Co., of Liverpool, owners of the vessel the 'Ann Martin,' being indebted to Mr. Thomas Harrison in a sum of 4000*l.*, executed on the 30th of November, 1854, a mortgage to him of the said vessel as a security for the payment of their debt, giving the creditor power to sell the same at the price and on the conditions he might deem advisable.

"The bill of sale was entered at the Custom House, Liverpool, on the 2nd of December, 1854, pursuant to the statute 8 & 9 Vict. c. 89, s. 37, and such entry was duly indorsed on the bill of sale.

"About the end of 1853, the 'Ann Martin' sailed for Melbourne ; from thence she was ordered to Calcutta, where she was chartered for Havre, in which port she arrived on the 6th of November, 1855.

[15] "Between 1854 and 1855, Messrs. Louis Castrique & Co., the present plaintiffs, having become entitled by assignment to the mortgage in question, endeavoured to take possession of the vessel ; but some creditors of Claus & Co. appeared as holders of bills drawn in the course of the voyage by the captain of the 'Ann Martin' on Claus & Co., but not accepted. They obtained judgment on the contention that their money had been used for the purposes of the vessel during the voyage.

"The sale of the vessel was judicially sued for, and was about to take place, when Louis Castrique & Co. formed a demand claiming the vessel, and founding their right on the bill of sale or mortgage of the 30th of November, 1854.

"The creditors who had seized the vessel contend,—first, that the certificate of registry of the vessel, of September, 1853, mentioned Claus & Co. as owners,—secondly, that *bonâ fide* third parties, who lent money to the captain of a vessel in the course of its voyage had only to look at the certificate of registry, and that the law of nations did not allow creditors whose claims owed their origin to the preservation of the vessel to be sacrificed,—thirdly, that the bearers of the deed of mortgage of the 30th of November, 1854, had only themselves to blame for having allowed the certificate of registry to exist.

"Messrs. Louis Castrique & Co. have contended,—first, that the deed of the 30th of November, 1854, was a real bill of sale, because it transferred the property and the right to sell at any time, under any form, and on any conditions,—secondly, that, if even it constituted a mortgage only, it gave them an undoubted right to sell the vessel in any other port than Havre, to apply the proceeds to the payment of their debt, and to hand over the balance to Claus & Co. or their [16] assignees,

they having become bankrupt,—thirdly, that, notwithstanding the certificate of registry, the deed of the 30th of November, 1854, entered at the Custom House on the 2nd of December following, must prevail against the claims of the creditors of Claus & Co.,—fourthly, that the English law gives no lien to the creditor for money lent to the captain, where no bottomry-bond is effected.

“Nevertheless, the tribunal of Havre has given the judgment which is herewith submitted to counsel, and decided against the plaintiff’s claim. [The judgment, ut ante, p. 10, was set out.]

“In that state of the case, the French advocate on the plaintiff’s behalf puts the following questions,—first, What is the nature and what are the effects of the contract entered into on the 30th of November, 1854, between Claus and Harrison?—Secondly, What are at common law in England the character and the effect of the contract called mortgage?—Thirdly, Can a vessel be mortgaged during a voyage? and is the entry at the Custom House sufficient to give a good title to the mortgagee as against third parties?—Fourthly, Can the creditor to whom the mortgage has been given claim the vessel, to the exclusion of those who have lent money to the captain during the voyage, and who have received from him bills of exchange drawn upon the owner mentioned in the certificate of registry?—Fifthly, Can the law of England give a privilege in the vessel to creditors who have lent the captain money for necessities supplied during the voyage, where no bottomry-bond is given?—Sixthly, What are (if any) the rights of the assignees of Claus & Co., who were declared bankrupts on the 10th of May, 1855, on the ‘Ann Martin’?—Seventhly, Cannot the assignees jointly contend that the French creditors, holders of the bills in question, have no right to compel a sale of the vessel?”

[17] Opinion thereon.

“The French tribunal appears to have misapprehended the English law, as will appear from the answers about to be given to the questions proposed.

“As to the first and third,—The bill of sale, on being perfected as required by the 8 & 9 Vict. c. 89, ss. 37, et seq., gave the mortgagee a specific lien and charge, valid against the assignees under the subsequent bankruptcy, notwithstanding the ship continued on her voyage in the reputed ownership of the bankrupts: s. 46. The indorsement on the certificate of registry is not necessary to pass the property: but the mortgagee’s title is complete on the entry of the bill of sale at the Custom House: ss. 27, 28. The indorsement on the certificate is only important on a question of priority between several specific mortgagees, &c.; and, even in this case, the first mortgagee has thirty days allowed him to procure the indorsement on the certificate, from the date of the ship’s return to the port to which she belongs: s. 39.

“As to the second,—A mortgage is in form an absolute conveyance of the property, defeasible on payment of the sum lent on a given day. If the re-payment be not made on that day, the dispositions remain absolute, and at common law the mortgagee becomes absolute owner. But, in the equity courts, the mortgagor,—the original owner,—may recover the property on re-payment of the sum advanced and interest.

“As to the fourth and fifth questions,—The law of all foreign codes founded on the Civil law gives a lien for money advanced for repairs and necessities on a voyage, without any express hypothecation. But by the law of England no such lien or claim upon the ship (in rem) exists, unless there be an express con[18] tract of hypothecation, viz. a bottomry-bond. This contract of hypothecation the master may enter into when the ship’s necessities require it in a foreign port, and there are no other means of obtaining necessities for or the means of prosecuting the voyage: *Johns v. Simons*, 2 Q. B. 425. So strict is the rule, that, if the repairs were done or money advanced on personal credit, even if a bottomry-bond be subsequently actually given, it will not hypothecate the vessel; as no repairs, &c., done on personal credit can be afterwards converted into a bottomry transaction: see Addison on Contracts, 4th edit. p. 289; and bills of exchange drawn on the owner, although accompanied by a verbal arrangement for a lien, will not effect an hypothecation: Abbott on Shipping, 9th edit. p. 130. In the case of *Shainbank v. Fenning*, 11 C. B. 88, it was decided by the court of Common Pleas that the master has no authority to hypothecate the ship for repairs, &c., unless the re-payment be made to depend on the safe arrival of the ship; and that he cannot hypothecate the ship and also pledge the personal credit of the owners. This case seems to be conclusive that the creditors for the money

advanced to the captain, having obtained no bottomry-bond, have no claim except as general creditors of the bankrupt.

"As to the sixth question,—The assignees are postponed to the plaintiffs' claim, under the 46th section of the 8 & 9 Vict. c. 89, but are entitled to the surplus proceeds after satisfying the plaintiffs' debt, &c.

"As to the seventh question,—The assignees may contend successfully, according to the law of England, that the French creditors have no specific lien, and must come in to participate *pro rata* with the other general creditors of the bankrupts, and that they have no specific right to compel a sale of the ship, the property in which, upon the bankruptcy, vested in the [19] assignees, subject to the plaintiffs' claim under their mortgage.

"A. E. COCKBURN.

"Temple. Oct. 27th, 1856."

And the said court thereupon, on the 3rd of March, 1857, gave judgment in the matter of the said appeal; of which judgment the following is a translation:—

"Adopting the reasons contained in the judgment of the civil tribunal of Havre on the 19th of April, 1856, we confirm the same, and condemn the appellants to the fine and costs (a)."

And thereupon, and after the said last-mentioned judgment had been given, and whilst the said ship and her appurtenances were and continued to be so seized and arrested as aforesaid, that is to say, on the 29th of May, 1857, the said ship and her said appurtenances were, under and in pursuance of an order of the said civil tribunal at Havre, sold by public auction at the port of Havre aforesaid. The now defendants then became and were the highest bidders at the sale for the said ship and her appurtenances, and then became and were adjudicated to be the purchasers of the said ship and her said appurtenances.

The plaintiff was present at the said sale, and bid through his attorney, and gave no notification at the said sale that he objected to it. The defendants at the time they became the purchasers of the said ship had no notice or knowledge of the plaintiff's title to [20] the ship, and were *bonâ fide* purchasers of the ship on their own account, and paid 49,420 francs, 50 c., into the said court of the civil tribunal of Havre as the price of the said ship; and the defendants, after they became the purchasers of the ship, being English subjects, obtained from the English consul at Havre a provisional certificate for the registry of the said ship, and brought the said ship and her said appurtenances to the port of Liverpool, in England, and afterwards applied to the board of Customs for the cancellation of the old registry of the ship, and for the ship to be registered *de novo* in the name of the defendants as owners; which application was granted, and the ship was registered *de novo* in the name of the defendants on the 15th of July, 1857.

Afterwards, on the 20th of August, 1857, the plaintiff duly demanded the possession of the said ship and her said appurtenances of and from the defendants; and the defendants then refused to give or deliver the possession of the said ship or her said appurtenances, or either of them, or any part thereof, to the said Louis Castrique.

The vessel has since the 20th of August, 1857, been totally lost at sea. The plaintiff has since the 20th of August, 1857, and before the commencement of this action, commenced fresh actions before the French tribunals to recover the price of the ship paid by the defendants to the officers of the civil tribunal at Havre, and such proceedings are still pending.

Copies of the several original judgments in the court of the Tribunal of Commerce at Havre, the civil tribunal of Havre, and of the court of appeal at Rouen, were annexed to the case, and were to be taken as part thereof: and the court were to be at liberty to draw any inferences from the facts and documents as above set forth that might be drawn by a jury.

[21] The question for the opinion of the court was, whether, under the above

(a) The original was as follows:—

"Cour Impériale de Rouen.

"Audience du 3 Mars, 1857.

"La Cour, adoptant les motifs qui ont déterminé les premiers juges, confirme le jugement du Tribunal Civil du Havre, du 19 Avril, 1856, et condamne l'appellant en l'amende, et aux dépens."

circumstances, the plaintiff was entitled to recover from the defendants the said ship and her appurtenances.

If the court should be of opinion that the plaintiff was so entitled to recover, then judgment was to be entered up for the plaintiff for the value of the ship on the 10th of August, 1857, the amount to be settled by arbitration, and costs of suit. If the court should be of a contrary opinion, then judgment of non-pros, with costs of suit, was to be entered up for the defendants.

James Wilde, Q. C. (with whom was Holl), for the plaintiff (*a*). It appears from the case that the ship "Ann Martin" being on a voyage, and the master requiring money for necessary disbursements, a bill was drawn by [22] him at Melbourne upon his owner in England; that, the ship being at the port of Havre, the bill (which had been refused acceptance by the drawee, who had in the meantime parted with his interest in the ship by bill of sale, duly registered,) was indorsed to certain persons in France for the purpose of suing the master there, the law of that country under such circumstances allowing a recourse to the ship. A judgment was accordingly obtained in the French court against the master, under which the ship was sold; neither the original transferee of the ship, nor the plaintiff, who claimed under a subsequent bill of sale from him, ever having notice of the proceedings in the French court, or an opportunity of being heard there in defence of their rights. It will be contended, on the other side, that the proceeding in the French court being a proceeding in rem, the judgment is conclusive against all the world. It is submitted, however, that this was not a proceeding in rem; and that the French court, assuming to decide according to English law, have fallen into the mistake of supposing that the property in a British vessel cannot pass by a bill of sale executed pending a voyage. They have, in effect, held that the real owner had no right to intervene, and decline to recognize any other title than that of Claus. [Keating, J. Do they not profess to decide according to their own law, and merely state that the English law coincides?] The contract, being English, was to be governed by the English law. The effect of a judgment of a foreign court has been considered in numerous cases. In *Dalglish v. Hodgson*, 7 Bingh. 495, 504, 5 M. & P. 407, 424, Tindal, C. J., says: "The general law upon this subject is well known, that the sentence of a foreign court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears [23] on the face of the sentence free from doubt and ambiguity. But it is at the same time as well established, that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence: it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. The cases of *Fisher v. Oyle*, 1 Campb. 418, and *Calvert v. Borill*, 7 T. R. 523, are express authorities to this point." The next objection to the proceedings here is, that no one who was interested in the vessel was cited to appear in the French court, or had any opportunity of being

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"First,—That the contract arising out of, and the liability in respect of, the supply of necessaries to the 'Ann Martin,' and the bill of exchange given by the captain thereof, must be construed and governed by and according to the law of England: that, by that law (the necessaries having been supplied on personal credit, and there being no contract of hypothecation), there was no lien upon the ship, and the ship could not have been proceeded against in rem; that the French courts, in their judgments, manifestly proceeded upon an erroneous view of the English law; that the said judgments are erroneous and utterly void; and that the sale thereunder passed no property in the ship as against the plaintiff:

"Secondly,—That the French courts had, under the circumstances stated in the case, no power or authority to seize or dispose of the property of the plaintiff for the purpose of satisfying the contract arising out of the said bill of exchange, to which the plaintiff was not a party, and upon which he was not in any way liable:

"Thirdly,—That neither Harrison, Emley, nor the plaintiff, had any proper notice of the proceedings in the French courts under which the ship was seized and sold, so as to render them valid as against the plaintiff."

heard. This is manifestly contrary to natural justice: *Obicini v. Bligh*, 8 Bingh. 335, 1 M. & Scott, 477; *Cowan v. Braidwood*, 1 M. & G. 882, 2 Scott, N. R. 138; *Pollard v. Bell*, 8 T. R. 434. In *Norelli v. Rossi*, 2 B. & Ad. 757, the defendant, in discharge of a debt to the plaintiff, indorsed bills to him which had been drawn and indorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here. The plaintiff indorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them "cancelled by mistake:" the bills were not however paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling: they would otherwise have honoured them. A re-acceptance was obtained from the acceptor, but he did not pay the bills. The plaintiff then took them up, and returned [24] them, regularly protested, to the defendant, who applied to the prior indorsers for payment, but they refused. The defendant, who resided abroad, cited the drawers, the intermediate indorsers, and the plaintiff, before the Tribunal of Commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of the legal remedies against the acceptor, and was equivalent to a delay granted him by the holders, with whom the plaintiff was identified, and consequently that the other parties to the bills were discharged. It was held, that the French courts had mistaken the law of England as to the effect of the cancellation, and therefore that the defendant was still liable at the plaintiff's suit for the debt in respect of which the bills were given, notwithstanding the decree. Lord Tenterden, in delivering judgment, there says: "It is unfortunate for the defendant if the law of England compels him to pay this debt, while the sentence of the French court, confirmed on appeal, prevents his recovering the amount from the indorsers and drawers of the bills abroad. But this is the consequence of his own act. Without waiting to ascertain what the judgment of an English court would be in a proceeding on these bills, he goes at once for relief before a court in France, where the law of England is misinterpreted, it being considered there that the remedy upon the bills in this country was suspended by the accidental cancelling of the acceptance, and consequently the indorsers and drawers discharged. If the defendant had waited the result of [25] an action here, the decision of the French court would then probably have been different. If there is no person in this country from whom the defendant can recover what he is liable to pay in this action, that is certainly a misfortune, but it is one that he has brought upon himself." [Keating, J. There, the contract was an English contract, and would be construed according to the English law.] So, here: for, the limits of Benson's obligations in respect of his draft would depend upon our law,—the mere fact of the bill having been indorsed to a Frenchman making no difference. [Willes, J. This is not procedure: it is in a part of the French code which is dealing with French contracts and French rights: see the Code de Commerce, book 2, tit. 1, art. 191, 7th division.] *Potter v. Brown*, 5 East, 124, is an authority to shew that the rights and liabilities of the parties to this contract were properly determinable by the law of England, and were in no degree affected by the accident of the vessel being found in a French port.

Mellish (with whom was Crompton Hutton), for the defendants (a). The judgment of the French court, being a judgment in rem of a court of competent jurisdiction with respect of the very thing which is the subject of the judgment is, whether right or wrong, binding on all the world. The defendant has purchased the ship under that judgment, without notice of any defect or of any fraud, and consequently his title cannot be impeached. [Willes, J. Which of the judgments do you [26] rely on as being a judgment in rem?] The judgment of the 15th May, 1855, and the

(a) The point marked for argument on the part of the defendants, was,—

"That the judgments of the French courts ordering the ship to be sold, and declaring the defendants to be the purchasers, were judgments in rem by a court of competent jurisdiction, and therefore binding on all parties, and conclusive evidence of the defendants' property in the ship."

ultimate decision of the court of appeal at Rouen. All judgments are *inter partes*, and only binding upon the parties to the proceeding; or judgments *in rem*, by which the status of a particular thing is determined, and which are binding upon all the world. [Willes, J. There is a third mode of procedure, where process is directed against property within the jurisdiction, *ad fundandum jurisdictionem*] That is a process to found a proceeding *inter partes*, as in the Mayor's court, London. Here, the proceeding, upon the face of the case, is against the ship. The captain, having the opportunity of opposing the detention of the ship, declined to avail himself of it, in order to obtain his personal discharge. Claus and his assignee were summoned, because the proceeding was *in rem*, and they were the only persons who appeared to be interested in the ship, and entitled to be heard. Story, in his *Conflict of Laws*, § 591, 592, 593, discusses the effect of judgments of this kind. "If," he says, § 591, "the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case: for, no other court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the *forum rei sitæ* is held absolutely conclusive. *Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt*. On the other hand, a judgment in any foreign country touching such immovables will be held no obligation. John Voet is explicit on this point. '*Licet autem regulariter judex requisitus non cognoscat de justitiâ sententiâ per alterum judicem latæ, nec eam ad examen penitus revocet, sed pro jus-[27]-titia ejus ac æquitate præsumat. Tamen si animadvertat eam directo contra sui territorii statuta latam esse circa res immobiles, in suo territorii sitas eandem non exsequitur; uti nec, si alias absque proluxa causæ cognitione constet, sententiam nullam esse.*'" J. Voet, *ad Pand.* tom. 1, lib. 42, tit. 1, n. 41, p. 788. "The same principle (§ 592) is applied to all other proceedings *in rem* against movable property within the jurisdiction of the court pronouncing the judgment. Whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of Admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, or of any the like nature over which such courts have a rightful jurisdiction founded on the actual or constructive possession of the subject-matter (*res*). The same rule is applied to other courts proceeding *in rem*, such as to the court of Exchequer in England, and to other courts exercising a like jurisdiction *in rem* upon seizures. And in cases of this sort it is wholly immaterial whether the judgment be of acquittal or of condemnation. In both cases it is equally conclusive. But the doctrine, however, is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and without fraud; for, if fraud has intervened, it will doubtless avoid the force and validity of the sentence. So, it must appear that there have been regular proceedings to found the judgment or decree; and that the parties in interest *in rem* have had notice, or an opportunity to appear and defend their interests, either personally or by their proper representatives, [28] before it was pronounced; for, the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard." The proceeding here was exactly like a proceeding on bottomry; and the only parties who were entitled to be heard were duly cited to appear in the French court, and the French court had actual possession of the subject-matter. In § 593, the learned author says: "In all these cases the same principle prevails, that the judgment, acting *in rem*, shall be held conclusive upon the title and transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned; and whether it be directly or incidentally brought in question. But it is not so universally settled that the judgment is conclusive of all the points which are incidentally disposed of by the judgment, or of the facts or allegations upon which it professes to be founded. In this respect, different rules are adopted by different states both in Europe and in America. In England such judgments are held conclusive, not only *in rem*, but also as to all the points and facts which they professedly or incidentally decide. In some of the American States the same doctrine prevails.

While, in other American States, the judgments are held conclusive only in rem, and may be controverted as to all the incidental grounds and facts on which they profess to be founded." The general maritime law requiring that every ship shall carry with her the certificate of registry, which is conclusive evidence of ownership, though our law allows a mortgage of a ship while on a voyage, the French court could not recognize any other title than that of Claus. The general effect of judgments in rem is very fully considered in the notes on *Hughes v. Cornelius* (2 Show. 232) and *The Duchess* [29] of *Kingston's case* (20 Howell's St. Tr. 355), in 2 Smith's Leading Cases, 4th edit. 607 et seq. Speaking of estoppel by matter of record, it is said, p. 611,— "Questions of this sort usually arise on judgments, they being by far the most extensive species of records. With regard to their conclusive effect, they may be divided into two classes,—1, judgments in rem,—2, judgments in personam; or perhaps it would be more accurate to say, inter partes, since an adjudication upon the status of a particular person is as much entitled to the conclusive effect of a judgment in rem as is an adjudication on the status of a particular inanimate thing. With regard to both these classes, one observation may be made, viz that, for the mere purpose of proving the existence of a judgment, the production of a record of either sort is conclusive upon all the world." Again, p. 613,— "The universal effect of a judgment in rem depends on this principle, viz. that it is a solemn declaration proceeding from an accredited quarter concerning the status of the thing adjudicated upon; which very declaration operates accordingly upon the status of the thing adjudicated upon, and ipso facto renders it such as it is thereby declared to be. Thus, a condemnation of goods in the Exchequer not merely declares the goods to be liable to forfeiture, but accomplishes the forfeiture accordingly. A sentence in a Prize Court not merely declares the vessel prize, but vests it in the captors. Now, when the status of the thing is thus altered, it seems to follow as a necessary consequence that the sentence altering it must conclude all the world: for, how vain would it be to try an issue whether the thing be or be not as decreed, when the decree has not only declared but rendered it such!" Again, p. 631,— "With regard to courts of Admiralty, the rule with regard to their sentences is the same as that regarding sentences of spiritual courts, where their [30] proceeding is in rem: for instance, when a vessel is condemned as prize, it seems never to have been disputed that the sentence is conclusive upon all the world: see the notes to *Le Quai v. Eden*, Dougl. 614." Again, p. 633, speaking of actions upon foreign judgments, it is said,— "There may be now some doubt whether, in such an action, circumstances impeaching it ought to be pleaded specially, or given in evidence under the plea of non assumpsit, as tending to rebut the implication of a promise arising from the existence of the judgment stated in the declaration. However this may be, there are some points clear upon the question of conclusiveness. First, it is clear that, if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law, *Norrell v. Rossi*, 2 B. & Ad. 757, or of the law of nations (*Pollard v. Bell*, 8 T. R. 444, *Bird v. Appleton*, 8 T. R. 562, *Baring v. Uagett*, 3 B. & P. 215, *Botton v. Gladstone*, 2 Taunt. 85), or to offend common sense and justice (*Buchanan v. Rucker*, 1 Campb. 63, 9 East, 192; and see *Caran v. Stewart*, 1 Stark. N. P. C. 525, *Frankland v. McGusty*, 1 Knapp, 274, *Bruce v. Wait*, 1 M. & G. 1, 1 Scott, N. R. 81, where the judgment was that of an inferior English court, *Ward v. Ellayn*, Cro. Jac. 261), or even to be grossly defective (*Obicini v. Bligh*, 8 Bingh. 335, 1 M. & Scott, 477), it would not be conclusive either in a declaration or a plea. It is also not too much to say that our courts would allow it to be impeached by extrinsic evidence, offered for the purpose of shewing that the court which pronounced it had no jurisdiction (see *Harelock v. Rockwood*, 8 T. R. 268, *Burles v. Orr*, 1 You. & C. 464), or that it was obtained by fraud, for that, to use the language of the Lord Chief Justice, is an extrinsic collateral act which vitiates the most solemn proceedings even of our own courts; or by means contrary to the established [31] principles of justices, as, for instance, without summoning or obtaining the appearance of the party defendant; for, such an objection, if apparent on the proceedings, would be fatal; and it would probably be thought too great a confidence to repose in the officers of a foreign court, if we were to assume the impossibility of their stating the observance of such forms in cases where they were not actually observed." Again, p. 639,— "The commonest instance of the effect of the judgment of a foreign court of competent jurisdiction in rem is afforded by the sentences of courts of Admiralty on

questions of prize. 'That these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question,' were the expressions of Le Blanc, J., in *Lothian v. Henderson*, 3 B. & P. 517. And this opinion is amply borne out by prior and subsequent authorities: see *Kindersley v. Chase*, Park, Ins. 490, *Bolton v. Gladstone*, 5 East, 155, *Baring v. Clagett*, 3 B. & P. 214, *Christie v. Secretan*, 8 T. R. 196. Such a sentence, being in rem, binds the rights of third persons." So held Lord Ellenborough in *Fisher v. Ogle*, 1 Campb. 418. The case of *Cammell v. Sewell*, 3 Hurlst. & N. 617 (which is, however, now pending in the Exchequer Chamber), is also an authority to shew that the judgment of a foreign court of competent jurisdiction proceeding in rem is binding and conclusive as against all the world (a). But it is contended on the part of the plaintiff, that, assuming this to be a judgment in rem, it is void because it proceeded upon an erroneous notion of the English law. [Willes, J. The proceeding in the French court was against the master personally; and the court decides that the present [32] plaintiff has no title, and orders a judgment in rem. Is not that an erroneous conclusion as to the subject-matter against which execution ought to go? Prize courts decide upon principles which are applicable all the world over. When such a court decides upon a question of prize, its judgment is perfectly intelligible. But this is no more than an award of execution against the property of B. to satisfy A.'s debt. A judgment in rem making B.'s goods liable for A.'s debt would, I apprehend, be a bad judgment, for want of jurisdiction. A court proceeding in rem must have jurisdiction so to proceed, in order to render its judgment universally binding.] By sending his vessel to a French port, the owner places himself within and subjects himself to the jurisdiction of the French courts: and, although the French court may have given a bad reason for its judgment, there was a good one, viz. that the plaintiff's bill of sale had not been registered at the time of the seizure. The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), did not come into operation until the 1st of May, 1855, and the assignment by Emley to the plaintiff took place on the 9th of April in that year, and consequently its validity would depend upon the previous act of 8 & 9 Vict. c. 89, the 37th section of which provided that no bill of sale or other instrument in writing should be valid and effectual to pass the property in any ship, or in any share thereof, until registered. *Novelli v. Rossi*, 2 B. & Ad. 757, is no authority for the plaintiff, for that was the case of a judgment inter partes. There is a further objection to the plaintiff's right to call in question the proceedings of the French court; for, the case finds that "the plaintiff was present at the sale, and bid through his attorney, and gave no notification at the said sale that he objected to it." He has, therefore, by his conduct ratified all that was done, and must be [33] taken to have waived any objection he might have had to the proceedings.

Holl, in reply. The proceedings in the French court do not upon the face of them appear to have been otherwise than proceedings in personam: and, assuming that they were proceedings in rem, still the judgment is not binding and conclusive upon the courts of this country, by reason of its having been based upon an erroneous notion of the English law: *Calvert v. Borill*, 7 T. R. 523; *Bird v. Appleton*, 8 T. R. 562; *Potter v. Brown*, 5 East, 124; *Le Caux v. Eden*, 2 Dougl. 614; *Melan v. The Duke de Fitzjames*, 1 Bos. & P. 138; *Morris v. Robinson*, 3 B. & C. 196, 5 D. & R. 34; *Novelli v. Rossi*, 2 B. & Ad. 757. [Willes, J. *Melan v. The Duke de Fitzjames*, is inconsistent with *De la Vega v. Fianna*, 1 B. & Ad. 284.] Whether the assignment to the present plaintiff was registered or not at the time of the seizure is wholly immaterial, inasmuch as that did not form the ground of the French judgment. The fact of the plaintiff being present and bidding at the sale is also immaterial; for, he could not in any way have interfered with a sale ordered by the court. [Williams, J. referred to the case of *The Bold Buccleugh*, *Harmer, App., Bell, Resp.*, 7 Moore's P. C. 267. A Scotch steamer ran down an English vessel in the Humber. An action was commenced in the court of Admiralty in England by the owners of the English vessel against the owners of the steamer, and a warrant of arrest issued against the ship; but, before the ship could be arrested, she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owner of the steamer in the court of Session in Scotland, for the damage, and the steamer was arrested

(a) The Exchequer Chamber have since given judgment, affirming the decision of the court below: see the case reported, 29 Law J., Exch. 350, 5 Hurlst. & Norm. 728.

under process of that court, but subsequently released upon bail. [34] Afterwards, and pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the court of Session were still pending, when the steamer, having come within the jurisdiction of England, was again arrested under process of the High Court of Admiralty in England, and an action for damage commenced in that court for the same cause of action as was still pending in Scotland,—instructions being sent to Scotland to abandon the proceedings in the court of Session. The owner of the steamer appeared under protest in the Admiralty court, and pleaded,—first, *lis alibi pendens*,—secondly, that he was a purchaser for value without notice. It was held by the Judicial Committee,—overruling such protest. First, that the plea of *lis alibi pendens* was bad, as the suit in Scotland was, in the first instance, in *personam*, the proceedings being commenced by process against the persons of the owners of the vessel (the defendants), and the arrest of the steamer only collateral, to secure the debt; while the proceedings in the Admiralty court in England were in the first instance in *rem*, against the vessel; and therefore, the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other.—Secondly, that, as by the Civil Law a maritime lien does not include or require possession, but, being the foundation of proceedings in *rem* (a process requisite only to perfect a right inchoate from the moment the lien attaches), such lien travels with the thing into whosoever possession it may come, and, when carried into effect by a proceeding in *rem*, relates back to the period when it first attached, the steamer was liable for the damage committed by her, though in the hands of a purchaser without notice of the damage or the proceedings instituted against her.]

Cur. adv. vult.

[35] WILLES, J. now delivered the judgment of the court (*a*)¹:—

The first question in this case is, whether the proceedings of the court at Havre can be examined into by this court. If those proceedings were in *rem*, and the court by a judgment upon proceedings of that character determined that the ship was charged with a “privilege” or lien for the advances, and liable to be sold to defray them, then, unless it appeared upon the face of such proceedings that the judgment was void, it could not be questioned even by persons who like this plaintiff were not before the court.

If, on the other hand, the proceedings were in *personam*, and the liability of the ship was only brought incidentally in question, such proceedings would not be binding upon persons who were not parties to them, and the question of property must be decided as between such parties without regard to the judgment, if shewn to be erroneous.

It appears to us that the proceedings must be considered as of the latter class, viz. in *personam*, and not in *rem*. They were originally instituted against the master personally, and, so far as they related to the vessel, that was proceeded against as a security for the judgment of *contrainte par corps* against the master. This we hold to have been a suit in *personam*, upon the authority of the judgment of Jervis, C. J., in *The Bold Buccleugh*, 7 Moore’s P. C. 267, 286.

Now, it is clear that the judgment, if examinable, cannot be sustained; for, it proceeds upon the erroneous assumption that Article 191 of the Code de Commerce created a maritime lien upon the ship though English, in respect of advances made to the [36] master in an English port by persons carrying on business there, upon a bill drawn by him upon his English owner in England, merely because that bill happened to have fallen into French hands, and the vessel had touched in the ordinary course of navigation at a French port (*a*)². This proposition of French law [37] is not

(*a*)¹ The judges present on the argument, were,—Erle, C. J., Williams, J., Willes, J., and Keating, J.

(*a*)² The 190th article of the Code de Commerce is as follows:—

“Les navires et autres bâtimens de mer sont meubles. Néanmoins ils sont affectés aux dettes du vendeur, et spécialement à celles que la loi déclare privilégiées.”

Art. 191. “Sont privilégiés, et dans l’ordre où elles sont rangées, les dettes ci-après désignées: 1 Les frais de justice et autres, faits pour parvenir à la vente et à la distribution du prix: 2 Les droits de pilotage, tonnage, cale, amarrage et bassin ou avant-bassin: 3 Les gages du gardien, et frais de garde du bâtiment, depuis son

sustained by anything stated in the case: and we have the satisfaction of knowing that the opinion of the court at Rouen, upon this point, when at last brought forward there, was in accordance with our [38] own, that that article of the code is not applicable to the present case (a).

The question as to the effect of the French proceedings is therefore reduced to this,—whether the sale [39] of A.'s vessel in execution of B.'s debt under the process of a foreign court not proceeding in rem, is binding upon A. in England.

It is clear that such a sale in this country would be [40] wholly void as against A.; and we are not informed that the law of France differs in this respect from our own.

entrée dans le port jusqu'à la vente : 4° Le loyer des magasins où se trouvent déposés les agrès et les apparaux : 5° Les frais d'entretien du bâtiment et de ses agrès et apparaux, depuis son dernier voyage et son entrée dans le port : 6° Les gages et loyer du capitaine et autres gens de l'équipage employées au dernier voyage : 7° Les sommes prêtées au capitaine pour les besoins du bâtiment pendant le dernier voyage, et le remboursement du prix des marchandises par lui vendues pour le même objet : 8° Les sommes dues au vendeur, aux fournisseurs et ouvriers employés à la construction, si le navire n'a point encore fait de voyage ; et les sommes dues aux créanciers pour fournitures, travaux, main-d'œuvre, pour radoub, victuailles, armement et équipement, avant le départ de navire, s'il a déjà navigué : 9° Les sommes prêtées à la grosse sur le corps, quille, agrès, apparaux, pour radoub, victuailles, armement et équipement, avant le départ du navire : 10° Le montant des primes d'assurances faites sur le corps, quille, agrès, apparaux, et sur l'armement et équipement du navire, dues pour le dernier voyage : 11° Les dommages intérêts dus aux affrêteurs pour le défaut de délivrance des marchandises qu'ils sont chargés, ou pour remboursement des avaries souffertes par les dites marchandises par la faute du capitaine ou de l'équipage. Les créanciers compris dans chacun des numéros du présent article viendront en concurrence et au marc le franc, en cas d'insuffisance du prix."

The 192nd article is as follows:—

"Le privilège accordé aux dettes énoncées dans le précédent article, ne peut être exercé qu'autant qu'elles seront justifiées dans les formes suivantes : 1° Les frais de justice seront constatés par les états de frais arrêtés par les tribunaux compétens : 2° Les droits de tonnage et autres, par les quittances légales des receveurs : 3° Les dettes désignées par les numéros 1, 3, 4 et 5 de l'art. 191, seront constatées par des états arrêtés par le président du tribunal de commerce : 4° Les gages et loyers de l'équipage, par les rôles d'armement et désarmement arrêtés dans les bureaux de l'inscription maritime : 5° Les sommes prêtées et la valeur des marchandises vendues pour les besoins du navire pendant le dernier voyage, par des états arrêtés par le capitaine, appuyés de procès-verbaux signés par le capitaine et les principaux de l'équipage, constatant la nécessité des emprunts : 6° La vente du navire par un acte ayant date certaine, et les fournitures pour l'armement, équipement, et victuailles du navire, seront constatées par les mémoires, factures ou états visés par le capitaine et arrêtés par l'armateur, dont un double sera déposé au greffe du tribunal de commerce avant le départ du navire, ou, au plus tard, dans les dix jours après son départ : 7° Les sommes prêtées à la grosse sur le corps, quille, agrès, apparaux, armement et équipement, avant le départ du navire, seront constatées par des contrats passés devant notaires, ou sous signature privée, dont les expéditions ou doubles seront déposés au greffe du tribunal de commerce dans les dix jours de leur date : 8° Les primes d'assurances seront constatées par les polices ou par les extraits des livres des courtiers d'assurances : 9° Les dommages intérêts dus aux affrêteurs seront constatés par les jugemens, ou par les décisions arbitrales qui seront intervenues."

(a) The judgment here referred to was as follows:—

"Attendu que le navire anglais Ann Martin, du port de Liverpool, ayant été saisi et vendu dans le port du Havre, une distribution s'est ouverte sur le prix de l'adjudication,

"Qu'aucune difficulté ne s'est élevée sur la somme à distribuer, fixée par M. le juge-commissaire, ni sur les collocations privilégiées, sous les n° 1, 2, 3, 4, 5, 6, 7, 8, 9 et 10 de l'état de distribution provisoire : mais que MM. Castrique et C^e ont contesté les collocations privilégiées allouées sous le n° 11 à M. Victor Elin, sous le n° 12 à MM. Delaroche, Armand Delessert et C^e, sous le n° 13 à M. Troteux, et ont eux-mêmes demandé à être colloqués en privilège, contrairement à la décision de M. le

This is to our minds decisive of the present case : and we are relieved from considering whether, if [41] it had appeared that by the French law the title of the purchaser under a judicial sale is valid, notwithstanding the invalidity or illegality of the preliminary proceedings, that law would be recognized in this [42] country as giving a good title to the purchaser, according to the maxim *Locus regit actum*. We pronounce

juge-commissaire, qui ne les a admis à la distribution que comme créanciers purement chirographaires :

“Attendu que la première question à résoudre, pour statuer ces contestations, est celle de savoir d’après quelle législation le prix du navire ‘Ann Martin’ devra être distribué ;

“Attendu, à cet égard, que, sans aucun doute, les membles sont régis par les lois du pays sur le territoire duquel ils se trouvent ; qu’ainsi les membles saisis et vendus sur le territoire français, encore qu’ils appartiennent à un étranger et soient de provenance étrangère, doivent être distribués d’après la loi française ;

“Mais qu’un navire n’est pas un meuble ordinaire ;

“Que le navire étranger conserve, même dans les ports français, son caractère de chose, de propriété étrangères ;

“Que ce caractère est imprimé au navire par une pièce dont doit être porteur le capitaine et qui certifie sa nationalité ;

“Que le navire a un port auquel il doit être attaché et qui est, pour ainsi dire, son domicile ;

“Que, d’ailleurs, les contrats en vertu desquels se présentent Castrique et C^e et Elin et joints ont été passés sur le sol britannique ou dans les colonies britanniques, entre Anglais, au sujet d’un navire anglais ;

“Que la législation anglaise doit donc seule présider à la distribution du prix du navire ‘Ann Martin’ ;

“Attendu, sur la réclamation de Castrique et C^e, qu’ils sont porteurs,—

“1^o D’un acte du Novembre, 1854, par lequel John-George Clauss, de Liverpool, sujet anglais, porté sur l’acte de nationalité comme propriétaire de ‘l’Ann Martin,’ alors en voyage aux Indes-Orientales, a transféré à Thomas Harrison, aussi sujet anglais, porteur d’une lettre de change de 4,000 livres sterling, souscrite par John-George Clauss, la propriété du navire ‘Ann Martin,’ parce que, si la lettre de change était payée, le transport serait nul, et parce que, au contraire, si elle n’était pas payée, Harrison était autorisé à vendre le navire, à se rembourser de la lettre de change et à verser le surplus du prix à John-George Clauss, qui devait d’ailleurs rester en jouissance du navire jusqu’à l’échéance de la lettre de change ;

“2^o D’un acte du 2 Février, 1855, par lequel, le bénéfice du premier acte a été transféré à Richard Emley, qui a réescompté la lettre de change ;

“3^o Et Enfin d’un acte du 9 Avril, 1855, par lequel, dans les mêmes circonstances, Richard Emley a, de son côté, transféré à Louis-Joseph Castrique le bénéfice des deux actes cidessus analysés ;

“Lesquels trois actes ont été enregistrés au Havre, le 9 Août, 1855 ;

“Attendu que, d’après Blackstone, 2^e volume de la 4^e édition d’Oxford, page 157, il y a deux espèces de gage, le gage vif, *vivum vadium*, et le mortgage, *mortuum vadium* ;

“Qu’il y a gage vif lorsqu’un bien est délivré par l’emprunteur au prêteur jusqu’à ce que les revenus aient remboursé la somme empruntée (on dit qu’en ce cas le gage est vivant, puisqu’il survit à la dette, et qu’après le paiement d’icelle il fait retour à l’emprunteur) ;

“Qu’il y a mortgage lorsque le bien est délivré au prêteur sous la condition que, si l’emprunteur rembourse la somme prêtée au jour fixé dans l’acte, l’emprunteur mortgagier restera en possession du gage, parce qu’au contraire, en cas de non-paiement au temps indiqué, le gage est, par la loi, mort pour l’emprunteur, qui est dépossédé, et le droit du mortgage sur le bien n’est pas conditionnel, mais absolu ;

“Attendu qu’il est bien évident, d’après ces définitions, que le contrat intervenu entre John-George Clauss et Harrison, dont le bénéfice a été transmis à Emley et ensuite à Castrique, est un contrat de mortgage ;

“Attendu que, d’après un acte du Parlement anglais du 4 Août, 1845, rendu dans les huitième et neuvième années du règne de la reine Victoria, il est décrété qu’aucun navire ne peut jouir des privilèges et avantages de navire anglais, à moins qu’il n’ait

no opinion upon this latter point, which we mention only lest it should be supposed to have escaped our attention.

[43] For these reasons, the proceedings in France did not defeat the title which by the law of this country the plaintiff acquired, unincumbered by any lien or "privilege" for the advances, or the bill drawn in respect of them.

[44] It only remains to notice the argument that the plaintiff, by bidding at the sale, gave it validity. This argument cannot prevail; for, the plaintiff obviously did

été enregistré comme tel par les autorités désignées, et qu'on n'ait obtenu de ces autorités un certificat d'enregistrement dans la forme voulue :

"Que les autorités dont il s'agit sont d'ailleurs en Angleterre les receveurs ou contrôleurs des douanes :

"Que, d'après le n° 37 du dit acte, aucun contrat de vente ou de mortgage d'un navire ne sera valable jusqu'à ce que l'acte de vente ou autre instrument soit produit au receveur ou contrôleur des douanes du port d'enregistrement, et jusqu'à ce que ce receveur ou contrôleur ait inséré les mentions des parties essentielles de l'acte de vente ou de mortgage au dos du certificat d'enregistrement ;

"Que, d'après l'article 39 de ce même acte du Parlement, il est défendu aux receveurs ou contrôleurs d'enregistrer un autre acte de vente ou de mortgage avant trente jours à partir de l'enregistrement du premier, ou, si le navire n'est pas dans le port où il a été enregistré, avant trente jours à partir de son retour, lesquels délais sont accordés pour qu'on puisse produire le certificat d'enregistrement du receveur ou contrôleur qui doit l'endosser, de l'acte de vente ou de mortgage, et dans le cas où, dans les dits délais, l'acheteur ou le mortgagé n'ont produit le certificat, les receveurs ou contrôleurs pourront enregistrer tout autre acte de vente ou de mortgage, et conférer des droits à un autre acheteur ou mortgagé, qui produira le certificat pour le faire endosser, la véritable intention de l'acte du Parlement étant que les divers acheteurs ou mortgagés aient rang et priorité, non suivant la date où leurs contrats ont été enregistrés, mais suivant celle à laquelle a été fait l'endossement sur le certificat d'enregistrement ;

"Attendu qu'il est bien évident, d'après la législation qui vient d'être analysée, que c'est cet endossement qui seul complète et opère, à l'égard des tiers, la translation de propriété ou les droits résultant de l'acte de mortgage, et qu'ainsi se trouve justifié par un texte précis le principe posé par le Tribunal dans son jugement du 2 Août, 1856, intervenu entre Castrique et C^e et Troteux et joints, sur l'opposition à la vente fait par Castrique : c'est à savoir qu'il est impossible d'admettre qu'une législation commerciale quelconque puisse permettre qu'un navire en cours de voyage puisse être vendu ou engagé sans qu'aucune mention du contrat de vente ou de nantissement soit faite sur l'acte de nationalité, c'est-à-dire, pour les navires anglais, sur le certificat d'enregistrement ;

"Attendu que les actes du 30 Novembre, 1854, du 2 Février, 1855, et du 9 Avril, 1855, ont bien été enregistrés à la douane de Liverpool, les 2 Décembre, 1854, 3 Février, 1855, et 13 Avril, 1857, mais que l'acte de nationalité du navire 'Ann Martin,' c'est-à-dire le certificat d'enregistrement de ce navire, dont était porteur le capitaine, et qui a été frappé au Havre par la saisie, n'ayant pu être représenté au receveur de la douane de Liverpool, l'endossement exigé par la loi anglaise n'a pu avoir lieu : que le contrat de mortgage n'a donc pas reçu sa perfection à l'égard des tiers ;

"Que le Tribunal a déjà jugé, le 2 Août 1856, que ce contrat n'a pas conféré à Castrique et C^e le droit de réclamer la propriété du navire 'Ann Martin' ; qu'il ne leur a pas davantage transmis un droit de préférence sur le prix ; que la demande de Castrique et C^e, tendant à obtenir une collocation en privilège, doit donc être rejetée ;

"Attendu que Castrique et C^e ont contesté les droits reconnus par M. le juge-commissaire au profit de Victor Elin, Delaroche, Armand Delessert et C^e et de Troteux ;

"Que le Tribunal ne s'arrêtera pas longtemps à discuter le moyen tiré de ce que ces négociants ne seraient pas porteurs sérieux des titres en vertu desquels ils ont agi ; que, saisis par la voie de l'endossement des traites tirées par le capitaine Benson sur le propriétaire du navire 'Ann Martin,' John George Clauss, valeur reçue pour débours faits pour le navire, ils ont obtenu jugement contre Benson, représentant au Havre le propriétaire du navire ;

"Que Castrique et C^e ont formé une tierce-opposition à ces jugements ; qu'ils en

not intend to, and indeed could not in point of law, ratify the sale made adversely to him, and not in his name. And there was no estoppel between him and the defendants, because the latter do not appear to have known of or been misled by the fact that the plaintiff was a bidder.

Our judgment is therefore for the plaintiff.
Judgment for the plaintiff (a).

ont été déboutés par jugement du 21 Décembre, 1857, confirmé par arrêt de la Cour du 14 Août, 1858; que dès-lors la légitimité des créances d'Elin, Delaroche, Armand Delessert et C^e, et de Troteux, est incontestable;

"Attendu, en ce qui concerne le privilège qui leur a été accordé, que, d'après la jurisprudence anglaise, constatée par de nombreux arrêts, des lettres de change tirées par le capitaine sur le propriétaire du navire, comme assurance de l'argent avancé au capitaine, quoique accompagnées d'un engagement verbal du capitaine portant que le navire serait affecté au paiement de ces lettres, ne peuvent être considérées comme des actes hypothécaires (Livre d'Abbott sur la loi des navires marchands et des marins, 9^e édition, 1854, page 132);

"Que ce même auteur, page 122, s'exprime ainsi: 'Nous avons vu précédemment que le maître peut, dans certains cas, hypothéquer le navire en pays étranger; maintenant je me propose de considérer la nature des actes par lesquels un navire peut être affecté par le capitaine comme sécurité de paiement d'une dette contractée pour ce navire; ces actes sont ordinairement qualifiés de prêts à la grosse;'

Attendu que dès-lors Elin et joints, n'étant porteurs d'aucune lettre de grosse, ne peuvent réclamer aucun privilège d'après la loi anglaise:

"Qu'il importe peu qu'ils aient obtenu condamnation en privilège: que c'est seulement lors de la distribution que les privilèges doivent être appréciés et classés;

"Qu'enfin il ne peut exister sur une même chose trois ordres de créanciers savoir: des créanciers privilégiés, des créanciers chirographaires, et des créanciers qui, sans être privilégiés seraient préférés aux créanciers simplement chirographaires;

"Que l'exemple cité pour étayer le système contraire et tiré de l'article 280 du Code de Commerce, inapplicable d'ailleurs au procès, est mal choisi, puisque les dommages-intérêts dus aux affréteurs sont classés par l'article 191 au nombre des créances privilégiées sur les navires;

"Qu'il importe donc peu qu'Elin et joints aient justifié que le montant des lettres de change a été employé pour les besoins du navire; qu'ayant négligé les précautions voulues par la loi anglaise pour obtenir l'affectation spéciale du navire à la sécurité de leurs créances, ils sont simples créanciers chirographaires du propriétaire, comme Castrique et C^e;

"Attendu que les diverses décisions intervenues ci-dessus sont d'autant plus acceptables par les tribunaux français que, basées sur la législation et la jurisprudence anglaises, elles sont conformes à la loi française;

"Qu'en effet, cette loi, d'une part, ne connaît pas le contrat de mortgage dont est armé Castrique, et exige certaines formalités, qui n'ont pas été remplies, pour que les avances faites au capitaine en cours de son voyage soient privilégiées,

"Par ces motifs,

"Le Tribunal, en prononçant défaut contre William Bird, Charles-Isaac Forget, Thomas Chilton, William-Henri Higgins, et Thomas Rigge, au nom et comme syndics définitifs de la faillite des sieurs John-George Clauss et C^e, parties saisies, faute d'avoir constitué avoué et de comparaître, ordonne que l'état d'ordre provisoire deviendra définitif en ce qui concerne la fixation de la somme à colloquer et les collocations allouées sous les n^{os} 1, 2, 3, 4, 5, 6, 7, 8, 9 et 10 de l'état de distribution provisoire; met au néant les collocations privilégiées allouées à Elin sous les n^{os} 11, à Delaroche, Armand Delessert et C^e sous le n^o 12, et à Troteux sous le n^o 13; ordonne que les dits Elin, Delaroche, Armand Delessert et C^e, et Troteux, ainsi que Castrique et C^e, viendront au marc le franc sur le restant de la somme à distribuer pour leurs créances, telles qu'elles ont été fixées par M. le juge-commissaire; maintient au surplus les collocations en sous-ordre accordées à Troteux sur Castrique et C^e; accorde à M. Lecour, avoué le plus ancien, ses dépens en privilège; accorde à Elin, Delaroche, Armand Delessert et C^e, Troteux, et Castrique et C^e, leurs dépens au rang et comme accessoire de leurs créances."

(a) See the Code de Procedure Civile, part i., liv. v., tit. 6, art. 546, and articles 2123 and 2128 of the Code Civil.

[45] SEEGER v. DUTHIE AND OTHERS. May 1st, 1860.

[S. C. 29 L. J. C. P. 253; 30 L. J. C. P. 65; 2 L. T. 483; 6 Jur. N. S. 1095; 7 Jur. N. S. 239; 9 W. R. 166. Adopted, *McAndrew v. Chapple*, 1866, L. R. 1 C. P. 648.]

By a memorandum of charter between the plaintiff, the captain and part-owner, and the defendants, merchants, it was agreed that the ship should load in the London Dock, and there receive and take on board all such lawful goods as might be required by the charterers, and should therewith proceed to Geelong, and there deliver the cargo agreeably to the bills of lading; that the captain should attend daily at the broker's office to sign bills of lading as customary; that the whole of the ship should be at the disposal of the charterers for the conveyance of goods and specie (excepting cabin and room for officers, crew, and stores); that, if gunpowder were shipped, the same was to be taken on board where ordered below Blackwall, as customary, &c.: in consideration whereof the charterers agreed to pay freight for use and hire of the ship 1400l., with a gratuity of 25 guineas to the master, payable before leaving London: the freight to be paid as follows,—so much as might be payable in the colony by bills of lading, to the extent of 800l., to be taken and received in part payment, and balance (600l.) in cash, less seventy days' discount from the date of clearing from London: forty running days were to be allowed the charterers, Sundays and holidays excepted (if the ship were not sooner dispatched), for loading the said ship, to commence from date of her being ready at her loading berth to receive cargo: the owner further engaged that the ship should be ready to sail for her destined port at the expiration of the said laying days, or sooner if required by the charterers: if the ship were not ready either on the owner's or charterers' part at above-named dates, then demurrage to be paid by the party in default, at the rate of 7l. per diem: the ship to be ready on or before the 10th of November, or charterers to have the option of cancelling that agreement: penalty for non-performance of the agreement, 1400l.: should bills of lading not represent 800l. payable in Geelong to cover the balance due, then the difference to be paid in cash before sailing from London.—By a memorandum in the margin of the charterparty, the charterers were to have the option of shipping acids on deck to the extent of 5 tons measurement at shippers' risk, to which effect a clause was to be inserted in bills of lading: Held, that the 600l. and the 25 guineas being by the terms of the contract payable on the sailing of the ship, when that event happened those sums were payable on request, and were recoverable upon a common indebitatus count; and that the captain, who was a part-owner, and with whom and in whose name the contract was made, might sue upon it alone: Held, also, that the stipulation for the payment of the 600l. was an independent stipulation, and that the things to be done by the plaintiff before the clearing out of the ship were not conditions precedent to his right to sue for that sum: Held also, that the stipulation that the captain should attend daily at the broker's office to sign bills of lading, was not a condition precedent to the plaintiff's right to sue for the stipulated freight:—Held also, that the stipulation that the ship should be ready (for loading) on or before the 10th of November, was a condition precedent:—Held also, that the demurrage clause was not applicable to the case of a delay caused by the captain's refusal to receive on board goods which he bona fide but erroneously supposed that he was not bound to receive: Held also, that the charterers were not entitled to set off or deduct from the plaintiff's claim in respect of the 600l. freight, the expenses incurred by them in consequence of such refusal of the captain:—Held also, by Byles, J.,—that, inasmuch as the charterparty specified no particular day for the sailing of the vessel, a delay in that respect, though it might be ground for a cross action by the charterers, did not disentitle the plaintiff to sue for the stipulated freight.

A decision upon a rule to reduce the damages, may be the subject of an appeal under the 34th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

This was an action for freight for the conveyance by the plaintiff for the defendants, at their request, of goods in ships; and for the demurrage of a ship of the plaintiff kept on demurrage by the defendants; and [46] for the defendants' use by the plaintiff's permission of ships of the plaintiff; and for the hire of ships by the

plaintiff let to hire to the defendants; and for money agreed to be paid by the defendants to the plaintiff for the privilege of putting certain goods on board a ship of the plaintiff to be carried to their destination, and which goods were shipped accordingly; and for a gratuity agreed by the defendants to be paid to the plaintiff as master of a certain ship under a charterparty of such ship made between the plaintiff and the defendants; and for money paid by the plaintiff for the defendants, at their request; and for money found to be due on accounts stated between them.

The particulars of demand claimed 600*l.* as part of freight payable in London under charterparty, 26*l.* 5*s.* as gratuity to captain, 196*l.* for twenty-eight days on demurrage (16th of December, 1857, to 13th of January, 1858, at 7*l.* per day), and 3*l.* 3*s.* for surveying fees.

The defendants pleaded,—first, never indebted,—secondly, payment before action,—thirdly, a set-off for goods sold and delivered, work and materials, money lent, money paid, money received by the plaintiff to the use of the defendants, money agreed to be paid by the plaintiff to the defendants by way of demurrage for default in readiness of the ship under the charterparty, interest, and money due on accounts stated. On these pleas issue was joined.

The particulars of set-off claimed various sums paid on ship's account, and also 330*l.* received by the plaintiff, 168*l.* for twenty-four days' demurrage at 7*l.* per day, as per charterparty, and various sums amounting in the whole to 21*l.* 2*s.* paid to shippers for delay and expenses and to surveyors.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term. The claim of the plaintiff was confined to the 600*l.*, less discount, [47] for freight payable in London, and the gratuity of 26*l.* 5*s.*; and credit was given for 330*l.* admittedly paid. In the course of the trial, various payments on ship's account were proved or admitted, further reducing the plaintiff's claim to 188*l.* 19*s.* 10*d.*

The following facts also appeared in evidence, or were admitted at the trial:—

On the 29th of October, 1857, the plaintiff, the master and part-owner of the ship "Van Laffert Lehsen," and the defendants, signed a charterparty in these words:—

"London, 29th October, 1857.

"Memorandum of agreement between Captain Seeger, captain of the good ship or vessel called the 'Van Laffert Lehsen' 3,3 Veritas, and coppered, of 424 tons British measurement or thereabouts, now in London, and Mr. William Duthie and Adamson & Ronaldson, of London, undertake that the said ship, being now tight, staunch, and strong, and in every way fitted for the voyage, shall load in the London Dock, in the river Thames, and there receive and take on board all such lawful goods, &c. as may be required by said charterers: and, being so loaded, shall therewith proceed to Geelong Wharf, to be lightered over the bar at charterers' expense, ship being free from any charge for lighterage, and there deliver said cargo agreeably to the bills of lading, which are to stipulate the cargo to be taken from alongside at the expense and risk of the consignees of the same (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted). The captain to attend daily at the broker's office to sign bills of lading as customary, and at any rate of freight, without prejudice to this charter. The whole of the ship to be at the disposal of the charterers for the conveyance of goods and specie (excepting cabin and such room as is requisite for officers and crew and stores requisite for the voyage, not to exceed thirty tons in the whole, including lazarettes and coal-holes), are to be carried on deck, the master being guaranteed against the dangers and accidents of the seas. If gunpowder be shipped, the same is to be taken on board where ordered below Blackwall, as customary. The captain to cause the cargo to be stowed in the best manner, and to take the measurements and other particulars as if for owners' benefit: and a sufficient number of men to be engaged by him for that purpose; the stevedore employed to be approved of by charterers. In consideration whereof, charterers agree to pay freight for use and hire of the said ship the sum of 1400*l.* sterling, with a gratuity of 25 guineas to the master, payable before leaving London. The ship to be consigned to charterers' agent at the port of discharge (whom the owners hereby accept and appoint as agents for the ship), paying the usual commission not exceeding 2½ per cent. on amount payable abroad. The vessel being

subject to the usual and ordinary Custom House and publishing charges of a vessel loading outwards, not exceeding 10l. No goods are to be received on board without the permission of the charterers. In case of general average, the owner agrees that the same shall be settled according to the custom at Lloyd's. The freight to be paid as follows,—so much as may be payable in the colony by bills of lading, to the extent of 800l., to be taken and received in part payment, and balance, say 600l., in cash, less 70 days' discount from the date of clearing from London. Forty running days are to be allowed the said charterers, Sundays and holidays excepted (if the ship be not sooner dispatched), for loading the said ship, to com-[49]mence from date of her being ready at her loading berth to receive cargo. The owner further engages that the ship shall be ready to sail for her destined port at the expiration of the said laying days, or sooner if required by charterers. If the ship be not ready either on the owners' or charterers' part at above-named dates, then demurrage to be paid by the party in default at the rate of 7l. per diem. The ship to be ready on or before 10th November, or charterers to have the option of cancelling this agreement. Should government stores offer, the captain or owner to sign the usual tender, if required by charterers. It is also agreed that charterers' liability herein shall cease so soon as all the cargo is on board, except as to so much of the freight as is payable in London as above after the vessel's final sailing. Penalty for non-performance of this agreement, 1400l. Should bills of lading not represent 800l. payable in Geelong to cover the balance due, then the difference to be paid in cash before sailing from London."

In the margin of the charterparty was the following memorandum: "Charterers to have the option of shipping acids on deck to the extent of 5 tons measurement at shippers' risk, to which effect a clause is to be inserted in bills of lading."

On the 5th of November, 1857, the ship was ready to receive cargo at her berth in the London Docks; and the plaintiff gave notice thereof to the defendants, and that the laying days would commence next day. Thereupon the loading of the ship began. The plaintiff, who was and continued to be captain of the ship, attended several times at the broker's office to sign bills of lading as customary, but did not attend there daily, and was some time absent on the continent.

Amongst the lawful goods which the defendants required the plaintiff to load, were a number of cases [50] of lucifer matches. These goods were brought alongside the ship on the 18th of December, and tendered for loading, but the plaintiff refused to receive them on board with acids; and they were therefore conveyed by the carman back to the warehouse. The defendant remonstrated (by letter) with the plaintiff on this subject; and next day these goods were again sent alongside and tendered for loading, and again refused by the plaintiff, and conveyed back to the warehouse. Some correspondence followed; and, in the end, the plaintiff allowed these goods to be loaded.

With the exception of a ton and a half of acids, which the defendants had notified their option to have shipped on the deck, and three tons of gunpowder shipped below Blackwall, according to the charterparty, all the cargo was loaded by the 24th of December; and the ship was cleared at the Custom House on the 26th of December.

The plaintiff refused to receive the acids and gunpowder, alleging that the ship could not safely stow and carry more cargo than was already on board, and gave notice to the defendants that the ship was ready to proceed to sea as soon as the ship's papers were handed to the plaintiff by the defendants.

A correspondence ensued, during which the plaintiff called on the defendants and demanded the ship's papers for the purpose of sailing on his voyage. The defendants refused to give the papers till the plaintiff took the acids and gunpowder, and said that the ship should not go till the acids and gunpowder were taken in.

The ship was surveyed on behalf of the plaintiff and the defendants respectively; and, on the 6th of January, 1858, in consequence of the surveyors previously employed by the plaintiff and defendants respectively having disagreed, Lloyd's surveyor was instructed to [51] survey the ship for the purpose of ascertaining whether she was sufficiently laden. The surveyor on that day certified that the ship would safely stow and carry ten tons more cargo; and thereupon the plaintiff signified his readiness to load the acids and gunpowder, and received on board and signed bills of lading for acids and afterwards the gunpowder, and then sailed with the ship on the 14th of January on her voyage to Geelong; and during that voyage this action was commenced.

It was admitted by the defendants that the refusal of the captain to receive the acids and gunpowder was made *bonâ fide*.

The defendants paid to different shippers of goods by the said ship on the said voyage sums amounting in all to 16l. 18s. for demurrage and expenses in respect of the said delays in loading, and also paid to marine surveyors 4l. 4s. for surveys and reports incidental to the plaintiff's said refusals to receive goods on board.

Questions arose at the trial as to the pleadings: the objections were reserved by the Chief Justice, who gave the defendants leave to move, and reserved the power of making all necessary amendments.

For the defendants it was contended that the plaintiff was not entitled to recover on the charterparty in respect of the money payable in London, because he had not performed the stipulations which according to the charterparty were previously to be performed on his part; nor on any implied contract, because such contract would enure to the owners, of whom he was only one; nor in *indebitatus assumpsit*, because the condition was not executed, and the express contract was still open and unperformed; that, if he was entitled to recover in *indebitatus assumpsit*, it could only be as on a quantum meruit, following the scale of remuneration stipulated for, with suitable deductions for the [52] failure of performance of stipulations on the plaintiff's part; and that the defendants were entitled to set off 168l. for twenty-four days' demurrage, the lay days' having expired on the 23rd of December, 1857, and the ship not having sailed till the 14th of January, owing to the plaintiff's default.

All these points were reserved by the Lord Chief Justice for the opinion of the court: and, under his lordship's direction, a verdict was found for the plaintiff for 188l. 19s. 10d., but subject to leave reserved for the defendants to move to enter the verdict for them, or to reduce the damages.

Grove, Q. C., in Hilary Term last, in pursuance of the leave reserved to him at the trial, moved for a rule to enter a verdict for the defendants or to reduce the damages. This is an unrescinded open contract, and not being executed *indebitatus assumpsit* will not lie upon it; and, if it would, the action should have been brought by the owners, and not by the captain. If the action had been brought upon the charterparty, as it ought to have been, the defendants might have raised the several points as to the non-performance of conditions precedent by their pleas, which they are precluded from doing by the general form of declaring. [Willes, J. Wherever there is a sum of money due from the one party to the other in respect of a consideration which has been executed, *indebitatus assumpsit* will lie.] Here, the consideration is not executed. [Erle, C. J. As to the 600l., which was to be paid on the ship's clearing out, it is.] If it is the implied contract that is relied on, the present plaintiff is not the proper party to sue. The 600l. payment in advance on account of the stipulated freight of 1400l., and the gratuity of 25 guineas to the captain, were to be paid in consideration of the performance of the several stipulations in the charterparty on the part of the [53] owners to be performed: and, further, it is submitted that the master forfeited his right to the gratuity by his misconduct in refusing to take on board goods which it ultimately turned out, and indeed was conceded, that he was bound to receive. Then, the defendants claim to be entitled to set off or deduct demurrage at the rate of 7l. per day for the number of days which were consumed by the captain's refusal to receive on board the acids and gunpowder, certain expenses incurred by the defendants in respect of those goods, and the fees paid to the surveyors for ascertaining whether or not the ship could receive them on board. In respect of the first, it is submitted that the defendants are entitled to a deduction for twenty-four days at 7l. per day, under the demurrage clause of the charterparty, which provides that, "if the ship be not ready either on the owner's or charterers' part at above-named dates, then demurrage to be paid by the party in default, at the rate of 7l. per diem." Perhaps "demurrage" is not the term that is precisely applicable to the case of a default by the owner. In *Valenta v. Gibbs*, ante, vol. vi., p. 270, the language of the charterparty was thus,—"should the vessel be unnecessarily detained, such detention to be paid for by the party delinquent to the party observant, at the above-named rate (7l. per day) of demurrage or compensation." In *Fletcher v. Dyche*, 2 T. R. 32, it was held, that, if two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work or the payment of a weekly sum, and the work is not finished in the time, such weekly

payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by [54] the obligor who executed. [Erle, C. J. The difficulty with the captain arose during the currency of the forty laying days. The captain, acting *bonâ fide*, objected to take the acids and lucifer-matches on board, partly on the ground of the danger to the rest of the cargo, and partly because he conceived the vessel to be already fully loaded. This dispute led to a reference to Lloyd's surveyor, who decided that the captain was wrong in his objection; and accordingly the goods were put on board, and the ship sailed as soon as she was ready. The defendants claimed a deduction in respect of the delay thus occasioned. On the other hand, it was insisted that the demurrage clause was only applicable to a delay in sailing after the expiration of the laying days, or to a delay in a subsequent part of the voyage.] The captain had no justifiable ground for objecting to receive the goods which were tendered to him; and, he being thus in default, it is submitted that the owners are liable to pay the stipulated sum of 7l. per day for the delay. In *Turner v. Diaper*, 2 M. & G. 241, 2 Scott, N. R. 447, it was held, that, where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter not of set-off but of deduction. Where, therefore, in debt for work and labour, the defendant pleaded, never indebted except as to 37l. 6s. 8d., payment of 36l. 3s. before action, and payment of 1l. 3s. 8d. into court, and the plaintiff joined issue on the first and second pleas, and took the 1l. 3s. 8d. out of court, and at the trial the defendant proved an agreement to do the work for 40l., and that he has paid 36l. 3s. on account, independently of the 1l. 3s. 8d. paid into court, and, to cover the balance, 2l. 13s. 4d., he proved that he had employed workmen to finish the work, and had paid them the last-mentioned sum,—it was held that the evidence was admis-[55]-sible under the plea of never indebted, and that the 2l. 13s. 4d. could not be pleaded as a set-off. Erskine, J., there says: "As to the sum of 2l. 13s. 4d., the defence clearly was, not in the nature of a set-off, but that the work was not done." [Williams, J. In that case, the plaintiff could not have asserted that he had performed his part of the contract.] So, here, it is submitted that the plaintiff has not performed his part of the contract, so as to entitle him to sue for these sums as upon an executed consideration; but, at the most, can only be allowed to recover the balance: *Green v. Farmer*, 4 Burr. 2221.

ERLE, C. J. We are of opinion that the plaintiffs are entitled to a rule thus far, viz. so far as regards their claim for demurrage at the rate of 7l. per day for the time during which the captain delayed the loading of the ship, and, as the defendants contend, wrongfully and in defiance of his contract under the charterparty,—that they are entitled to a rule to avail themselves of that claim, either as matter of set-off, if it is properly available in that way, or as a ground for defeating the plaintiffs' claim altogether, in case it should turn out on discussion that the loading of the ship according to the contract for that purpose contained in the charter-party was a condition precedent to the right of the owner to demand the 600l. and the 25 guineas gratuity to the captain on the ship's clearing from London. But we are of opinion that there should be no rule on the ground that the action is misconceived, because we are of opinion that if the contract was a special contract for the payment of a specific sum on the happening of a given event, the moment that event happened, the money was payable on request, and therefore *indebitatus assumpsit* would lie. We are also of opinion that there should be no rule on the ground of the action being brought by the master alone without [56] joining the other part-owners, because the contract was made with the captain alone; and, though it turns out that he was acting partly on his own behalf and partly as agent for his co-owners, yet he had a personal interest in the contract, and therefore, if nothing remained to be done on his part, he had a right to sue for the 600l. and 25 guineas payable by the defendants under the contract, and to sue in *indebitatus assumpsit*. With regard to the defendants' claim to set off the expenses incurred by them in consequence of the captain's wrongful refusal to receive on board certain cargo which had been provided by them, and the fees paid to the surveyors who were called in to determine whether or not the captain was justified in such refusal, we are of opinion that the defendants cannot avail themselves of either of those sums either as matter of set-off or as matter of deduction from the sums payable by them under the charter-party. These matters do not constitute any debt, but, assuming them to be chargeable at all, are mere incidental and unliquidated damages: and further, we are of opinion that these are not matters for

deduction, within that class of cases where it has been held that a defendant may avail himself in reduction of damages of the plaintiff's failure to perform a part of his contract,—as, for instance, where a builder contracts to perform certain work for a given sum, but as to a portion of it altogether fails; if the party with whom he contracts accepts the work done, he is only bound to pay for it what it is reasonably worth: the builder cannot claim in respect of work which he has left unperformed; but that is not a case of deduction; it is a failure of proof. The present case does not fall within that principle. The contract is, to pay 600*l.* and 25 guineas on the ship's clearing out from London. The vessel having cleared out, the plaintiff's contract is wholly per-[57]-formed,—subject to the question as to the delay caused by the captain. The money being due, no deduction or abatement from the amount can be claimed.

Grove suggested, that, as to the 25 guineas gratuity, the captain had by his wrongful refusal to load as he was bound by the charterparty disentitled himself to the gratuity.

WILLES, J. It has long been established, ever since the year 1815, at all events, that the master's negligence is no bar to his recovering the stipulated gratuity, but only ground for a cross-action: *Shields v. Davis*, 6 Taunt. 65.

The rule was accordingly drawn up as follows,—to enter a verdict for the defendants pursuant to leave reserved, “upon the ground that the plaintiff is not entitled to recover, he not having complied with the terms of the charterparty,” or to reduce the damages by 7*l.* per day for demurrage or delay occasioned by the plaintiff's default.

Lush, Q. C., and Honyman, now shewed cause. The first question is, whether the plaintiff is entitled to recover the 600*l.* which by the terms of the charterparty was to be paid on the ship's clearing out from London, and the gratuity of 25 guineas. The argument on the other side is, that the clause in the charterparty which provides for the payment of freight renders all the preceding stipulations conditions precedent to the right of the owner to demand the freight or any part of it; so that, a neglect on the captain's part to attend at the broker's office for one day, or his refusal on whatever ground to receive a part of the in-[58]-tended cargo on board, would be an answer to the whole demand; for, if the 600*l.* was not payable on the ship's clearing out, it would not be payable at all. From the case of *Boon v. Eyre*, 1 H. Bl. 273 (a), 2 W. Bl. 1312, down to the present time, it has uniformly been held, that, where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. Then, as to the claim to deduct 7*l.* per day for the number of days consumed by the dispute between the captain and the charterers as to the propriety of putting on board the acids and lucifer-matches, that clearly is not a matter for set-off or deduction under the demurrage clause in the charterparty. No doubt the master was wrong in refusing the goods offered, and possibly the charterers may have a cross-action against the owners for that refusal, whereby the loading of the ship was delayed: but the state of things contemplated by the demurrage clause is, a delay in proceeding with the voyage, the goods being on board. The master's delay may, it is true, prevent the owners from counting the number of days thus consumed among the laying days, and charging the charterers demurrage for any excess within that number: but it could give the latter no right to charge the owners with the stipulated penalty until after the expiration of the forty laying days. This point was glanced at in *Valente v. Gibbs*, ante, vol. vi. p. 270. And in *Tarrabochia v. Hickie*, 1 Hurlst. & N. 183, it was held that the stipulations in a charterparty that the vessel, being tight, staunch, and strong, shall sail with all convenient speed, are not conditions precedent to the charterer's obligation to [59] load, unless by the breach of such stipulations the object of the voyage is wholly frustrated. In giving judgment, Pollock, C. B., says: “The general rule laid down by Lord Ellenborough in *Davidson v. Gwynne*, 12 East, 381, is, ‘that, unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant for the breach of which the party injured may be compensated in damages.’”

Grove, Q. C., and Henderson, in support of the rule. It is submitted in the first place that the plaintiff is not entitled to recover either the 600*l.* or the 25 guineas gratuity; and, in the next place, that the defendants are entitled to a deduction in

respect of the days during which the master improperly delayed the loading, in the nature of demurrage. By the charter-party, a round sum of 1400*l.* was to be paid as freight for the voyage, of which 800*l.* was to be paid in the usual way at the termination of the adventure, and 600*l.*, and 25 guineas gratuity to the captain, on the clearance of the ship, that is, on her obtaining permission to sail: Abbott on Shipping, 8th edit. 348. But there are various things which the owners undertake to do before the time for sailing arrives, in consideration whereof they are to receive prompt payment. All these are clearly conditions precedent to the owners' right to demand the money. If, as is contended on the other side, they are not conditions precedent, but rest in contract only, it follows that the plaintiff might have cleared the ship and sailed and claimed the 600*l.*, without having any cargo put on board at all. [Byles, J. The fair meaning of the term clearance is, a clearance with the goods on board.] The payment contemplated, being one and indivisible, [60] does not become due unless all the conditions in the charterparty are performed. The consideration is entire: *Lucas v. Godwin*, 3 N. C. 737, 4 Scott, 502. The judgment of the Exchequer Chamber in *Chanter v. Leese*, 5 M. & W. 698, 701, is very much to the purpose here. Tindal, C. J., says: "But it was further contended that it must be taken on these pleadings that the other five [patents] are good, and also that the defendants have enjoyed the use of them, and consequently that they are bound to perform their part of the agreement by paying the annuity, and must bring a cross-action for damages in respect of the one void patent. This reasoning would undoubtedly apply, if the consideration had been divisible, and the money payable by the defendants had been apportioned by the contract to the different parts of the consideration; in which case the principles laid down in *Boon v. Enre*, and other authorities of that class, would have governed the present decision. But here it is plain that the enjoyment of all the six patents is the consideration for every part of the defendant's promise, and that the annuity to be paid is neither apportioned by the contract, nor capable of being apportioned by a jury." [Byles, J. There, no one of the patents could be enjoyed by the defendant unless all were conveyed. Unless he had the whole consideration for which he bargained, he would have nothing at all.] If the ship had performed the voyage and earned freight, and it had been payable per ton, this action might have been maintained. [Byles, J. The case is, by arrangement, to be considered as if the declaration had been specially framed, and the defendant had pleaded the non-performance of conditions precedent.] The only consideration for the prompt payment would be the performance of the several stipulations contained in the charterparty on the owners' part. [Byles, J. If your [61] own argument is worth anything, it would equally go to defeat the plaintiff's right to recover the 800*l.* on arriving out at Geelong.] If the action had been for freight earned by the vessel, the contract might have been looked at to ascertain the rate at which the freight was payable. In *Glabbe v. Hays*, 2 M. & G. 257, 2 Scott, N. R. 471, by a charterparty it was agreed that the vessel should proceed to Trieste, and there load a full cargo of wheat, &c., and, being so loaded, should proceed to a port in the United Kingdom; "the vessel to sail from England on or before the 4th of February then next:" and it was held that the sailing of the vessel from England on or before the day named was a condition precedent to the owner's right to sue the merchants for not providing a cargo at Trieste. Suppose the vessel had sailed on the 5th, the same argument of hardship might have been urged there: but the answer would be, "The parties have so stipulated." [Byles, J. That was the ordinary case of a warranty to sail on a given day. If the ship be not ready by the day named, the merchant may look out for another, and sue for a breach of contract. But an engagement to sail with "the first fair wind" or "the first favorable wind," would not be a condition precedent: *Constable v. Cholerie*, Palmer, 397.] In *Ollive v. Booker*, 1 Exch. 416, to an action for not loading a vessel in pursuance of the terms of a charterparty, the defendants pleaded, setting out the whole of the charterparty, which stated that it was agreed between the plaintiff, "original charterer of the good ship or vessel called the "Dove," A 1, &c., now at sea, having sailed three weeks ago or thereabouts," and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load certain goods of the defendant, and therewith proceed to a safe port in the United King-[62]dom, calling at Cork or Falmouth, for a certain rate of freight: thirty working days to be allowed, Sundays excepted. The plea then averred that time was an essential and material part of the contract: that the probable situation of the vessel

with reference to the date of her sailing, and the object of her voyage, was also an essential and material part of the contract: and that in point of fact at the time of the making of the charterparty the vessel had not sailed three weeks, but a materially and unreasonably later time, of which the defendant had no notice or knowledge,—for which cause the defendant neglected and refused to load the vessel. It was held that the time at which the vessel sailed was material, and that the statement in the charterparty amounted to a warranty. Rolfe, B., in giving judgment, says: “The condition was founded upon the object that the vessel should load her cargo in a certain time; and, if it had been that she should load in six weeks, that being the length of the voyage, that would be the same as a condition that she should load in the ordinary time, of which she had already been three weeks at sea. I think the case is governed by that in the Common Pleas (*Gleholm v. Hays*), which is consistent with common sense and reason.” [Byles, J. *Oliver v. Booker* simply amounts to this, that a warranty to sail on a given day or thereabouts may be a condition precedent.] In *Oliver v. Fielden*, 4 Exch. 135, in assumpsit on the following charterparty,—It is mutually agreed between E. O., agent for the owners of the “*Lydia*,” new ship now on the stocks, now at Quebec, to be launched and ready to receive cargo in all May, guaranteed to sail in June, and F. & Co., merchants, that the ship shall proceed to, &c., and there load a cargo of timber, &c.,—it was held that the readiness to receive cargo in all May was a condition precedent to the plaintiff’s right [63] to recover for not loading a full cargo. “The stipulation,” says Pollock, C. B., “as to the vessel being ready to receive a cargo in May is not mere description, but part of the contract, and forms a condition precedent to the plaintiff’s right to recover.” Here, every provision of the charterparty was designed for the purpose of avoiding delay: and the case comes clearly within the second rule in the notes to *Portage v. Cole*, 1 Wms. Saund. 320 c., that, “when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance.”

Then, as to the claim for demurrage, The charterparty provides that “forty running days are to be allowed the charterers for loading, to commence from the date of the ship’s being ready at her loading berth to receive cargo. The owner further agrees “that the ship shall be ready to sail for her destined port at the expiration of the said laying days, or sooner, if required by the charterers:” and then comes this provision,—“If the ship be not ready, either on the owner’s or charterers’ part, at the above-named dates, then demurrage to be paid by the party in default, at the rate of 7l. per diem.” The obvious meaning of this latter clause is, if through the default of the owner the vessel is not ready to receive cargo, or if through the default of the charterers she is delayed loading beyond the forty days, then the party causing the delay shall pay to the other compensation or demurrage at the rate mentioned. The intention of the clause was to prevent delay or detention of the ship on either side, dispatch being the object of both parties. The somewhat analogous clause in *Valente v. Gibbs*, ante vol. vi., p. 270, had reference to another period of the voyage. The defendants are clearly entitled to deduct this [64] sum, if the detention falls within the terms of the contract.

ERLE, C. J. We have come to the conclusion that the rule in this case must be discharged. I am of opinion that the stipulation for the payment of the 600l. was an independent stipulation; that is to say, that no one of the things stipulated to be done on the part of the owner before the ship’s clearance was a condition precedent to his right to receive that portion of the freight. Certain things were to be done by the owner before clearing out from London, and certain other things after, such as sailing for the port of destination: and, for the whole of these things,—as well those done after as before clearance,—the owner is to receive 1400l., of which 600l. is to be paid immediately on the ship’s clearing from London, and the remaining 800l. on arrival at Geelong. The 600l. therefore is part of the 1400l. which is the stipulated reward for the entire service. The construction to be put upon contracts of this sort depends upon the intention of the parties to be gathered from the language of the individual instrument. Whether particular stipulations are to be conditions precedent or not, must in all cases solely depend upon that intention as it is to be gathered from the instrument itself. Now, looking at this charterparty, I have no hesitation in saying that the parties did not intend that the stipulations that the captain should attend daily at the broker’s office to sign bills of lading, or that the ship should be ready to

clear out by a particular day, or that a sufficient number of men should be engaged for stowing the cargo, or the like, should be conditions precedent to the plaintiff's right to demand the 600l. freight and 25 guineas gratuity. These are evidently independent stipulations, for the breach of which, if any damage arose, the [65] charterers might have a remedy. In one of the cases cited in support of the defendants' argument, viz. *Glaholm v. Hays*, 2 M. & G. 257, 2 Scott, N. R. 471, the charterparty contained a stipulation that the vessel should sail on or before the 4th of February; and in another, *Ollive v. Booker*, 1 Exch. 416, the stipulation was that the ship, "then at sea, having sailed three weeks ago or thereabouts," should proceed from Genoa to Marseilles. In each of these the court held that time was of the essence of the contract, and therefore the readiness to sail in the one case, and the going from Genoa on the day named in the other, were conditions precedent. Now, I look at the contract which is before me, and I see there is a stipulation which the parties have made a condition precedent, shewing that when they so intended they knew how to carry that intention into effect. The charterparty contains this provision,—“The ship to be ready on or before the 10th of November, or the charterers to have the option of cancelling this agreement.” Time as to this was of the essence of the contract, and the parties have in terms so expressed it: but I do not find that language in any other part of the instrument. The only construction, therefore, which I can give to this charterparty is, that the plaintiff's right to receive the 600l. and the 25 guineas accrued on the clearing of the ship, independently of the stipulations I have adverted to. The action perhaps could not have been sustained upon the declaration in its present form whilst part of the contract on the plaintiff's part remained open and unperformed. But, if the whole contract had been set out, and the pleadings had been adapted to the state of facts shewn here, I see no difficulty in the plaintiff's recovering those two sums.

Then arises the question whether the defendants are entitled to set off or deduct 7l. per day for the number [66] of days during which the loading of the vessel was interrupted by the captain's refusal to take on board the acids and gunpowder and the lucifer-matches, and so prolonging the time for sailing beyond the stipulated day, to the extent of some twenty-three or twenty-four days. It turned out, upon reference to the surveyors, that the captain was not justified in his hesitation to take these articles on board. He was, therefore, clearly guilty of a breach of his contract. But the question is whether the compensation for that breach is by the agreement of the parties to be computed at the rate of 7l. per day. I think not. The words of the charterparty applicable to this part of the case are,—“The owner further agrees that the ship shall be ready to sail for her destined port at the expiration of the said laying days, or sooner if required by the charterers. If the ship be not ready, either on the owner's or the charterers' part at the above mentioned dates, then demurrage to be paid by the party in default, at the rate of 7l. per diem.” Undoubtedly there was a default on the owner's part, through the delay in the loading whilst the captain was doubting either the expediency of taking what he conceived to be dangerous goods on board, or the capacity of the ship to receive them. But I think that was not an unreadiness of the ship such as was contemplated by this charterparty. The stipulation upon which this question turns must be construed *reddendo singula singulis*: if delay arises through the default of the owner or the captain in the performance of matters within his province, then the owner is to pay the charterers 7l. per day: if the delay arises from the default of the charterers in the performance of matters within their province whereby the ship is detained beyond the forty running days, the latter are to pay the owner 7l. per day. If the owner did not have the ship in a seaworthy condition, pro-[67]-perly found, and with a competent crew, and ready to sail at the expiration of the running days, and the charterers had performed all on their part to enable the ship to sail with her cargo, they would be entitled to claim an allowance of 7l. per day so long as that state of unreadiness continued. On the other hand, if at the expiration of the forty days the ship was ready in a seaworthy state to proceed on her voyage, and any delay was occasioned by the default of the charterers, the owner would be entitled to receive from them demurrage at the like rate of 7l. per day. But, if the owner or the captain omits to load cargo properly tendered by the charterers, and so the specified number of running days is exceeded, I have, though with considerable doubt and hesitation, come to the conclusion, that, although that is a delay for which the owner is liable, it is not a default which entitles the charterers to claim the 7l. per day under the demurrage clause. I have been looking at the

inconvenience suggested, of putting the owner to an action for the value of the ship's services at the end of the voyage, and the charterers to an action for unliquidated damages; but I am unable to see that the putting the parties to that mode of procedure would be productive of any other result than that to which in my judgment we must come upon this rule. Upon the whole, I feel compelled to hold that the rule must be discharged.

BYLES, J.(a). I am of the same opinion. It is unnecessary to say what would have been our decision upon the declaration as it now stands. This case affords another instance of the great advantage which has accrued to the administration of the law from the facilities which are now afforded to the making of amendments in pleadings and other matters. Suppose [68] there had been a special count upon this charterparty, and appropriate pleas, the plaintiff would have clearly been entitled to recover the 600*l.* and the 25 guineas; and it is agreed that he shall be considered to be in the same position as if that had been done. But it is said that, before the plaintiff can be entitled to recover the 600*l.*, he must prove that all the various stipulations in the charterparty which are alleged to be conditions precedent have been satisfied by him. It seems to me, however, that the case of *Boone v. Eyre* is precisely applicable here, and that all those matters which precede the stipulation for the payment of freight are independent stipulations. It is needless to enlarge further on that, except to say that, in addition to the stipulation in the charterparty referred to by my Lord to shew, that, where they have intended to make a stipulation a condition precedent, the parties knew how to do it, viz. the option given to the charterers to cancel the contract if the ship was not ready by the 10th of November, there is, as it seems to me, another express condition precedent on which the payment of the 600*l.* is in terms made to depend, viz. the ship's clearing out from London. For these reasons, I concur with my Lord in thinking that the plaintiff is entitled to recover the 600*l.*

With regard to the set-off claimed, I must confess that my mind has vacillated very much during the argument. I was much struck with the observation of Mr. Grove, that the words "if the ship be not ready to sail either on the owner's or charterers' part," applied to unreadiness both on the owner's and on the charterers' part to sail, and that an unreadiness on the part of the charterers is most likely an unreadiness to sail by reason of the cargo through their default not being put on board in time. I am inclined to think that Mr. Grove is right in that; but I think he is wrong when he [69] says that the unreadiness here spoken of may not have a different meaning when applied to the charterers from that which it has when applied to the owner. *Reddendo singula singulis*, it seems to me that those words may mean different things as applied to the different parties. The unreadiness which is to charge the owner is the unreadiness of the ship to proceed on her voyage. The unreadiness which is to charge the charterers may be an unreadiness of the goods which they are to put on board. But the unreadiness here to charge the owner must have been an unreadiness of the ship, of which there was no evidence; for, the ship was ready, but the goods were not on board. It may be that this was caused by the default of the owner or the master: but, if the charterers have any subject of complaint against the owner in that respect, it seems to me that they are not limited to the 7*l.* per day demurrage, but that they have their remedy against the owner by a cross-action for unliquidated damages. For these reasons, I am of opinion that the plaintiff is entitled to succeed upon this rule as to both points.

There is one further observation which I wish to make upon *Glabholm v. Hays*, 2 M. & G. 257, 2 Scott, N. R. 471, and the other cases cited upon the first point. Where a charterparty contains a stipulation that the ship shall sail on a particular day, time is of the essence of the contract. To sail on another and a later day, is to substitute a different contract,—the weather may be different; the ship may arrive at a totally different market. But that rule has been very strictly confined; for, in *Tarrabochiu v. Hickie*, 1 Hurlst. & N. 183, Pollock, C. B., says: "It is not a condition precedent that the vessel should sail with convenient speed, or in a reasonable time. Where, indeed, the charterparty provides that the vessel shall sail on a particular day, that is a condition precedent. The dis-[70]tinction is obvious: where a particular

(a) Willes, J., was engaged in the Divorce Court.

day is named, it is obviously the intention of the parties that the vessel shall sail on that day; and, if the ship-owner refuses to do so, the merchant may decline to load, for the voyage is thereby altered, and the success of the adventure may depend on the vessel sailing on the day named. In *Abbott*, part iv., c. 1, § 5, it is said, 'Whether or not a particular covenant by one party be a condition precedent, the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them. An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed.' Those cases, therefore, seem to stand upon their own ground. If they are an exception to the rule laid down in *Boone v. Eyre*, the present case falls within the rule, and not within the exception.

KEATING, J. I am of the same opinion. The authorities as to what particular stipulations do and what do not amount to conditions precedent, undoubtedly run very fine; and it is difficult to lay down any very clear rule. Lord Chief Justice Tindal, however, in *Stavers v. Curling*, 3 N. C. 355, 3 Scott, 740, 754, seems in a few words to express all that can well be said upon the subject. "The rule," he says, "has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering [71] such intention has been laid down with great accuracy by Lord Ellenborough in the case of *Ritchie v. Atkinson*, 10 East, 295, to be this, 'that, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.'" That certainly is a very strong instance of the doctrine that covenants however expressed to be dependent may nevertheless be held to be independent; for, there, the defendant covenanted, on the performance of the several stipulations on the plaintiff's part, to do so and so; and yet this was held not to amount to a condition precedent. Mr. Henderson has contended that the present case falls within the second rule in the notes to *Portage v. Cole*, 1 Wms. Saund. 320 c., where it is said that, "when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance." But it appears to me that that is not so, because the 600l. sought to be recovered here (and we must take it as if it were claimed under a special count upon the contract) is a portion of the 1400l. freight, which 1400l. is in the charterparty expressed to be the freight for the use and hire of the ship, including what was to be payable after clearance. The provision as to the mode of payment makes no difference as to the effect of that stipulation. Under these circumstances, it appears clearly to me that this case does not fall within the rule relied on by Mr. Henderson; but that, looking at the whole instrument, the stipulation in question was in the nature of an independent covenant. There was another argument urged by Mr. Henderson, to which I think it [72] right to advert. He says, assuming this to be a condition precedent, when the voyage was performed, the owner might bring *indebitatus assumpsit* for the freight earned, and then the defendants might claim deductions in respect of the delay occasioned by the default of the captain and other matters. But how could that be done? The claim in respect of the captain's default would be a claim for unliquidated damages.

As to the second point of the rule, I entirely concur in what has fallen from my Lord and my Brother Byles, though I must confess that I also at one time had considerable doubts. There is undoubtedly great force in the arguments of Mr. Grove as to this part of the charterparty: but, upon the whole, I have come to the conclusion that the construction which my Lord and my Brother Byles have put upon it is the correct one.

Rule discharged.

Nov. 30th.—The defendants appealed against this decision, and the case was argued in the Exchequer Chamber, at the sitting after Michaelmas Term, 1860,

before Cockburn, C. J., Wightman, J., Martin, B., Bramwell, B., Channell, B., Hill, J., and Blackburn, J.

[Groves, Q. C. (with whom was Beasley), for the appellants (a)¹, contended that the due performance by [73] the plaintiff of all the stipulations in the charterparty on his part was a condition precedent to his right to demand the 600l. freight,—relying upon the cases of *Starers v. Curling*, 3 N. C. 355, 2 Scott, 740, *Chanter v. Leese*, 5 M. & W. 698, *Oliver v. Fielden*, 4 Exch. 135, and the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 b. As to the second point, he submitted that, the plaintiff being in default by the captain's refusal to load lawful goods, the defendants were entitled under the demurrage clause to deduct at the rate of 7l. per day for the number of days the sailing of the ship was thereby delayed; that readiness to sail meant a readiness to proceed on the voyage with cargo on board; and that the captain's wrongful refusal to take on board the [74] acids and gunpowder and the lucifer-matches was an unreadiness of the ship within the terms of the charterparty.

Honyman (with whom was Lush, Q. C.), contra (a)², was only heard upon the question whether a decision upon a rule to reduce a verdict is the subject of an appeal within the 34th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which provides that, “in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused, or granted and then discharged or made absolute, the party decided against may appeal.” As

(a)¹ The points marked for argument on the part of the defendants (the appellants) were,—

“That the verdict should be entered for the defendants, or for a reduced amount :

“That the action (brought during the voyage) rests on the express contract to pay 600l. in London after the sailing, in cash, less 70 days discount from date of clearing from London; and that any implied contract for the use of the ship would enure to all the owners, of whom the plaintiff is one.

“That the stipulations to be according to the contract performed on the plaintiff's part before sailing, were not performed; that there was failure, not only in attendance to sign bills of lading, but also in receiving goods on board when required; that the whole of the ship was not at the disposal of the charterers, part of it being for some time refused to them; that the ship was not ready to sail at the expiration of the laying days, for the owner then, and for some time afterwards, refused to receive a part of the cargo, and she could not be ready to sail within the meaning of the charterparty till she received her whole cargo; and that the contract to pay the 600l. was not independent, and the owner could not by merely clearing and sailing without cargo, entitle himself to that sum :

“That, until completion of the voyage, compensation for the benefit received and accepted could not be sued for, and then only by all the owners, and as to all the matters now in question was satisfied by the admitted payment before action :

“And that, under the terms of the charterparty, the defendants had a right to demurrage at the rate of 7l. per day from the expiration of the laying day, the ship not being then ready to sail, not having her whole cargo on board, and the plaintiff being the party in default until he received the whole cargo.”

(a)² The points marked for argument on the part of the plaintiff, were,—

“1. That the several matters of the non-performance of which the appellants complain are conditions precedent to the plaintiff's right to recover the 600l. freight and the gratuity :

“2. That the said matters did not go to the whole consideration for the defendants' promise, and are merely ground for a cross-action :

“3. That the ship having sailed, the 600l. and gratuity became payable according to the true construction of the charterparty :

“4. That the ship was ready to sail, within the meaning of the charterparty, and consequently that the defendants' claim to demurrage is untenable :

“5. And the respondents will further contend that the provisions of the Common Law Procedure Act, 1854, do not warrant an appeal on a mere question as to the amount of damages, and consequently, that, assuming the defendants are not entitled to have the verdict entered for them, they cannot ask the court of error to reduce the damages.”

to this, he submitted that a rule which merely went to regulate the amount of the damages was not a rule within the contemplation of that section.

MARTIN, B. In reality, the rule is that the judge [75] misdirected the jury, in not telling them to allow the deduction which the defendants claimed.

COCKBURN, C. J. As to the first point, I am of opinion that the argument was thoroughly disposed of and annihilated by the judgment delivered in the court below, and I think this appeal ought never to have been brought, and that it would be treating it with more consideration than it deserves to say a word more about it. As to the second point, I am clearly of opinion that the deduction claimed by the defendants was not within the meaning of the demurrage clause in the charterparty. If the commencement of the voyage were deferred by a delay on the part of the master in stowing the cargo in proper time, that would be a default within this clause. But a mere refusal on the part of the master to receive goods, either because he conceives that they are not proper goods, or because he considers his ship already fully loaded, is not within it. If the master's refusal was wrongful, and damage resulted to the defendants, they may bring a cross-action, and proper damages will be awarded to them.

WIGHTMAN, J. I am entirely of the same opinion.

MARTIN, B. As to the first point, the rule is well laid down in Abbott on Shipping, 8th edit. 266,—“Whether or not a particular covenant by one party be a condition precedent, the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them (*Harelock v. Geldes*, 10 East, 555). An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed. The general rule (in the words of Ellenborough, in *Davidson v. Gargrave*, 12 East, 381) is, that, unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but as a distinct covenant, for the breach of which the party may be compensated in damages.” And this is adopted by Pollock, C. B., in *Tarrabochia v. Hickie*, 1 Hurlst. & N. 183, 187. Tindal, C. J., again, lays down the rule in *Sturges v. Curling*, 3 N. C. 355, 368, 3 Scott, 740, 754, thus,—“The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie v. Atkinson*, 10 East, 295, to be this, that, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.” I apprehend that is the correct rule; and, applying it here, there would be the greatest absurdity in saying that the omission of the captain to attend at the broker's office for a single day for the purpose of signing bills of lading would defeat the owner's claim altogether. There is something more in the other point, though not much. The charterparty stipulates that “forty running days are to be allowed the said charterers, Sundays and holidays excepted (if the ship be not sooner dispatched,) for loading the said ship, to commence from [77] the date of her being ready at her loading-berth to receive cargo.” That is the obligation which the charterers take upon themselves. “The owner further agrees that the ship shall be ready to sail for her destined port at the expiration of the said laying days, or sooner if required by the charterers.” What is the meaning of that stipulation? It means that the ship shall by the time mentioned be provided with a competent crew and be in every respect fitted to sail for her destined port. Then comes the provision, that, “if the ship be not ready, either on the owner's or charterers' part, at the above-named dates, then demurrage to be paid by the party in default, at the rate of 7l. per diem.” The default there contemplated on the owner's part is in the ship's not being ready to sail. Here, the ship was ready to sail, but the charterers insisted that she could carry more cargo, and the master that she could not; and so some days were consumed in disputes between them. It may be that

the owner may be liable for not having taken a full cargo when offered him; but for this he is not liable upon the stipulation last adverted to, so as to constitute a ground of set-off.

BRAMWELL, B., and CHANNELL, B., concurred.

BLACKBURN, J. Upon the first point, I entirely agree with the judgment of the court of Common Pleas. As to the other, I own I have entertained some doubt: but I am now satisfied that the construction put upon this part of the charterparty by my Brother Martin is the correct one. The plaintiff, whatever may have been his delinquency in other respects, has not been guilty of this breach, so as to entitle the defendants to the stipulated damages. Consequently they are not entitled to the set-off or deduction they claim.

Judgment affirmed.

[78] FITZJOHN v. MACKINDER. 1860.

[Reversed in Exchequer Chamber, 9 C. B. N. S. 505.]

M. sued F. in the county-court for a debt. F. claimed a set-off, in answer to which M. produced his book containing an acknowledgment signed, as he swore, by F. F. denied the signature, which he averred to be a forgery; but the judge, induced by partly the statement of M., and partly by the conduct of F. on previous occasions before him, disbelieving F.'s denial, committed him under the 14 & 15 Viet. c. 100, s. 19, and bound M. over to prosecute. F. was accordingly tried for perjury, and acquitted.—F. then brought an action against M. for maliciously and without probable cause causing him to be prosecuted on an unfounded charge:—Held, by Erle, C. J., and Williams, J.,—Willes, J., dissentiente,—that the committal of F. and the binding over of M. to prosecute being the act of the judge, the action was not maintainable,—although the judge was in part influenced by the perjury and forgery of M.

The plaintiff was a farmer residing at Oakham, in the county of Rutland, and the defendant was a seed-merchant and farmer residing also at the same place.

In December, 1858, the now defendant brought an action against the now plaintiff in the county-court of Rutlandshire, holden at Oakham, to recover a sum of money for goods supplied by the now defendant to the now plaintiff, and the now plaintiff, in answer to the last-mentioned claim, gave notice of a set-off, to a larger amount, for certain soil supplied to the now defendant by the now plaintiff in the year 1852; and that action came on to be tried on the 8th of December, before the judge thereof, when the now plaintiff and the now defendant were both sworn and examined as witnesses, and no other witnesses were called on either side. The now defendant did not on the trial of the last-mentioned action dispute his liability to the now defendant's claim therein; but relied on his set-off, and stated it was due. In answer, the now defendant said, "Why, that was settled between us years ago," and that they had had a settlement of account years ago, and that the claim for this soil was settled, and that, knowing Fitzjohn to be a difficult person to deal with, he had taken care to have his name attached to the settlement at the time: and the now defendant then produced his ledger, which contained on one side entries to the debit of the now plaintiff, amounting to 23l. 4s. 4d., and on the other side of the [79] same sheet the words "Balanced by a c, 23l. 4s. 4d.;" and also immediately above those words an entry in the words and figures following, that is to say, "1853. November 7th. In this settlement, all claims for soil and labour are balanced up to this time, by agreement with J. Fitzjohn,"—all, as he alleged, written by himself except the words "J. Fitzjohn," which he swore were in the handwriting of the now plaintiff, and that he wrote them in his presence.

The judge of the county-court, who was called on this trial and examined as a witness by the defendant, said that he had looked at the entry, and told the now plaintiff to look at it, and that he had to ask him once or twice before he could prevail upon him to look at it, and that the now plaintiff at first turned his head away, but he afterwards looked at the book and said it was not his handwriting; and that he, the judge, then said to the now plaintiff, "You had better take care: I have had to caution you before for your false statement;" that the now plaintiff denied the

signature in a faint manner, and did not speak so positively as at the present trial : and that, in consequence of his manner, and of the proceedings, he, the county-court judge, said to the now plaintiff, "You stand committed for perjury;" and that he then required the now defendant to enter into recognizances to prosecute the now plaintiff: and that he also made and signed the following order and certificate under the statute 14 & 15 Vict. c. 100, s. 19:—

"At a county-court held for the county of Rutland, at Oakham, this 8th day of December, 1858:

"Whereas, at a county-court as aforesaid holden here this day, before me, the undersigned judge of the said court, a certain plaint in which John Draper Mackinder was plaintiff, and James Fitzjohn was defend-[80]-ant, came on to be heard and tried before me; and the said James Fitzjohn, being examined, and having given evidence *viva voce* according to the practice of this court on behalf of himself as defendant: And whereas it appears to me that the said James Fitzjohn, in the evidence so given by him, has been then guilty of wilful and corrupt perjury: And I therefore, in pursuance of the statute in such case made and provided, direct and order that the said James Fitzjohn be prosecuted for the said perjury, there appearing to me to be reasonable cause for such prosecution. Given under my hand and seal," &c.

"At a county-court held for the county of Rutland, at Oakham, the 8th day of December, 1858.

"To John Draper Mackinder, who has entered into a recognizance before me this day to prosecute one James Fitzjohn for wilful and corrupt perjury, and to whomsoever else it may concern.

"I hereby certify, that, at a county-court as aforesaid holden here this day before me, the undersigned judge of the said court, a certain plaint, in which the said John Draper Mackinder was plaintiff and the said James Fitzjohn was defendant, came on to be heard before me; and the said James Fitzjohn being examined, and having given evidence *viva voce*, according to the practice of this court, on behalf of himself as defendant, and it appearing to me that the said James Fitzjohn, in the evidence so given by him, was guilty of wilful and corrupt perjury,—I, therefore, as judge of the court aforesaid, in pursuance of the statute in such case made and provided, ordered and directed that he the said James Fitzjohn should be prosecuted for the said perjury, there appearing to me to be reasonable cause for such prosecution. Given under my hand and seal," &c.

[81] The county-court judge also said that he adopted this course spontaneously, without any suggestion, and merely in consequence of what took place before him; and that he did so partly from the now plaintiff's manner, and that he had no other evidence before him but that of the now plaintiff and the now defendant, and the entry in the book; and that he afterwards gave judgment in favour of the now defendant for the amount of his claim.

The now defendant entered into a recognizance to prosecute the now plaintiff at the next Assizes for the county of Rutland, and afterwards accordingly preferred before the grand jury of the said county of Rutland a bill of indictment against the now plaintiff for perjury committed by him at the said county-court in his aforesaid evidence, and prosecuted the same at the next Assizes at Oakham, holden on the 1st of March, 1859, before Erle, J.; and the now plaintiff was then in due manner and by due course of law tried for and acquitted of the said offence by a jury of the said county; and the now plaintiff was thereby put to large expense in defending himself in the premises.

The present action was then brought by the now plaintiff against the now defendant for the damages which he the now plaintiff had sustained by reason of the aforesaid prosecution.

The declaration stated that the defendant falsely and maliciously, and without any reasonable or probable cause, at the county-court of Rutlandshire, holden at Oakham, in the said county, before R. M., Esq., judge of the said county court, went and appeared before the said judge in support of a certain action on contract then pending in the said county court, in which the said now defendant was the plaintiff and the said now plaintiff was the defendant, and the said now defendant then and there falsely and maliciously, [82] and without any reasonable or probable cause, caused and procured the said county court judge to direct the said now plaintiff to be prosecuted for perjury on certain evidence given by him before the said county court

judge in the said action, and then falsely and maliciously, and without any reasonable or probable cause, caused the county-court judge to commit the said now plaintiff, so directed to be prosecuted as aforesaid, until the then next assizes for the said county of Rutland, then and there to take his trial for the said alleged offence, unless the said now plaintiff should enter into a recognizance with one or more sufficient surety or sureties, conditioned for the appearance of the said now plaintiff at such then next assizes for the said county, and that he would then surrender and take his trial, and not depart the court without leave: That the said now defendant, afterwards, falsely and maliciously, and without any reasonable or probable cause, directed and caused the said now plaintiff to be indicted for wilful and corrupt perjury: and the defendant afterwards falsely and maliciously, and without any reasonable or probable cause, prosecuted and caused to be prosecuted the said indictment against the said now plaintiff, until the said now plaintiff, afterwards, to wit, at the said then next assizes for the said county of Rutland, holden at Oakham, in the said county of Rutland, in and for the said county, at a day and time now passed, and in due manner and by due course of law, was tried and acquitted of the premises in the said indictment charged upon him, by a jury of the said county of Rutland; and it was afterwards considered that the said now plaintiff should depart thereof without delay: That the said prosecution of the said now plaintiff for the said offence was duly ended and determined before the commencement of this suit; and thereupon the said [83] now plaintiff was afterwards discharged out of custody upon the said charge, fully acquitted thereof as aforesaid: And that, by means of the said several premises, the said now plaintiff had been and was injured in his good name and credit, and had suffered great pain and anxiety of mind and body, and was prevented thereby from attending to his lawful affairs and business; and also, by reason of the premises, the plaintiff necessarily incurred large expenses, in defending himself against the said prosecution and proceedings, and in relation to the premises, and otherwise, and was and is thereby otherwise injured, &c.

The defendant pleaded not guilty, and thereupon issue was joined.

The cause was tried before Williams, J., at the last Summer Assizes at Oakham, when the now plaintiff was called, and several witnesses were called on his behalf, who stated, that, in their opinion, the signature "J. Fitzjohn" was not in the handwriting of the now plaintiff: and one of the witnesses said he believed it to be the handwriting of the now defendant.

The now defendant was not called as a witness at the last-mentioned trial; and no other witness was called on his part.

The learned judge ruled that the action was not maintainable, but allowed the case to go to the jury on the assumption that it was: and, in his summing-up, he asked the jury if the now defendant procured the prosecution to be carried on, without reasonable or probable cause, and maliciously; and directed them, that, if they were of opinion that the now defendant, at the time he told the county-court judge that the entry in the ledger produced was signed by the now plaintiff, was knowingly misinforming the county-court judge, there was no reasonable or probable cause for the prosecution, and that the now defendant must [84] have known that the now plaintiff was innocent: and, as to malice, he directed the jury, that, if they thought that the now defendant knew that he was saying that which was false, they could have no doubt that he was acting maliciously: and that the simple question was, whether the entry was signed by the now plaintiff, and whether the now defendant knew that it was not.

The jury found a verdict for the plaintiff, with 200*l.* damages: and the learned judge directed a nonsuit to be entered, and gave leave to the now plaintiff to move to enter a verdict for him for 200*l.* if the court should be of opinion that the now defendant was liable.

O'Brien, in Michaelmas Term last, pursuant to the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the plaintiff with 200*l.* damages. He submitted that the defendant, having by his false evidence before the county-court judge, and by means of the forged document put forward by him on that occasion, induced the judge to commit the plaintiff and to bind him (the defendant) over to prosecute and give evidence against him on the charge of perjury which he knew to be unfounded, was not entitled to rely upon the act of the judge for his justification.

Hayes, Serjt., and Field, in Hilary Term last, shewed cause. There was no

evidence to shew that the defendant, in the language of the declaration, caused the plaintiff to be prosecuted. The 19th section of the 14 & 15 Vict. c. 100, enacts that it shall be lawful for the judge of certain courts (including the county-courts), in case it shall appear to him that any person has been guilty of perjury in any evidence before him, to direct such person to be prosecuted for such perjury in case there shall be reasonable cause for such prosecution, and to commit such person for trial, unless he [85] enters into a recognizance, with sureties, to appear and take his trial: and also to require any person he (the judge) shall think fit to enter into such recognizance to prosecute or to give evidence, and also to give to such prosecutor a certificate, which shall be deemed sufficient proof of such prosecution having been so directed. The county-court judge proved at the trial that the committal of the plaintiff for trial was his own spontaneous act, in exercise of his powers under the act, and bound the defendant over to prosecute: and in obedience to the requisition of his recognizance, he did prosecute, and the prisoner was acquitted. To make the defendant liable to this action, the prosecution must be his own spontaneous and wilful act. There is no precedent for an action of this sort: and the court will be slow to establish one. In *Dubois v. Keats*, 11 Ad. & E. 329, 3 P. & D. 306, it was held to be no answer to an action for maliciously procuring a person to be indicted for felony, that the defendant was bound over to prosecute, if the jury believed that the defendant caused himself to be bound over, by making the charge maliciously and without probable cause before the magistrate who took the recognizance. But there it was plain that the charge from the first was malicious and unfounded: and, in the course of the argument, Little-dale, J., observed that, "if a defendant were bound over against his will, as, for instance, if a third person informed the magistrate that the plaintiff had been seen to pick the defendant's pocket, and the magistrate sent for the defendant and bound him over to prosecute, the defendant would not be liable to an action." The county-court judge, when he directed the prosecution of the plaintiff, might if he pleased have selected one who had not given evidence before him to prosecute. Would the person so selected have been liable as the [86] party causing the prosecution, even though he knew or had the means of knowing that the offences had not been committed? It is clear that a civil action will not lie against one who gives false evidence or makes a false affidavit in the course of a judicial proceeding: *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 Hurlst. & Norm. 569. [Williams, J. That will not be disputed.] Then, the party cannot be made responsible by merely varying the form of the allegation.

O'Brien and Beasley in support of the rule. It may be conceded that a witness is not civilly responsible for perjury. But it is submitted that, notwithstanding the plaintiff's committal was the act of the judge, and that it was the act of the judge to cause the recognizance to be entered into for his prosecution, that affords the defendant no protection if he was actuated by malice and had no probable cause for acting as he did. By his false evidence, he secures an unjust verdict for himself in the county-court; and, by wilfully deceiving the judge, he procures himself to be bound over to prosecute. The prosecution, therefore, is as much his act as if he had asked the county-court judge to commit the plaintiff for trial. [Erle, C. J. The judge seems to have been very much influenced by his previous knowledge of Fitzjohn.] That does not prove that the defendant's evidence did not produce on the judge's mind the impression which induced him to commit the plaintiff for trial. [Erle, C. J. Suppose the statute had authorized the judge to impose a fine, and he had fined the plaintiff 100*l.*, would the now defendant have been responsible for that?] That would be a proceeding to which he was no party. [Williams, J. Suppose the judge had ordered the overseers of the parish to prosecute, what difference would [87] it have made to the plaintiff?] The element of malice would be wanting there. But here the defendant must be presumed to have contemplated that which was the natural and inevitable consequence of his act. In *Hoslop v. Chapman*, 23 Law J., Q. B. 49, in an action for maliciously and without reasonable or probable cause prosecuting the plaintiff for perjury, it appeared that the statements alleged to be perjury had been made by the plaintiff as a witness in an action against the defendant, respecting facts known to the defendant only by the relation of others. There was evidence that the defendant had been told that the plaintiff's evidence was wilfully false: but there was also evidence that the defendant had said that he had indicted the plaintiff merely to stop his mouth as a witness in another proceeding. The judge directed the jury, "that, if

the plaintiff had in fact sworn falsely, or if the defendant at the time he preferred and prosecuted the indictment, acting upon the information he had received, believed, and had reasonable grounds for believing, that the plaintiff had sworn falsely, then there was reasonable and probable cause for preferring and prosecuting the indictment; but, if the defendant at the time he preferred and prosecuted the indictment did not believe the information he had received to be true, but in his own mind believed and had reasonable grounds to believe, that the plaintiff had not sworn falsely, or, still more, if he believed that the plaintiff had spoken the truth, then there was no reasonable or probable cause for preferring and prosecuting the indictment:" and it was held, on bill of exceptions, that this direction was correct. In the course of the argument, Alderson, B., said: "Suppose a man was robbed on the highway, and two witnesses swore positively that a certain individual was the robber, could another person who had been in company with the supposed [88] robber in another place at the very time when the robbery happened, and who therefore knew that the party charged was not the man, maintain a prosecution against the individual for the robbery, and say that he had reasonable and probable cause for so doing? I do not say that it is necessary for a prosecutor to act only upon his own belief as to the weight of the evidence: but, if he has peculiar means of knowing that the charge is untrue it is a different case." Here, the defendant had peculiar means of knowing that the charge he was preferring was false: can he, then, be permitted to shelter himself under the order of the judge, which his own falsehood and fraud have procured to be made? [Williams, J. The only question in the case is, whether the defendant caused the prosecution.] But for his act, it never would have been instituted. In *Farley v. Danks*, 4 Ellis & B. 493, the declaration charged that the defendant falsely and maliciously and without any reasonable or probable cause filed a petition for adjudication of bankruptcy against the plaintiff, and falsely and maliciously and without any reasonable or probable cause caused and procured the plaintiff to be declared a bankrupt: and it was held that this charge was established by proof that the plaintiff petitioned for the adjudication, and by depositions false in fact and maliciously made induced the commissioner to adjudicate the bankruptcy,—although it appeared that, even if the depositions had been true, the adjudication could not have been supported in law. Lord Campbell there says: "The declaration was clearly proved. It alleges that the defendant caused and procured the plaintiff to be adjudicated a bankrupt. Is that true? The defendant presented a petition in which he alleged that the plaintiff had committed an act of bankruptcy. He swears to the existence of a debt, and that no payment [89] has been made. And thereupon the adjudication takes place which would not have taken place but for the defendant's presenting the petition and making the deposition. It is said that the adjudication ought to be a consequence necessarily and legally following from the facts if true. But all that is necessary is, that the defendant should falsely and maliciously cause the act; and he does that when he swears falsely and the act would not be done without his so swearing. It would be monstrous to say that this does not make out the charge. I should be very sorry to find any decisions of our courts to that effect. Where a man makes a true statement of fact, upon which the court acts wrongly, the grievance, it is true, arises, not from the statement, but from the judgment: but it would be monstrous to hold that this is so where the statement is maliciously false." [Williams, J. There, the defendant set the law in motion, and produced the very result he contemplated: here, the defendant was probably as much astonished as his adversary was at the course matters took before the county-court judge.] Every man is presumed to contemplate the natural and necessary consequences of his acts. If the defendant had not sworn falsely and produced a forged voucher, the county-court judge never would have done as he did. In *Weston v. Beeman*, 27 Law J., Exch. 57, a distinction is taken between instituting and merely taking up and continuing a prosecution. *Knight v. German (or Jermin)*, Cro. Eliz. 70, 134, and *Bagnall v. Knight*, Cro. Car. 553, were also referred to.

Cur. adv. vult.

WILLIAMS, J. I am of opinion that this rule must be discharged. The action is for a malicious prosecution,—in other words, for having caused criminal proceedings [90] to be taken against the plaintiff for perjury. The only question is, whether there is any proof that the defendant did cause that prosecution: and I think there is not. The facts shew that the immediate cause of it was, the order made by the

county-court judge under the 19th section of the statute 14 & 15 Vict. c. 100, by which it is enacted that it shall be lawful for the judge of certain courts, including the county-court, in case it shall appear to him that any person has been guilty of perjury in any evidence before him, to direct such person to be prosecuted for such perjury, in case there shall be reasonable cause for such prosecution, and to commit such person for trial, unless he enter into a recognizance, with sureties, to appear and take his trial: and also to require any person he (the judge) shall think fit to enter into such recognizance to prosecute or to give evidence: and also to give to such prosecutor a certificate which shall be deemed sufficient proof of such prosecution having been so directed.

In pursuance of this enactment, the county-court judge, believing (as he said on the trial of the present case) that the plaintiff had been guilty of perjury, partly in consequence of what the defendant swore (no other witness being called on his behalf), and partly in consequence of the plaintiff's manner, and because in previous cases he had given his evidence very unsatisfactorily, made an order that he should be prosecuted for it, committed him till the requisite recognizances were entered into, and bound over the defendant to prosecute.

Under these circumstances, it appears to me quite plain that it was not the defendant, but the county-court judge, who set the criminal law in motion; and the prosecution was wholly his creature.

But then it is said that the county-court judge would never have ordered the prosecution if the de[91]fendant had not been guilty of perjury, whereby he led the judge into the belief that the plaintiff, who spoke the truth, was swearing falsely; and that thus it appears that he did cause the prosecution to be instituted. I am of opinion, however, that this is only a remote cause and not a cause sufficiently proximate to make the defendant civilly responsible for the consequences of it.

Suppose the county-court judge had, in the exercise of the discretion given him by the statute, selected some other person to be prosecutor, and had merely bound over the defendant to give evidence, and he had given evidence accordingly before the grand jury and at the trial,—surely it would hardly have been contended, that, in such case, this action would have been maintainable against the defendant: and yet his perjury would have been the cause of the prosecution, just as much as in the present case. To contend that such an action could be supported, is nothing short, as it seems to me, of contending that an action will lie against a man for having committed perjury, to recover damages for any injury which the plaintiff can shew she has sustained in consequence of such perjury. But no such action has ever been maintained, although innumerable occasions for it must have occurred: see *Henderson v. Broomhead*, 4 Hurlst. & Norm. 569.

Another argument on behalf of the plaintiff was, that the defendant is no more excused from being regarded as the author of the prosecution in the present case, because he was bound over to prosecute, than the prosecutor in any ordinary case, who is bound over by the committing magistrate, and yet has been clearly held liable in an action for the subsequent proceedings, if malice and the absence of reasonable and probable cause can be shewn, according to the case of [92] *Dubois v. Keats*, 11 Ad. & E. 329. But the answer is, that there the taking of the recognizance is a mere step in the criminal proceedings instituted by the defendant. Indeed, in *Dubois v. Keats*, Littledale, J., said: "If a party were bound over against his will, as, for instance, if a third party informed the magistrate that the plaintiff had been seen to pick the defendant's pocket, and the magistrate sent for the defendant and bound him over to prosecute, the defendant would not be liable to an action."

It was further urged that the defendant ought rather to have forfeited his recognizance than have gone before the grand jury, when he must have well known that the prosecution was groundless. But, supposing he had taken this course, and so subjected himself to have his recognizance estreated, the plaintiff must still have appeared at the Assizes, according to the exigency of his own recognizance, and must necessarily have been put to no inconsiderable portion of the expense and annoyance he complains of. And, as to this, it is conceded by this argument, that he would have no remedy.

For these reasons, it is plain, in my opinion, that this prosecution was not caused by the defendant, so as to make him liable to an action for having caused it.

ERLE, C. J., signified his concurrence in the above judgment.

WILLES, J. I think the rule to enter the verdict for the plaintiff ought to be made absolute, upon the following grounds,—that the defendant as prosecutor went before the grand jury, procured a bill for perjury to be found against the plaintiff, and stuck to the charge at the trial, when there was an acquittal,—that the defendant had no reasonable or probable [93] cause for the charge, but preferred it with knowledge of its falsehood, and endeavoured to maintain it by forged and perjured evidence,—consequently, that, but for the order of the county-court judge, this action would beyond doubt have been maintainable,—that that order ought not to aid the defendant, first, because it was occasioned by his own contrivance and wrong; secondly, because it is void as a judicial act, inasmuch as it was obtained by a fraud upon the court “in scenâ non in foro.”

I need hardly add that I deliver this dissentient opinion with reluctance and hesitation, not having under the circumstances any confidence in its correctness.

Rule discharged (*a*).

IN RE JANE SAUNDERSON. April 26th, 1860.

The court allowed a certificate of an acknowledgment taken at Adelaide, under the 3 & 4 W. c. 74, to be filed, notwithstanding the affidavit of verification omitted to mention the place where the acknowledgment was taken,—it appearing by affidavit that the acknowledgment was taken at that place.

Milward moved that the proper officer might be directed to receive and file the certificate of an acknowledgment of the execution of a deed in Australia by Mrs. Sanderson, under the 3 & 4 W. 4, c. 74, ss. 83, 84, notwithstanding that the affidavit verifying the certificate, required by the rule of Hilary Term, 1834, omitted to state where the acknowledgment was taken. The affidavit of verification, however, purported to be [94] sworn at Adelaide: and there was an affidavit shewing that all the parties resided at that place. He submitted that the omission was immaterial, inasmuch as the only reason for the insertion of the place of taking the acknowledgment in the form given by the rule of court was, that it might appear that the commissioners taking it were acting within the limits of their jurisdiction,—a reason which could not apply to the case of a commission directed to special commissioners abroad.

The attention of the court having been called to the cases of *In re Shoghlbottom*, 6 Scott, 898, and *In re Partridge*, 17 C. B. 18, where under similar circumstances it had been held to be unnecessary to name the place where the acknowledgment was taken,

ERLE, C. J., said: The affidavits of verification in the cases referred to presented the same defect as that now before us, and the court considered that in the case of a commission executed abroad it was not fatal. This case, therefore, falls within that principle, and the documents may be filed.

Fiat.

[95] BARBER v. LAMB. April 30th, 1860.

[8 C. 29 L. J. C. P. 234; 2 L. T. 238; 6 Jur. N. S. 981; 8 W. R. 461. Distinguished, *Fraggs v. Worms*, 1861, 10 C. B. N. S. 153. Referred to, *Taylor v. Hollard*, [1902] 1 K. B. 681.]

A plea of judgment recovered in an action brought in the consular court at Constantinople, established under the 6 & 7 Vict. c. 94, and payment by the defendant of the amount,—Held, a good bar to an action brought here for the same cause.

This was an action for money payable by the defendant to the plaintiff and one James Hartley, since deceased, for money received by the defendant for the use of the plaintiff and the said James Hartley, and for money found to be due from the defendant to the plaintiff and the said James Hartley on accounts stated between the said defendant and the plaintiff and the said James Hartley. Claim, 1000l.

(*a*) The plaintiff appealed, and the case was argued before the court of error at the sitting in the Exchequer Chamber after Michaelmas Term, 1860. The court took time to consider its judgment.

Fourth plea,—that, after the passing of an act of parliament made and passed in the 7th year of Queen Victoria (7 & 8 Vict. c. 94), intituled “An act to remove doubts as to the exercise of power and jurisdiction by Her Majesty within divers countries and places out of Her Majesty’s dominions, and to render the same more effectual,” and before the accruing of the causes of action in the declaration mentioned, at a Court held at Buckingham Palace, before the Queen’s most excellent Majesty in council, Her said Majesty, then having power and jurisdiction in the dominions of the Sublime Ottoman Porte, by and with the advice of Her privy council, it was ordered by Her said Majesty that the power and jurisdiction hitherto exercised by Her Majesty’s consul general at Constantinople, so far as relates (amongst other things) to the judicial settlement and determination of all manner of differences, contentions, suits, and variances that might or should happen to arise between British subjects, should be vested in an officer who should represent such consul-general, and should be called the judge of the supreme consular court of Constantinople, and who should hold, by special commission from Her Majesty, the appointment of vice-consul; which judge should, in his [96] capacity of representative of the consul-general, have the same power and jurisdiction to hold the said consular court of Constantinople, and therein to try, determine, adjudicate, and act upon all matters properly brought before the said court, whether the same be of a civil or criminal nature, as Her said Majesty’s consul-general had customarily or by virtue of any act of parliament or order in council exercised on behalf of Her Majesty within the dominions of the Sublime Ottoman Porte; and, in pursuance of the said order, Her said Majesty had appointed Edmund Hornby, Esq., to represent the said consul-general at Constantinople, and to be judge of the said supreme consular court to settle and determine all manner of differences, contentions, suits, and variances that might arise between British subjects, and to try, determine, adjudicate, and act upon all matters properly brought before the said court, as Her Majesty’s consul-general at Constantinople has customarily exercised on behalf of Her Majesty within the said dominions of the Sublime Ottoman Porte; and had also appointed the said Edmund Hornby, Esq., Her Majesty’s vice-consul at Constantinople; and the said Edmund Hornby, Esq., being and continuing judge of the said court and such vice-consul as aforesaid; and the plaintiff and the defendant then being British subjects, the plaintiff, on the 3rd of March, 1859, and before the commencement of this suit, impleaded the defendant in the said court at Constantinople, and within the dominions of the said Sublime Ottoman Porte, in an action for the very same identical claims and causes of action and sums of money as in the declaration in this action mentioned, and for which this action is brought, the same being claims and causes of action properly brought before the said court, and being such matters as Her said Majesty’s consul-general has customarily exercised on [97] behalf of her Majesty within the said dominions of the Sublime Ottoman Porte; and such proceedings were thereupon had in the said action in that court, that the plaintiff, afterwards, and before the commencement of this suit, by the consideration and judgment of the said court, recovered in that action against the defendant the sum of 45l., for the said identical claims and causes of action, debt, and sums of money in the said declaration mentioned, together with his costs of suit; which judgment remains unreversed and not made void; and which sum of money so recovered, together with the said costs of suit, the defendant before the commencement of this suit paid to the plaintiff in satisfaction of the said judgment.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

Archibald, in support of the demurrer (a). The judgment of the consular court at Constantinople is no estoppel: *The Bank of Australasia v. Harding*, 9 C. B. 661; *The Bank of Australasia v. Nias*, 16 Q. B. 717. Assuming it to have all the force and validity of a foreign judgment, it is at the most but *prima facie* evidence: *Houlditch v. The Marquis of Donegal*, 8 Bligh, N. S. 301. [Erle, C. J. Those cases proceed upon the effect to be given to the judgment of a foreign or colonial court of [98] competent

(a) The points marked for argument on the part of the plaintiff were as follows:—

“That the fourth plea does not shew that the judgment therein referred to was final or conclusive between the parties, or that the causes of action in question were merged in or extinguished or in any manner affected by the said judgment, either according to the law of the country where such judgment was given, or according to the law of England; and that the fourth plea is not a good plea of payment.”

jurisdiction, when it is sought to make it the foundation of proceedings here. But here the plaintiff is seeking to recover in respect of causes of action as to which he has already been satisfied by the judgment of the court at Constantinople.] There is no case where the precise point has arisen. But it is submitted, that, if the judgment of the consular court does not operate a merger, it amounts to no more than evidence that before the commencement of the present action the defendant had paid the plaintiff 45l. He might have pleaded payment, and have given this judgment in evidence. But the question here is, whether the judgment is pleadable as a bar to this action. [Willes, J. If this action had been brought to recover the 45l., it is clear that the judgment would have been a good defence.] If pleaded as payment. This is not a good plea of payment,—a payment of 45l. not being a satisfaction of 1000l. [Willes, J. The plaintiff was bound to bring forward his whole claim in the first action: *Lord Bugot v. Williams*, 3 B. & C. 235, 772, 5 D. & R. 87, 719. This is in effect an appeal against the judgment of Mr. Hornby, whereas the only appeal is to the Privy Council.] It may be doubted whether this court can take any notice of a judgment of a court constituted like the court in question. Besides, there is no averment in this plea that the judgment of the consular court was binding and conclusive. In *Plummer v. Woodburne*, 4 B. & C. 625, 7 D. & R. 25, it was held that a judgment obtained by the defendant in a colonial court cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the colony (*a*). [Byles, [99] J. A judgment in an action for a debt is *ex vi termini* conclusive.]

Malcolm, *contra*, was not called upon.

Cur. adv. vult.

ERLE, C. J. Upon consideration, I am of opinion that the fourth plea in this case is a valid plea and constitutes a good defence to the action. The question is, whether a plea of judgment recovered for 45l. in the consular court at Constantinople, in an action brought in that court in respect of the very same causes of action as are declared on here, and payment of that sum in satisfaction of that judgment, is a bar to the action. One objection which has been urged before us is, that it is not sufficiently shewn upon the face of the plea that the court at Constantinople had jurisdiction. If it rested upon that point only, I should be of opinion that the jurisdiction is sufficiently alleged. But I find it decided in a case of *Robertson v. Struth*, 5 Q. B. 941, that a declaration in debt on the judgment of a foreign court need not state that the court had jurisdiction over the parties or the cause. Patteson, J., there says: "We presume that the judgment of a foreign court is correct. If you have any objection, ought not it to have been raised by plea?" If it were necessary to state that the court had jurisdiction, the plea does state that the claims and causes of action were properly brought before the said court, and were such matters as Her Majesty's consul-general at Constantinople had customarily exercised on behalf of Her Majesty within the dominions of the Sublime Ottoman Porte. There is a judgment by the judge of a consular court duly constituted under the authority of the act of parliament, for the same cause of action, and [100] payment of the sum so recovered. It appears to me that that is a satisfaction of the debt. The plaintiff has already preferred his claim before a competent tribunal, and has had its judgment, and his opponent has paid the amount awarded against him. Every presumption is to be made in favour of a judgment of a foreign court of competent jurisdiction: *Henderson v. Henderson*, 6 Q. B. 288. The great distinction between this case and the authorities referred to by Mr. Archibald as to the necessity of there being a merger of the causes of action in the judgment is, that here the defence does not rest on merger, but on the principle that the plaintiff has obtained the judgment of a tribunal to which he has resorted for enforcing his debt, and that the judgment so obtained has been satisfied by payment of the sum awarded. It seems to me that the case bears a strong analogy to that of parties choosing to refer their differences to arbitration. Where a party has obtained the decision of an arbitrator in his favour, and his adversary has paid the amount, it would be manifestly contrary to reason and justice to allow the successful party to endeavour to obtain a better judgment in respect of the same matter from some other tribunal.

BYLES, J. I am of the same opinion. In addition to the presumption which,

(a) And see *Smith v. Nicolls*, 7 Scott, 147, 5 N. C. 208, 7 Dowl. P. C. 282.

according to the case referred to by my Lord, is to be made in favour of the jurisdiction of the foreign court, and to what he has said as to the former decision having been a decision of a tribunal selected by the plaintiff himself, it seems to me, that, if there were any claims which it was competent to that tribunal to decide, the claim in question was amongst them, because the plea alleges that "the plaintiff and defendant then being British subjects, the plaintiff, on the 3rd of March, 1859, and before the [101] commencement of this suit, impleaded the defendant in the said court at Constantinople, and within the dominions of the Sublime Ottoman Porte, in an action for the very same identical claims and causes of action and sums of money as in the declaration in this action mentioned, and for which this action is brought, the same being claims and causes of action properly brought before the said court, and being such matters as Her said Majesty's consul-general has customarily exercised on behalf of Her Majesty within the said dominions of the Sublime Ottoman Porte." That is a sufficient allegation that the court at Constantinople had jurisdiction.

KEATING, J. I entirely agree with my Lord and my Brother Byles that our judgment must be for the defendant on this demurrer. This decision will not in the least interfere with the numerous cases which have held that the judgments of foreign courts may be examinable under certain circumstances. If there were anything to deprive the consular court of jurisdiction over the subject-matter of the action, or to deprive the judgment of validity, that might have been shewn by the replication. None such is shewn to exist here. I entirely agree with my Lord that this is not a case of merger. It is not so pleaded. But the ground is, that there has been a judgment of a court having jurisdiction over the subject-matter, and that that judgment has been satisfied by payment. The plea is, therefore, a perfectly good plea, and the defendant is entitled to judgment.

Judgment for the defendant.

[102] HUTCHINSON AND OTHERS v. COPESTAKE AND ANOTHER. April 25th, 1860.

[Affirmed in Exchequer Chamber, 9 C. B. N. S. 863.]

Held,—in conformity with the rule laid down by the court of Queen's Bench in *Renshaw v. Bean*, 18 Q. B. 112, —that an action will not lie for the obstruction of antient lights the position of which has been so altered by the re-building of the premises within twenty years, that the defendant could not exercise his right to obstruct such portions of the lights as were unprivileged, without at the same time obstructing the privileged portions.

This was an action brought by the plaintiffs against the defendants for erecting and continuing a building, and thereby obstructing the passage of light to windows in a warehouse of the plaintiffs. The defendants pleaded not guilty, that the plaintiffs were not possessed of the warehouse, —and that the plaintiffs were entitled to the passage of light as claimed.

Issue was joined on all the above pleas.

The defendants originally proposed to plead with those pleas, other pleas, one of them alleging an abandonment by the plaintiffs, and cesser of their alleged right before the committing of the grievances complained of: the other, justifying on the ground of the plaintiffs having thrown out new lights and parts of lights, and because the defendants could not interrupt the enjoyment of the same, and prevent the gaining the right of the enjoyment of the same, without at the same time committing the grievances complained of. By consent, the two last-mentioned proposed pleas were disallowed by a judge's order, whereby the parties respectively were to be at liberty, under the pleas which were allowed (being those actually pleaded), to give in evidence any matter which would have afforded a defence to the action, or an answer to such defence, if the same had been raised in pleading.

The cause came on to be tried before Cockburn, C. J., at the sittings for London after Hilary Term, 1859, when it was agreed that a verdict should be found for the plaintiffs with 40s. damages, and costs of suit, subject to the opinion of the court upon the following case:—

The plaintiffs, at the time of the erection by the [103] defendants of the building hereinafter mentioned, were the occupiers of a warehouse situated on the west side of

Bread Street, at No. 5, and continued to be such occupiers up to the trial of this cause.

[A model, which was referred to and made part of the case, shewed the position and size of the several windows on the first, second, and third floors of the plaintiffs' house, and which windows had existed for more than twenty years.]

On the 31st of December, 1853, a fire took place by which the buildings numbered respectively 4, 4½, and 5, in Bread Street, were much injured, and in consequence thereof were subsequently taken down.

Another model, which was to be taken as part of the case, represented part of the east side of Bread Street, and the building thereon, including premises of the defendants and in their occupation for several years before and until they were taken down by them as hereinafter mentioned, and which were marked 60, and other adjoining premises, as the same existed at the time of the fire.

After the fire, the plaintiffs' present warehouse, in respect of which the action was brought, was built.

A third model represented the plaintiffs' warehouse, numbered 5, and other adjoining premises on the west side of Bread Street, as built up after the fire.

The two windows in the attic continued until after the re-building of the defendants' premises hereinafter mentioned.

The other windows shewn upon the third model as now being in the plaintiffs' warehouse and the adjoining premises, are the present existing windows.

The plaintiffs' warehouse as re-built is higher from the ground to the apex of the roof by five feet and a half, and from the ground to the top of the parapet by three feet, than their former warehouse.

[104] Some of the present windows in the plaintiffs' warehouse are larger than any of the windows in their old warehouse; and portions of each of the present windows are in sites not occupied by any of the former windows.

In that part of the plaintiffs' warehouse which is below the ground-floor is a window. In the former building there was no window there.

No complaint nor suggestion was made to the plaintiffs by or on behalf of the defendants, or by or on behalf of any person interested in or connected with their said premises, that the above-mentioned alterations in the plaintiffs' warehouse, or the windows thereof, did or could in any way affect or injure the defendants' said premises, or that any right of the occupiers or owners thereof, or of the site thereof, could at any future time be prejudiced thereby, until after the erection of the defendants' present building, as hereinafter mentioned.

After the building up of the plaintiffs' warehouse, and before the commencement of this action, the defendants caused their building numbered 60 to be taken down, and the present building to be erected on the site thereof.

The defendants' present building as re-built has a flat roof: the parapet is higher than the roof. The present building is higher from the ground to the parapet by twenty-seven feet and a quarter than the height of the former building from the ground to the apex of the roof, and by thirty-seven feet than the height of the former building from the ground to the parapet. This building was erected within a year next before the commencement of this action.

After the erection of the defendants' present building, the following letter was written and sent to the defendants on behalf of the owners and occupiers of the plaintiffs' premises:—

[105] "To Messrs. Groucock & Co., and all others whom it may concern,—

"Take notice, that the Goldsmiths' Company, the reversioners of the premises Nos. 4½ and 5, otherwise 5 and 6 Bread Street, Cheapside, in the city of London, and Thomas Upton, of Warnford Court, in the said city, the tenant under a lease from the company of the said premises, object to the buildings now in course of erection on the east side of Bread Street aforesaid, and opposite to the said premises of the company, inasmuch as the said buildings obstruct the light and air from the said premises of the said company and Thomas Upton; and they thereby require that the said buildings may be abated. Dated the 8th day of December, 1857.

"WALTER PRIDEAUX,
"Solicitor for the said Goldsmiths' Company
and the said Thomas Upton."

In answer to this letter, the following letter was written and sent on behalf of the defendants :—

“59 Friday Street, Cheapside,
“London, December 10, 1857.

“Dear Sir,—Messrs. Copestake, Moore, & Co. have handed to us your notice to them on behalf of the Goldsmiths' Company, complaining of the buildings now in course of erection by them as interfering with the lights in the premises of the company on the opposite side of the street; and we are instructed to say that our clients deny that the company have any ancient light in those premises, and, if they have, they are not obstructed by the buildings in question; but, on the contrary, our clients complain that the new houses which have been built on the west side of the street in the place of those destroyed by the fire, have been an inconvenience to them and an obstruction to their lights.

“REED, LANGFORD, & MARSDEN.”

[106] The above letter from Messrs. Reed & Co. was the first complaint or suggestion made to the plaintiffs of the alterations in the plaintiffs' premises being in any way prejudicial to the defendants.

After the receipt of that letter, and before the commencement of this action, the plaintiffs caused the windows in the attic of their warehouse to be and the same have ever since been entirely blocked up.

[Plans and tracings shewing the condition of the respective premises of the plaintiffs and the defendants as well before as after the re-building thereof respectively, were also annexed to and were to be taken as part of the case. From the plans and tracings of the plaintiffs' premises it appeared that the windows of the new building were larger than those in the old building, and in part only occupied the same sites.]

The defendants' new building obstructed to some extent the passage of light through the attic windows of the plaintiffs' new building whilst they existed, but did not and does not obstruct the passage of light to the said new window under the ground floor to a sensibly greater extent than the same was obstructed by the old building numbered 60.

The defendants' new building has obstructed and does obstruct the passage of light to the windows on the ground floor, first, second, and third floors of the plaintiffs' warehouse, including both the new and the old portions thereof, to a sensibly greater extent than the same was obstructed by the old building numbered 60; and the rooms lighted thereby have by the erection of the defendants' new building been rendered to a sensible degree darker than the rooms lighted by the windows on the ground-floor, first, second, and third floors of the plaintiffs' old buildings were before the fire.

There is a public foot and carriage highway over the whole of Bread Street, including the whole of the space [107] between the plaintiffs' and defendants' premises, which are opposite to and front each other.

The defendants could not have obstructed the passage of light to the attic windows whilst they existed, or to such portions of the windows of the plaintiffs' present warehouse as are new, without at the same time obstructing the passage of light to such portions of the plaintiffs' windows as are in the sites of old windows, to the extent complained of in the declaration.

The question for the opinion of the court was,—whether the plaintiffs are entitled to maintain this action. If the court shall be of opinion that they are, then the verdict is to be entered for the plaintiffs as aforesaid; but, if the court shall be of a contrary opinion, then the verdict is to be entered for the defendants upon such of the above-mentioned issues as the court shall direct.

It was agreed between the parties that the court should have power to draw any inferences of fact which a jury might have drawn; and it was further agreed that, if the court should be of opinion that any fact not stated in the above case was material to its determination, the court should have power to amend the case by adding the same, such fact to be ascertained, if necessary, by some gentleman at the bar agreed upon by the parties, or, in case of their disagreement, by some gentleman at the bar appointed by the court.

Montague Smith, Q. C. (with whom was Coxon), for the plaintiffs (a). The rule

(a) The points marked for argument on the part of the plaintiffs, were as follows :—

“1. That the occupiers of the plaintiffs' old warehouse having at the time of the

of law is this, that any [108] alteration may be made in an easement, subject to the condition that the alteration does not throw any greater burthen on the servient tenement. Here it is submitted that the alterations do not increase the burthen of the servient tenement, and therefore do not deprive the plaintiffs of the easement they enjoyed before the alteration. All the new windows occupy a portion of the site of the old ones, though the size, number, and position of them are somewhat changed: [109] four larger windows have superseded six smaller ones. The principal authorities upon the subject are collected in Gale on Easements, 2nd edit. pp. 363 et seq., viz. *Cherrington v. Abney*, 2 Vern. 646, *Cotterell v. Grighths*, 4 Esp. N. P. C. 69, *Martin v. Goble*, 1 Campb. 320, *Chandler v. Thompson*, 3 Campb. 80, *Garratt v. Sharp*, 3 Ad. & E. 325, 4 N. & M. 834, and *Luttrell's case*, 4 Co. Rep. 87 a., from which the principle to be deduced is, that, "if the alteration in the mode of enjoyment is such as clearly not to render the easement more onerous on the owner of the servient tenement, the right remains unimpaired." In *Thomas v. Thomas*, 2 C. M. & R. 34, it was held that, where a party has a right to have the droppings of rain fall from his wall upon the premises of another, the right is not destroyed by his increasing the height of the wall: and Alderson, B., in the course of the argument, asks,—"How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim?" and he adds, "It has been held, in the case of lights, that, where a party enlarges an antient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the antient window (a). If the act of the defendants is injurious to the plaintiff's original right, it is not the less so because it is injurious also to a further right which the plaintiff claims." In *Saunders v. Newman*, 1 B. & Ald. 258, it was held that the occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for twenty years: and therefore it was held to be no defence to such an action, that the occupier had within a few years erected [110] in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an antient mill. Abbott, C. J., there says: "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill: if he were, that

fire acquired an absolute and indefeasible right to the access and enjoyment of light and air through the windows of such warehouse, this right was not lost by the taking down of the old warehouse and the building of the new one:

"2. That it was not necessary, in order to preserve such right, that the windows of the new warehouse should occupy precisely the same positions or be of precisely the same dimensions as the windows of the old one:

"3. That the windows on the ground, first, second, and third floors of the plaintiffs' new warehouse admitted light in substantially the same manner, so far as the owners and occupiers of the defendants' premises are interested or affected, as the windows on the ground, first, second, and third floors of the old warehouse; and that the mode of enjoyment of light to the plaintiffs' new warehouse by means of the new windows, did not render the easement of light to the new warehouse more onerous than before to the owners or occupiers of the defendants' premises; and that the defendants had no right to obstruct or darken them:

"4. That the defendants at all events had no right, under the circumstances, to obstruct and darken the portions of the windows in the new warehouse of the plaintiffs which occupied the same position and sites as those in the old warehouse:

"5. That the existence of the attic windows in the plaintiffs' warehouse did not justify the defendants in obstructing and darkening the other windows in the plaintiffs' warehouse, in respect of which he had a right to the passage of light and air:

"6. That, at all events, when such attic windows no longer exist, their former existence cannot justify the defendants in continuing a permanent obstruction to the easement of light and air to which the plaintiffs are entitled in respect of their other windows."

(a) Citing *Chandler v. Thompson*, 3 Campb. 80, *Martin v. Goble*, 1 Campb. 320, and *Luttrell's case*, 4 Co. Rep. 87 a.

would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different." And Holroyd, J., says: "The change of the wheel can make no difference, because at the time it was done it was certainly lawful for the plaintiff to make the alteration. Then, if that be so, the defendant by his subsequent act cannot deprive the plaintiff of an advantage which he had already lawfully acquired." The same principle equally applies to windows. The question is very fully gone into in the judgment of Patteson, J., in *Blanchard v. Bridges*, 4 Ad. & E. 176, 5 N. & M 567. E., being owner of a house, enlarged it, and inserted a window at one end, in a part added, and, at another end, carried out the side walls, between which two windows formerly stood, in a straight line, five feet, converting this end into a bow, and inserting two bow windows, in the same direction, but not in the same situation as the two former: and it was held that, whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows. In giving judgment, the learned judge says: "As to the windows at the east, the case finds that they do not occupy the places of the [111] old windows; the wall in which those windows were no longer exists: and, assuming that no greater change of position has been made than is necessarily consequent upon a carrying out of the side walls five feet, and converting the termination into a bow, such a change is in our opinion sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), still the act of the owner of such land from which the right flows must have reference to the state of things at the time when it is supposed to have taken place: and, as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position,) which existed at the time when such consent is supposed to have been given. It appears to us that convenience and justice both require this limitation. If it were at once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented if it had come in question in the first instance." All that, however, is applicable to a totally different state of things from that which exists [112] here. The windows were not constructed upon the old site. [Willes, J. Do you mean to insist that this case is distinguishable from *Reushar v. Betu*, 18 Q. B. 112? There, the plaintiff, being reversioner of a house which adjoined premises in the occupation of the defendant, and had antient windows, re-built the house, added an upper storey, opened windows in that storey, and enlarged the antient windows and otherwise altered their position: such re-building and alterations being within twenty years of the commencement of the action. The defendant subsequently re-built his premises, and thereby darkened the windows in both the upper and the lower storeys of the plaintiff's house. In an action by the plaintiff, as reversioner, for this obstruction, it was held that the plaintiff having by his alterations exceeded the limits of his right, and it being, through the nature of such alterations, impossible for the defendant, in the lawful exercise of his own rights, to obstruct such excess without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right, at all events until he restored his house to its original condition.] If necessary, it will be contended that that case is not law: but it is enough to say that it is distinguishable, on the ground that there were windows which were altogether new. The judgment of Lord Campbell admits that the defendant had no right to intercept the flow of light and air to the old portion of the windows. "We by no means," says his Lordship, "say, that, where the owner of a house alters the dimensions of an antient window in it, he may in no case maintain an action for that which is an obstruction to the window in its new state, and would have been an obstruction to it in its former state. This would be contrary to a long series of decisions, beginning with *Luttrell's case*. [113] [Byles, J. You must concede

that the owners of the opposite premises had a right to obstruct the new part of the plaintiffs' windows. That they could not do so without also obstructing the old part. Are they therefore to be deprived of the exercise of their right altogether? The question is, not whether the plaintiffs can justify what they have done, but whether the defendants may obstruct their lights. The identity of the easement here is not destroyed by the alteration. [Erle, C. J. I think *Renshaw v. Bean* is a decision quite in point against you: and we certainly should not overrule a decision of a court of co-ordinate jurisdiction. It is there laid down that, where the owner of the dominant tenement has windows which are privileged, and he enlarges them, the owner of the servient tenement has a right to prevent the acquisition of the new right, and to block up the unprivileged part; and that, if he cannot block up the one without at the same time interfering with the other, he is not liable to an action for obstructing the whole. That part of the judgment is I think conclusive against you, and binds us.] Assuming that a portion of the plaintiffs' windows were unprivileged here, can it be said that their right is altogether gone?

Hawkins, Q. C. (with whom was Aspland), for the defendants, was not called upon (a)¹.

[114] ERLE, C. J. Having carefully looked at this case, and at the models and plans which form part of it, we are of opinion that the case of *Renshaw v. Bean*, 18 Q. B. 112, compels us to give judgment for the defendants.

Judgment for the defendants (a)².

THE MERSEY DOCKS AND HARBOUR BOARD v. JONES AND OTHERS, Churchwardens and Overseers of the Poor of the Parish of Liverpool. 1860.

[See S. C. in House of Lords, 11 H. L. C. 443; 11 E. R. 1405 (with note).]

By a series of local acts, the trustees of certain public docks were impowered to take certain rates and tolls from vessels entering therein, the proceeds to be applied to the repair and maintenance of the docks and harbour; and, if the amount raised should be more than sufficient for that purpose, then the rates and tolls were to be lowered.—By subsequent acts, the trustees were impowered to raise money for building additional warehouses, and to levy rates for payment of the expenses of carrying the acts into effect, paying interest, and maintaining the buildings so erected; but such additional warehouses were to be rateable to the poor as in the case of premises of which there was a beneficial occupation.—Held,—in deference to the decision of the court of Queen's Bench (between the same parties) upon a case stated by the sessions in 1827 (*The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780), and the legislative declaration as to the rateability of the additional buildings erected under the authority of the later acts,—that the trustees were not rateable in respect of the old docks, &c.—The court has no power hostilely to vary a special case which has been stated by consent, for the purpose of raising a different question from that which the parties originally contemplated.

This was an action of replevin brought by the plaintiffs against the defendants for

(a)¹ The points marked for argument on the part of the defendants were as follows:—

“That no right is shewn to have ever existed in respect of the windows mentioned in the pleadings: that the right, if any, was in respect of former windows, which right has been lost by the plaintiffs' alterations: that the plaintiffs have abandoned or otherwise lost any right to lights heretofore existing by throwing out new windows, and varying the site and enlarging the size of former windows, and altering their premises as stated in the case and shewn in the plans and models; that any such right came to an end (if not previously) when the defendants newly built their house: that any right, if not destroyed, was at all events suspended, and has not been revived: that the suspension continues until the plaintiffs restore their premises to their former condition: and that the facts existing at the time justified the defendants in raising the premises, and that they are not liable to an action for continuance of a building so justifiably built, especially as it is a permanent structure.”

(a)² An appeal is pending.

the taking and detaining certain goods and chattels of the plaintiffs, and by consent of the parties and under a judge's order pur-[115]-suant to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court:—

By a rate made for the relief of the poor of the parish of Liverpool, on the 2nd of June, 1858, the plaintiffs were assessed in the sum of 20,580l. 18s. 8d., in respect of the annual value of the dock estates within the said parish vested in the said board. The following is a copy of the assessment:—

	£	s.	d.
“Wet docks and basins, cranes, sheds, and wharfs connected therewith, within the parish, viz. Wellington, Bramley, Moore, Nelson, Stanley, Collingwood, Salisbury, Clarence, Trafalgar, Victoria, Waterloo, Prince's, Canning, Albert, Salthouse, Wapping, King's, and Queen's docks	18,900	0	0
Graving-docks and graving-blocks, engines, and sheds connected therewith, at the Clarence, Prince's, Canning, King's, and Queen's docks	746	13	4
Transit-sheds and offices, Prince's dock	375	13	4
Tramway, railroad, and sidings, and high level railway along the side of the docks within the parish	233	6	8
Dock offices, comprising general offices, treasurer's offices, solicitor's offices, secretary's offices, marine surveyor's offices, board-room, and store-room	116	13	4
Depot for wrecked goods, Waterloo dock	52	10	0
Depot for wrecked goods, Prince's dock	32	13	4
Transit-shed west side of Nelson dock	23	6	8
Transit-shed west side of Nelson dock	23	6	8
Transit-shed west side of Nelson dock	23	6	8
Transit-shed west side of dock entrance to Waterloo dock	20	8	1
Weighing-machine, George's Dock Passage	14	0	0
Weighing-machine, Prince's dock	11	13	4
Telegraph-office, Tower Buildings	7	7	0

The plaintiffs did not appeal against the said rate.

[116] The distress in question was levied in consequence of the non payment of the rate. The plaintiffs entered into the usual replevin-bond, and brought the present action.

The dock estates within the parish of Liverpool became vested originally in the mayor, aldermen, bailiffs, and common council of the borough of Liverpool, as trustees of the docks and harbour of Liverpool, by virtue of several acts of parliament. Part of those estates was granted voluntarily by that corporation, part was sold by that body to the trustees for a pecuniary consideration, and other parts were purchased by the trustees from private individuals, according to the powers given to them by the said before-mentioned and other acts, being altogether twenty two in number, and forming a series extending from the first year of Queen Anne to the 21st year of Her present Majesty, both inclusive; all of which were to be referred to as part of the case.

Before the construction of many of the present works, part of the land was shore, both above and below high-water mark: but the greater part consisted of land and buildings in the occupation of individuals rated to the relief of the poor of the said parish. The dock estates at present consist of docks, basins, piers, jetties, graving-docks, gridirons, wharfs, quays, sheds, offices, buildings, landing stages, ships, stairs, river walls, dams, embankments, locks, gates, bridges, mevis, sluices, tunnels, cuts, channels, roads, railways, tram roads, cranes, engines, machinery, and other matters and conveniences requisite to form complete docks: and the trustees are authorized to receive large sums of money under the name of dock rates and duties for the accommodation of vessels in the said docks, by virtue of the said acts of parliament.

Under and by virtue of the 6 G. 4, c. clxxxvi., and [117] the 14 & 15 Vict. c. lxiv. (being two of the acts comprised in the said series), a committee was appointed in the manner directed by these acts, called “The committee for the affairs of the estate of the trustees of the Liverpool Docks,” and all the powers and authorities of the said trustees of the Liverpool Docks were vested in such committee.

By statute 20 & 21 Vict. c. clxii. (local and personal), and which was also to be referred to as part of the case, intituled "An act for consolidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust, and for other purposes," s. 26, all the docks, lands, buildings, and other property, real and personal, situate at Liverpool, that were held by or in trust for the trustees of the Liverpool Docks became vested in the plaintiffs, under the style of "The Mersey Docks and Harbour Board," but subject to all charges and liabilities affecting the same.

By s. 49 of the last-mentioned act, it is enacted, "that, subject to the provisions of this act, the board shall stand possessed of all the property, powers, rights, and privileges hereby transferred to them, upon the trusts and for the purposes upon and for which such property, powers, rights, and privileges were holden previously to the commencement of this act."

The 56th section enacts as follows:—"The following rules shall be observed by the board with respect to the moneys received by them under this act, that is to say, —1. The conservancy expenditure shall be defrayed out of the conservancy receipts, —2. The pilotage expenditure shall be defrayed out of the pilotage receipts, —3. No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure, —4. No sums shall be payable in respect of docks by any vessel that does not use the same, —[118] 5. Save as by this act is provided, no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes."

The 59th section is as follows:—"The board shall render to parliament as soon as may be after the 24th of June in every year an account of its receipts during the preceding year ending the 24th of June, and the manner in which the same have been applied."

The board manages the dock estate by its servants and agents, who receive and account for to the board the dues and other moneys arising from the management of the said estates: and no part of the estates and premises comprised in the above assessment or schedule is let off to other persons, nor are any rents paid to the board for any part thereof.

With regard to the application of the moneys received as dock duties, the statute 8 Anne, c. 12, s. 9, under which the first dock was built, enacts as follows:—"That all and every such sum and sums of money that shall be raised and received by the duties aforesaid, and recovered for any the forfeitures in this act appointed, other than so much thereof as shall be laid out and allowed to the collector or other necessary officer for the collecting and managing the said duty for charges of recovering the same, shall, by the said mayor, aldermen, bailiffs, and common council for the time being, be applied and disposed of to the building and repairing the said new dock or basin and other works, and for the securing, preserving, amending, and maintaining the said dock or basin and harbour of Liverpool, and to no other use or purpose whatsoever."

By sections in subsequent acts, all the acts in the [119] series, including this of 8 Anne, are directed to be read and construed as one act.

All the dock rates payable by the former acts of parliament were repealed by the 51 G. 3, c. cxliii., one of the above-mentioned series, by which new rates were substituted.

The 27th section of that statute is as follows,—"That all the moneys which shall be collected, received, levied, borrowed, and raised by and under this act, shall be applied in paying and defraying the charges and expenses attending the obtaining and passing this present act, and to the paying the expenses and charges attending the levying and collecting the said rates and duties: and, after the paying and appropriating one third part of the said moneys to and for the purpose of making and completing the southernmost portion of the said north docks as hereinafter is mentioned, then to the paying off and discharging the present bond-debt of 114,705l. 19s. 4d., and the debt of 67,406l. 18s. 7d. owing by the said trustees to the corporation of Liverpool for the purchase of land and strand intended for the site of the southernmost of the said two northern docks, and any future bond-debt and the interest on the same, and to the paying and discharging the interest and all other

moneys which may be hereafter borrowed and taken up at interest under the provisions of this act upon the credit of the said dock rates and duties as aforesaid, and to the carrying into execution the purposes of this act and the said recited acts, in the making, erecting, building, finishing, and maintaining such docks, basins, piers, and other works and buildings in the port of Liverpool under the said acts and this act, and to the paying, defraying, and satisfying all other charges and expenses already incurred or hereafter to be incurred in the carrying into execution or under or in consequence of any of the said former acts or this present [120] act; and the residue or surplus of all moneys arising from such rates or duties which shall remain after such application thereof as aforesaid, shall from time to time be applied in or towards the re-payment of the principal moneys which shall have been borrowed under this act, until such principal moneys shall be repaid, and all assignments of or mortgages upon the rates and duties are paid off, satisfied, discharged, and redeemed: and when by the means last mentioned all the principal moneys which shall have been borrowed shall be repaid and all assignments and mortgages upon the said rates are satisfied and redeemed, then and in such case it shall be lawful for the said trustees, and they are hereby required, to lower and reduce the rates and duties hereby granted and made payable as far as the same can be done in the then state of the docks, basins, buildings, and other works and buildings of the said port, and leaving sufficient for all charges of management and collection of rates and other concerns of the said docks, basins, piers, works, and other buildings, and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of the said former acts and this act."

By the 6 G. 4, c. clxxxvii., of the said series, another power is given by the 105th section to the said trustees to levy certain fresh rates; and by the 106th section to lower all rates, and to raise the same again; and by the 130th section it is enacted, "That all the moneys which shall be collected, levied, borrowed, and raised under this act or the said recited act, shall be applied in any order with respect to priority of such application as to the said trustees shall seem expedient and proper (except as by this act provided as to the time of payment of assignments of the said rates and duties granted by virtue of the said recited act), in paying and defraying the charges and expenses of obtaining this act, and in paying the expenses and charges of [121] collecting the rates and duties, and all interest due and to grow due from time to time on moneys borrowed or taken up at interest by the said trustees, and any principal moneys that may be called in from time to time, and in the general management and conducting of the said trust estate, in the construction of the works by this and the said former acts authorized to be erected, established, and maintained, in supporting, maintaining, and repairing the same and every part thereof, and in carrying into execution all the provisions of the several recited acts and this act, and in paying off and discharging the whole or any part of the present bond or other debt, and any future bond or other debt, and all interest due and to grow due thereon, and also in the defraying, paying, and satisfying all the charges and expenses already incurred or hereafter to be incurred in carrying into execution the several purposes of, or under, or in consequence of any of the clauses, provisions, powers, or authorities contained in the said former act or this act."

By the 4 & 5 Vict. c. xxx., another of the said series, power is given to the trustees to erect transit sheds, to make a wet dock, to construct other works, and to raise a further sum of money, and to levy certain additional rates; and by the 124th section it is enacted "that all the moneys which shall be collected, levied, borrowed, or raised under or by virtue of the said recited acts and this act shall be applied, in any order with respect to priority of such application as to the said trustees shall seem expedient, in and towards the completion of the several docks, transit sheds, warehouses, and other works by the said recited acts and this act authorized to be made, formed, erected, and built, and for and towards the several objects and purposes in the said recited acts and in this act mentioned, in the general management and conducting the said [122] trust estate, and carrying into execution all the provisions of the said several recited acts and this act, and for the general improvement and reparation of the docks, basins, and works of the said trustees."

By the 7 & 8 Vict. clxxx., another of the said series, power is given to the trustees to construct additional docks, and raise further sums of money; and by the 127th section it is enacted "that all the moneys which shall be collected, levied, borrowed, or raised under and by virtue of the said recited acts and this act, shall be applied, —

first, in and towards the payment of all expenses of and attending the passing of this act, and then in and towards the completion of the several docks and other works by the said recited act and this act authorized to be made and constructed, and for and towards the several objects and purposes of the said recited acts and this act mentioned, and in the general management and conducting of the said trust estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the said several docks and other works of the said trustees."

By the act 9 & 10 Vict. c. cix., another of the said series, power is given to the said trustees to construct additional wet docks and other works, and to raise a further sum of money: and by the 47th section it is enacted "that all the moneys which shall be collected, levied, borrowed, or raised under and by virtue of the said recited acts, and this act, shall be applied,—first, in and towards the payment of all expenses of and attending the passing of this act, and then in and towards the completion of the several docks and other works by the said recited acts and this act authorized to be made and constructed, and for and towards the several objects and purposes in the said recited acts and this act mentioned, and in the general manage[123]ment and conducting of the said trust estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the several docks and other works of the trustees."

By the 11 Vict. c. x., another of the said series, power is given to the said trustees to construct additional docks and other works: and by the 40th section it is enacted "that all money which shall be collected, levied, borrowed, or raised under and by virtue of this and the said recited acts, shall be applied in and towards the payment of all expenses of and attending the passing of this act, and in and towards the construction and completion of the several docks, warehouses, and other works by the said recited acts and this act authorized to be made and constructed, and for and towards the several objects and purposes in the recited acts and this act mentioned, and in the general management and conducting of the said trust estate and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the several docks and other works of the trustees."

The board are bound to apply the present dock-rates and dues, and all other moneys received by them out of the dock estate, according to the directions of the several acts of parliament; and no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock estates.

All the docks, sheds, tramways, railroads, offices, and other things mentioned in the above assessment, were erected and provided under and in pursuance of the said several acts of parliament, or some of them, solely for the purposes of the dock business, and are not used for any other purpose whatsoever; and all [124] revenue of any kind derived by the board from any part of the property is carried to the general dock estate, and is appropriated and applied in manner shewn by the accompanying accounts for the year 1858, which were to form part of the case.

By the 4 & 5 Vict. c. xxx., s. 52, the trustees were empowered to build warehouses on the quays of one of the docks: and by the 11 Vict. c. xxx., s. 3, such power to build warehouses was extended to all the dock quays; and by s. 71 of the first-mentioned, and by s. 4 of the secondly mentioned act, such warehouses were expressly made subject to all parochial and other rates. None of the warehouses built in pursuance of the said acts are included in the above assessment.

The question for the opinion of the court was,—Whether the Mersey Docks and Harbour Board is rateable to the relief of the poor in respect of the property enumerated in the above schedule, or any part of it.

If the court should be of opinion in the affirmative, then judgment was to be entered for the defendants for such sum as the court should think they were entitled to distrain for, and costs. If the court should be of a contrary opinion, then judgment was to be entered for the plaintiffs, for their costs of suit.

May 8th.—Quain, on the 24th of April, obtained a rule calling upon the defendant to shew cause why the plaintiffs should not be at liberty to amend the special case, by inserting therein a statement to raise the question whether the decision of the court of Queen's Bench in the case of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, where the property of the Liverpool Dock Company was held not to be rateable to the poor, being a decision ad rem, was not an estoppel.

[125] Bovill, Q. C., and Mellish, on a subsequent day, shewed cause. This case was stated by consent, under the authority of the 46th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), for the purpose of raising the question of the rateability of these docks. The plaintiffs now come and ask to have the special case amended for the purpose of raising a totally new and different issue, viz. whether the defendant is not estopped by the decision of the court of Queen's Bench upon a case stated for their opinion in the year 1825. The very object of this case is, to enable the parish authorities to question the propriety of that decision in the House of Lords. [Byles, J. At the time the case of *The King v. The Inhabitants of Liverpool* was stated, there were no means of questioning the propriety of the decision upon it in a court of error.] There were not. The court, it is submitted, has no power to alter the form of a special case agreed on by the parties, or to interfere in any way, except in case of fraud, when they might discharge the order for the special case. Here, there is no pretence for saying that there has been either fraud or mistake.

Sir F. Kelly, Q. C., and Quain, in support of the rule. This is a contest between the parish officers of Liverpool and the dock and harbour commissioners, who, as public officers exercising powers of enormous interest to the public, are bound to take the opinion of this court, and if necessary the opinion of the court of ultimate appeal, upon a question affecting the property under their management, to the extent of about 40,000l. per annum. The only object of this rule is, that the whole question may be fairly presented to the court. The court of Queen's Bench, in 1827, affirmed the non-rateability of this property, and that decision has ever since been acquiesced in until now. The plaintiffs are [126] desirous of placing that decision upon the record. That the court has power to amend a special case, can hardly be doubted, seeing the very large powers of amendment which the courts possess under the 222nd section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and the 96th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) (a). In the case of *The Yorkshire Tyre and Arle Company, App., The Rotherham Local Board of Health, Resp.*, ante, vol. iv., p. 362, this court sent back a case stated by justices under the 20 & 21 Vict. c. 43, s. 2, for amendment. [Willes, J. That was under the express provision for that purpose contained in the 7th section of the statute.] The decision we seek to avail ourselves of is a determination between substantially the same parties on the very same subject-matter which is now at issue. [Erle, C. J. It is in effect the opinion of the Quarter Sessions, assisted by the judgment of the court of Queen's Bench Willes, J. You are seeking to give effect to that decision as a judgment in rem.] At all events, the court may, in its discretion, in order to do justice between the parties, discharge the order for the special case, and so leave the parties to state another.

ERLE, C. J. I am of opinion that this rule should be discharged. In the absence of consent of the parties, the court has no control over the form of a special case. The statement of a special case is entire matter of agreement: and I am not aware that the court have ever interfered to compel either party against his will to allow a statement to be introduced so as to raise a question which he has not agreed to have raised. My [127] judgment is entirely against the notion that the court has any such power. The substantial question is, whether we will discharge the order which has been drawn up by consent to state the case for our opinion. No ground has been laid before us to warrant our resorting to that course. The parties, well knowing what they were about, have agreed to raise a certain question for our decision: and, when that question is ripe for a hearing, one of them wishes to insert a statement, which, whatever may be its worth, the other side will not consent to. If the statement sought to be inserted in the case appeared in the shape of a plea, we should know how to deal with it. The rule must be discharged, and with costs to the parish officers in any event.

WILLES, J. I am entirely of the same opinion. In the case of *The Yorkshire Tyre and Arle Company, App., The Rotherham Local Board of Health, Resp.*, the court directed the case to be sent back for amendment in pursuance of the power expressly reserved to them for that purpose: and it is to be observed that cases under that statute are not usually stated by consent. The court has, undoubtedly, power to prevent justice

(a) This argument was urged, but without effect, in *Nolman v. The Anchor Assurance Company*, ante, vol. vi., p. 536: and see *Hills v. Hunt*, 15 C. B. 30.

being defeated by a mere slip. But, in order to induce us to exercise that jurisdiction, it must be clearly made out that the proposed amendment is with a view to raise the substantial question which the parties intended to raise. Now, in the first place, I do not think that which it is sought by this rule to raise is a substantial question: and, in the next place, it is not the question which the parties intended to raise.

BYLES, J. I am entirely of the same opinion. If the matter now sought to be introduced into the special case had tended to raise a question which the parties [128] had impliedly intended to raise, possibly the court might, in order to do substantial justice between the parties, have lent its aid to the applicant. But it seems to me that this,—which could not have been absent from the minds of the parties or their advisers when the case was stated,—is not within their contemplation and consent. How the decision in *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, can in any way be made matter of estoppel, I must confess I am unable to discover.

KEATING, J., concurring,
Rule discharged accordingly.

Sir F. Kelly, Q. C. (with whom was Quain), for the plaintiffs (*a*). The docks in question were established for public purposes so long back as the reign of Queen Anne; and they have by repeated decisions in 1792, 1808, and 1827, been declared to be exempted from rates: and the court is now called upon to overrule all those decisions. The argument on the other side will be threefold,—first, that these docks are occupied by persons entitled to usufruct,—secondly, that the dock dues taken under the authority of the acts of parliament are not applicable to public purposes,—thirdly, that the property comes within the Parochial Assessments Act, 6 & 7 W. 4, c. 96: and for this purpose it [129] must be assumed that a tenant would be ready to give for the property a rent equal to the sum in respect of which the rate is imposed. These are not premises in the possession of individuals or of a company who could let them or deal with them for a profit: but they are in the possession of persons who are clothed with an important trust for the benefit of the public. In *The King v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730, where by an act of parliament the commissioners of a navigation were authorized to take certain tolls, the whole of which were directed to be applied to public purposes,—it was held that the tolls were not rateable to the poor. Lord Kenyon, in giving judgment, there says: "The trustees have a bare naked trust, not coupled with any interest. If any interest resulted either to the commissioners or to the owners of the adjoining land, after the public purposes of the act were answered, these tolls might have been rated; but it is admitted that all the money which is collected under this act of parliament must be expended for the purposes of the act: and, therefore, upon the ground upon which the court proceeded in *Rex v. St. Luke's Hospital*, 2 Burr. 1053, namely, that there was no occupier, these commissioners are not liable to be rated. This case is distinguishable from *The King v. The Dock Company of Hull*, 1 T. R. 219, *The King v. The Mayor, &c., of London*, 4 T. R. 21, and all other cases mentioned in the argument, on the ground I have stated, that the commissioners are mere trustees to superintend the execution of this act, without any personal advantage. In *The Hull case*, the owners of shares received great profits: and in *The Hampton Wick case*, there was a surplus value of the land belonging to the corporation of London, which was rateable in their hands." In 1808 there was another decision to the same effect, a record of which has been found in [130] the Crown Office. And in 1827 came the case of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, where the very point now in contest was decided in favour of the now plaintiffs, the court of Queen's Bench holding that the Liverpool Dock Company were not rateable to the relief of the poor in respect of the dock-dues received by them, nor of the premises purchased or hired and used by them for the purposes of the dock, no individual having beneficial occupation of those premises. Lord Tenterden there says,—“The case of *The King v. The Commissioners of Salter's Load Sluice* is decisive. There, the tolls were by act of parliament directed

(*a*) The point marked for argument on the part of the plaintiffs was as follows:—

“The plaintiffs will rely on the case of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, as conclusive; it being the same case as the present, and having been acquiesced in from the time it was decided (1827) till the present distress was made.”

to be applied 'to the purposes of the act, and to and for no other use or purpose whatsoever.' The statute under which the dock-rates in question are levied does not indeed contain an express direction that the rates shall be applied to the purposes specified, and no other; but it directs that certain burdens shall be discharged, and that then the rates shall be lowered; and therefore any application of those rates to other purposes not specified, would be a direct violation of the statute." So, in *The King v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70 (c), 9 D. & R. 788, where the surplus tolls of a navigation were directed by act of parliament to be expended in repairing public bridges and highways, it was held that they were not rateable to the relief of the poor. These decisions were followed and approved of in *The King v. The Beverley Gas Works*, 6 Ad. & E. 645, 1 N. & P. 646, *The Queen v. The Mayor, &c. of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334 (a)¹, *The Queen v. The Guardians of Wallingford Union*, 10 Ad. & E. 259, 2 [131] P. & D. 226, *The Queen v. The Inhabitants of Emsminster*, 12 Ad. & E. 2, 4 P. & D. 69, and *Crease v. Sawle*, 2 Q. B. 862, 2 Gale & D. 812, in which latter case, Tindal, C. J., in delivering the judgment of the court of error, observes upon the extreme inconvenience and mischief of overruling decisions which have been long and constantly acted upon, even though the reasons assigned for them may not be perfectly satisfactory. The legislature itself has adopted the decision of the court of Queen's Bench in *The King v. The Inhabitants of Liverpool*; for, by the 4 & 5 Viet. c. xxx., s. 52, the trustees are empowered to erect additional docks and warehouses, and the 71st section provides that "the occupancy by the trustees of all or any of the warehouses to be erected under the provisions of that act, shall be subject to the payment of all parochial and other local rates now levied and hereafter to be levied in the said parish of Liverpool, in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial,"—evidently shewing that the rateability of the newly built premises had been the subject of discussion and contest between the trustees and the parish authorities. A similar provision is contained in the 17 & 18 Viet. c. clxxiv., s. 31. The Parochial Assessments Act, 6 & 7 W. 4, c. 96, was not in existence at the time the decision in *The King v. The Inhabitants of Liverpool* was pronounced. It is impossible, however, that that act can apply to this case. There is no net profit derived or derivable from the premises in question after payment of the expenses of management and other statutable charges.

Bovill, Q. C. (with whom were Manisty, Q. C., and [132] Mellish), for the defendants (a)². In none of the acts by which the affairs of these docks are regulated is there any exemption or prohibition against rating: see 51 G. 3, c. exlii., s. 27, 6 G. 4, c. clxxxvii., s. 130, 20 and 21 Viet. c. clxii., ss. 5, 18, 26, 27, 56 (art. 5), and 21 & 22 Viet. c. xcii., s. 175. Some portion of the property which is under the control of these trustees, therefore, clearly is rateable. By the decision of the court of Queen's Bench in *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780,—which came before the court in such a shape as to prevent the propriety of the decision from being further inquired into, and which is clearly inconsistent with several subsequent cases,—other portions are held to be exempted from rates. The question was discussed in a very able judgment by Lord Denman in *The Queen v. Badcock and Others, Trustees of Taunton Market*, 6 Q. B. 787, where the trustees were held rateable, though they had no beneficial occupation. In *The Huddersfield Waterworks case, The Queen v. The Overseers of Longwood*, 13 Q. B. 116, by certain local acts, commissioners were authorized to purchase lands, and construct reservoirs, and lay down pipes for the purpose of supplying the town and neighbourhood of Huddersfield with water. They were

(a)¹ There, a municipal corporation had been rateable and rated to the relief of the poor in respect of town and anchorage dues, before the statute 5 & 6 W. 4, c. 76; and it was held that the 92nd section of that statute, by appropriating all the corporate funds to purposes of a public nature, exempted the above dues from further rateability.

(a)² The points marked for argument on the part of the defendants were as follows:—

"That the docks at Liverpool and the other property of the Mersey Docks and Harbour Board specified in the case are liable to be rated to poor-rates under the statute of Elizabeth; and that none of the acts of parliament referred to in the case, according to their true construction, exempt the Mersey Docks and Harbour Board from being so rated, or make it illegal to rate them."

impowered to divert the water from springs in a township (Longwood) adjoining Huddersfield; and, by way of compensation to certain mill-owners in [133] Longwood who had previously used the said springs, they were required to construct one reservoir in Longwood, and to impound therein sufficient water for the use of such mill-owners. Water was to be supplied to the premises of such inhabitants of the town and neighbourhood of Huddersfield as might desire it, at certain rents varying with the rack-rents of the premises. The commissioners were authorized to borrow money on the security of their works and water-rents. All the money raised by them was to be applied to the purposes of their acts; and, as soon as all mortgage-debts should have been paid off, the water-rents were to be reduced, so that the proceeds should only cover the current expenses of executing the powers of their acts. Under these powers, the commissioners borrowed money, and constructed two reservoirs, one for the supply of water to Huddersfield, and the other as a compensation reservoir to the mill-owners in Longwood, and laid down pipes for conveying water to the inhabitants of Huddersfield, and received the prescribed water-rents, which had been always applied to the purposes of their acts. The commissioners were bound to furnish water gratis in case of fire; and for watering the streets, at 1d. per 100 gallons. It was held that neither of the reservoirs was exempted from poor-rate, as property occupied solely for public purposes. It is difficult to conceive a case more directly in point than that: there was no beneficial occupation in any one: all was for the advantage to the public (a). So, in *The Queen v. The Harrogate Commissioners*, 15 Q. B. 1012, it was held that, to exempt property from poor-rate, as being devoted to public purposes, it is not sufficient that it produces no benefit to the occupiers individually, and that the [134] occupation is in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community: the benefit must be exclusively public. In *The Queen v. The Inhabitants of Kentmere*, 17 Q. B. 551, by a local act reciting that it was expedient to form reservoirs on the river Kendal, for the purpose of affording a more regular supply of water to the mills on its banks, and by means thereof cleansing the stream and improving the health of those resident on its banks, the occupants of mills on the river Kendal were made commissioners for making reservoirs; and the said commissioners were authorized to make and maintain reservoirs, and to levy a water-rate on all mills using the water, for the purposes of defraying the expenses of the act, and maintaining the reservoirs; and it was held that the commissioners had a beneficial occupation, and were rateable in respect of such reservoirs. In the case of *The Trustees of the Birkenhead Docks, App., The Overseers of Birkenhead, Resp.*, 2 Ellis & B. 148, the trustees of Birkenhead Docks were impowered by statute to take lands by purchase, &c., to construct works, to re-sell or lease land not wanted, to impose, within a certain amount, such rates for vessels using their dock as they might think proper, and to vary these rates, and to lease their wharfs, quays, &c. They were also impowered to borrow money on the security of the rates. All sums received from rates, or the sale or rents of land, were to be laid out by them in defraying the costs of the works, paying officers and servants, carrying the act into execution, and paying the interest and principal of moneys borrowed. It was held that they were rateable to the poor in respect of their premises: for, that, assuming that the purposes to which all the sums were appropriated by the statute were public, still it did not [135] appear that the rates must be kept down so as only to meet such appropriation; and therefore it could not be considered that the legislature had absolutely disposed of all the profits to purposes other than the poor-rate, or that the poor-rate might not properly be paid before ascertaining the sum which would be wanted for such other purposes. That is precisely this case. In *The Queen v. Temple*, 2 Ellis & B. 160, lands were purchased by the commissioners of the treasury, on behalf of the committee of counsel on education, for the purpose of establishing a normal and model school, and were conveyed to a trustee for them. The premises were occupied as a normal school. A principal and masters were appointed, who resided on the premises. Part of the lands were let; and the proceeds, together with annual payments from the scholars, were carried to the general funds of the school, but were not sufficient to defray the expenses; and the deficiency was made good by the committee of council out of the money voted by parliament for the promotion of public education. It was held that the premises were liable to the poor-rate, as there was a beneficial occupation; and that, though the premises were

(a) A limited number of the public.

occupied for a public purpose, and the expenses were defrayed out of the public revenue, those circumstances did not afford a ground of exemption. So, in *The Mayor, &c., of Liverpool v. The Overseers of West Derby*, 6 Ellis & B. 704, the corporation of Liverpool were held to be rateable in respect of waterworks held by them in the township of West Derby, although by a local act they were so to regulate the charges for the water supplied to the inhabitants of Liverpool as to raise no more money than the interest of the money borrowed by them for the works and the expenses of management. *The Queen v. Churton*, 28 Law J., M. C. 131, and *The [136] Queen v. The Trustees of the River Lea*, 19 J. P. 319 (a), are also authorities to the same effect.

Sir Fitzroy Kelly, in reply. It certainly is difficult to distinguish some of the cases cited. But the question, it is submitted, is concluded by *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, which has been often recognized, and never overruled.

ERLE, C. J. I am of opinion that the judgment of this court should be given in accordance with the decision in *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, where the same question in effect on the same statutes was the subject of adjudication. At the same time, I beg to reserve to myself the right of re-considering the point, in case I should here-[137]-after form a part of a court of error to decide between these parties. My learned Brethren in the Queen's Bench had my full concurrence in the cases cited for the defendants. In these cases, the questions seem to me to be,—first, does the statute prohibit payment of poor-rates where it makes the property subject to the payment of all charges thereon? If not, then, is the party rated a trustee occupying merely for the public benefit? In all these cases, the question which was mooted in *The Queen v. Badcock*, 6 Q. B. 787,—what is the public's?—is the governing consideration. Property held on behalf of the government of the country for the purposes of administration, is clearly held for the public benefit. Beyond this, no clear definition of holding for the public interest has been given, that I have found. In each of the series of cases relied on for the defendants, the effect of the decision was, that the claim of exemption on the ground of public interest was not sustained. Thus, the millers benefited by the Kentmere reservoir; the inhabitants of Huddersfield, or of Harrogate, or of Manchester, benefited by water-works; and the capitalists investing capital in merchandize and shipping resorting to the port of Birkenhead and the port of Tynemouth, were not the public. If the question here is narrowed to the point, whether the capitalists thus resorting to the port of Liverpool for commerce are the public, the analogy to the cases cited is strong. If the exemption continues, these capitalists benefit. If the liability is established, these capitalists will probably sustain the burthen, as they would have to pay increased charges for the use of the port. The main distinction between the cases decided and *The Liverpool case* thus being the comparative wealth and importance of the town of Liverpool.

I have wished to say this much, that I may not appear to have deserted an opinion which I repeatedly [138] expressed in concurrence with my Brethren with whom I had the satisfaction to act in another court. But, as a court here of co-ordinate jurisdiction with the court of Queen's Bench, I give my judgment upon the express decision

(a) The navigation of the river Lea was, by the 7 G. 3, c. li., declared free for all the King's subjects, upon the payment of tolls, and the management was vested in trustees. The 84th section directed the application of the rates and duties allowed by the act, as follows,—first, to defraying the expenses of the act,—secondly, to the payment of compensation,—thirdly, to defraying the expenses of construction, the performance of contracts, and the carrying the act into execution, “and to no other use or purpose whatsoever.” The 104th section exempted the rates and duties from the payment of any taxes, rates, assessments, or impositions whatsoever. The 13 & 14 Vict. c. cix., gave fresh powers to the trustees for improving the navigation by making new cuts, and for selling surplus water, and authorized the trustees to apply the moneys to the purpose specified in the former act, “or to any other purposes which the trustees might by law be authorized to carry into effect,” and expressly repealed the 104th section of the former act, all provisions of which it confirmed, except so far as they were inconsistent with that act. It was held, that without the 104th section of the 7 G. 3, there was no ground of exemption from poor-rate to be found in the statutes governing the trust, and that since the 13 & 14 Vict. that ground of exemption had ceased.

in the case of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780,—reserving to myself the right hereafter as above expressed.

WILLIAMS, J. I am entirely of the same opinion. I think we are bound by the decision of the court of Queen's Bench in *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780. Mr. Bovill has certainly called our attention to several recent decisions of the court of Queen's Bench which are, I admit, inconsistent with the principle on which that case was decided, especially *The Birkenhead case* (a), *The River Lea case* (b), and the case of *The Northumberland Docks* (c). In these recent cases, the ratio decidendi in *The King v. The Inhabitants of Liverpool* is regarded as founded on a supposed statutory prohibition to apply any part of the surplus of the dock's receipts to the poor-rates, because such surplus was entirely devoted to certain other prescribed purposes: and its authority is treated as if applicable only to cases where there is such a statutory exemption. But, looking at the report of the case in 7 B. & C. 61, the ground on which the case was decided manifestly was, that there was no person who had a beneficial occupation of the docks. This is plain, not only from Lord Tenterden's language to that effect, but also from his referring to the case of *The King v. Woodward*, 5 T. R. 79, as an analogous decision, in which case it had been holden that a Quaker's [139] meeting-house, if the pews were not let, was not rateable. So, Bayley, J., in delivering the judgment in *The King v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70 (c), 9 D. & R. 788, which was pronounced immediately after judgment had been given in *The King v. The Inhabitants of Liverpool*, says that the principle of the latter decision was applicable, because the surplus tolls of the navigation were to be applied to the repairing and maintaining of bridges and highways, which were public purposes: and, as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees. A long series of subsequent fully considered cases has recognized the case of *The King v. The Inhabitants of Liverpool*, and recognized it as decided on that ground; especially the case of *The Queen v. Badcock*, 6 Q. B. 787, which was cited in the argument, and *The King v. The Inhabitants of St. George's, Southwark*, 10 Q. B. 864, which, I believe, was not cited. There, Lord Denman, in delivering the considered judgment of the court, says: "It has been settled by several cases that the possessors or occupiers as trustees of property otherwise rateable, the profits of which they are bound by act of parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such purposes:" and then he cites the cases of *The King v. The Commissioners of Salter's Load Sluice*, *The King v. The Inhabitants of Liverpool*, and *The King v. The Trustees of the River Weaver Navigation*. The same recognition of *The King v. The Inhabitants of Liverpool*, and of the distinction which is established between a beneficial occupation and a non-beneficial one, by reason of the property being applicable to public purposes exclusively, was continued down to the case of *The Queen v. Harrogate*, 15 Q. B. 1012, where the same question, as to what properly constituted a [140] public purpose, so as to be within the principle of the exemption, which had been fully discussed in *The Queen v. Badcock*, was again considered by Lord Campbell and the other judges of the court of Queen's Bench, and treated as the established test of liability to the rate. And Lord Campbell, though he deprecates the exemption on such a ground, adds: "The law, indeed, is so settled: but I would not extend it." Again, the legislature itself, as it seems to me, has likewise clearly recognized the law as settled by *The King v. The Inhabitants of Liverpool*, and as settled on the ground that the occupation of the trustees is not a beneficial one. The statute 4 & 5 Vict. c. xxx., after authorizing the erection of certain warehouses by the trustees of the Liverpool Docks, enacts, by s. 71, that "the occupancy by the trustees of all or any of the warehouses to be erected under the provisions of this act, shall be subject to the payment of all parochial and all other local rates, &c., in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial." Similar clauses are to be found in the statutes 11 & 12 Vict. c. x., and 20 & 21 Vict. c. clxii. Now, these enactments appear to me to amount to a declaration by the legislature, that, but for the special provisions they contain, the

(a) *The Birkenhead Docks Company, App., The Overseers of Birkenhead, Resp.*, 2 Ellis & B. 148.

(b) *The King v. The Trustees of the River Lea*, 19 J. P. 310.

(c) *The King v. Churton*, 28 Law J., M. C. 131.

occupation of these new warehouses, like that of the rest of the property occupied by the trustees, would not be beneficial, so as to be subject to rates. In other words, the legislature consider the law as laid down in *The King v. The Inhabitants of Liverpool* as settled, and consequently that the occupation of the warehouses would not be beneficial, and so not liable to be rated unless it were otherwise provided; and then proceed to enact that the occupation of them shall be subject to the payment of the rates as they would be payable in respect of warehouses the occupation of which is beneficial, —[141] assuming, therefore, that the occupation of the warehouses will not be in fact beneficial, but subjecting them to rates as if it were so.

How, then, can we, sitting here as a court of co-ordinate jurisdiction, decline to be bound by the authority of a case which for so many years has been regarded by the Bench as well as the Bar as a leading case on the subject of rating; which has always been distinguished, and never impugned in argument; which no one, before to-day, has ever ventured to say ought to be overruled; and which, moreover, the legislature have adopted as the basis of enactments in three acts of parliament.

For these reasons, I am of opinion that our judgment ought to be for the plaintiffs.

BYLES, J. I also am of opinion that our judgment must be for the plaintiffs. I found my opinion upon the applicability of the case of *The King v. The Inhabitants of Liverpool*. Indeed, applicability is hardly the proper word to use. This very question, with the acts of parliament exactly as Mr. Bovill now contends that they are, presented itself to the minds of the court of Queen's Bench in 1827; and they decided that this property was not rateable. I say "exactly as they are," because, although it has been pointed out,—and it is as well to recall attention to the fact,—that, supposing Mr. Bovill is right in his contention that the statute of the 8 Anne, c. 12, s. 9, is no longer in existence, Lord Tenterden, for some reason or other which is not very apparent, construed these acts of parliament without reference to that act; for, he says that the statutes which he was considering did not contain the words "to the purposes of the act, and to and for no other use or purpose whatsoever." The statutes, therefore, presented themselves, that is, the earlier statutes, to [142] the mind of the Queen's Bench in 1827 precisely as Mr. Bovill now says they are. That is a decision on the very point, and between the very parties now before the court, that these docks are not rateable. I admit that Mr. Bovill has been more successful in contending that the case of *The Birkenhead Docks*, followed as it has been by the two cases of *The Newcastle Docks* and *The River Lea*, is with difficulty distinguishable from the case of *The King v. The Inhabitants of Liverpool*. But the court, in giving judgment in the case of *The Birkenhead Docks*, expressly refrained from overruling that prior case. On the contrary, they treat it as a subsisting authority. How is it possible for us, therefore, with the respect which should be always due from one court of co-ordinate jurisdiction to another, to refuse to recognise the existing authority of *The King v. The Inhabitants of Liverpool*, which the court of Queen's Bench did at the time when they were deciding *The Birkenhead Docks case*, which the learned counsel for the defendants says is irreconcilable with that prior case.

But, although it is more easy to point out slight differences than to distinguish these cases on any solid and substantial ground of distinction, it must not be assumed that the acts of parliament are the same. It is impossible to read the acts of parliament to which my Brother Williams has called attention, without seeing clearly that it was a matter of bargain between the parish and the docks, that the rateability of the new warehouses should be created, but that the absence of rateability on the rest of the property should be preserved. Their bargain, it is true, can make no difference in the law; but then that bargain is incorporated in three acts of parliament, which seem to me to imply, almost as clearly as if they had expressed it, that the rule laid down in the case of *The King v. The [143] Inhabitants of Liverpool*, whether applicable to other cases or not, shall at all events govern the rateability of these docks. If, therefore, we were at liberty to do what the court of Queen's Bench did not venture to do, it seems to me that we are entirely precluded by the subsequent acts of parliament.

I do not wish to preclude myself from forming any other opinion, if, on further consideration in another place, I should be called upon to give it. But, at present, it seems to me that the acts of parliament are not the same, but that they differ, and differ in a way unfavourable to the defendants. I cannot help, however, saying, and I think that I am bound to say, that I think the case of *The King v. The Inhabitants of*

Liverpool was rightly decided: and that, when the case comes to be discussed in a court of error, it is possible that that decision may be arrived at.

Now, all these decisions proceed on the statute of the 43 Eliz. What does the 43 Eliz. do? It delegates to the new overseers of the poor, then first created, a power of taxation. Now, whom are they to tax? They are to tax the inhabitants and the occupiers in the parish, according to their ability. Such are the words of the statute, "according to ability." Did the legislature intend to delegate to the overseers the privilege of parliament to tax the public? I say nothing of the exemption of Crown lands from taxation, or even of the exemption of those lands which are temporarily severed from the Crown, and under the administration of the Woods and Forests. It may be that they stand on another footing: they are Crown property; and the Crown is not bound by a statute unless it is named therein. But public lands, public buildings, the extensive lands of the Bedford Level, lands or buildings which are for the benefit of a borough, —have all been held exempt from rateability.

[144] Now, in this case, as in a thousand others, it may be very easy to say, property of this nature is clearly not liable to taxation, property of another nature is liable to taxation: but very difficult to lay down a precise rule as to other cases which fall near to the dividing line. On the other hand, if there be a plurality of individuals, even members of a neighbouring parish, they are individuals; and, if trustees hold for them, they are rateable in the name of their trustees. On the other hand, it seems to me that if the occupier is agent or trustee for a body who are the general public, then, according to the decisions, and upon the true construction of the statute of Elizabeth, the property is not rateable; and that is consistent with the first and leading case on the subject, —I mean the case of *The King v. The Commissioners of Salter's Load Shute*, 4 T. R. 730, —and all the cases down to the case of *The Birkenhead Docks*, 2 Ellis & B. 148, as far as I am aware.

Then, that brings the question to this narrow point, —is this a public purpose? Mr. Bovill says it is not, because it is only a portion of the public who use it, viz. capitalists who invest money in ships. It might equally be said of a public highway for carriages, that that is for the use of that branch of the public only who invest their property in carts and waggons. In one case as well as the other, all have a right to use it. And, if a great public harbour like this, open for all the public, is to be rated, I do not see how we can avoid going on and saying that the occupier of the soil, over which there is the easement of a public highway, is also rateable for the value of the benefit which the public receive. The distinction between the two is this, —but it is no distinction in principle, —the frequenters of this great public harbour pay a compensation for the use of it. Put the case of a turnpike-road: [145] there, the public pay a toll for the use of the road. There is, indeed, now an act of parliament specially exempting the tolls of a turnpike-road: but that was intended to meet the case of mortgagees in possession. It had been decided long before that the soil of a public turnpike-road is not rateable, on the ground that it belongs to the public. Now, I cannot conceive any difference, in principle, I must admit, between the case of a public harbour, where any man may enter with his ship and pay a compensation towards the sustentation of the harbour, and the case of a public road, where any man may enter with his vehicle and pay his contribution towards the support of the road.

Upon these grounds, I am bound to say that it seems to me that the case of *The King v. The Inhabitants of Liverpool* was rightly decided. At the same time, I place my judgment, as I said before, on the incompetency of this court to review a solemn decision of the court of Queen's Bench, recognized by them when they had all the opposite considerations before their eyes; especially when I see several acts of parliament which in this particular case have treated that as being law, whatever it may do in other cases, which is to conclude all questions arising between the parishes of Liverpool and the docks in that borough.

Judgment for the plaintiffs.

[146] IN THE MATTER OF AN ARBITRATION BETWEEN THE DUKE OF BEAUFORT AND THE SWANSEA HARBOUR TRUSTEES. Jan. 20th, 1860.

[S. C. 29 L. J. C. P. 241 : 6 Jur. N. S. 979. Referred to, *R. v. Metropolitan Railway Company*, 1883, 48 L. T. 369.]

Lands of the Duke of Beaufort being required by the Swansea Harbour trustees, the latter gave notice under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the matter was referred to arbitrators, or an umpire, who were to determine "what consideration or sum or sums of money should be paid by the trustees for the purchase by them in fee-simple of the lands, and what other, if any, sum or sums of money should be paid by the trustees as or by way of compensation for or in respect of the damage or injury (if any) to be sustained by the Duke by reason of the severing of the lands from other lands of the Duke," &c.—The arbitrators and umpire sat together and heard evidence on both sides, including evidence that the Duke would sustain damage by reason of the severance of his lands, and by their being otherwise injuriously affected: and ultimately the umpire, by his award, reciting the submission, awarded as follows,—“Having heard the parties, and having weighed and considered the evidence and matters so referred to me as aforesaid, I do hereby award, &c., that the sum of 5627l. is the consideration money or value, and shall be paid by the trustees for the purchase by them in fee simple of the said lands,” &c.:—Held, that the award was good; for, that the silence of the umpire on the subject sufficiently negatived the claim for severance damage.

The Swansea Harbour trustees requiring certain land belonging to the Duke of Beaufort for the improvement of their harbour and works, gave him the proper notice of their intention to take it and to have the amount of purchase-money and compensation assessed by a jury, offering at the same time a sum of 3500l., to include both purchase-money and compensation for severance damage. The Duke, however, declined to accept that offer, but claimed 7046l. 5s. for the purchase-money, and 1424l. for severance damage, and gave the trustees notice of his desire to have his claim settled by arbitration under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). The parties not agreeing as to the appointment of a single arbitrator, each named one, and the two arbitrators were by their award, if they could agree, to “determine what consideration or other sum or sums of money was or were the value, and should be paid by the said Swansea Harbour trustees for the absolute purchase by them in fee-simple in possession of the said lands and hereditaments described or referred to in the schedule thereunder written, and what other (if any) sum or sums of money should be paid by the said trustees as or by way of compensation for or in respect of the damage or injury (if any) to be sustained by the said Duke of Beaufort by reason of the severing of the [147] same lands and hereditaments from the other lands of the said Duke of Beaufort, or otherwise injuriously affecting such other lands by the exercise of the powers of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), or the Swansea Harbour Act, 1857 (20 & 21 Vict. c. cxlii.), or any act incorporated therewith.”

The two arbitrators before proceeding appointed an umpire pursuant to the provisions of the Lands Clauses Consolidation Act, 1845; and the three sat together and heard the evidence on both sides, including evidence on behalf of the Duke shewing the damage he would sustain by reason of the severance of his lands, and by their being otherwise injuriously affected by the proposed works.

The umpire ultimately made his award, which, after reciting the submission and his appointment, and that the arbitrators did not agree as to the matters referred, and that the same had accordingly been referred to him as umpire, was as follows:—

“Know ye, that I, J. C., having taken upon myself the charge and burthen of the said umpirage, and having viewed the premises and heard the parties, and having weighed and considered the evidence and matters so referred to me as aforesaid, do hereby award, settle, and determine that the sum of 5627l. is the consideration money or value, and shall be paid by the Swansea Harbour trustees for the absolute purchase by them in fee-simple in possession of the said lands and hereditaments described or

referred to in the schedule to the said recited appointment of the 27th day of June, 1859."

Grove, Q. C., in Michaelmas Term last, obtained a rule nisi to set aside this award, on the ground that it was not final, and did not determine all the matters in difference between the parties.

[148] Bovill, Q. C., and Phipson, now shewed cause, upon affidavits (amongst others) of the umpire, in which he deposed, that the sum of 5627l. was fixed and awarded as the sum to be paid by the Swansea Harbour trustees to the Duke solely and exclusively for the absolute purchase in fee-simple in possession of the lands and hereditaments mentioned to be required by the trustees; that he (the umpire) was of opinion, and in fact determined, that the Duke of Beaufort had not sustained any damage or injury by reason of the severing of the same lands and hereditaments from the other lands of the Duke, or otherwise injuriously affecting such other lands by the exercise of the powers of the Lands Clauses Consolidation Act, 1845, or the Swansea Harbour Act, 1857, or any act incorporated therewith; that, upon the evidence adduced before him, no sum of money whatever was in his judgment payable by the trustees to the Duke in respect of any such alleged damage, but by an inadvertence in drawing up the award his finding and determination in that respect was omitted to be stated therein; and that, to the best of his judgment and belief, the sum which he had awarded to the Duke of Beaufort in and by the award was a full and adequate compensation for all claims of the Duke in respect of the taking of his land by the trustees, and the exercise by them of the powers of their special act or the acts incorporated therewith.

The arbitrator has sufficiently disposed of the whole matter referred to him. After a recital of the submission, he proceeds to make his award thus,—“having weighed and considered the evidence and matters so referred to me as aforesaid, I do hereby award, settle, and determine that the sum of 5627l. is the consideration money or value, and shall be paid by the Swansea Harbour trustees for the absolute purchase by them in fee-simple in possession of the said lands,” &c. [149] The award is not rendered invalid by the silence of the arbitrator as to one of the matters referred. In 1 Wms. Saund. 33 a., n. (b), it is said that the opinion of the court in the principal case (*Birks v. Trippett*, 2 Saund. 32) “was recognized and acted upon in *Wharton v. King*, 2 B. & Ad. 528, as an authority to shew that, by an award of general releases, the arbitrator must be deemed to have taken into consideration matters in difference submitted and made known to him, although not mentioned specifically in his award. And it should seem, that, even where there is no award of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator does not per se prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good, notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters submitted to him, provided it does not appear that he has excluded any: *Gray v. Greenup*, 1 B. & Ald. 106; *Hayllar v. Ellis*, 6 Bingh. 225, 3 M. & P. 553; *In re Gillon*, 3 B. & Ad. 493; *Day v. Bonnin*, 3 N. C. 219, 3 Scott, 597; *In re Brown*, 9 Ad. & E. 522, 1 P. & D. 391; *Dunn v. Walters*, 9 M. & W. 293; *Wright v. Curnell*, 1 Dowl. N. S. 327; *Feale v. Warner*, 1 Wms. Saund. 327, n. (2).” The point came under discussion in the Exchequer Chamber in a case of *Harrison v. Creswick*, 13 C. B. 399. There, a cause and all matters in difference between the parties were referred to a barrister. A cross-claim was urged on the part of the defendant before the arbitrator. The arbitrator, professing to make his award “of and concerning the said several premises so referred as aforesaid,” after disposing of all the issues in favour of the plaintiff, directed the defendant to pay a gross sum to the plaintiff, apportioned the costs of the reference and award, and, on [150] payment thereof, directed that the plaintiff should execute and deliver to the defendant a general release; but nothing was said in respect of the cross-claim: and it was held that the award was nevertheless final; for, that it must be intended from the silence of the arbitrator upon the subject that he had negatived the cross-claim. In the course of the argument, Parke, B., says that, “unless the contrary appears, the court will presume that the award finally disposes of all the matters in difference:” and Alderson, B., says,—“Where, from its nature, a claim is such as to require an affirmative decision to give it, silence will not do so: but, where the claim is such as to require only a negative decision, is not the omission to say anything about it a

decision against the claim?" And, in delivering judgment, Parke, B., says: "The rule is this,—where there is a further claim made by the plaintiff, or a cross-demand set up by the defendant, and the award, professing to be made of and concerning the matters referred, is silent respecting such further claim or cross-demand, the award amounts to an adjudication that the plaintiff has no such further claim, or that the defendant's cross-claim is untenable: but, where the matter so set up from its nature requires to be specifically adjudicated upon, mere silence will not do." In the case of *Bradshaw and the East and West India Docks and Birmingham Junction Railway Company*, 12 Q. B. 562, it was held to be no objection, under the 63rd section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), to the award of an umpire made under s. 28, that the price of the land and the compensation for damage by severance, though each is expressly claimed, are assessed in a gross sum. [Williams, J. The object of the reference is, to fix the amount of the purchase-money. How would the sum be stated in the conveyance?] The gross amount would be stated as the purchase-money: see the form [151] Schedule (A.). The 49th section enacts that, "where such inquiry,"—that is, where a jury is impanelled,—"shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, &c., and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any act incorporated therewith." But the language of the 63rd section is different. It enacts that, "in estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damages, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith." There is nothing upon the face of this award to shew that the arbitrator has not properly performed his duty.

Grove, Q. C., and G. Somerset, in support of the rule. Where the arbitrator awards payment of a balance by the one party to the other, he may be assumed to have taken into his consideration conflicting claims. But no case can be found in which the award has been held good where an arbitrator, having several matters re-[152]ferred to him, expressly makes his award of and concerning one of those matters, and omits all mention of the others. Here, the umpire has in terms confined his award to one of the matters referred; for, he expressly awards and determines "that the sum of 5627l. is the consideration money or value, and shall be paid by the Swansea Harbour trustees, for the absolute purchase by them in fee-simple in possession of the said lands and hereditaments." [Erle, C. J. There is no duty cast upon the arbitrators by the statute to distinguish between the amount of purchase-money and the sum awarded for damage by severance. In the conveyance, it seems, the consideration expressed would be the whole sum the company is to pay.] In *Doe d. Madkins v. Horner*, 8 Ad. & E. 235, 3 N. & P. 344, where an arbitrator to whom all matters in difference in an ejectment cause were referred, awarded "of and concerning the matters referred" that the plaintiff was entitled to the possession "of a certain part of the lands sought to be recovered," which he set out by boundaries, and concluded his award without any further adjudication,—it was held bad, for want of any decision as to the residue. That case was acted upon in *Doe d. Starling v. Hillen*, 2 Dowl. N. S. 694. In *Randall v. Randall*, 7 East, 81, upon a reference of all actions, controversies, &c., and also of two distinct matters of difference, it was held that the arbitrator's omission to decide one of such distinct matters vitiated the whole award. Lord Ellenborough said: "The arbitrators had three things submitted to them; one was, to determine all actions, &c., between the parties; another was, to settle what was to be paid by the defendant for the hop-poles and potatoes in certain land; the third was, to ascertain what rent was to be paid by the plaintiff to the defendant for certain other land. The authority given to the arbitrators was conditional, [153] ita quod they should arbitrate upon those matters by a certain day.

If, then, they fail as to one of them, the condition has not been performed upon which the award was to have its obligatory effect: and here they have stopped short, and have omitted to settle one of the subjects of difference which was stipulated for." In *Gyle v. Boucher*, 5 Dowl. P. C. 127, it was held by Coleridge, J., that, where a cause and all matters in difference are referred to an arbitrator, and by his award he merely directs a verdict to be entered in favour of the plaintiff for one entire sum, the award is not final, and therefore is bad. [Williams, J. That case is not now considered to be law. Willes, J. It is treated in the text books as having been overruled by the decision of the Exchequer Chamber in *Harrison v. Creswick*, 13 C. B. 399 (a). Williams, J. The impression of this court when *Creswick v. Harrison*, 10 C. B. 441, was before it, was also adverse to *Gyle v. Boucher*.] In *re Robson and Boulston*, 1 B. & Ad. 723, on a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party; no evidence was therefore given concerning it, nor any adjudication upon it requested. The arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money (without saying on what account) to the party against whom the above claim had been made, with costs: and it was proved that they left that claim out of consideration in making their award, a matter not in dispute: and it was held that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. So, in the case of *In re Riders and Fisher*, 3 N. C. 874, 5 Scott, 86, in a dispute upon a building contract, arbitrators were to award on alleged defects in the building, [154] on claims for extra work, and deductions for omissions, and to ascertain what balance, if any, might be due to the builder: and an award ordering a gross sum to be paid to the builder, without any decision on the alleged defects, was held ill. In *re Smith and Wilson*, 2 Exch. 327, by agreement in writing certain disputes were referred to arbitration, "the costs of the submission, reference, award, and of making the submission a rule of court, to be in the discretion of the arbitrators." The arbitrators awarded that the costs of the submission, reference, and award should be borne by the parties in equal proportions; and that the costs of making the submission a rule of court should be paid by such of the parties through whose default in the performance of the award the same should become necessary: and it was held that the award was not final or certain as to the costs of making the submission a rule of court, and therefore bad. That decision was upheld in *Williams v. Wilson*, 9 Exch. 90. In *re Tribe and Upperton*, 3 Ad. & E. 295, and *Ross v. Boards*, 8 Ad. & E. 290, are to the same effect. These authorities shew that, where several matters are referred to an arbitrator, and he awards as to one of them only, taking no notice of the others, the award is bad. One test of the validity of this award is, to see whether, if the Duke brought an action for the damage by severance, the award would be an answer. It clearly could be no answer, when there is nothing to shew that it ever entered the mind of the arbitrator. In *Bradshaw and the East and West India Docks and Birmingham Junction Railway Company*, 12 Q. B. 562, there was a distinct determination by the umpire upon every matter referred: and the only objection was that the award omitted to distinguish how much was given in respect of each. Assuming that the omission was a mistake, the court cannot deal with it. [Williams, J. May we not send it back to the arbitrators to be recti-[155]-fied?] No. The 8th section of the Common Law Procedure Act, 1854, does not apply. [Willes, J. In *re Morris and Morris*, 6 Ellis & B. 383, the court of Queen's Bench held that the power given to the court under that section is not confined to references under that act.] The point does not arise here.

ERLE, C. J. I am of opinion that this rule should be discharged. It is a rule calling upon the trustees of the Swansea Harbour to shew cause why an award should not be set aside, on the ground that the umpire has not determined all the matters referred. It was referred to the arbitrators to determine what consideration or other sum or sums of money was or were the value and should be paid by the trustees for the absolute purchase by them in fee-simple in possession of the lands and hereditaments described or referred to in the schedule, and what other, if any, sum or sums of money should be paid by the said trustees as or by way of compensation for or in respect of the damage or injury (if any) to be sustained by the Duke of Beaufort by

(a) See Russell on Arbitration, 2nd edit. 273: Arch. Pr. by Prentice, 9th edit. p. 1565.

reason of the severing of the same lands and hereditaments from the other lands of the Duke, or otherwise injuriously affecting such other lands by the exercise of the powers of the Lands Clauses Consolidation Act, 1845, or the said Swansea Harbour Act, 1857, or any act incorporated therewith. The umpire has awarded a sum as the consideration money or value of the fee-simple of the lands: and therefore it is contended that he has given no decision upon the point what sum, if any, is due for compensation for severance. But I am of opinion that the arbitrator has substantially decided both these matters. Consider the way in which this reference arises. It arises under the Lands Clauses Consolidation Act, 1845, by which a series of provisions is made for the summary taking of [156] land in order to enable the undertakers to proceed with the work without delay, and to ascertain the amount to be paid to the owners for the price of the land and compensation for severance damage. The parties desirous of taking the land are to give notice (s. 18), and the land-owner is to say how much he claims for the value of the land and how much for severance damage (s. 21). The claim having been sent in, the amount to be paid is to be settled by private agreement. The amount to be paid, all through the statute, down to the provision, to which I shall advert presently, for the verdict of a jury, is the one question in dispute which is contemplated. If the parties can agree as to the amount to be paid in respect of the two descriptions of claim, the one sum being paid, there are no means by the act of ascertaining how much is given in respect of each. Where the amount claimed is under 50l., it is to be inquired into before two justices, who are to say what is the amount of compensation to be paid (s. 22). If the amount claimed exceeds 50l., and the parties choose to have the claim settled by arbitration, the single question to be referred is, the question of disputed compensation for the value of the land and for the severance damage (ss. 24-37). But the amount to be paid for the two claims is the practical question. It has been held (in *Bradshaw's case*) that an award of a lump sum in respect of both claims, not distinguishing how much for the one and how much for the other, is a good award. The only case in which it is provided that the two amounts shall be separately ascertained is where the parties do not agree, and the sum is too large to be the subject of inquiry before justices, and the parties will not consent to a reference, but a jury is summoned (ss. 38 et seq.); and these, by s. 49, are expressly required to be assessed separately. Throughout the whole series of provisions, it is only in the case [157] of an assessment by a jury that the amount of compensation due in respect of the value of the land is to be assessed and ascertained separately from the amount of damage by severance. That, however, has been held to be directory only, and not imperative: and the proceeding is not void if that direction be not obeyed. There is no analogy between the proceeding by arbitration and the assessment of compensation before a jury. The arbitrator is to say what sum the owner is entitled to for the purchase of the land and for severance damage, if any. Both these claims are by the terms of the submission distinctly brought to his notice: and he says, that, having viewed the premises and heard the parties, and having weighed and considered the evidence and matters so referred to him as aforesaid, he awards and settles that 5627l. is the consideration money or value, and shall be paid by the trustees for the purchase in fee-simple of the lands. As to the question of severance damage he is silent. I infer from his silence that he in effect decides that nothing is due for severance damage. The question was, what was the amount to be paid? That being ascertained, there is an end of the matter. I arrive at this conclusion because I find the tenor of the later decisions to be, that, where matters are referred to an arbitrator, and there are cross claims, it is not necessary for the arbitrator in terms to dispose of the claims on the one side and on the other, but that it is enough if it appears on the face of his award that he has considered them, and that he awards a sum to be paid as the balance by one party to the other. Unless we can assume the arbitrator to have made a blunder here, I am of opinion that he has substantially and sufficiently decided that the sum he has given is the value of the land taken, and that nothing is due in respect of severance damage. Whether this award would be a [158] protection to the company against an action in respect of severance damage, is in truth the same question. If it disposes of the whole question referred, it would beyond all doubt be an answer. Upon the whole, I am clearly of opinion that this case falls within the principle of the decision in *Harrison v. Creswick*, 13 C. B. 399, and that the rule should be discharged.

WILLIAMS, J. I am entirely of the same opinion. The cases have long ago settled,

that, where several cross-claims are the subject of a reference, and the arbitrator by his award directs a sum to be paid by one party, without mentioning the cross-claim, his silence is tantamount to a negation of the cross-claim. Lord Abinger in *Dunn v. Warters*, 9 M. & W. 293, expresses his disapprobation of these cases. He says: "But for these authorities, I should certainly have thought, that, as the award must be in writing, its silence as to any matter in difference brought before the arbitrator prevented it from being a sufficient exercise of the authority vested in him by the submission. There would be much weight in the argument that the words 'of and concerning the premises' shewed that the matter in question had been disposed of, if that matter had been previously mentioned in specific terms; but that has not been done. The authorities, however, especially the case of *Gray v. Greenway*, 1 B. & Ald. 106, are too strong to be got over." The answer to the noble Lord's objection to what he calls "written silence" is, that the arbitrator, by awarding on one claim, and directing payment of a sum of money in respect of that, must be taken to mean to award in respect of that claim only. The question is, whether the now well-established rule applies to this case. I see nothing on the face of the award to satisfy me that it should not: but, on the contrary, I think there are several [159] features which call for its application. The umpire recites the submission and his appointment, and twice adverts to the severance claim: and he proceeds to award the Duke a sum of money as the value of the land taken, but is altogether silent as to there being anything payable in respect of severance. It seems to me, therefore, that his silence as to the latter claim is neither more nor less than an averment that nothing is due in respect of it.

WILLES, J. I am of the same opinion. It appears to me that this award must be read as having been made of and concerning all the matters referred, just as much as if the arbitrator had in terms stated it to have been made de premissis. The use of that expression is unnecessary now; for, the court will assume that the award is made upon all the matters referred, unless it is apparent on the face of it that it is not so made. As to the argument urged on the part of the Duke, that difficulties may arise in future proceedings in which it may be necessary to rely upon this award, from its omitting to shew on the face of it that the umpire intended to negative the claim in respect of severance damage,—it seems to me that that is only an objection of form. It certainly would be desirable for the arbitrators in such cases distinctly to negative the claim for severance damage, if they mean so to do: but it is not necessary that they should. I apprehend it would always be competent to the parties, in case a question should at any time arise as to whether or not the claim for severance damage was really disposed of by the award, to aver that that was a matter in difference before the arbitrator; and then the finding as it now stands would shew that the arbitrator negatived the existence of any foundation for the claim. That was the reasoning of the court of [160] Queen's Bench in the case of *In re Brown and the Croydon Canal Company*, 9 Ad. & E. 522, 1 P. & D. 391. There, a canal company agreed with B. for the use of an engine constructed by him, during a term of years, they paying a stipulated annual sum. In the course of the term, disputes arising, the parties put an end to the agreement, and referred all matters in difference between them to arbitration. On the reference, B. claimed, among other things, compensation for future loss in respect of the part of the term unexpired. The company stated a set-off. The arbitrators by their award, reciting the submission to arbitration, and that they had heard and considered all the evidence of each party, and had investigated all the accounts and vouchers touching the matters in difference, adjudicated (not saying that they did so of and concerning the matters referred) that there was due from the company to B. 515*l.*, which they directed the company to pay him. On motion to set aside the award, on the grounds,—first, that it was not final, inasmuch as no decision appeared touching the future damage,—secondly, that it was uncertain,—thirdly, that it left a doubt whether or not the set-off had been considered,—the court held that the award was sufficient. And Littledale, J., said: "Comparing the submission bonds with the recital in the award immediately preceding the adjudication ('we, having fully heard and maturely considered all the evidence, &c.), I think it is clear that the award is upon all the matters in difference. It does not purport to be made 'of and concerning the premises,' but that, according to the later decisions, is not necessary. Nor is any sufficient objection raised on affidavit. As to the set-off,—if sums are claimed on one side, and set-off on the other, I do not think it is neces-

sary that the claims on each side should be noticed by the award : it [161] is sufficient to state the balance. Then it is said, that, in this case, a future debt was in difference, and it should have appeared how much was due for that. It is clear that an arbitrator on a reference of matters in difference has power over all matters down to the period of the submission, but cannot award on future and contingent claims. The parties, however, may give him such a power if they think fit ; and the arbitrator will then award what is due on each account. That power being given here, it is said that the award ought to have shewn what was due at the time of the submission, and what was the claim for future damage. I see no reason for that. If an action were brought for any part of the contingent damage subsequently arising, the award might be pleaded in bar ; and, with a view to that, it would certainly be more desirable that arbitrators in such a case as this should set out what is allowed for present and what for future damage. But this is not strictly necessary ; the subject-matter of the adjudication may be explained afterwards by evidence, as is done in many cases arising on awards. This part of the question turns more upon what is reasonable and convenient, than what is necessary." If the umpire in his award here had said distinctly "I award that the sum of 5627l. shall be paid by the Swansea Harbour trustees in respect of the claims of the Duke of Beaufort," would that have been bad ? It must be conceded that it would not. Why would it have been sufficient ? Either on the ground that it shewed that the award included both claims, or on the ground that that sum was awarded in respect of one claim, the other being negatived. In any view, therefore, it appears to me that this award is sufficient.

Rule discharged, with costs.

[162] WALTON v. LAVATER. May 4th, 1860.

[S. C. 29 L. J. C. P. 275.]

The assignee of a patent may maintain an action for an infringement, even though he has acquired the right by assignment of two separate moieties, and the party sued is the original grantee.—And the action is maintainable, although there has been no infringement since the defendant has received notice that the entire interest in the patent has become vested in the plaintiff.—A sale in this country of the patent article imported from abroad is an "user" of the invention, within the prohibition of the letters-patent.—Form of rule or order for account, under the 15 & 16 Vict. c. 83, s. 42.

This was an action for an alleged infringement of a patent.

The declaration stated that the defendant was the true and first inventor of a certain new manufacture, that is to say, "The application of the principle of exhausting air as used in plate-holders, breast-pumps, for pegs," and thereupon Her Majesty Queen Victoria by her letters-patent under the great seal of the United Kingdom of Great Britain and Ireland, granted to the defendant, his executors, &c., the sole privilege to make, use, exercise, and vend the said invention within the said United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, during the term of fourteen years from the 7th of January, 1858, subject to a condition that the defendant should within six calendar months next after the date of the said letters-patent, cause to be filed in the great seal patent office an instrument in writing under his hand and seal particularly describing and ascertaining the nature of the said invention and in what manner the same is to be performed ; and the defendant did within the time prescribed fulfil the said conditions : That afterwards, and before the making and filing of the disclaimer and memorandum of alteration thereafter mentioned, by an indenture made between the defendant of the one part and the plaintiff of the other part, the defendant assigned one equal half part of and in the said letters patent and patent right unto the plaintiff : That afterwards, and before the committing of the infringement thereafter mentioned, the plaintiff and the defendant, having first obtained the leave of Her Majesty's attorney-general, certified by his [163] fiat and signature, did, according to the statute in such case made and provided, file in the office appointed for filing specifications in Chancery under the Patent Law Amendment Act, 1852, a disclaimer and memorandum of alteration under the hands

and seals of the plaintiff and defendant respectively, whereby certain parts of the specification filed in the great seal patent-office in pursuance of the said letters-patent, were respectively disclaimed and altered as therein mentioned, stating therein the reasons for such disclaimer and memorandum of alteration; and that the said disclaimer and memorandum of alteration were not such a disclaimer or alteration as could or did extend the exclusive right granted by the said letters-patent: That, after the making of the said letters-patent, and before the committing of the infringement thereafter mentioned, by virtue of certain indentures, that is to say, the said indenture hereinbefore mentioned, and a certain other indenture made between N. S. Dodge and R. L. Giandonatti of the one part, and the plaintiff of the other part, the said letters-patent and the sole privilege so granted by the said letters-patent as aforesaid became and were assigned to the plaintiff: That, after the making of the said several indentures respectively, and before the committing of the infringement thereafter mentioned, each of the said indentures was duly entered in the register of proprietors kept at the office for filing specifications under the Patent-Law Amendment Act, 1852; and thereupon the whole of the said sole privilege so granted by the said letters-patent as aforesaid became and were vested in the plaintiff: That the defendant afterwards, and after the making, entering, and filing the said disclaimer and memorandum of alteration, and after the making and registering of the said several indentures, and during the said term, did infringe the said patent right: And the plaintiff [164] claimed 10,000l.: And the plaintiff prayed that an account might be taken and kept of all profits which had been, or which during the pending of this suit might be, made or obtained by the defendant by the infringement of the said patent right, and that the defendant might be by the court here ordered and compelled to pay the amount of all such profits to the plaintiff.

Plea, not guilty. Issue thereon.

The following particulars of breaches were delivered by the plaintiff:—

“That the defendant, at divers times between the 6th day of June, 1859, and the day of the commencement of this suit, made and caused to be made pegs, brackets, and similar articles according to and also in imitation of the invention comprised in the said letters-patent and described in the specification filed in pursuance of the same letters-patent; and also sold and used and caused to be sold and used divers pegs, brackets, and similar articles respectively made in manner aforesaid. The precise numbers, dates, and amounts of such infringements are not at present known to the plaintiff; but, when the same shall have been ascertained, the plaintiff will claim to recover against the defendant full compensation in respect of all such infringements as aforesaid. The plaintiff will also claim from the defendant an account of all profits which he has since the 6th day of June, 1859, made, or which he may hereafter make, by the infringement of the said letters-patent. Dated this 18th day of November, 1859.”

The cause was tried before Byles, J., and a special jury at the sittings at Westminster after last Michaelmas Term.

The provisional specification, of the 7th of January, 1858, the complete specification, filed the 6th of July, [165] 1858, and the disclaimer, filed the 11th of December, 1858, were put in. The provisional specification was as follows:—

“Provisional specification left by the said Manuel Leopold Jonas Lavater at the office of the commissioners of patents, with his petition, on the 7th of January, 1858.

“I, the undersigned Manuel Leopold Jonas Lavater, india-rubber manufacturer, of 23 Holywell Lane, Shoreditch, London, do hereby declare the nature of the said invention for ‘The application of the principle of exhausting air, as used in plate-holders, breast-pumps, for pegs,’ to be as follows:—

“I have applied for pegs the principle of exhausting air as used in plate-holders, breast-pumps, so that an exhausting apparatus made in the shape of pegs, I apply on window-glasses, walls, for hanging articles on: I therefore claim as my invention the application of the said principle for pegs of all shapes.”

The complete specification was as follows:—

“Specification in pursuance of the conditions of the letters-patent, filed by the said Manuel Leopold Jonas Lavater in the Great Seal Patent-Office on the 6th July, 1858.

“To all to whom these presents shall come, I, Manuel Leopold Jonas Lavater, india-rubber manufacturer, of 23 Holywell Lane, Shoreditch, London, send greeting:

“Whereas, Her most excellent Majesty Queen Victoria, by Her letters-patent, bearing date the 7th day of January, 1858, in the 21st year of Her reign, did, for

herself, her heirs and successors, give and grant unto me the said Manuel Leopold Jonas Lavater, Her special licence that I the said Manuel Leopold Jonas Lavater, my executors, administrators, and assigns, or such others as I the said Manuel Leopold Jonas [166] Lavater, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for 'The application of the principle of exhausting air (pneumatics), as used in plate-holders, breast-pumps, cuppings, for instruments to be called self-adhering pegs, or pneumatic brackets, or pneumatic instruments or utensils,' upon the condition (amongst others) that I the said Manuel Leopold Jonas Lavater, my executors or administrators, by an instrument in writing under my or their or one of their hands and seals, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent-Office within six calendar months next and immediately after the date of the said letters-patent:

"Now know ye that I the said Manuel Leopold Jonas Lavater do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

"My invention consists in the application of the principle of pneumatics to cause pegs, brackets, and other similar articles to adhere mechanically on solid surfaces, such as glass, walls, pannels, furniture; the said pneumatic pegs, brackets, and other similar articles, adapted with accessories, such as holes, rings, hooks, nails, springs, buttons, slides, screws, and other similar means, for the purpose of receiving and supporting or fastening articles, such as chandeliers, candlesticks, sconces, lamps, vases, shelves, shaving or other glasses, [167] furniture, fixtures for gas reflectors, stands for hatters, milliners, drapers, and other trades, and generally all articles or goods that is required to be supported.

"Process of manufacture.

"On the edge of a wooden cup is fixed an india-rubber disk (as used in plate-holders), and on the top of the said cup is placed a rotary cylinder, the inside of which is a female screw or knot.* The cylinder and cup are traversed through the centre by a square stem, the end of which is a screw working in the knot* of the cylinder; to the other end of the stem is attached a flat button, which is fastened to the disk.

"The method of using the above named pneumatic utensils are as follows:—The disk should be placed on any solid surface, when, by turning the cylinder, it acts on the stem which draws the india-rubber disk and creates a vacuum, greater or less according to the modulation of the screw, which when done the utensil will remain secure. For disadhering the said utensil, unscrew the cylinder till the disk is forced flat.

"Other known methods of creating a vacuum I use instead of the aforesaid screw, such as india rubber bottles or balls, pumps, but I prefer the said screw, which I apply also to breast pumps, cuppings, plate holders, and other similar instruments and utensils; and, in manufacturing the above pegs, brackets, breast pumps, cuppings, plate holders, and other similar pneumatic instruments and utensils, I do not confine myself to any express shape, form, or size (which will vary according to their application and use): also I use all kind of materials in the course of manufacture. In witness whereof, I the said Manuel Leopold Jonas Lavater have hereunto set my hand and seal this 25th day of June, 1858."

The disclaimer and memorandum of alteration were as follows:—

[168] "In the matter of a patent granted to Manuel Leopold Jonas Lavater, india rubber manufacturer, of 23 Holywell Lane, Shoreditch, London, for the invention of 'the application of the principle of exhausting air, as used in plate holders, breast-pumps, for pegs,' bearing date the 7th day of January, 1858, and which said letters-patent have become and are now vested in the said Manuel Leopold Jonas Lavater, and Christopher Walton, of Ludgate Street, in the city of London, goldsmith.

"Disclaimer and memorandum of alteration proposed to be entered by the said

* Nut.

Manuel Leopold Jonas Lavater and Christopher Walton, as such patentee and assignee as aforesaid, pursuant to the statutes in that case made and provided.

"Whereas the said patentee and assignee have been advised that the title and specification of the said invention are ambiguous and uncertain, and that it is doubtful whether the specification does not claim more than was new at the date of the said letters-patent; for which reason we the said Manuel Leopold Jonas Lavater and Christopher Walton wish to disclaim and alter the title and specification of the said invention, as follows:—

"We strike out the words 'as used in plate-holders, breast-pumps,' from the title inserted in the said letters-patent: we also strike out the words '(pneumatics) as used in plate-holders, breast-pumps, cuppings;' also the words 'instruments to be called self-adhering;' also the words, 'or pneumatic brackets, or pneumatic instruments or utensils,'—which words were introduced in error into the title in the preamble of the said specification: and we insert the word *fixing* between the words 'for' and 'pegs,' and also the words *to solid surfaces* after the word 'pegs,' so that the title in the said letters-patent and in the preamble of the said [169] specification will be in the words following, viz. 'The application of the principle of exhausting air for fixing pegs to solid surfaces.' We also wish to disclaim the parts of the specification which are in the words following, viz. 'which I apply also to breast-pumps, cuppings, plate-holders, and other similar instruments and utensils, and;' and also the words 'and utensils.'

"And, in order to make sense in the descriptive parts of the specification, we alter it in such manner, that, when the disclaimer and alteration have been made, the specification will be in the words following, that is to say,—

"To all to whom these presents shall come, I, Manuel Leopold Jonas Lavater, india-rubber manufacturer, of 23 Holywell Lane, Shoreditch, London, send greeting:

"Whereas, Her most excellent Majesty Queen Victoria, by Her letters-patent, bearing date the 7th day of January, 1858, in the twenty-first year of Her reign, did, for Herself, Her heirs and successors, give and grant unto me, Manuel Leopold Jonas Lavater, Her special licence that I the said Manuel Leopold Jonas Lavater, my executors, administrators, and assigns, or such others as I the said Manuel Leopold Jonas Lavater, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for, 'The application of the principle of exhausting air for fixing pegs to solid surfaces,' upon the condition (amongst others) that I the said Manuel Leopold Jonas Lavater, my executors or administrators, by an instrument in writing under my or their or one of their hands and seals, should particularly describe and ascertain the nature of the said invention, and in [170] what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent-Office within six calendar months next and immediately after the date of the said letters-patent:

"Now know ye that I the said Manuel Leopold Jonas Lavater do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

"My invention consists in the application of the principle of pneumatics to cause pegs, whether to act as brackets or other similar articles, to adhere mechanically on solid surfaces, such as glass, walls, pannels, and furniture. The said pneumatic pegs, whether in the form of brackets or other similar articles, may be adapted (with accessories, such as holes, rings, hooks, nails, springs, buttons, slides, screws, and other similar means,) for the purpose of receiving and supporting or fastening articles, such as chandeliers, candlesticks, sconces, lamps, vases, shelves, shaving or other glasses, furniture, fixtures for gas-reflectors, stands for hatters, milliners, drapers, and other trades, and generally all articles or goods that are required to be supported on pegs fixed to solid surfaces.

"Process of manufacture. On the under side in an inverted wooden cup is fixed an india-rubber disk, and on the top of the said cup is placed a rotary cylinder, on the inside of which is formed a female screw or screw-nut. The cylinder and cup are traversed through the centre by a stem, the outer end of which is formed into a screw working in the screw-nut of the cylinder: to the other end of the stem is attached a flat button, which is fastened air-tight to the disc of india-rubber.

"The method of using the above-named pneumatic pegs is as follows:—"The disc should be placed on any solid surface, when, by turning the cylinder, it acts on [171] the stem, which draws the india-rubber disc into the cup and creates a vacuum, greater or less according to the extent the screw is moved, and the peg will remain secure. For disadhering the said peg, unscrew the cylinder or nut till the disc is forced flat. Other known methods of moving the disc may be used instead of the aforesaid screw; but I prefer the said screw. In manufacturing the said pegs, whether in the form of brackets or other similar pneumatic instruments, I do not confine myself to any express shape, form, or size (which will vary according to their application and use), or to the use of any particular kind of materials in the course of manufacture. In witness," &c.

The assignment by the defendant of a moiety of the patent to the plaintiff on the 28th of September, 1858, in consideration of 1000*l.*, was proved. It was also proved that the defendant, in consideration of 250*l.*, assigned to certain persons named Dodge and Giandonatti the remaining moiety of the patent, by an indenture of the 4th of February, 1859; and that, on the 6th of June, 1859, Dodge and Giandonatti, in consideration of 400*l.*, assigned such moiety to the plaintiff, who thus became entitled to the whole of the English patent.

It further appeared that the defendant, after he had assigned both moieties of the patent, imported from France (where he had the privilege of manufacturing them), large quantities of the patent articles, which bore his name, and which he offered for sale and sold in his shop in London, and elsewhere by means of travellers, and which he continued to sell down to the 14th of June, 1859, when he was served with the following notice:—

"4 Tokenhouse Yard, 13 June, 1859.

"Sir,—We are instructed by Mr. C. Walton, of, &c., who is the sole owner and proprietor of letters-patent granted to you, and bearing date the 7th of January, [172] 1858, for an invention for 'The application of the principle of exhausting air for fixing pegs to solid substances,' to require you to render an account of all pneumatic brackets and other articles you have made, used, or vended in infringement of the said letters-patent and invention; and to give you notice and warn you not to infringe the said letters-patent, and that, if you do so, he will apply to the court of Chancery for an injunction to restrain you and your agents, servants, and others, from making, using, or selling any articles according to the said invention, or in violation thereof; and he will also take proceedings at law for recovery of damages for all such infringements. —Yours, &c.

"WICKINS & BRITTON.

"Mr. M. L. J. Lavater."

The plaintiff's counsel proposing, for the purpose of claiming substantial damages, to go into evidence to shew the quantity of goods which had been sold by the defendant in violation of the patent since the assignment, and that they were of a quality and description calculated to damage the character and so diminish the value of the article in the market,—it was objected, on the part of the defendant, that the jury could only (if satisfied that the patent had been infringed) give a verdict for nominal damages, and then the plaintiff might apply for an order under the 42nd section of the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, which enacts that, "in any action in any of Her Majesty's superior courts of record at Westminster and in Dublin for the infringement of letters-patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or, if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, [173] and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit."

After some discussion, and a reference to the case of *Holland v. For*, 3 Ellis & B. 977, the learned judge retired to consult Erle, C. J.; and, on his return, he said that, fortified by the opinion of his lordship, he should, in the event of the jury finding for the plaintiff, tell them to find nominal damages only; and that he should at once make an order under the 15 & 16 Vict. c. 83, s. 42, for an account, without giving any specific directions as to the mode of taking it; and that either party might apply to the court or a judge to vary that order.

On the part of the defendant it was insisted that the articles sold by him were

things well known before the date of the patent as "plate-holders," instruments used by photographers for holding plates of glass by exhausting the air from a disc of india-rubber, and consequently that there was no infringement: and it was further submitted that no title passed by the assignment of the moiety of the patent to the plaintiff, such assignment in law operating merely as an assignment of a right to a moiety of the profits.

For the plaintiff it was insisted that, the defendant having obtained the patent for the articles in question, it was not competent to him to deny the novelty.

The learned judge declined to nonsuit the plaintiff, but reserved leave to the defendant to move, on condition of his being content to abide the decision of the court of Common Pleas: and ruled that, at all events, the defendant was liable for any infringements between the 6th of June, 1859 (when the plaintiff became possessed of the entire patent), and the 14th (when the defendant ceased to sell the patented articles). And [174] he told the jury that the defendant, having sold the patent and received the purchase-money, could not be allowed to say that the invention was not new. And he directed them to find for the plaintiff, with nominal damages,—it being reserved to the defendant to take the opinion of the court of Common Pleas as to whether, upon the construction of the specification and disclaimer, there could be any infringement of an article which was a "plate-holder," as described.

Webster, in Hilary Term last, moved for a new trial on the grounds of misdirection, and also on the point reserved. He submitted that, by the assignment of the 28th of September, 1858, the plaintiff became a mere licensee, the patent being an indivisible thing: and that the assignment of the other moiety to him on the 6th of June, 1859, did not vest in him such a right as to enable him to sue the defendant, the original grantee: *Challet v. Hoffman*, 7 Ellis & B. 686. He further submitted (on the point as to misdirection) that the mere sale of the articles as imported from abroad was not an infringement of the patent: *Holmes v. The London and North Western Railway Company*, 1 Macrory's Patent Cases, 4, 22, where Maule, J., in the course of the argument, says,—“Before the statute 21 James 1, c. 3, monopolies were very common, and were a great grievance. Queen Elizabeth put an end to some of them, and then there was passed this act of James 1, abolishing all monopolies, but in which there is a clause specially exempting from the operation of the 1st section of that statute ‘letters-patents and grants of privilege of the sole working or making of any manner of new manufactures.’ If the patent imports anything beyond the granting of the sole working and making, it grants something that the Crown has no power to grant. You must restrain the sense [175] of those words ‘make, use, exercise, and vend,’ in the patent, to such an user as amounts to an infringement of the prohibition as to the working and making.” [Erle, C. J. What are the words of the patent?] In the granting part, they are, “make, use, exercise, and vend;” but, in the prohibitory part, they are, “make, use, or put in practice the said invention.” The word “use” has a very different meaning in the case of a mere vendor or consumer from that which it bears in the case of one who manufactures or causes to be manufactured the patent article. [Willes, J. “Use” has been held to include vending. Williams, J. In *Gibson v. Brand*, 1 Webster's P. C. 630, 4 M. & G. 179, 4 Scott, N. R. 844, Tindal, C. J., says: “If they (the defendants) have themselves sold an article of exactly the same fabric, made in the same manner as that for which the patent was taken out, such sale may be considered as a using of the invention.”] That must be taken in conjunction with what had been previously said by the same learned judge, viz. “In this case, the evidence is, that an order was given for making articles by the same mode for which the plaintiffs had obtained their patent, which articles were afterwards received by the defendants. This is quite sufficient to satisfy an allegation that they made these articles: for, he that causes and procures to be made may be well said to have made them himself.” In *Minter v. Williams*, 1 Webster's P. C. 135, 4 Ad. & E. 251, 5 N. & M. 647, exposing or offering for sale was held not to amount to an infringement of a patent: and the language of the court in *Holmes v. The London and North Western Railway Company* shews that it is at least doubtful whether a mere sale can be an infringement.

ERLE, C. J. As to the question whether the mere act of sale of the patented article is an infringement of [176] the plaintiff's right, although the strong inclination of our opinion is against you, yet, as we believe the point has not been actually decided, we think it better that you should have a rule. As to the other point, that the plaintiff,

being the assignee of the two moieties of the patent, is not entitled to sue for an infringement in the same manner as he would have been if he had taken the whole interest in the patent under one assignment,—we are of opinion that the assignment to the plaintiff of that partial interest under the deed of the 28th of September, 1858, made the plaintiff in effect tenant in common with the defendant of the entirety of the patent: and that, the defendant having afterwards assigned the remaining moiety to Dodge & Giandonatti, when Dodge and Giandonatti assigned to the plaintiff on the 6th of June, 1859, the plaintiff became assignee of the whole patent, as if the original assignment to him from the defendant had comprised the whole. Upon that point, therefore, we think there should be no rule.

As to the point made, that the defendant is not liable for the sale of the patented articles between the 6th of June, when the plaintiff became sole proprietor of the patent, and the 14th of June, when the defendant received notice of the plaintiff's interest, and so ceased to have any right to act upon a supposed license from Dodge and Giandonatti, and as to the question whether the sale of the articles called plate-holders was an infringement of the patent,—we will speak to my Brother Byles, and communicate to you the result.

On a subsequent day, his Lordship intimated that there was to be no rule as to the plate-holders.

The rule was drawn up as follows:—"Upon reading, &c., it is ordered that the plaintiff, upon notice of this [177] rule to be given to him or his attorney, shall shew cause to this court, on, &c., why the verdict found for him on the trial of this cause at, &c., should not be set aside, and instead thereof a verdict be entered for the defendant pursuant to leave reserved, on the ground that the patent was not wholly vested in the plaintiff, and that the plaintiff was not entitled to maintain the action against the defendant until after notice of the assignment of the patent, and that the sale of the articles imported from abroad was not an infringement; or why a new trial should not be had between the said parties on the ground of misdirection as to the sale of an article imported from abroad being an infringement; and why the order for an account, so far as the same may relate to plate-holders, should not be discharged," &c.

Hindmarch (with whom was Pigott, Serjt.) shewed cause. The first point on which the rule was moved is, that the patent was not wholly vested in the plaintiff, and that he was not entitled to maintain an action against the defendant until after notice of the assignment to him of the second moiety of the patent by Dodge and Giandonatti. This point hardly arises. The declaration alleges, that, before the accrual of the cause of action, the plaintiff had become assignee of the second moiety of the patent: and there is an independent allegation that the whole had become vested in him; and that the infringement took place after the assignment of the entirety. And there is no plea of leave and licence. Down to the time of the assignment to Dodge and Giandonatti, of the 4th of February, 1859, the plaintiff and defendant were acting in concert with reference to the patent. The moment the latter had divested himself of the portion of the right which remained in him after the assignment of the [178] first moiety to the plaintiff, he was a stranger to the patent. The case of *Jefferys v. Boosey*, 4 House of Lords Cases, 815, will be relied on for certain dicta of Lord St. Leonards and some learned judges to shew that there cannot be a partial assignment of copyright. [Byles, J. How can that case or those dicta have any application after the assignment of the second moiety of this patent to the plaintiff?] It can have no application at all. The 35th and 36th sections of the 15 & 16 Vict. c. 83, recognize the assignment of a partial interest in a patent. The next ground is, that the sale of articles imported from abroad was not an infringement. If a sale of the patent article is not an infringement, it is difficult to see how a patent can be infringed at all except by a manufacturer of the article. All the precedents allege a sale: *Tindal, C. J.*, in his summing up in *Gibson v. Brand*, 1 Webster's P. C. 630, says: "If they (the defendants) have themselves sold an article of exactly the same fabric, made in the same manner as that for which the patent was taken out, such sale may be considered as a using of the invention within the terms of the declaration:" and the whole court in the case of *Minter v. Williams*, 4 Ad. & E. 251, 5 N. & M. 647, 1 Webster's P. C. 126, 135, assume that if the defendant had sold an article made in imitation of the plaintiff's invention, he would have been liable. That vending would be infringing nobody ever doubted. [Byles, J. Introducing from abroad is one species of making.] It is so put by *Tindal, C. J.*, in his summing up in the case of

Gibson v. Brand, 1 Webster's P. C. 630. [Byles, J. I thought the distinction between copyright and patent law was this,—that the importation of a book published abroad is no infringement of the former, but that the sale of an article patented here manufactured abroad is an infringement of the latter.] The case of *Caldwell v. Fawcissengen*, 9 Hare, 415, is an authority to shew [179] that the fact of importation makes no difference. There, the foreign owners of a ship, without fraud, and in ignorance of the patent, caused to be made and attached to their vessel, not being a British ship, in their own country, a screw-propeller on a principle which was protected by an English patent. The vessel came to England with a cargo, for the purposes of trade. The Vice-Chancellor restrained by injunction the use of the screw-propeller while the vessel should be within the waters over which the English patent extended. A remonstrance from the Dutch government against this decision procured the insertion in the 15 & 16 Viet. c. 83, of the 26th section, which enacts that "no letters-patent for any invention (granted after the passing of this act) shall extend to prevent the use of such invention in any foreign ship or vessel, or for the navigation of any foreign ship or vessel, which may be in any port of Her Majesty's dominions, or in any waters within the jurisdiction of any of Her Majesty's courts, where such invention is not so used for the manufacture of any goods or commodities to be vended within or exported from Her Majesty's dominions: Provided always that this enactment shall not extend to the ships or vessels of any foreign state of which the laws authorize subjects of such foreign state having patents or like privileges for the exclusive use or exercise of inventions within its territories, to prevent or interfere with the use of such inventions in British ships or vessels, or in or about the navigation of British ships or vessels, while in the ports of such foreign state, or in the waters within the jurisdiction of its courts, where such inventions are not so used for the manufacture of goods or commodities to be vended within or exported from the territories of such foreign state." As to the third ground upon which the rule was moved, there clearly was no [180] misdirection in the learned judge's telling the jury that the sale of the articles imported from France,—called on the one side plate-holders, and on the other brackets or pegs,—was an infringement of the patent. They were the things which were specifically described in the specification as amended by the disclaimer. [Byles, J. If the defendant meant to say that the article imported was old, he should have raised that by plea: but, having sold the patent, he is estopped from averring its invalidity.] The account ordered by the learned judge at the trial is one which the plaintiff is entitled to; and the court will not interfere with the order. [Erle, C. J. As at present advised, we should like to hear what Mr. Webster has to say.]

Webster, in support of the rule. The plate-holder was a known implement at the time of the grant of the letters-patent. The patent is for the accessories only, not for plate-holders; and there is no evidence of any sale by the defendant of any article embraced by the patent after the notice of the 14th of June, 1859. [Erle, C. J. The difficulty in your way is, that the defendant is precluded from setting up the invalidity of the patent, as between himself and the plaintiff.] A grant of a patent is an entire and indivisible thing: and an assignment of a share of it conveys to the assignee no right beyond a right to an account: *Protheroe v. May*, 5 M. & W. 675, 1 Webster's P. C. 414. [Keating, J. You contend, that, if the patentee assigns a moiety of the patent to A., and another moiety to B., he still retains the legal interest?] Precisely so. [Keating, J. Then, if the grant be to two, it is impossible for one of the grantees to assign his share!] The assignment of part will not enable the assignee to work the patent independently. That there cannot be a partial assignment of copyright, seems pretty clear [181] from the dicta in *Jefferys v. Boosen*, 4 House of Lords Cases, 815; and there is no reason why the same principle should not apply to the patent-law. Pollock, C. B., there says, p. 940,—“I think it very doubtful whether copyright can be at all partially assigned. I am clearly of opinion that in this country the proprietor of the copyright could not assign it with reference to one county to one person, and with reference to another county to a different person, so as to give to each a right to maintain an action for infringing the copyright. Now, the statute in force at the time of this transfer was the 54 G. 3, c. 155. The 4th section of that act makes copyright under the statute commensurate with the British dominions; and I think it is a right or property which is not capable of being divided into parts and divisions according to local boundaries. It appears to me, therefore, that the assignment to the defendant in error, being for publication in the United

Kingdom only, and not all the British dominions, would operate as a license only, and would not by the laws of the country enable the defendant to sue at law as the proprietor of the copyright for the United Kingdom only." And Lord St. Leonards says, p. 992,—“If there is one thing which I should be inclined to represent to your Lordships as being more clear than any other, in this case, it is, that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible, or is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the king-[182]-dom.” It may be here that the plaintiff would have an action against Lavater for the breach of his covenant, but not an action for an infringement of the patent. The disclaimer gets rid of the right as to plate-holders, leaving the patent valid, perhaps, as to the brackets or pegs; but the defendant could not be guilty of any infringement until he had notice of the assignment of the second moiety to the plaintiff, which might be taken to be a determination of the licence. Then, the mere sale of the patent article is no infringement. “Working or making,” in the 6th section of the 21 Jac. 1, c. 3, must be taken to refer to something more than mere use. The words apply only to the manufacture of the article, and not to articles innocently imported from abroad. [Erle, C. J. I should have thought that selling the patent article was a very material practising of the invention.] At the most, it could only be evidence for the jury. *Gibson v. Braud*, 1 Webster’s P. C. 630, is a strong authority for the defendant. And *Minder v. Williams* merely shews that offering for sale is not equivalent to selling; not that selling would necessarily be an infringement. The matter was much discussed in *Holmes v. The North Western Railway Company*, 1 Macrory’s P. C. 13. With respect to the form of the order,—as it now stands, it embraces plate-holders, which are not within the patent: whereas, it should have been confined to the pegs or brackets.

ERLE, C. J. I am of opinion that this rule should be discharged. I take the four grounds upon which it has been moved as stated in the rule itself. I consider the first ground relied upon by Mr. Webster to be that the patent was not wholly vested in the plaintiff, and that plaintiff was not entitled to maintain the action until after the defendant had notice of the [183] complete assignment of the patent to him. It turns out that the patent having been granted to Walton, he assigned one moiety of it to the plaintiff and the other moiety to two persons named Dodge and Giandonatti, and that, before the accrual of the cause of action, this second moiety was assigned by Dodge and Giandonatti to the plaintiff; so that, when this action was commenced, both moieties were vested in the plaintiff. On the part of the defendant, Mr Webster has contended that a grant under letters-patent is one and indivisible, and that, notwithstanding the assignment of a moiety, the original patent right remains in the patentee, and nothing passes to the assignee but a mere license to use the patent and a right to have an account; and he has further contended, that, even when the patentee has assigned the other moiety to a third person, and both moieties have ultimately come together and become vested by assignment in the same person, the original franchise still remains in the grantee of the patent, though he may have no beneficial interest therein, and the assignee only acquires the imperfect ownership before mentioned. This argument has been urged with a great deal of learning and ingenuity: but I cannot think it ought to prevail. I think it would lead to very great inconvenience if it were to be held that the legal right was thus vested in one person and the beneficial ownership in another: and I consider that the 35th section of the 15 & 16 Vict. c. 83, does incidentally recognize the assignment of a share of a patent as passing to the assignee something more than the shadowy interest which has been thus contended for. That section provides that “there shall be kept at the office appointed for filing specifications in Chancery under this act a book or books intitled ‘The register of proprietors,’ wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters-patent, or of any [184] share or interest therein, any licence under letters-patent, and the district to which such licence relates, with the name or names of any person having any share or interest in such letters-patent or licence, the date of his or their acquiring such letters-patent, share, and interest, and any other matter or thing relating to or affecting the proprietorship in

such letters-patent or licence; and a copy of any entry in such book, certified, &c., shall be given to any person requiring the same, on payment of the fees thereafter provided; and such copies so certified shall be received in evidence in all courts and in all proceedings, and shall be *prima facie* proof of the assignment of such letters-patent, or share or interest therein, or of the licence or proprietorship, as therein expressed: Provided always, that until such entry shall have been made the grantee or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, and of all the licences and privileges thereby given and granted," &c. This is by no means a direct enactment to that effect: but it shews that the legislature contemplated that an interest might pass by an assignment of a part or share of a patent. The 36th section also provides that it may be lawful for a larger number than twelve persons to have a legal and beneficial interest in letters-patent. It is said that these persons would take as joint-tenants, and that, if one died, no interest would pass to his personal representatives, but the legal right would survive to the other joint-tenants. That view presents so much inconvenience that I cannot accede to it; and I think the law will be much better laid down, as we lately, whether rightly or wrongly, held in *Dunnieliff v. Mullett*, ante, vol. vii., p. 209, that an assignee, whether of the entirety of a patent, or of a part or share in it, takes the legal interest, and is not to be considered merely as a licensee.

[185] As to the contention that the defendant was not liable for the infringement of the patent, until he received notice of the assignment of the second moiety to the plaintiff, for that he may have *bonâ fide* acted under a supposition that he was entitled to sell the patent articles,—it seems to me that entirely fails; for, whatever right the defendant might have had whilst he remained owner of a moiety of the patent, from the moment he assigned that right to Dodge and Giandonatti, he must have known that he had no interest whatever in the patent, unless he had that *scintilla* of right which Mr. Webster has endeavoured to convince us he had, and that he was infringing the right of some one.

The next point contended for by the defendant was, that there had been no infringement, because the defendant had only sold the articles in question, and that the mere sale of articles imported from abroad is not an infringement of the patent, though the making of them would be. I have attentively listened to the arguments of the learned counsel on both sides derived from the old statute and the language of the grant. The words in the statute of James are "working or making." In the granting part of the letters-patent the words are "make, use, exercise, and vend," and in the prohibitory part, "make, use, or put in practice." All these words are susceptible of some of the constructions which have been contended for: but it appears to me to be clearly the intention of the Crown in granting letters-patent for a new invention, to prohibit and prevent third persons from using the patent article for the purpose of profit by selling. The object is to give to the inventor the profit of his invention; and the most effectual way of defeating that object would be the permitting others to derive from the sale of the patent article the profit which it was intended to secure to the patentee. It seems to me, [186] therefore, that proof that a party has sold the patent article, without proof of his having made it or procured it to be made, would be good evidence to warrant a jury in finding that he has been guilty of an infringement. As to the circumstance of the goods having been imported from abroad, I should say, that, if this were simply the case of an importation, without any proof of knowledge on the part of the importer that the article imported was a patented article, the mere sale would be sufficient to charge him. But it is unnecessary to lay that down here: for, the defendant acted with full knowledge: he has not imported goods by hazard which have been made by another manufacturer; but he has imported articles with his own name stamped on them as the maker, which he well knew to be a violation of the patent. Being himself the patentee, and having the privilege of manufacturing the article in France, and the articles having been imported by him from France, and bearing his name, it is clear to my mind that the jury would have been well-warranted in coming to the conclusion that the defendant manufactured them in France for the purpose of importing and selling them in this country, in violation of the English patent.

The last point made by Mr. Webster was, that the account to which the plaintiff is entitled under the order of the learned judge is not to extend to the article which has been called by Mr. Webster a pneumatic plate-holder, and by the counsel for the

plaintiff a pneumatic peg or bracket. The original patent was for the application of the principle of pneumatics to cause pegs, brackets, &c., to adhere mechanically on solid surfaces, and so applying it to a variety of articles. As between these parties, I am of opinion that it is not competent to the defendant to question the validity of the patent on the ground of want of novelty, [187] because the description therein embraced the plate-holder of Bolton, which is apparently an application of the pneumatic principle. The defendant, who has received a large sum for the sale of this patent, ought not to be allowed to raise any question as to its validity. I have looked at the original specification and at the disclaimer. Mr. Webster contends that the disclaimer was intended to give up all claim of extending the patent so far as to comprise what he calls "plate-holders," and to confine it to pneumatic pegs, with accessories, such as hooks, &c. So that, according to his construction, taking the specification with the disclaimer, it was a patent for applying accessories to pneumatic instruments. I am of opinion, however, that it is not a patent for adapting those accessories to pneumatic pegs, but for the application of the pneumatic principle for fixing pegs to solid substances, by creating a vacuum. That is the substance of it; and the mode of using it with the accessories there spoken of, is only pointing out a way of using the invention, and to my mind forms no part of the substance of the specification. I am, therefore, of opinion that the articles which the defendant calls plate-holders, and the plaintiff pegs, are clearly within the specification as amended and altered by the disclaimer.

KEATING, J. I am entirely of the same opinion. I think all the grounds taken by Mr. Webster upon this rule have failed, though they have been urged with much ingenuity and ability. It would certainly be quite new to hold that no legal interest in this patent passed by the assignment to the plaintiff. No authority has been or could be cited to support the proposition: but certain dicta in the case of *Jefferys v. Boosey*, 4 House of Lord's Cases, 815, have been referred to. It would indeed be a strange thing at this time of [188] day, when patents have been divided so frequently, and when the 35th and 36th sections of the 15 & 16 Viet. c. 83, to which my Lord has referred, recognize the assignment of a share in a patent coupled with an interest in the assignee, if we were without any distinct authority to hold that a party who has by two separate assignments of the two moieties of a patent got the whole beneficial interest in the patent vested in him, could not maintain an action for an infringement,—because the same argument which would prevent the plaintiff from maintaining an action against the present defendant would of course equally prevent him from maintaining an action against any other person who might infringe the patent; and this would be establishing a rule the inconvenience of which can hardly be conceived. I therefore think there was sufficient interest in the plaintiff as assignee of this patent to entitle him to maintain this action. Nor do I think, for the reasons stated by my Lord, that notice was necessary.

I must confess I have never from the beginning of the argument entertained the slightest doubt that the selling of these articles in the way that was shewn here was an infringement of the patent. What we have to see, is, whether there has been such a use by the defendant of the patented invention as to constitute an infringement within the meaning of the statute. It seems to me that the selling of an article, and the converting it into money, is about the most effectual and available mode of using it that can be imagined. The only possible argument that could be urged by Mr. Webster with any show of reason was that which he has so strenuously urged, viz. that the word "vend" is found in the granting part of the letters patent only, and not in the prohibitory part,—the words there being "make, use, or put in practice." [189] But I do not think that circumstance is at all inconsistent with the position that the vending or selling an article, and turning into money, is a using or putting in practice the invention.

With respect to that part of the rule which seeks to vary the order for an account, it seems to me that all we have to look at is simply this,—are the articles as to which the account is to be taken within the terms of the specification, as altered and amended by the disclaimer? I am clearly of opinion that they are, and that it is not competent to the defendant in this case, regard being had to the relation in which he stands to the plaintiff, to enter upon the discussion which Mr. Webster raised as to some of the articles in question being plate holders. They are pegs, pneumatic pegs, clearly within the terms of the specification.

BYLES, J. I entirely concur in the opinions expressed by my Lord and my Brother Keating. Notwithstanding the result, the defendant will at all events have the satisfaction of reflecting that his case has not failed for want of the zealous exertions of his very able counsel; though I must confess I have never from the first entertained any doubt about the matter.

With regard to the first ground upon which the rule was obtained, viz. that there cannot be an assignment of a portion of a patent, I quite accede to the view taken by my Lord and my learned Brother: and, having been well acquainted with the case of *Jefferys v. Boosey* in its progress through the House of Lords, I may venture to say that what was there said by the learned judges and noble Lords who took part in the discussion has nothing whatever to do with this case. The question there was, whether a copyright could be divided so as to be assigned as to different localities to several different persons. Here, the question is, whether [190] a patent right is capable of assignment to a plurality of owners. That a plurality of holders may exist in the case of a patent is clear from the language of the old cases and the statutes, and no authority has been cited or argument urged which satisfies me that the assignees took equitable interests only, or held their respective shares as tenants in common or joint tenants.

Then, as to the selling the patent articles not being an infringement,—I will not say a word as to the principle: but, upon authority, the matter stands thus,—there is no authority to shew that it is not, and there are two distinct authorities to shew that it is; for, in the case of *Minter v. Williams*, 4 Ad. & E. 251, 5 N. & M. 647, 1 Webster's P. C. 135, every one of the learned judges gave his judgment upon the ground that exposing for sale was not selling, which leads one to the inference as clearly as if it had been expressed in words, that, in their opinions, a vending or selling of the patented article is an infringement of the patent.

As to the order for the account,—there would have been no necessity for this part of the rule, had it not been for the ambiguity, or rather the difference in the mode of describing the article in the letters-patent and in the disclaimer. Mr. Webster calls the thing a plate-holder: Mr. Hindmarch calls it a peg. That which was ordered at the trial, and which is ordered now, is, that, for the article called a bracket or peg imported from abroad, there shall be an account, but not for the article which both sides agree in calling a "plate-holder."

I may add, that, although Mr. Webster is by the terms of the rule,—terms which were imposed upon him for the sake of saving needless expense, and which do not affect the judgment of this court in the smallest degree,—bound to rest satisfied with the decision here, still he is not bound as to the first point, if he thinks [191] he can apply this reasoning of the judges in *Jefferys v. Boosey* to this case, because the objection, if any exist, appears upon the record.

Hindmarch. The order will be in the general form given in *Holland v. Fox*, 3 Ellis & B. 977, for an account of sales down to the present time.

Webster. There can be no objection to that; for, there has been no sale since the notice of the 14th of June, 1859.

Rule discharged.

The rule was drawn up as follows:—"Upon reading a rule made in this cause on Tuesday, the 24th of January last, and on hearing counsel on both sides, it is ordered that the said rule be and the same is hereby discharged: And it is further ordered that one of the masters of this court do take an account of *all profits made by the defendant by means of the infringement of the letters-patent* in the declaration mentioned since the 6th day of June, 1859, up to the present time, in respect of the brackets and pegs such as given in evidence upon the trial of this cause, or described in the specification of the said patent, and that the defendant do pay to the said plaintiff the amount of such profits so to be ascertained as aforesaid."

Hindmarch, in Trinity Term, moved to amend the above rule, by substituting for the words in italics the words "all profits of which the plaintiff has been deprived by means of the infringement by the defendant of the letters-patent." He submitted that it might be that the defendant had made no profits, and yet might have deprived the plaintiff of a great deal; that this was not like the case of *Holland v. Fox*, 3 Ellis & B. 977, where the question was as to the profits pend-[192]-ing the suit; and that the account here sought was given by the 15 & 16 Vict. c. 83, s. 42, in lieu of an assessment of damages by the jury. [Erle, C. J. This is given as a substitute for the

account in Chancery. How is the account taken there?] The defendant may have worked the patent so as to bring the article into disrepute. In that case, the profits he made would be no compensation for the injury resulting to the plaintiff from the infringement (a). [Byles, J. I am not aware of any precedent in Chancery of an account of the sort you now apply for.] This is the first case that has arisen since the statute: and there is only one case of an account in Chancery; and that was not proceeded with. It was obviously the intention of the statute that the patentee should have a fair remuneration for the loss he has sustained by reason of the infringement. [Erle, C. J. The question is an important one, and therefore if you like to take a rule you may.]

On a subsequent day, the rule was made absolute without opposition; and, on the 12th of July, the master gave the following certificate:—

“Upon hearing the evidence adduced by both the plaintiff and defendant, I find that the profit of which the plaintiff has been deprived by reason of the infringement of the patent amounts to the sum of 697l. 6s. “PARK.”

[193] THE MARQUIS OF SALISBURY v. RAY. May 1st, 1860.

[S. C. 29 L. J. C. P. 225; 6 Jur. N. S. 1117; 8 W. R. 462. Applied, *Armitage v. Jessop*, 1866, L. R. 2 C. P. 15; *In re Long*, 1888, 20 Q. B. D. 318.]

The 123rd section of the Common Law Procedure Act, 1852, which gives the plaintiff in every case of execution a right to levy “the expenses of the execution,” over and above the sum recovered by the judgment, does not entitle him to take under a ca. sa. the expenses of a previous abortive writ of fi. fa.

The plaintiff having recovered a judgment against the defendant for the sum of 23l. 18s., issued a fi. fa., which proved unproductive. He then issued a ca. sa., under which the defendant was arrested, and, in order to procure his discharge, his attorney paid the sheriff's officer 28l. 4s., which sum was compounded of the following items:—

	£	s.	d.
Levy	23	18	0
Costs of writs	2	6	0
Interest	0	11	0
Caption fee	1	1	0
Search	0	3	6
Discharge fee	0	4	6
	<hr/>		
	£28	4	0

The second item included 1l. 5s. for the costs of the abortive fi. fa.

Prentice, on a former day in this term, obtained a rule calling upon the plaintiff or his attorney to shew cause why he or his attorney should not refund to the defendant or his attorney this sum of 1l. 5s. so improperly indorsed on the ca. sa. as and for the costs of the unproductive fi. fa. He submitted that the plaintiff was only entitled to levy as costs of “execution,” the expenses of the writ actually executed,—referring to the 43 G. 3, c. 46, s. 5, and the 15 & 16 Vict. c. 76, s. 123, *Earp v. Satchell*, 4 Q. B. 121, *Ex parte Bethell*, *In re Reid*, 30 Law Times, 296, and Tidd's Practice, 9th edit. p. 997.

[194] T. Jones, on a subsequent day, shewed cause. The question turns upon the construction of the 123rd section of the Common Law Procedure Act, 1852, which enacts, that, “in every case of execution, the party entitled to execution may levy the poundage, fees, and expenses of the execution, over and above the sum recovered.”

(a) Mr. Norman, in his treatise on the patent law, says,—p. 161, —“Now that a court of common law has the power of ordering an account, it would seem a proper mode of taking the account, to ascertain the profits which might have been made by the patentee on the articles made, used, or sold by the infringer, had they been made, used, or sold by the patentee; or the profits or saving made by the infringer by his use of the patent right may be claimed.”

Before that statute, under a *ca. sa.* the plaintiff could levy nothing but the amount of the debt. The clause was inserted to remedy this defective state of the law. In the 8th edition of Archbold's Practice, p. 565, which was published before the passing of the Common Law Procedure Act, 1852, it is said: "It would seem that the plaintiff cannot levy under a *ca. sa.* sheriff's fees [poundage], officer's fees, or other expenses of the execution above the sum recovered by the judgment, unless the judgment was for a penalty, and the execution be for less than the penalty, or unless the defendant has by warrant of attorney, cognovit, or otherwise, expressly agreed to the levy of them:" for which are cited *Hayley v. Ricket*, 5 M. & W. 620, and *Pitcher v. Roberts*, 2 Dowl. N. S. 394. But, in the 9th edit. p. 586, that passage is omitted, and the following substituted,—“By the Common Law Procedure Act, 1852, s. 123, the party entitled to execution may levy the fees and expenses of the execution over and above the sum recovered.” The case of *Earp v. Satchell*, 4 Q. B. 121, is disposed of by saying that it occurred before the passing of the Common Law Procedure Act. The title to the costs vests on the issuing of the writ. In *Bayley v. Potts*, 8 Ad. & E. 272, 3 N. & P. 365, the plaintiff having signed judgment for 23*l.* debt and costs, took out a *fi. fa.* for 24*l.*, the 1*l.* being claimed for costs of execution under the 43 G. 3, c. 46, s. 5. An attempt was made to levy, which failed, the defendant having no goods. The defendant then tendered [195] 23*l.*, which the plaintiff refused, and issued an *elegit* for the 24*l.* It was held that the tender was insufficient, the plaintiff being entitled under the statute to the costs claimed above 23*l.*, and the court refused to set aside the *elegit*. Lord Denman there said: “A *fi. fa.* issued, under which the plaintiff had endeavoured to levy. The debtor then asks him to accept the debt without the costs of the *fi. fa.* He refused to do so; and he had a right to refuse; for, he might by law recover the whole under the writ.” [Erle, C. J. Did the court hold there that the plaintiff might take the 24*l.*?] That was left open. It is the usual course to indorse the *ca. sa.* as well as the *fi. fa.* with the costs of execution. The execution is not the particular writ: the writ is merely the aid to that which the law holds to be the execution. Seeing the anxiety of modern legislation to avoid all unnecessary personal restraints of the debtor, it is reasonable in all cases to proceed in the first instance to enforce the judgment by an execution against the goods: but a plaintiff,—who should in all cases as far as may be have a full indemnity against all costs legitimately incurred,—will rarely do this, if he does it at the risk of himself bearing the costs of the abortive *fi. fa.*

Hayes, Serjt., and Prentice, in support of the rule. If a plaintiff is at liberty to indorse on the *ca. sa.* the costs of a previous abortive *fi. fa.*, it will always be to the interest of the attorney to issue a *fi. fa.* in the first instance, for the purpose of increasing the costs. And, if one *fi. fa.* may issue, where is to be the limit? Whether the defendant possesses goods or not, the idle ceremony will be gone through and the useless expense incurred in all cases. Unless it is given him by some act of parliament, it is clear that the plaintiff can have no right to the costs in question. The judgment fixes [196] the limit of the amount to be levied, unless there be some special statutory provision authorizing the levy of something more. Poundage was only given to the sheriff by the statute 28 Eliz. c. 4; and it is now regulated by the 7 W. 4 & 1 Vict. c. 55. The sheriff could not levy poundage under the abortive *fi. fa.*: and why should the attorney be placed in any better position? The 43 G. 3, c. 46, s. 5, which for the first time gave a plaintiff the costs of the execution, was confined to executions against the goods of the debtor. The 123rd section of the Common Law Procedure Act, 1852, extends that right to executions against the person of the debtor. It would seem from the books, that, under the 43 G. 3, c. 46, s. 5, the costs of a first writ of *fi. fa.* would have been recoverable under a *testatum fi. fa.* But by the 121st section of the Common Law Procedure Act, 1852, the ground-writ is abolished. In *Earp v. Satchell*, 4 Q. B. 121, it was expressly held that a *ca. sa.* must not be indorsed to levy the expenses of a *fi. fa.* in the same cause, to which there had been a return of *nulla bona*. The 123rd section of the Common Law Procedure Act, 1852, has made no difference in this respect. What do the legislature mean by “the execution?” Why, clearly, the process under which the levy is made: not a prior *fi. fa.*, which is a process of a totally different character. The words of the section are satisfied by an execution by *fi. fa.*, by *ca. sa.*, or by *elegit*. In *Augus v. Coppard*, 3 M. & W. 57, where it was held that there is no irregularity in issuing several writs of summons for the same cause of action, where there are two defendants,

if they are issued on the same præcipe, and dated on the same day, Parke, B., says: "There is a convenience in allowing two writs, because there may be often great difficulty in serving many joint defendants who reside in different counties; and it is no inconvenience to the [197] defendant, because he will be liable to the expense of one writ only."

ERLE, C. J., who was sitting alone, said, that, as the point was of some practical importance, he would advise with the other judges upon it.

Cur. adv. vult.

ERLE, C. J., now said: "The question raised by this rule is, whether a plaintiff who has obtained a judgment and issued a *fi. fa.* which has been returned *nulla bona*, and who has afterwards issued a *ca. sa.*, has a right to indorse on the latter writ the expenses of the former abortive writ. The claim to do so is based upon the 123rd section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, which enacts, that, "in every case of execution, the party entitled to execution may levy the poundage, fees, and expenses of the execution, over and above the sum recovered." The question is, whether these words the "expenses of the execution" mean the expenses of all the process by way of execution which the plaintiff may have resorted to, or merely the expenses of the specific process of execution under which the fruits are obtained. We are all of opinion that they apply to the expenses of the specific execution under which the money has been recovered, and do not comprise the expenses of another line of execution. Under the 43 G. 3, c. 46, s. 5, under which the costs of execution against the goods were given, I believe the practice was to levy for the costs of several writs of execution: for instance, the ground-writ into the county where the venue was laid, and a *testatum fi. fa.*, and an *alias testatum*, and so on. As far as we can ascertain, the practice was, to add the expenses of all these writs, and levy the whole under the last. [198] Here, there has been only one *ca. sa.* issued: and we do not mean to express any opinion as to what would be the rights of the plaintiff where more than one *ca. sa.* has been issued. Whether he would be entitled to the expenses of all the writs of *ca. sa.* which may have been issued, as under the old practice he was entitled to those of all the writs of *fi. fa.*, we neither affirm nor deny. It may be that he would be so entitled: and, when the question is properly raised, we shall be prepared to decide it. All we have now to determine is, whether under a *ca. sa.* the plaintiff is entitled to take, in addition to the expenses of that execution, the expenses of a prior fruitless *fi. fa.* No doubt there is a great deal in the reasoning of my Brother Hayes that to allow this would be offering an inducement to the multiplication of useless costs in all cases: but there is also much force in what has been urged on the other hand by Mr. Jones, that it is more merciful to the debtor to proceed against his goods by a *fi. fa.*, rather than at once to issue a *ca. sa.* to take his body; and that the creditor should so far as may be have a full indemnity against all costs legitimately incurred. We have fully considered these several arguments; and, weighing those presented by Mr. Jones against the inconvenience suggested on the other side, we have come to the conclusion, that, if it were held that the costs of a previous abortive *fi. fa.* might be recovered under the *ca. sa.*, it would be holding out a premium for unprincipled persons in all cases to increase the burthen of the debtor by adopting a course which would enhance the expenses of the execution, and that it will be better for the general interests of the community that we should hold those expenses not to be recoverable. It seems to me from the language used by the legislature in the 123rd section of the Common Law Procedure Act, 1852, that they took the same view of the matter [199] as we now do: whereas, before, the plaintiff could only recover the expenses of the execution by *fi. fa.*, now, in every case of execution, he may levy "the expenses of the execution,"—that is, the expenses of the writ under which the money is obtained to satisfy the judgment. We therefore think that the rule should be made absolute for the return of the 1l. 5s. received as the costs of the *fi. fa.*

Jones. Under the circumstances, perhaps the court will hardly think this is a case for costs.

KEATING, J. When this matter was before me at Chambers, I thought it was a very fit case to be discussed before the full court, and therefore I think the rule should be made absolute, without costs.

ERLE, C. J., and BYLES, J., concurring,

Rule absolute, without costs.

[200] EDWARD NEWMAN, *App.*, HENRY BAKER, *Resp.* April 23rd, 1860.

The court will not entertain an appeal from a decision of a magistrate, under the 20 & 21 Vict. c. 43, upon a question of fact.—The magistrate having, upon the construction of the 5th rule of s. 26 of the Metropolitan Buildings Act, 1855 (18 & 19 Vict. c. 122), decided that a certain place, being a row of houses forming part of a line of thoroughfare, was a street,—this court declined to interfere with his decision.

The following case was stated for the opinion of this court under the 20 & 21 Vict. c. 43:—

In the matter of a complaint made by the respondent under the Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 122, ss. 26 and 46, before one of the magistrates of the police-courts of the metropolis, sitting at the police-court, Marylebone.

Whereas, a notice was issued by the said respondent, who is the district-surveyor of the district of St. Pancras, and served on the appellant, in the terms following:—

“Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 155, s. 45.

“District Surveyor’s Office, 11 Upper Gower Street.

“To Mr. Edward Newman, of 3 Bartholomew Place, Kentish Town, builder.

“With reference to the works at the building under-mentioned and now in progress under your superintendence as builder engaged in executing the same, I hereby give you notice that they are not conformable to the rules of the Building Act, in the particulars hereunder stated; and I require you within forty-eight hours from the date hereof to render the same conformable to the rules of the said act in such particulars.

“*Building referred to.* Addition to a dwelling-house.

“*Situation of building.* Parish of St. Pancras, in the county of Middlesex.

“*Street.* Bartholomew Place, Kentish Town.

“*Number in Street (if any).* 3.

[201] “*Description of locality (if the site is vacant ground).*

“*Particulars of work done contrary to the act, and to be amended:* s. 26. The said additions, or such portions thereof as are already executed, forming a projection from and in front of the said dwelling-house in such manner as to extend beyond the general line of fronts in the street called Bartholomew Place, as aforesaid, without the permission of the metropolitan board of works first had and obtained, such projection not coming within the exceptions permitted by the said act, with regard to shop fronts, water-pipes and their appurtenances, copings, cornices, facias, window-dressings, and other like architectural decorations. Dated this 16th day of May, 1859.

“HENRY BAKER.”

And whereas, the said notice not having been complied with, the respondent afterwards obtained and served upon the appellant a summons in the following terms,—

“The Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 122, s. 46.

“Metropolitan Police District, to wit.

“To Mr. Edward Newman, of 3 Bartholomew Place, Kentish Town, builder.

“Whereas, complaint hath this day been made before the undersigned, one of the magistrates of the police-courts of the metropolis, sitting at the police-court in High Street, Marylebone, in the county of Middlesex, and within the metropolitan police-district, by Henry Baker, of, &c., for that you, on the 16th day of May, in the year of our Lord 1859, in erecting an addition to a building situate and being No. 3 Bartholomew Place, Kentish Town, in the parish of St. Pancras, in the county of Middlesex, and within the said district, and within the limits of the Metropolitan Buildings Act, [202] 1855, and within the district of St. Pancras, of which he the said Henry Baker is the district-surveyor under the said act, did do certain things contrary to certain of the rules of the said act in s. 26, namely, did build such addition, or such portions thereof as are already executed, in front of the said building, and

forming a projection therefrom, in such manner as to extend beyond the general line of fronts in Bartholomew Place, forming part of a street called the Kentish Town Road, without the permission of the metropolitan board of works first had and obtained; such projection not coming within the exceptions permitted by the said act with regard to shop-fronts, water-pipes and their appurtenances, copings, cornices, facias, window-dressings, and other like architectural decorations; and that he the said district-surveyor, on the 16th day of May, 1859, did give you, the builder engaged in erecting such addition to the said building, notice in writing, requiring you as such builder, within forty-eight hours from the date of such notice, to cause such things done as aforesaid contrary to the rules of the said act to be amended; but that you have made default in complying with the requisitions of such notice:

"These are therefore to command you in Her Majesty's name to be and appear on Saturday next, the 21st of May, at 2 of the clock in the afternoon, at the police-court aforesaid, before me, or such other magistrate of the police-courts as may then be there, to answer to the said complaint, and to be further dealt with according to law.

"Given under my hand and seal this 19th day of May, in the year of our Lord, 1859, at the police-court aforesaid."

And whereas the said appellant by his counsel attended the hearing of the said summons; and it [203] appeared and was admitted by the parties on both sides that the said Bartholomew Place was and is a row of private houses, with gardens before them, in Kentish Town Road or High Street, and the said building was and is one of such houses, and the said addition thereto was and is the erection of brick walls to form a shop covering a portion of the garden before the said house, but not coming within several feet of the foot-pavement.

And thereupon the said counsel for the appellant objected and contended that the said erection or addition was not a projection within the meaning of the 26th section of the said statute: but the said magistrate held otherwise, and decided that it was such a projection.

And thereupon evidence was given to the effect following,—"That the said thoroughfare was Kentish Town Road, and was by some called High Street, Kentish Road, and consisted of divers rows of houses in such thoroughfare, and that some of them were shops; that, in Hawley Place, in the said thoroughfare, which was opposite Bartholomew Place, the shops abutted on the foot-pavement, as they also did in Chapel Place and Inwood Place; that there was a long row of houses in the course of building next below Inwood Place, and above Bartholomew Place, and which had the shop-fronts nearly abutting on the foot-pavement, and not at a greater distance from the pavement than the front of the proposed new shop in Bartholomew Place, and that this had been sanctioned by the metropolitan board of works; that the foot-pavement on both sides of the road all along was flagged; and that the shops were not further from it than the proposed new building."

And the said parties produced before the said magistrate maps or plans of the said road or street, which [204] were mutually admitted and received. And thereupon the said counsel for the appellant objected and contended that the general line of fronts was the general line of fronts all along the said road or street: but the said magistrate held that the part called Bartholomew Place was to be taken as the general line of fronts in regard to the subject-matter of the said complaint: and thereupon the said magistrate did hold and determine that the said erection and addition did extend beyond the general line of fronts in the said street, and made an order upon the said appellant, as follows:—

"The Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 122, s. 46.

"Metropolitan Police-District, to wit.

"To Mr. Edward Newman, of No. 3 Bartholomew Place, Kentish Town, builder.

"Be it remembered, that, on the 19th day of May, 1859, complaint was made before R. S. Broughton, Esq., one of the magistrates of the police-courts of the metropolis, sitting at the police-court in High Street, Marylebone, in the county of Middlesex, and within the metropolitan police-district, by Henry Baker, of, &c. district-surveyor duly appointed under and in pursuance of the Metropolitan Buildings Act,

1855, to the district of St. Pancras, in the county of Middlesex, and within the limits to which by the said act the same is declared to extend, and within the metropolitan police-district, That Edward Newman, of No. 3 Bartholomew Place, Kentish Town, in the parish of St. Pancras, in the county of Middlesex, builder, was theretofore, and after the 1st day of January, 1856, to wit, on the 16th day of May, 1859, the builder engaged in building an addition to a building situate and being No 3 Bartholomew Place, Kentish Town, in the parish of St. Pancras, in the county of Middle-[205]-sex, and in the said district of St. Pancras, and within the limits to which the said act is thereby declared to extend; and that the said Edward Newman did, in erecting the said addition to the said building, and while he was such builder as aforesaid, do certain things contrary to the rules of the said act, namely, did build such addition, or such portions thereof as are already executed, in front of the said building, so as to form a projection therefrom in such manner as to extend beyond the general line of fronts in Bartholomew Place, forming part of a street called the Kentish Town Road, without the permission of the metropolitan board of works first had and obtained, such projections not coming within the exceptions permitted by the said act with regard to shop-fronts, water-pipes and their appurtenances, copings, cornices, facias, window-dressings, and other like architectural decorations; and that, on the same day, to wit, on the 16th of May, 1859, the said Henry Baker, as such surveyor as aforesaid, did give to the said Edward Newman notice in writing requiring the said Edward Newman within forty-eight hours from the date of such notice to cause the said things to be amended; but that the said Edward Newman had made default in complying with the requisitions of such notice, or any of them: and thereupon, to wit, on the said 19th day of May, 1859, the said R. S. Broughton, Esq., did issue a summons requiring the said Edward Newman to appear before him, or such other magistrate of the said police-courts as should be then and there present at the police-court aforesaid, to answer to the said complaint, on the 21st day of May, 1859; and on the 21st of May both the said Henry Baker and the said Edward Newman did appear before me, G. Long, Esq., one of the magistrates of the police-courts of the metropolis sitting at the police-court in High Street, [206] Marylebone, in the county of Middlesex, and within the metropolitan police-district; and, having heard the matter of the said complaint, and it appearing to me that the requisitions thereafter mentioned made by such notice are authorized by the said act, I do hereby order, command, and adjudge the said Edward Newman within twenty-eight days from the date hereof to comply with the requisitions of the said notice, in the following particulars, to wit, that he the said Edward Newman do and shall take down and remove such addition or such portions thereof as are already executed in front of the said building, so that the same shall no longer form a projection beyond the general line of fronts in Bartholomew Place, forming part of the said street called Kentish Town Road, unless he the said Edward Newman should in the meantime obtain the permission of the metropolitan board of works to erect such projection."

The appellant submits and maintains that the said order is not supportable, and that the decision of the said magistrate upon both points was wrong in point of law, that is to say,—first, that the said addition was not nor is a projection within the meaning of the 26th section of the act,—secondly, that the general line of fronts in the said street was and is the general line of fronts all along the said street, and not in the particular row called Bartholomew Place.

The question for the opinion of the court is,—Whether the magistrate was right or wrong in his decision. If the court should hold that he was right, then the judgment on this appeal to be for the respondent. If the court should hold that the magistrate was wrong, then the judgment to be for the appellant, and the said order to be set aside.

[207] Field, for the appellant. The question turns upon the construction of the 26th section of the Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 122, which provides for the rules to be observed as to projections. The 5th rule is as follows:—"Except in so far as is permitted by this section in the case of shop-fronts, and with the exception of water-pipes and their appurtenances, copings, cornices, facias, window-dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the metropolitan board of works hereinafter mentioned." In *Tear v. Freebody*, ante, vol. iv., p. 228, this court held that the words in the 143rd section of the Metropolis

Local Management Act, 18 & 19 Vict. c. 120, which provide that no building shall be erected beyond "the regular line of buildings in the street in which the same is situate," do not mean a strict mathematical line, but a substantially regular line. The object of that statute, as was said by Crowder, J., in that case, was, the maintaining a generally uniform and ornamental appearance in the line of buildings. The first question is, what is the meaning of "street,"—whether it is to receive the limited construction the magistrate assumes? He picks out a portion of a long line of street. [Willes, J. What is the point of law that is involved in this case?] Whether Bartholomew Place is a "street" within the meaning of the 26th section of the Metropolitan Building Act. [Erle, C. J. You suggest that the "street" is "High Street," or "Kentish Town Road." Surely that is a question of fact: there is no principle of law that prevents Bartholomew Place from being a "street" within the meaning of the act.] The decision of the magistrate may be read as a direction to the jury. [Willes, J. The "general line of fronts" may be a crescent. Could [208] the occupier of the centre insist upon his right to carry out a projection in front of his house to a level with the two ends?] Probably not.

ERLE, C. J. There clearly is no question of law presented for our decision in this case. The decision of the magistrate must be affirmed.

Littler, who appeared for the respondent, asked for costs.

Per Curiam. The decision will be affirmed with costs.

Judgment affirmed accordingly (a).

BROWN v. SYMONS AND ANOTHER. April 23rd, 1860.

[S. C. 29 L. J. C. P. 251; 2 L. T. 323; 6 Jur. N. S. 1079; 8 W. R. 460. See *Gardner v. Ingram*, 1889, 61 L. T. 730.]

It was agreed between A. & B. that A. should enter into the service of B. as a traveller; and it was stipulated that the agreement should be "binding between them for twelve months certain from the date thereof, and continue from time to time until three months' notice in writing be given by either party to determine the same:"—Held, that this was a contract for a year certain only, and that B. was at liberty to put an end to it at the expiration of the year, by giving A. three months' previous notice.

This was an action for an alleged wrongful dismissal of the plaintiff from the defendants' employ.

The declaration stated, that, in consideration that the plaintiff would enter into the service of the defendants as their country traveller in their trade or business of wine-merchants, and would continue therein for one year certain, and would further continue therein from time to time until three months' notice in writing should be given by the plaintiff or by the defendants to discontinue such service, and would make three journeys during the year to such parts as they might direct, and would attend entirely to their [209] business, and not take any other commission, the defendants agreed to employ him in the capacity aforesaid, and to pay him a yearly salary of 150*l.*, payable quarterly, and also an allowance of one pound and one shilling per diem during the time he should be upon his said journeys, and to continue him in such service for the period and upon the terms aforesaid, and during the continuance of the said employment from time to time to direct and allow the plaintiff to make three journeys in each year: that thereupon the plaintiff entered into the service of the defendants in the capacity and upon the terms aforesaid, and continued therein until the expiration of one year: and that, although the plaintiff was ready and willing to make the said three journeys in each year, and to continue in the said service of the defendants, and although all conditions precedent had been fulfilled to entitle the plaintiff to have the said agreement performed by the defendants, and to continue in their said service, and to make the said journeys, and to maintain this action in respect of the breaches hereinafter alleged,—yet the defendants did not, although requested by the plaintiff so to do, direct or allow him to make the said journeys during the said year of his service as

(a) See *Peacock, App., The Queen, Resp.*, ante, vol. iv., p. 264, where the court, having no jurisdiction to entertain the appeal, held that they had no power to give costs.

their country traveller as aforesaid, and wrongfully dismissed the plaintiff from their said employment; whereby the plaintiff had been deprived of the allowance, salary, and profits which he otherwise would have received for his said journeys and service, and had also lost and been deprived of valuable commercial connection in divers parts of the United Kingdom.

Fourth plea,—as to so much of the breach in the first count assigned as alleges that the defendants wrongfully dismissed the plaintiff from their said employment,—that the said agreement in the first count mentioned was an agreement in writing, and was and is in the [210] words and figures and to the tenor and effect following,—“Memorandum of agreement entered into this 11th day of January, 1858, between Frederick Symons and John Fairgray Sharpin, wine-merchants trading under the firm of Symons, Sharpin, & Co., at No. 5 Lawrence Pountney Lane, in the city of London (for themselves and the survivor of them), of the one part, and Robert Brown, of No. 5 St. Paul's Churchyard, in the said city of London, commercial traveller, of the other part. The said Robert Brown engages to serve the parties of the first part as their representative or country traveller in their trade or business of wine-merchants aforesaid, in all such parts of the United Kingdom as they may from time to time determine upon, for the purpose of soliciting orders and collecting in accounts, at the yearly salary of 150*l.* sterling, payable quarterly, and also an allowance of one pound and one shilling per diem during the time he is upon his journey; he being allowed any reasonable extra expenses he may be put to by entertaining any of the customers when transacting business and settling accounts, &c. He also engages to remit all moneys received by him, by the first or second post, as time and circumstances will permit, and send a statement of all moneys received by him and remitted home, keeping only a balance of odd moneys in hand that cannot conveniently be remitted by letter. He also undertakes to make three journeys during the year, to such parts as they the said parties of the first part may direct, and will attend entirely to their business, and not take any other commission. The said parties of the first part hereby agree to the aforesaid terms, and engage to pay the said yearly salary and other allowances, and such other increased sum for salary as they may deem the said Robert Brown to be entitled to receive. This agreement to be binding between the said parties for twelve months certain from [211] the date hereof, and continue from time to time until three months' notice in writing be given by either party to determine the same.” Averment, that they the defendants gave to the plaintiff three months' notice in writing of their desire to determine the said employment of the plaintiff at the expiration of twelve months from the date of the said agreement, and at the expiration of such notice his said employment was determined accordingly.

To this plea the plaintiff demurred, the ground stated in the margin being, “that the agreement set out in the plea was not determinable at the expiration of the first year.” Joinder.

Day, in support of the demurrer. Construing this agreement grammatically, it amounts to a contract analogous to a contract for a tenancy from year to year, which could not be determined by a notice to quit given at the end of the first year. A letting for one year certain and so on from year to year, is a letting for two years: and there is nothing peculiar in the case of a contract of tenancy to distinguish it in this respect from a contract for services. In *Grey v. Pearson*, 6 House of Lords Cases, 61, 106, Lord Wensleydale says: “I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that, in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. This is laid down by Justice Burton, in a very excellent opinion [212]—which is to be found in the case of *Warburton v. Loveland*, 2 Hudson & Brooke, 648.” Construing this agreement according to that rule, it is a contract for one year certain and for three months more at the least. The agreement is to be binding “for twelve months certain,” and “is to continue,”—that is, further to enure,—“from time to time until three months' notice in writing be given by either party to determine the same.” The three months' notice is to determine the continued and uncertain time of service which is to commence at the expiration of the first twelve months.

Hayes, Serjt., contrâ. The old rule as to a tenancy from year to year enuring for two years, was somewhat qualified by the case of *Doe d. Clarke v. Smaridge*, 7 Q. B. 957, where it was held, that, where a tenant, at the expiration of a term of years, held over, and the landlord received rent from him, the tenancy from year to year thus created might be put an end to by a half-year's notice requiring the tenant to quit at the end of the first year after the term of years had expired. Lord Denman there says: "A tenancy from year to year lasts only so long as both parties please; that is, it is determinable by either party at the end of any year, by giving notice to quit half a year before the end of the year. There is no reason why it should not be so determined at the end of the first year, as well as at the end of any subsequent year, unless the parties have by express contract prevented such determination. In the cases of *Agard v. King*, Cro. Eliz. 775, *Denn d. Jacklin v. Cartwright*, 4 East, 29, *Bellasis v. Burbrick*, 1 Salk. 209, 1 Ld. Raym. 170, *Legg v. Strudwick*, 2 Salk. 414, *Birch v. Wright*, 1 T. R. 378, 380, *Doe d. Chadborn v. Green*, 9 Ad. & E. 658, 1 P. & D. 454, *The Queen v. Chawton*, 1 Q. B. 247, 4 P. & D. 525, such express contract appeared either by the pleadings or the evidence. In this case there is no such express [213] contract, but a tenancy for two years at least is supposed to be implied of necessity by law. The case of *Bishop v. Howard*, 2 B. & C. 100, 3 D. & R. 293, was cited for the defendant, some words which fell from Lord Tenterden being supposed to be applicable; but, on looking at that case, it will be found that the words there used do not affect the present question: they shew only that, by holding over, and payment of rent as rent, a tenancy from year to year is created; but they do not touch the question when that tenancy may be determined. We are of opinion that the tenancy from year to year so long as both parties please, is determinable at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use expressions shewing that they contemplate a tenancy for two years at the least. Here there are no such words: and the notice to quit was therefore sufficient. We are aware that this decision may appear at variance with an impression which has prevailed in Westminster Hall, and has perhaps derived some countenance from the words of Lord Tenterden in *Bishop v. Howard*, though they were perfectly unnecessary for that decision. But the authorities, when examined, certainly do not warrant the conclusion that has been drawn from them, for the reasons above given: and it would be absurd in principle, and even inconsistent with the contract, to hold that the tenancy exists from year to year, determinable by half a year's notice by either party, and yet to hold that neither can give such notice during the first year." Assuming that there is any analogy between a case of this sort and a contract of tenancy, *Thompson v. Maberly*, 2 Campb. 573, is undistinguishable from the present case. It was there held, that, if premises are taken "for twelve months' certain, and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice to quit, expiring at the [214] end of the first year. The obvious meaning of this agreement is, that the plaintiff's service should be continued for one year certain, and should not be determined before the end of the year. In *Thompson v. Maberly*, Lord Ellenborough "laid considerable stress upon the word *certain*, applied to the first twelve months, which shewed that everything afterwards was uncertain, and depended on the notice." The argument on the other side would make this a contract for "fifteen months certain."

Day, in reply. The true construction of this agreement is, that the contract shall enure for twelve months certain, and for such further period as the parties shall mutually agree, determinable at any time after the first year by a three months' notice. *Thompson v. Maberly* is clearly distinguishable: there, nothing was said in the agreement about the continuance of the tenancy beyond the twelve months. [Willes J. The word "afterwards" there is quite as strong as "continue" here.] The contract would have expired at the end of the twelve months, without any notice: there was no stipulation for a continuance of the tenancy; the words "and six months' notice afterwards" were quite superfluous. [Willes, J. If the word "until" had been "unless," the construction would have been more favourable for you.] It was the uncertain period only, it is submitted, that was to be determined by the notice.

ERLE, C. J. My notion of the proper construction of this agreement is in accordance with the argument urged on the part of the defendant. If the two members of the sentence had been transposed, the matter would have been quite clear. "This agreement to continue from time to time until three months' notice [215] in writing

be given by either party to determine the same, but to be binding between the said parties for twelve months certain from the date hereof." That is what the parties intended. This is the best construction I can put upon the agreement; and it gives full effect to all its words. The evident intention was, to contract for a year certain, and no more.

WILLES, J., and BYLES, J., concurred.

KEATING, J. I must confess my mind is not quite free from doubt; but my doubts are not sufficiently strong to induce me to dissent from the judgment of my Lord and my learned Brothers.

Judgment for the defendants.

THE LONDON GAS-LIGHT COMPANY v. THE VESTRY OF CHELSEA.
April 25th, 1860.

[S. C. 2 L. T. 217; 8 W. R. 416.]

The plaintiffs by deed contracted for the supply of gas to the public lanterns of the parish of Chelsea, covenanting, amongst many other things, that they would, to the satisfaction of the defendants (the vestry), or their surveyor, light each lantern at sun-set, and continue the same so lighted until sun-rise,—the gas supplied to be well and sufficiently purified, so that the said gas should give a clear and white and brilliant light, and the light or flame to be such a light or flame as was known by the name of the large bat's-wing burner, each burner consuming at the rate of five cubic feet of gas per hour at the least; and the defendants covenanted, that, if the plaintiffs should well and sufficiently light, &c., and perform, fulfil, and keep all and singular the covenants in the deed contained on their part to be performed, &c., they, the defendants, would pay, out of the funds in their hands, or which they could or might raise or obtain by virtue of the powers and authorities vested in them, unto the secretary of the plaintiffs, a certain sum per annum for each and every lantern so lighted by them.—To an action to recover the stipulated annual payments for gas supplied under this deed, the defendants pleaded,—that the plaintiffs did not during the said period light the said public lanterns, or cause the same to be and continue lighted, pursuant to the said deed, to the satisfaction of the defendants or their surveyor,—and that the plaintiffs did not during the said period so light the said public lanterns during each and every night at sun-set, and so continue the same lighted till sun-rise, that the light or flame therein was such a light or flame as is known by the name of the large bat's-wing burner, and consumed at the rate of five cubic feet of gas per hour at the least, within the true meaning of the said deed:—Held, on demurrer, that the matters alleged in the plea did not entitle the defendants to refuse to pay for the gas supplied under the contract,—the performance of all the several stipulations by the plaintiffs not being a condition-*precedent* to their right to receive the money.

This was an action for the breach of a contract for the supply of gas by the plaintiffs to the defendants.

The first count of the declaration stated, That, theretofore, by deed made the 23rd of March, 1858, between the defendants of the first part, and the [216] plaintiffs of the second part,—after reciting that the plaintiffs had lately tendered to the defendants a contract in writing to light with gas the public lamps then set up in the streets and other public passages and places within the said parish (exclusive of the outlying district of Kensal Town), and to paint, maintain, repair, and keep in repair, the posts, columns, lanterns, and fittings of the same, for the term of three years, to be computed from the 1st of October, 1857, subject to the proviso therein-after contained for sooner determining the same, and in the manner and upon the terms thereafter contained,—the defendants did thereby, as far as they lawfully might, signify their consent that the plaintiffs and their servants, workmen, and agents, might at any time and times, and from time to time thereafter, upon reasonable and proper notice for that purpose given as thereafter provided, enter into the several streets and other public places within the said district, and in a due, proper, and careful manner, under the superintendence and direction of the defendants, break up and remove the pavements and roads, and dig and sink trenches, and lay down proper

and sufficient iron main-pipes and service-pipes composed and made of the best materials and in the soundest manner, in, under, across, and along the said streets and places, for the purpose of and in a due and proper manner conveying gas for [217] lighting the same, and also for lighting the churches, shops, inns, taverns, houses, manufactories, and other buildings situate within the said district; and also from time to time to take up and carry away when absolutely necessary such main-pipes, service-pipes, and other apparatus, and to lay and place others of the best materials and construction in lieu thereof with the least delay and inconvenience to the public thoroughfare, as occasion should require or should be deemed expedient: And, in consideration of the consent thereinbefore given, the plaintiffs did thereby covenant with the defendants, and with their then present and future clerk on their behalf, that the breaking up of the pavements and roads, streets, and places in pursuance of the thereinbefore-mentioned authority, should be done in a careful and workmanlike manner, with as little damage and delay as might be; and that the plaintiffs should and would furnish and lay down at their own expense all such main-pipes, service-pipes, and other apparatus as might be necessary for the conveyance of gas for lighting the public lamps in the said streets and other public places within the said parish (exclusive as aforesaid), constructed of the best materials and in the most workman-like manner, and so as not to suffer any escape of gas or any interruption of the due and proper light to be afforded at all times in pursuance of the said contract: And the plaintiffs did thereby further covenant with the defendants, that they the plaintiffs should and would, by their own workmen, and at their own costs and charges, but under the inspection and direction and to the satisfaction of the surveyor to the defendants, relay and make good in a careful and sufficient manner the whole of the footway and carriage-way pavements which should or might be taken up or disturbed by the plaintiffs for any purpose whatsoever: [218] and also should and would, in like manner, fill in and ram down the ground or soil of the carriage-way over and above the main-pipes and service-pipes, and cart away and remove all or such portions of surplus ground, soil, or material as might be directed by the surveyor to the defendants, and also should and would pay or cause to be paid to the defendants, at and after the rates specified in the schedule thereunto annexed, for every square yard of carriage-way pavement, or road and footway pavement, which should or might be relaid or made good by the defendants by reason of the same having been disturbed or removed by the plaintiffs at any time thereafter during the continuance of the said contract for any purposes whatsoever, and the like sums respectively for every square yard of the carriage-way or footway pavement or road which should be certified by the said surveyor to have been relaid or made good a second time, within three calendar months from such relaying or making good as thereinbefore mentioned: And it was thereby expressly declared and agreed between and by the parties thereto, that the whole of the stand-pipes, lantern-irons, lanterns, lamp posts, and apparatus that were then and might thereafter be set up should be the property of the defendants: And the plaintiffs thereby further covenanted with the defendants that the plaintiffs should and would, at their own costs and charges, to the satisfaction of the defendants or their surveyor, for and during the term of three years, to be computed from the 1st of October, 1857, determinable as hereinafter mentioned, well and sufficiently light or cause to be lighted with gas in all and every the streets and other public places and passages in the said parish in which their mains were then or might thereafter be laid (exclusive as thereinbefore mentioned), each and every night at sun-set, and continue lighted until sun-rise, such number of [219] public lanterns, to be fixed upon posts, columns, or brackets, provided or to be provided by the plaintiffs, or under or in pursuance of the direction of the surveyor of the defendants for the time being, at and after the rate of 4l. 10s. for every lantern for a year, and so in proportion for any period less than a year during which the said lanterns should be duly supplied and lighted with gas,—such gas to be well and sufficiently purified, so that the said gas should give a clear and white and brilliant light agreeably to the true meaning of the said contract, and the light or flame to be in all respects such a light or flame as was known by the name of the large bat's-wing burner, each burner consuming at the rate of five cubic feet of gas per hour at the least: and also that the plaintiffs should and would, whenever required so to do by the said surveyor, supply, furnish, set up, provide, and fix all such posts, columns, lantern-irons, and lanterns, with proper service-pipes, stop-cocks, bat's-wing burners, and all other apparatus

necessary thereto, to the satisfaction of the said surveyor, and at or in such places as he should within the said parish (exclusive as thereinbefore mentioned), in which the plaintiffs should then or thereafter should have mains as thereinbefore provided, at or for the sum of 5 guineas for each such post, column, lantern-iron, lantern, service-pipe, stop-cock, bat's-wing burner, and apparatus,—the same to be in every respect of as good materials and workmanship as those which had been recently supplied by the Imperial Gas Light and Coke Company under former contracts; and that the plaintiffs should and would keep the main-pipes and service-pipes constantly cleansed, and also should and would twice in each and every week, or oftener if necessary, during the term thereinbefore mentioned, cause or procure the said lanterns and burners to be well and sufficiently [220] cleansed, and cause and procure by that and other means a steady and uniform light to be produced and kept up within the hours aforesaid,—all such cleansings to be done under the direction and to the satisfaction of the said surveyor: And the plaintiffs did thereby further covenant to and with the defendants, that, if they the plaintiffs should not place in the said streets or places all such main-pipes and service-pipes to the foot of each lamp-post as should be necessary for lighting the whole of the public lamps therein with gas, within the distance thereinbefore mentioned, then and in such case they the plaintiffs should and would pay, over and above all other payments, 1s. for every yard lineal of such streets and places in respect of which such default should take place, as damages stipulated in that behalf, and so toties quoties for every like default; and also that the plaintiffs should and would, at their own costs, repair and amend, to the satisfaction of the said surveyor, all such lamp-posts, columns, brackets, lantern-irons, lanterns, service-pipes, stop-cocks, burners, broken glass, and apparatus, throughout the said streets and places, as should be broken or damaged, within forty-eight hours after notice in writing of the same being so broken or damaged should be given or left at the office of the plaintiffs, and, in default thereof, should pay the sum of 5s. for each and every neglect or omission: And the plaintiffs did thereby further covenant with the defendants, that so often as the said lanterns should not be lighted at sun-set, or should not be supplied with such quantity of gas as aforesaid, or should not be kept properly lighted from sun-set to sun-rise to the satisfaction of the said surveyor, or should be found by any officer of the defendants extinguished between sun-set and sun-rise, then the plaintiffs should and would, at their own charges, on receiving notice thereof, well and sufficiently supply [221] such defect by oil lamps or otherwise as might be deemed most expedient; and that, so often as such neglect should happen, and that in case and as often as any such neglect or default should occur, the plaintiffs should and would remedy the same without delay or pay to the defendants the sum of 2s. 6d. for each and every day on which such default or neglect should continue: And also should and would during the said term, under the direction of the said surveyor, paint or cause to be painted in a workman-like manner twice over with good and proper oil colour all the said posts, columns, brackets, lantern-irons, and lanterns, of such colours as should be directed by the said surveyor, as follows, viz. the lanterns inside and outside, and also the posts, columns, brackets, and lantern-irons, in the month of May in every year, and, in default thereof, should and would pay to the defendants the sum of 5s. for every such post, column, bracket, lantern-iron, or lantern which should not be so painted as aforesaid: And the plaintiffs did thereby further covenant with the defendants that they the plaintiffs should and would pay the amount of and save harmless and keep indemnified the said vestry from and against all costs, charges, and expenses which they the defendants should or might sustain, expend, or be put unto for or by reason of any breach, neglect, or default in any of the covenants, articles, and things therein contained; and that they the plaintiffs should and would bear, pay, and discharge all the costs, damages, and expenses which should or might arise or be occasioned to or be incurred or sustained by the defendants, and save, defend, keep harmless and indemnified the defendants of, from, and against all actions, suits, indictments, claims and demands whatsoever, which should be incurred or sustained, or commenced, prosecuted, or made against them, or any of them, for or in respect of [222] any injury happening or arising from the gas thereby contracted to be supplied, by or through the negligence or carelessness of them the plaintiffs, or their servants, agents, or workmen: And it was thereby further covenanted, declared, and agreed by and between all the said parties thereto, that the whole of the works to be performed by the plaintiffs by virtue of the said presents should be performed in the best manner,

under the superintendence and to the satisfaction of the surveyor of the defendants : And the defendants did thereby, as far as they lawfully could or might, covenant and agree with the plaintiffs, that, if the plaintiffs should and did paint and keep the said columns and posts, and service-pipes, brackets, lantern-irons, lanterns, stop-cocks, bat-swing burners, glass, and other apparatus in good repair and condition, and well and effectually light the said lanterns with gas, and observe, perform, fulfil, and keep all and singular the covenants, clauses, and agreements therein contained, and which on their part ought to be observed, performed, and kept, in all respects, and particularly according to the true meaning of the said presents, they the defendants should and would well and truly pay or cause to be paid, out of the funds in their hands, or which they could or might raise or obtain by virtue of the powers and authorities then vested in them, unto J. R. Hinde, the then secretary, or unto any future secretary for the time being of the plaintiffs, or such other person as the plaintiffs might appoint, for and on their account, for every lantern lighted with gas by them the said plaintiffs, at and after the rate of 4l. 10s. by the year, and so in proportion for a less period than a year, during which such lantern should be actually so lighted, painted, and repaired as aforesaid, in manner following, that is to say, on the 1st of October, the 1st [223] of January, the 1st of April, and the 1st of July in every year, or as soon after as conveniently might be, without any deduction or abatement whatsoever : And it was thereby further mutually covenanted and agreed between the said parties thereto, that the said yearly sum of 4l. 10s. so thereinbefore covenanted to be paid by the defendants for each and every lamp so to be lighted, painted, and repaired as aforesaid, should be paid, at the several times and in manner thereinbefore mentioned, into the hands of the said J. R. Hinde, the then secretary of the plaintiffs, or unto any future secretary, or such other person as the said company might appoint, for the use of the plaintiffs, whose receipt or receipts should be binding on the plaintiffs for so much money as in the said receipts should be expressed or acknowledged to have been received for or on account of the plaintiffs : And it was thereby provided, that, if either of the parties thereto should be desirous to rescind, put an end to, and annul the said agreement and contract at the end of the first or second year of the term of three years thereby contracted, and if such desiring party should give the other party three calendar months' notice thereof in writing before the expiration of the first or second year (as the case might be), then and in such case, the covenants and agreements thereinbefore contained being in all respects fulfilled as they were thereinbefore covenanted to be, the said agreement and contract, and every clause and thing therein contained, should at the expiration of the first or second year of the said term thereby contracted for (whichever in the said notice should be expressed) determine and be utterly void to all intents and purposes, in like manner as if the whole term of three years had run out and expired, or the said agreement or contract had been made for one or two years only, anything in the said [224] presents contained to the contrary thereof notwithstanding, save and except such right of action or other remedy which either of the said parties might have against the other or others of them : And it was thereby further provided that nothing therein contained should apply to that portion of the said parish theretofore called the district of Hans Town until the expiration of the then existing contract bearing date the 11th of June, 1851 : And lastly it was thereby mutually covenanted and agreed by and between the said parties, that, if any dispute should arise upon the terms or conditions of the said contract, or the construction of any matter, clause, or thing therein contained, that the same should be referred to such person as should be agreed upon between the said parties, and who should hear the evidence to be offered on both sides, and determine any such dispute or difference, and whose award when made should be binding on all parties : and the costs, charges, and expenses of such reference, evidence, and award should be borne and paid by the party against whom such award should be made : Averment, that the said deed had been from the time of making thereof hitherto, and still was, in full force and effect and not determined, and that the said term of three years thereby created had not been determined : and that they the plaintiffs did in pursuance of the said deed supply and deliver to the defendants, who accepted the same, large quantities of gas during the year 1858, to wit, to the value of 2292l. 6s. : that they had performed all conditions precedent on their part to be performed according to and under the said deed : that all things had been done and happened necessary to entitle them to payment from the defendants in the manner provided by the said deed for the said gas so supplied and

[225] delivered as aforesaid: and that all times had elapsed necessary to entitle the plaintiffs to such payment by the defendants as aforesaid, and to maintain the action; yet that the defendants had not paid the plaintiffs, or any person on their behalf, for the said gas supplied as aforesaid, or any part thereof, but had therein wholly failed and made default, contrary to the said deed.

The second count stated that, before the passing or coming into operation of an act of parliament made and passed in the session of parliament held in the 18th and 19th years of the reign of Her present Majesty, and intituled "An Act for the better local management of the Metropolis," to wit, on the 11th of June, 1851, by articles of agreement made between George Bague, &c., &c., on behalf of themselves and all others the commissioners who then or might thereafter act in the execution of an act of parliament made and passed in the thirtieth year of the reign of His late Majesty George the Third, intituled "An Act for forming and keeping in repair the streets and other public passages and places within a certain district in the parish of St. Luke, Chelsea, in the county of Middlesex, called Hans Town, and for otherwise improving the same," and also another act of parliament made and passed in the forty-third year of the same reign, being "An Act for amending, altering, and enlarging the powers of the said first-mentioned act," and being the major part of the commissioners present at a meeting duly holden on the 12th of February then last past, and thereafter described as commissioners of the first part, and the plaintiffs of the second part, and sealed by the said parties of the first part, and with the seal of the said plaintiffs,—after reciting that the plaintiffs had lately tendered to the said commissioners a contract in writing to light with gas the public lamps set up, or thereafter to be set up, in the streets and other public [226] passages and places within the said district of Hans Town, and to paint, maintain, repair, and keep in repair, the posts, columns, lanterns, and fittings of the same, for the term of seven years, to be computed from the 30th of June, 1851, subject to the proviso thereafter contained, for sooner determining the same, and in the manner and upon the terms thereafter contained, the said commissioners did thereby, as far as they lawfully might, signify their consent, &c. &c. [setting out a contract similar to that set out in the first count]: Averment, that the said deed remained and was continually from the time of the making thereof until the expiration of the said seven years therein mentioned, to wit, until the 30th of June, 1858, in full force and effect, and not determined in any way; that they the plaintiffs did while the said deed was in full force and effect duly supply and deliver before the said 30th of June, 1858, large quantities of gas under and according to the terms of the said deed for the purpose of lighting the said district of Hans Town, and which gas was before the last-mentioned day so used in lighting the said district under the said deed: that they the plaintiffs had performed all conditions precedent on their part to be performed according to and under the said deed, and that all things had been done and happened necessary to entitle them to payment of the price mentioned in the said deed of a large sum, to wit, 151l. 16s. 3d. for and in respect of a certain quantity of the gas so supplied and delivered as aforesaid, and which is still unpaid for, and to maintain this action: that the said district of Hans Town was as theretofore mentioned and is a district within the said parish of Chelsea, in the said county of Middlesex; and that the said parish of Chelsea is a parish mentioned in Schedule A. to the said first-mentioned act of parliament; and that the defendants are [227] and were before this suit the vestry of the parish, and body corporate under the provisions of the said act of parliament; yet that the said sum of, to wit, 151l. 16s. 3d., in respect of the said gas so supplied and delivered as aforesaid, had not been paid to the plaintiffs, and was still due and owing to them.

The declaration also contained counts for money payable by the defendants to the plaintiffs for gas sold and delivered by the plaintiffs to the said commissioners in the second count mentioned, at their request, after the coming into operation of the said act of parliament in the said second count mentioned and intituled, &c.; for money payable by the defendants to the plaintiffs for gas sold and delivered by the plaintiffs to the defendants at their request: and for money found to be due from the defendants to the plaintiffs on accounts stated between them. Claim 4000l.

Second plea, to the first and second counts, that the plaintiffs did not during the said period light the said public lanterns, or cause the same to be and continue lighted, pursuant to the said deeds, to the satisfaction of the defendants or their surveyor.

Fourth plea, to the same counts, that the plaintiffs did not during the said period so light the said public lanterns during each and every night at sunset, and so continue the same lighted till sunrise, that the light or flame therein was such a light or flame as is known by the name of the large bat's wing burner, and consumed at the rate of five cubic feet of gas per hour at the least, within the true meaning of the said deeds.

There was also a plea of payment into court of 1800l.

The plaintiffs demurred to the second and fourth pleas, the grounds of demurrer stated in the margin of each demurrer being, "that the matters alleged in the pleas did not entitle the defendants to refuse to [228] pay as alleged, and afford no answer to the claim of the plaintiffs." Joinder.

Bovill, Q. C. (with whom were Pigott, Serjt., and Holland), in support of the demurrers (a). If the performance by the plaintiffs of the several matters set forth in the second and fourth pleas were a condition precedent to the defendants' obligation to accept and to pay for the gas supplied to the parish lamps, the omission to cause one lamp to be lighted for a night, or for a single hour between sun-set and sunrise, would absolve the defendants from the obligation to pay anything. A proposition so monstrous cannot be for a moment entertained. If it be necessary to cite author[ities], the case falls precisely within the third rule in the notes to *Portage v. Cole*, 1 Wms. Saund. 320 c., where it is laid down, that, "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. As, where A. by deed conveyed to B. the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500l. and an annuity of 160l. for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy; and B. covenanted that, A. well and truly performing all and everything therein contained on his part to be performed, he would pay the annuity, —in an action by A. against B. on this covenant, the breach assigned was the non-payment of the annuity: plea, that A. was not at the time legally possessed of the negroes on the plantation, and so had not a good title to convey. The court of King's Bench held the plea to be ill, and added, that, if such plea were allowed, any one negro not being the property of A. would bar the action:" *Boone v. Eyre*, 1 H. Bl. 272, n. (a), 2 W. Bl. 1312. *Stavers v. Curling*, 3 N. C. 355, 3 Scott, 740, is also in point.

The court called on

Knowles, Q. C. (with whom were David Keane and Watkin Williams), to support the pleas (b). The [230] hardship suggested on the other side would be no greater

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That the matters alleged in the second and fourth pleas did not entitle the defendants to refuse to pay as alleged, and afford no answer to the claim of the plaintiffs:

"That the performance of the several matters set forth in the second and fourth pleas was not a condition precedent to the acceptance of gas by the defendants, and, at all events, was not a condition precedent to payment by the defendants for gas actually supplied to and accepted by them:

"That, even if the performance of the several matters set forth in the second and fourth pleas was a condition precedent, it appears upon the record that the consideration of the agreements mentioned in the declaration has been executed in part, and, therefore it is not competent for the defendants to insist, by way of defence in this action, upon the non-performance of those things which were originally conditions precedent:

"That the second and fourth pleas only shew at most a partial failure of performance by the plaintiffs of the terms of the contract for which there may be compensation in damages:

"And that the defendants have, by accepting the gas for which payment is claimed in this action, estopped themselves from setting up in this action the defences set forth in the second and fourth pleas."

(b) The points marked for argument on the part of the defendants were as follows:—

"That the second and fourth pleas traverse the fulfilment of conditions necessary

than would be the hardship of compelling the defendants to pay the plaintiffs a large sum for each lamp, and leaving them to a remedy by a cross-action for breaches of covenant on their part. The deed contains two classes of covenants. The first class relates to the breaking up and replacing the pavements, &c. As to these, the defendants are satisfied to rely on the covenants of the plaintiffs. Then comes a second class of covenants relating to the lighting of the parish lamps. The plaintiffs covenant with the defendants that they will, to the satisfaction of their surveyor, well and sufficiently light the several lamps for a given period from sunset to sunrise, and with gas of a given quality, &c. And the defendants covenant to pay at the rate of 4l. 10s. per annum for the lamps so lighted. The consideration for the defendants' covenant is the covenant by the plaintiffs that the light shall be supplied for the time and of the quality and quantity specified. In the notes to *Cutter v. Powell* (6 T. R. 320), in Smith's Leading Cases, 4th edit. vol. i., p. 19, after observing the general rule to be, "that, while the special contract remains unperformed, no action of indebitatus assumpsit can be brought for anything done under it," it is said: "We now come to the exceptions from that rule: and the first of them is that adverted to by Parke, J., in the passage just cited (from *Read v. Rann*, 10 B. & C. 438). It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In such a case the party cannot recover the remuneration stipulated for in the contract, because he [231] has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labour, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and, to recover that quantum of remuneration an action of indebitatus assumpsit is maintainable." [Willes, J. That is wholly inapplicable to a body which cannot be sued except on a contract entered into in writing and in a particular form. It has been held in the Exchequer that that rule does not apply to corporations.] The second plea in substance is, that the plaintiffs have not performed their part of the contract by lighting the parish lamps in the manner stipulated, to the satisfaction of the defendants' surveyor. That this is a good plea, is clear from *Morgan v. Birnie*, 9 Bingh. 672, 3 M. & Scott. 76. There, the defendant was to pay for building upon receiving an architect's certificate that the work was done to his satisfaction: the architect checked the builder's charges, and sent them to the defendant; and it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. The authority of that case has repeatedly been recognized. [Byles, J. There was a specific and clear provision that no part of the work should be paid for until the certificate had been obtained.] In *Grafton v. The Eastern Counties Railway Company*, 8 Exch. 699, the declaration stated, that, by a certain contract, the plaintiffs agreed that they would, during a certain term, supply to the defendants, and that the defendants would take from them, all the coke the defendants' company should require at Lowestoft; [232] according to the capacity of certain ovens, provided that the said coke should be of the best quality; the plaintiffs on their part engaging that the same should be large, and of the best quality, and equal to that made from the best Brancepeth coal, and be to the satisfaction of the said company's inspecting officer for the time being; and agreeing that the company should have power to refuse to accept coke of inferior quality or small in its pieces, and to purchase what they might require elsewhere if the plaintiffs did not supply coke of the best quality, and equal to that above described, and to the satisfaction of the said company's said officer, and to charge the plaintiffs with the excess of price beyond the said contract price. The declaration then contained an averment, that, during the term, the plaintiffs manufactured and supplied to the defendants, in the manner provided by the said agreement, certain coke, which they required at Lowestoft, which was of the quality required by the agreement, and equal to that made from the said Brancepeth coal, and large in its pieces; and alleged as a breach the refusal of the defendants to accept

to be performed by the plaintiffs in order to entitle them to be paid in manner and to the amount provided for in and by the several deeds in the declaration set forth; and that, if the issue on either of these pleas be found for the defendants, the plaintiffs are only entitled to recover on the quantum meruit, to which a third count is directed."

the said coke. It was held, that, according to the true construction of the agreement, it was a condition precedent to the right of the plaintiffs to insist upon the defendants' acceptance of the coke, that it should be to the satisfaction of their inspecting officer; and, consequently, that the declaration, which omitted that allegation, was bad in substance. Then, as to the fourth plea,—the doing of that which the plaintiffs are there alleged not to have done, was clearly a condition precedent to their right to be paid under the contract. In *Glazebrook v. Woodrow*, 8 T. R. 366, the plaintiff covenanted to sell to the defendant a school-house, &c. and to convey the same to him on or before the 1st of August, 1797, and to deliver up the possession to him on the 24th of June, [233] 1796; and, in consideration thereof, the defendant covenanted to pay the plaintiff 120l. on or before the 1st of August, 1797: and it was held, that the covenant to convey and that for payment of the money were dependent covenants, and that the plaintiff could not maintain an action for the 120l. without averring that he had conveyed or tendered a conveyance to the defendant. In *Ellen v. Topp*, 6 Exch. 424, by the terms of an indenture of apprenticeship, an infant was placed by his father (who was a party to the indenture) as apprentice to a master described in the indenture as “an auctioneer, appraiser, and corn-factor,” “to learn his art, and with him after the manner of an apprentice to serve.” After the making of the indenture and the commencement of the apprenticeship, the master wholly relinquished the trade of corn-factor; whereupon the apprentice absented himself from his master's service. In an action upon the indenture, by the master against the father, for the desertion of the apprentice, it was held that the relinquishment by the master of his trade of corn-factor was a good answer to the action, —the exercise of the three trades being an entire and indivisible consideration for the service of the apprentice, and the relative duty to teach the three being a condition precedent. Referring to the third rule in the notes in 1 Wms. Saund. 320 c. Pollock, C. B., says: “There is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if, in the case of *Boone v. Eyre*, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could [234] have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it. So, in *Graves v. Legg*, 9 Exch. 709, by a written agreement, the plaintiff contracted to sell to the defendant 300 to 350 bales of white washed Donskoy fleece wool, laid down in certain ports in England, “deliverable at Odessa during August then next, to be shipped with all dispatch, warranted fair average quality; but, should they prove otherwise, to be taken with a fair allowance, to be assessed by Messrs. H. & R., subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped,” &c. To an action for the breach of this contract, by not accepting the wools, the defendant pleaded, that the wools were bought, with the knowledge of both parties, for the purpose of re-selling in the course of the defendant's business; that wool is an article of fluctuating value, and not saleable until the names of the vessels in which it was shipped should have been declared according to the contract; and that the plaintiff had neglected to declare the names of the vessels in which the wools were shipped until an unreasonable time after they had been shipped; and it was held that the provision in the contract that the names of the vessels in which the wools were shipped should be declared as soon as they had been shipped, was a condition precedent to the defendant's obligation to accept and pay for them, and consequently that the plea was good. Again, in *Roberts v. Brett*, 18 C. B. 561, by agreement dated the 15th of May, 1855, the plaintiff covenanted forthwith to procure a vessel and stow on board a certain telegraphic cable then at M.'s wharf, and to rig, provision, and man her, and have her ready for sea at the Nore on or before the 15th of July: and the defendant covenanted to pay the plaintiff 5000l. [235] by instalments,—1000l. seven days after the arrival of the vessel at M.'s wharf, 2000l. on or before the expiration of twenty-one days after the vessel should have arrived alongside M.'s wharf, and the remaining 2000l. as soon as the ship should put to sea from the Nore, and also to give the plaintiff 500 shares in a certain company. It was also mutually agreed that each party should, within ten days after the execution of the agreement, give and execute to the other a bond, with two sureties, in the

sum of 5000l., for the due performance of the covenants on his part. In an action upon this agreement, the breaches assigned being, non-payment by the defendant of the 5000l., or any part thereof, and non-delivery of the shares,—it was held, that the execution of the bond by the plaintiff was a condition precedent to his right to sue for such breaches (a)¹. In *Neale v. Radcliff*, 15 Q. B. 916. the plaintiff and defendants agreed, the plaintiff to let, and the defendants to take, a messuage, barn, stable, and outbuildings; and the defendants agreed to keep in repair the said messuage, building, and premises, the same being first put into repair by the plaintiff. In an action of assumpsit for non-repair,—the declaration alleging, that, although the plaintiff before the breach of promise put the said messuage, buildings, and premises into repair, yet the defendants did not keep the same in repair, and the defendants pleading that the plaintiff did not first put the said messuage, buildings, and premises into repair, upon which plea issue was taken,—it was proved, and found in terms by the jury, that the plaintiff had not put the whole premises into repair, but part only, and that the defendants had not kept that part in repair; and the jury gave damages for the part. It was held,—first, [236] that the repair by the plaintiff was a condition precedent to the obligation on the defendants to keep in repair,—secondly, that, on this contract, the condition precedent could not be divided, and that the plaintiff could not recover for non-repair of any part of the premises, without having first repaired the whole. In *Grey v. Friar*, 4 House of Lords Cases, 565, A. became tenant to B. of a colliery and also of some farm land, at distinct rents. The lease contained very numerous covenants as to the payment of the rents, and as to the management of each property. The term created was for forty-two years; but the tenant was to have liberty to put an end to the term, on giving eighteen months' notice before the expiration of the first eight years, or of any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words,—“then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed,) this lease, and every clause and thing therein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine, and be utterly void: . . . but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained.” The court of Exchequer (5 Exch. 584) had held that this proviso did not make the performance of all the covenants a condition precedent to the tenant's power to put an end to the lease: but the Exchequer Chamber (5 Exch. 597), held that the proviso did make the performance of the covenants a condition precedent. On appeal to the House of Lords, the lords being equally divided, the judgment of the Exchequer Chamber was [237] affirmed (a)². The language of Willes, C. J., in *Thomas v. Culwallader*, Willes, 496, is precisely applicable here. It was there held, that, in an action on a covenant against a lessee for not repairing (the covenant adding “the lessor allowing and assigning timber for the repairs”), it is necessary to aver that the lessor did allow and assign timber, &c. The Lord Chief Justice, in stating the opinion of the court, says: “I expressed my dislike of those cases, though they are too many to be now over-ruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as, where there are two covenants in a deed, the one for repairing, and the other for finding timber for the reparations; this notion plainly tending to make two actions instead of one, and to a circuitry of action and multiplying actions, both which the law so much abhors. If, therefore, this were a new point, I should be inclined to be of opinion, that, though, where there are mutual covenants relative to one another in the same deed, a plaintiff is not obliged in an action brought for the breach of them to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff: but this has been so often determined otherwise, that it is too late now to alter the law in this respect. But, where words make a condition precedent or a qualification of a

(a)¹ Affirmed in error, *Roberts v. Brett*, ante, vol. vi., p. 611.

(a)² And see *Friar v. Grey*, 15 Q. B. 891, and *Grey v. Friar*, 15 Q. B. 901.

covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification." [238] *Boone v. Eyre* was a very different case from this. There, the estate was conveyed. [Byles, J. There were various stipulations there, as there are here.] All the cases proceed upon the inequality in the position of the parties. Here, a cross-action would by no means meet the justice of the case. The whole is past and gone. Besides, there is a payment into court of 1800l. upon the indebitatus count.

Pigott, Serjt., in reply, was stopped by the court.

ERLE, C. J. I am of opinion that the judgment of the court upon these demurrers ought to be for the plaintiffs; and I found that opinion upon the construction which I put upon the contract between these parties, gathering that construction from the terms of the instrument, and having regard to the subject matter of the contract. The substance of the deed is, that the plaintiffs contract to light the parish lamps for a given period from sunset to sunrise with gas of good quality and sufficient in quantity; and the parish contract to pay the company for that service at the rate of 4l. 10s. per annum for each lamp. It is not one unity of contract on one side and of promise on the other. Each is a severable contract and promise. It manifestly would be contrary to the intention of the parties, that the omission of the plaintiffs to light one lamp for a single night should defeat the claim of the plaintiffs to be paid the stipulated sum in respect of all the other lamps in the parish which were properly lighted. Mr. Knowles suggests that there is an indebitatus count, upon which the defendants have paid 1800l. into court. But, when we are considering one count, and the rights of the parties in respect of the line of pleadings applicable to that count, we cannot have recourse to another for the purpose of assisting our judgment. We [239] can only deal with the two pleas which are before us, and the demurrers to those pleas. Here is a severable contract, with a severable consideration, and a severable promise. It would be monstrous to hold that the failure to keep one lamp alight should operate an entire destruction of the plaintiffs' claim, which it would do if we were to hold that the performance by them of each and every of the stipulations in the deed on their part was a condition precedent to their right to call upon the defendants for the stipulated payments. The case of *Guy v. Friar*, is not much to the purpose. There, the act to be done by the lessees to entitle them to put an end to the lease, was one and indivisible. Here, as it seems to me, there is a severable consideration and a severable promise.

WILLES, J. I am entirely of the same opinion. The pleas might be satisfied and proved by shewing that on one night a single lamp went out in a high wind, and remained unlighted. It never could have been the intention of the parties that the plaintiffs' right should be defeated by such a circumstance as that.

BYLES, J. I am of the same opinion. The clearest words of condition must yield to the prominent intention of the parties as gathered from the whole instrument. The words were very clear in *Boone v. Eyre*. I entertain no doubt whatever.

KEATING, J. It is clear to my mind that the several covenants here were intended by the parties to be independent, and not mutual covenants.

Judgment for the plaintiffs.

[240] FREDERICK WOODCOCK PEDGRIFT, *Appellant*: BARRINGTON CHEVALLIER, *Respondent*. April 23rd, 1860.

[S. C. 29 L. J. M. C. 225; 6 Jur. N. S. 1341; 8 W. R. 500.]

To warrant a conviction under the Medical Act, 21 & 22 Vict. c. 90, s. 42, for acting as or pretending to be a surgeon, there must be unequivocal evidence that the party has so acted or pretended: it is not enough that he is so called by persons whom he has attended professionally, in the absence of evidence to shew that he has done so on his own account and for his own profit.

The following case was stated for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43:—

At the Halesworth (Suffolk) petty sessions, on the 26th of October, 1859, Frederick Woodcock Pedgrift was charged upon the information of Barrington Chevallier, for that he did on the 5th of August, 1859, at Wissett, in the said county, wilfully and

falsely pretend to be a general practitioner, contrary to the form of the statute in that case made and provided. The evidence given on that occasion was as follows:—

Barrington Chevallier produced a book which he stated to be a copy of a medical register published in pursuance of the Medical Act. On the cover of this book were the words "By authority:" and the following is a copy of the title-page,—*"The Medical Register, pursuant to an act passed in the 21 & 22 Victoria, cap. 90, to regulate the Qualifications of Practitioners in Medicine and Surgery; 1859. London: Published and sold at the Office of the General Council of Medical Education and Registration of the United Kingdom, 32 Soho Square: Price 7s. 6d."* The book then contained an account of the fees for registration, the names of the members and officers of the general council of medical education and registration, in which Dr. Francis Hawkins is stated to be registrar of the general council; some explanatory notes by Dr. Hawkins: the Medical Acts of 1858 and 1859; and a table of abbreviations: and then followed the names of medical men, with date of registration, residences, and qualifications, extending over 335 pages, and headed with the words and figures *"The Medical Register, [241] 1859."* The witness stated that he had searched the register, and that the name of the defendant was not in it.

Jonathan Warren stated that he was a labourer at Wissett, and a member of the Rational Sick and Burial Association; that he was admitted February, 1858, was examined by the defendant before being admitted, that defendant said he would do, and passed him: that Mr. Cowles was agent of the club, and witness paid him 2s. 6d. when he was admitted. Witness produced his card, which was headed *"Rational Sick and Burial Association. Branch No. 63. Mr. Jonathan Warren was admitted to Class No. 3 on the 1st day of February, 1858. Progressive No. 60,"* and contained columns for figures, to be filled up with subscriptions paid or in arrear, some of which were filled up, and ended with *"Mr. John Cowles, residing at Halesworth, agent; Mr. F. W. Pedgrift, residing at Halesworth, medical attendant."* The witness further stated that, on the 5th of August last, he sent for the defendant, that the defendant came and saw him, said his complaint was stoppage of water, and gave him some medicine.

Martha Warren, wife of the last witness, stated that she was a member of the club: that she was examined by the defendant in February, 1858; that she asked the defendant whether he was the surgeon they were to send for if she or her husband were ill: that he said he was: that she was present when the defendant examined her husband on the 5th of August; that she told the defendant they belonged to the club; and that, after the defendant came down, he mixed some medicine for her husband, and said he should cup him in the evening if he were not better. The court asked this witness whether she considered the defendant as the medical officer of the club; and she said she did.

[242] John Cowles stated that he was the agent of the Rational Sick and Burial Association; that members on being admitted passed a doctor, and that the doctor's certificate is sent to Manchester; that Jonathan Warren was a member, and witness received his contributions; that Mr. Irwin has been medical attendant since August, 1858: that the change was made on account of a communication from Mr. Tidd Pratt to the effect that they must have a regularly qualified medical man, in consequence of which the witness saw the defendant, who said that he was not qualified, and that Mr. Irwin had come to take his place. The witness admitted, that, since that, he had continued to describe the defendant as the surgeon to the club; and he first said that his doing so was an error, and afterwards that it was because the country members would not know who Mr. Irwin was. The witness produced several papers relating to the illness of members of the club, dated from August to December, 1858. The following is a copy of the latest in date,—

"Rational Sick and Burial Association. Chief Office, 44 Thomas Street, Manchester. Branch No. 63, held at Halesworth."

"Schedule of visiting officers attending Mr. Benjamin Buller, member of Class No. 4, Residence, Bridge Street, who declared upon the sickness-fund on the 9th December, 1858, at o'clock in the ."

"Mr. William Collings, chairman: Mr. George Ayers, Mr. John Gooch, sickness-visitors: Mr. F. W. Pedgrift, medical attendant; Surgery or residence, Halesworth: Mr. John Cowles, branch agent: Mr. William Woolstencroft, general-agent"

The figures and the words in italics are written; the remainder is printed. The written part is apparently all written with the same ink, at the same time. On another side is the following,—

[243] “To the agent of the *Halesworth* Branch, No. 63, of the Rational Sick and Burial Association, 1858.

“Sir,—This certifies that I am now restored to health, and so far recovered from my late sickness as to be able to resume my employment, and with the opinion of my medical attendant I do hereby declare myself off the funds of the association. I do also hereby acknowledge that I have received the sum of 6s. 3d., being weeks and 3 days’ pay during the period of my sickness. As witness my hand this 13th day of December, 1858.”

(Signed) “*Benjamin Buller.*”

“Certified by me *Richard Phibbs Irwin, M.R.C.S., &c., &c.*, medical attendant.

“Surgery or residence of medical attendant, *Thorofure Street, Halesworth.*”

The other four papers are in the same form, all describing the defendant as the medical attendant, but all signed by Mr. Irwin as medical attendant. The witness said he had other similar papers at home, signed by the defendant for Mr. Irwin. He said Mr. Irwin received all moneys, and that the defendant was not paid anything for attending the club. He subsequently said that the 1st of October, 1859, was the day Mr. Irwin was formally elected surgeon to the club.

The counsel for the defendant objected,—first, that the book produced by Dr. Barrington Chevallier was not a copy of the register within the meaning of the 27th section of the Medical Act, and was therefore improperly admitted in evidence, —secondly, that the evidence adduced of Jonathan Warren being a member of the club was improperly admitted, —thirdly, that the evidence adduced of Martha Warren being a member of the club was improperly admitted, —fourthly, that [244] the question put by the court to the witness Martha Warren was improper, and her answer inadmissible, —fifthly, that there was nothing in the Medical Act to prevent the defendant practising, —sixthly, that there was no evidence to convict the defendant of any offence under that act.

The justices considered, from the evidence above set forth, that the defendant did on the day named wilfully and falsely pretend to be a general practitioner. They therefore convicted him of the offence with which he was charged, in the penalty of 10l., and 2l. 5s. costs: and, he having served them with a notice that he was dissatisfied with their determination as being erroneous in point of law, and made application for a case for the opinion of this court, they therefore submitted this case for the opinion of the court, in order that, if their determination were right, the conviction might be affirmed, or, if wrong, might be reversed.

Lush, Q. C. (with whom was N. Palmer), for the appellant. The conviction in this case proceeded upon the 40th section of the Medical Act, 21 & 22 Vict. c. 90, which enacts that “any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate of medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under this act, or that he is recognized by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall upon a summary conviction for any such offence, pay a sum not exceeding 20l.” Where is the evidence here that Mr. Pedgrift has, since the day on which the act came into operation (1st Oct. 1858), wilfully and falsely pretended to be or taken or used the [245] name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary? According to the evidence, it appears that all that he has done since August, 1858, was done as assistant to Mr. Irwin, who had been appointed the medical officer of the club in his stead. And, if there was any evidence that he had assumed either of those characters, there was none that he had done so falsely, or that he was not in fact a duly qualified practitioner: and there is nothing in the act which makes it necessary for a qualified practitioner to cause himself to be registered. The only penalty imposed on him for the omission to register is, that he shall not be entitled to recover any charge in any court of law for any medicine or surgical advice, attendance, or for the performance of any operation,

or for any medicine which he shall have both prescribed and supplied,—s. 32; and that he shall be ineligible for certain appointments,—s. 36. [Keating, J. The magistrates seem to have assumed that there was some secret arrangement by which Mr. Pedgrift was to receive the emoluments of the practice in the name or through the hands of Mr. Irwin: but I see no evidence of that. Byles, J. All that appears is, that some one calls him a medical practitioner.]

No counsel appeared in support of the conviction

ERLE, C. J. Deeply impressed as I am with the importance of this act of parliament, I think we are bound before we sustain a conviction to see that it is founded upon sufficient evidence that the party complained of has wilfully and falsely done that which the statute prohibits. Upon the statement submitted to us in this case, I see no evidence to warrant the [246] conclusion the magistrates have come to: and no one appears before us to support the conviction. It seems that Mr. Pedgrift was practising before the passing of the act as a surgeon and accoucheur; but that from that period he has carefully abstained from so doing or from so holding himself out. My Brother Keating has suggested that which probably was operating on the minds of the justices. But that is mere conjecture: there is nothing in the evidence as stated to us to warrant the conviction.

The rest of the court concurring,

Appeal allowed (a).

FREDERICK WOODCOCK PEDGRIFT, *Appellant*: BARRINGTON CHEVALLIER, *Respondent*.
Feb. 23rd, 1860.

A. and B. (the latter being a duly qualified medical practitioner) jointly occupied a house on one door of which was a plate with the name of Mr. A. engraved thereon. On another plate on the same door, under the former, but inclosed in the same frame, was the name of Mr. B., with the addition of the words "Surgeon, Accoucheur, &c." On another door was written the word "Surgery," and on a lamp over the door "Surgeon Accoucheur." The name of A. was not in the Medical Register.—Upon a complaint under the Medical Act, 21 & 22 Vict. c. 90, s. 40, the justices, assuming from the above facts that A. "falsely pretended to be a surgeon" convicted him in the penalty of 10l. —This court, on appeal under the 20 & 21 Vict. c. 43, quashed the conviction, on the ground that there was no evidence to warrant it.—Semble, that a book purporting to be a copy of the "Medical Register" pursuant to the act, and professing to be "published and sold at the office of the General Council of medical education and registration," is admissible under s. 27.

The following case was stated for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43:—

At the Halesworth (Suffolk) petty sessions, on the 26th of October, 1859, Frederick Woodcock Pedgrift was charged upon the information of Barrington Che-[247]-vallier, for that he did on the 12th of October, 1859, at Halesworth, in the said county, wilfully and falsely pretend to be a surgeon, contrary to the form of the statute in that case made and provided.

On the hearing of the case, a book was produced, which was stated to be a copy of a medical register published in pursuance of the Medical Act. On the cover of this book are the words "By Authority;" and the following is a copy of the title-page,—
"The Medical Register, pursuant to an act passed in the 21 & 22 Victoria, c. 90, to regulate the Qualifications of Practitioners in Medicine and Surgery: 1859. London: Published and sold at the office of the General Council of Medical Education and Registration of the United Kingdom, 32 Soho Square: Price 7s. 6d." The book then contained an account of the fees for registration, the names of the members and officers of the general council of medical education and registration, in which Dr. Francis Hawkins is stated to be registrar of the general council, some explanatory notes by Dr. Hawkins, the medical acts of 1858 and 1859, a table of abbreviations, and then follows the names of medical men, with date of registration, residences, and qualifications, extending over 335 pages, and headed with the words and figures, "The Medical Register, 1859."

(a) See the next case.

It was also proved, that, on a door of the house in which the defendant and Mr. Richard Phibbs Irwin, a registered surgeon, lived, and for which they were jointly assessed to the rates, was a plate in a wooden frame, on which was engraved,—

MR. PEDGRIFT.

MR. IRWIN.

Surgeon, Accoucheur, &c.

It appeared that the name of Mr. Pedgrift was on a separate piece of plate from the rest: but there was no [248] division between the names of Mr. Pedgrift and Mr. Irwin, except the line which was necessarily apparent where the two pieces of plate joined. It also appeared that “Surgery” was written on another door, and “Surgeon Accoucheur” on the lamp over the door.

The counsel for the defendant objected,—first, that the book produced was not a copy of the register, within the meaning of the 27th section of the Medical Act, 1858, and was therefore improperly admitted in evidence,—secondly, that there was no evidence that the defendant pretended to be a surgeon,—thirdly, that there was no evidence that he was not a surgeon.

The justices considered that the words “Surgeon, Accoucheur, &c.,” on the plate, were intended to apply equally to Mr. Pedgrift and Mr. Irwin. They therefore considered that the defendant did on the 12th day of October wilfully and falsely pretend to be a surgeon; and they convicted him of the offence with which he was charged, in the penalty of 10*l.*, and 1*l.* 13*s.* costs. And, he having served them with a notice that he was dissatisfied with their determination as being erroneous in point of law, and made application for a case for the opinion of this court, the justices stated this case, in order that, if their determination were right, the conviction might be affirmed, or, if wrong, might be reversed.

Lush, Q. C. (with whom was N. Palmer), for the appellant. The evidence to fix the appellant with the offence charged is as defective in this case as in the last. It appears that the appellant and a Mr. Irwin, a duly qualified medical practitioner, jointly occupied a house at Halesworth; that the names of the appellant and Mr. Irwin appeared on one of the doors of the house, that of the latter having under it the words “Surgeon, Accoucheur,” and that of the former being [249] close above, but on a separate plate; and that, on another door was written the word “Surgery,” and on a lamp over the door “Surgeon Accoucheur.” [Erle, C. J. Combining the statements in this case with those contained in the former one, the conviction might possibly be justified. That shews that the suggestion thrown out by my Brother Keating in the other case was in all probability well founded. Keating, J. The magistrates say that they considered that the words “Surgeon, Accoucheur, &c.,” on the plate, were intended to apply equally to both. Erle, C. J. That is a conclusion of fact.] And one which there is no evidence whatever to justify. Of itself it is no evidence of the appellant having held himself out as a surgeon and accoucheur; and there is no proof of his having since the passing of the act ever acted in either of those capacities. [Willes, J. The appellant gives no evidence as to why his name appeared in so equivocal a position.] For anything that appears, he might have been a lodger. [Byles, J. The case finds that he and Irwin jointly occupied the house, and were jointly assessed to the rates in respect of it. The magistrates do not say that the words under the name of Irwin appeared to apply to both the parties; but merely that they considered that they were intended so to do.] They have acted upon a mere suspicion or surmise. Then, assuming that the appellant did hold himself out as a surgeon, there is no evidence that he did so falsely. There is nothing in the act which requires one who before its passing was a licentiate in medicine, or member of the college of physicians or surgeons, to register at all: and the penal clause (s. 40) only applies to those who wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, [250] or description implying that he is registered under the act. There is no evidence here that what the appellant is assumed to have done was done falsely. The case does not even find that he was not registered. The only effect of an omission on the part of a duly qualified practitioner to cause himself to be registered is, that he is disentitled to sue for advice, attendance, medicines, &c. (s. 32), and is disqualified for holding certain appointments,—s. 36. The material sections

of the act are, the 15th, 17th, and 31st. The 15th section enacts that "every person now possessed, and (subject to the provisions hereinafter contained) every person hereafter becoming possessed of any one or more of the qualifications described in the schedule (A.) to this act, shall, on payment of a fee not exceeding 2*l.* in respect of qualifications obtained before the 1st of January, 1859, and not exceeding 5*l.* in respect of qualifications obtained on or after that day, be entitled to be registered, on producing to the registrar of the Branch Council for England, Scotland, or Ireland the document conferring or evidencing the qualification or each of the qualifications in respect whereof he seeks to be so registered, or upon transmitting by post to such registrar information of his name and address, and evidence of the qualification or qualifications in respect whereof he seeks to be registered, and of the time or times at which the same was or were respectively obtained:" and then follows a proviso as to colleges and other bodies. The 17th section enacts that "any person who was actually practising medicine in England before the 1st day of August, 1815, shall, on payment of a fee to be fixed by the General Council, be entitled to be registered on producing to the registrar of the Branch Council for England, Scotland, or Ireland a declaration according to the form in schedule (B.) to this act, signed by him, or [251] upon transmitting to such registrar information of his name and address, and inclosing such declaration as aforesaid." And the 31st section gives certain privileges to persons registered, enacting that "every person registered under this act shall be entitled, according to his qualification or qualifications, to practise medicine or surgery, or medicine and surgery, as the case may be, in any part of Her Majesty's dominions, and to demand and recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients: Provided always that it shall be lawful for any college of physicians to pass a bye-law to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any court of law: and thereupon any such bye-law may be pleaded in bar to any action for the purposes aforesaid commenced by any fellow or member of such college." Then, the book produced (the admissibility of which was objected to) was not a copy of the register within the meaning of the 27th section. That section enacts that "the registrar of the General Council shall in every year cause to be printed, published, and sold, under the direction of such council (i.e. the General Council, constituted as provided by ss. 3, 4), a correct register of the names, in alphabetical order according to the surnames, with the respective residences, in the form set forth in schedule (D.) to this act, or to the like effect, and medical titles, diplomas, and qualifications conferred by any corporation or university, or by Doctorate of the Archbishop of Canterbury, with the dates thereof, of all persons appearing on the general register as existing on the 1st day of January in every year: and such register shall be called 'The Medical Register:' and a copy of the medical register for the time [252] being, purporting to be so printed and published as aforesaid, shall be evidence in all courts and before all justices of the peace and others that the persons therein specified are registered according to the provisions of this act: Provided always, that, in the case of any person whose name does not appear in such copy, a certified copy, under the hand of the registrar of the General Council or of any Branch Council, of the entry of the name of such person on the general or local register, shall be evidence that such person is registered under the provisions of this act." The thing produced here did not purport to be "printed, published, and sold under the direction of the General Council:" it merely purported to be a book "published and sold at the office of the General Council of Medical Education and Registration of the United Kingdom."

ERLE, C. J. The magistrates seem to have sent these two cases to us as if they were to be read together. In the first case, it was quite clear that there was no evidence to shew that the appellant had acted or held himself out as a medical practitioner subsequently to the passing of the 21 & 22 Vict. c. 90. In this case there is a total absence of evidence that the appellant wilfully and falsely pretended to be a surgeon. The course, therefore, which we propose to take in this case is, to send back the case, under the authority given to us by the 7th section of the 20 & 21 Vict. c. 43, to be re-stated by the justices if they think fit, upon the evidence they had before them at the hearing, by shewing, if the facts will warrant it, that the appellant did falsely pretend to be a surgeon, &c.

The rest of the court concurring, the case was accordingly sent back. It was afterwards returned with the following additional statement:

"We the undersigned justices, in accordance with [253] an order dated the 23rd of April instant, state that we had no other grounds for holding the appellant to have falsely pretended to be a surgeon than those stated in the case, namely, that his name did not appear in the Medical Register, from which we assumed he was not a surgeon, and there was a plate upon the door mentioned in our case with the word surgeon upon it, from which we considered he pretended he was a surgeon."

The amended case came on to be argued in Trinity Term, when Lush, Q. C., appeared for the appellant, but no counsel appeared for the respondent. The learned counsel repeated the arguments urged by him on the former occasion, and further referred to the statute 22 & 23 Vict. c. 21, an act for extending the time for registration.

ERLE, C. J. This case raises a question upon a statute of very grave public importance. A conviction has been brought before us upon an extremely scanty state of facts. Unless satisfied that it is warranted by the evidence, we cannot uphold it. Now, the appellant has been convicted for having on the 12th of October, 1859, after the Medical Act, 21 & 22 Vict. c. 90, came into operation, wilfully and falsely pretended to be a surgeon: and there is nothing upon the face of the case which has been sent to us to shew that he was not a surgeon in practice before the passing of the act, nothing to shew that he had not a diploma or other qualification, or that he was not recognized by law as a surgeon in a sense that he had a right by law to practice as such and might have enforced payment of fees by action. There is nothing, in short, to negative his having been a duly qualified surgeon before the passing of the act. I feel bound under these circumstances to say that the conviction must be quashed. [254] I am not prepared to yield to the objection to the admissibility of the register which was put in: but it is unnecessary on this occasion to give any opinion upon it.

WILLIAMS, J., and BYLES, J., concurring,

Appeal allowed.

HOLDER v. SOULBY. April 30th, 1860.

[S. C. 29 L. J. C. P. 246; 2 L. T. 219; 6 Jur. N. S. 1031; 8 W. R. 438.

Commented on, *Scarborough v. Cosgrove*, [1905] 2 K. B. 805.]

The law imposes no obligation upon a lodging-house keeper to take care of the goods of his lodger. — Where, therefore, certain property of a lodger who was about to quit had been stolen by a stranger who in his absence was permitted by the occupier of the house to enter the rooms for the purpose of viewing them, — Held, that the lodging-house keeper was not responsible for the loss.

This was an action against a lodging-house keeper for the negligent loss of a lodger's goods.

The first count of the declaration stated that the plaintiff, at the request of the defendant, hired of the defendant at and for a certain price in that behalf certain furnished apartments in the house of the defendant, and brought into the same certain personal luggage, chattels, and effects of the plaintiff; yet that the defendant, neglecting his duty in that behalf, did not take such due and proper care of his said house as a prudent owner would take; by means whereof certain dishonest persons, in the absence of the plaintiff, were admitted into the said house and obtained access to the said apartments so hired as aforesaid, who converted, took, and carried away the said luggage, chattels, and effects of the plaintiff, and the same had been and were wholly lost to the plaintiff.

Second count, — that the plaintiff was in possession of certain furnished apartments hired by him of the defendant, in the house of the defendant, and had therein certain personal luggage, chattels, and effects of the [255] plaintiff, and was shortly about to quit and yield up the said apartments to the defendant, and the defendant was then desirous to procure another lodger to hire the said apartments after the same should have been yielded up by the plaintiff: Averment, that in such case, it was and is the usage for the landlord to have licence, whether his tenant is present or absent, to enter and shew the apartments to any person or persons proposing to become the

future tenant or tenants thereof : that the defendant then had such licence to enter and shew, and did, in pursuance thereof, in the absence of the plaintiff from the said apartments, enter and shew the said apartments to divers persons in that behalf for the purpose aforesaid : and thereupon it became and was the duty of the defendant so shewing the said apartments in the absence of the plaintiff, to use due and proper care to prevent any of the said persons from injuring or carrying away any of the said luggage, chattels, and effects of the plaintiff therein : nevertheless, the defendant, neglecting his duty, did not use such due and proper care : by means whereof the said goods, chattels, and effects of the plaintiff then in the said apartments were taken and carried away by a certain person to whom the said apartments were in the plaintiff's absence so shewn by the defendant, and had become and were wholly lost to the plaintiff.

The defendant demurred to each of these counts, the ground of demurrer stated in the margin being, "that, the count not alleging the defendant to be a common inn-keeper, or any contract for insurance against loss, or any personal bailment to the defendant, does not disclose any duty or liability on the part of the defendant to take care of the plaintiff's goods." Joinder.

John Thompson, in support of the demurrer. Neither of these counts discloses any duty in the defendant to [256] take care of the plaintiff's goods. The first question which arises is, what are the rights of a lodger as to the possession of the rooms which he occupies ? The distinction between an inn-keeper and a lodging-house keeper is thus put by Best, J., in *Thompson v. Lucy*, 3 B. & Ald. 288,—"An inn is a house the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation * in which they are fit to be received : a lodging-house keeper, on the other hand, makes a contract with every man that comes ; whereas, an inn-keeper is bound, without making any special contract, to provide lodging and entertainment for all, at a reasonable price." The duties of a lodging-house keeper, therefore, arise out of contract : and, in the absence of any express contract on his part to take care of his lodger's goods, no obligation can be imported by custom. The distinction between the two classes of persons is also distinctly laid down by Holt, C. J., in *Parker v. Flint*, 12 Mod. 255. "If," he says, "one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and, as such, is not under the innkeeper's protection : but, if he eat or drink there, it is otherwise, or if he pay for his diet there, though he do not take it there." There is no foundation for the supposition that a lodger and his goods are under the especial protection of the lodging-house keeper. *Calvin's case*, 8 Co. Rep. 32, is an authority to shew that the responsibility even of an innkeeper is confined to the goods of travellers and way-faring men ; and that, therefore, if a neighbour, who is no traveller, as a friend, at the request of the landlord, lodges in the inn, and his goods be stolen, he shall not have an action. In *Newton v. Harland*, 1 M. & G. 644, [257] 1 Scott, N. R. 474, a lodger holding over after the expiration of his term was held not entitled to maintain an action against his landlord for forcibly expelling him. That case proceeded mainly upon the authority of *Hullary v. Gay*, 6 C. & P. 284, where it was held, that, if a tenancy of a house be determined, and the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street ; but, if the tenancy be determined, and the tenant and his family be gone away and the house locked up, no one being in possession, the landlord would be justified in breaking into the house and obtaining possession. The case of *Dansay v. Richardson*, 3 Ellis & B. 144, will in all probability be relied on for the plaintiff. The question there was, whether a boarding-house keeper was liable for the loss of a box belonging to a guest through the negligence of a servant of the boarding-house keeper. It appeared that the servant, being sent out by the guest for the purpose of procuring something from a neighbouring shop, left the house door open, and that a thief in her absence entered and carried away the box from the hall, where it had been placed preparatory to the departure of the guest. Erle, J., before whom the cause was tried, directed the jury that a boarding-house keeper was not bound to take more care of her house and the goods of her guests therein than a prudent owner

could be expected to take, and that she was not liable if there was no negligence on her part in hiring and keeping the servant. Upon a motion for a new trial on the ground of misdirection, the judges were equally divided,—Lord Campbell, and Coleridge, J., being of opinion that the direction was incorrect, and that the distinction between the negligence of the servant in [258] leaving the door open and that of the boarding-house keeper in hiring and keeping the servant, could not be supported in point of law; whilst Wightman, J., and Erle, J., were of opinion that the direction was right, and the defendant not liable. That case is distinguishable in many important particulars from the present. [Erle, C. J. I did not intend to say that a lodging-house keeper was bound to take such care of his lodger's goods as a prudent owner would take of his own property. Quite the contrary. But, as it was the rule of law which the plaintiff contended for, I said, in effect, that, even if the law were as contended for by the plaintiff, is there any evidence of such want of care in this case? Meaning to give no ground for a motion for misdirection.] The opinion of Wightman, J., is strongly opposed to the liability sought in this case to be cast upon the defendant. "I can find," he says, "no authority for holding that a boarding-house keeper is a bailee of the goods of his guest at all, or that he is bound to take more care about the goods of his guest, which are no further given into his care than by being in his house with the guest, than he, as a prudent owner, would take with respect to his own." And Erle, J., said: "The goods of the plaintiff in this case remained in her possession and under her control, and were disposed of by her as she chose, without notifying what she had done to the defendant. The bailee for reward has possession, and can apply care to guard, and undertakes to do so: the defendant had no possession, and could apply no care to goods which she knew not of. The decisions that a bailee by deposit is not liable for a theft by his own servants unless there was negligence of himself, are in favour of the defendant: for, she had not the same duty to keep with care as a depositary has, not having had the possession. In *Foster v. The Essex Bank*, 17 Massachusetts Rep. 479, [259] cited from the American reports, in Story on Bailment, §§ 71, 88, 181, and *Finnucane v. Small*, 1 Esp. N. P. C. 315, it appears that the servants of the depositary stole the deposit, and the masters were held not liable. Now, if a depositary is not liable for an actual theft by his servant, it seems to me that he ought not to be liable for a theft facilitated by the negligence of his servants." [Byles, J. My Brother Wightman assumes that the defendant in that case was bound to take some care of the goods of the guest.] It does. At the conclusion of his judgment, Erle, J., says,—"The unlimited extent of the liability for unknown goods, and the impossibility to guard against all negligence in every servant, and the unreasonableness of charging a party for the loss of goods which he never was intrusted to keep, are strong against now imposing for the first time such an uncompensated risk on the keepers of lodging houses: and I know no reason for imposing it." And Lord Campbell expressly distinguishes the case from that of an innkeeper: for, he says,—"The defendant did receive the plaintiff with her goods on the terms of providing her with rooms, furniture, meat, drink, servants' attendance, and other necessaries, and of taking due and reasonable care of her goods while they were in the said house and plaintiff remained such guest therein; i.e. such due and reasonable care as a boarding house keeper ought to take of the goods of a guest. This by no means amounted to the care which an innkeeper is bound to take of the goods of a guest, or the care required of a bailee with whom goods are deposited to be safely kept and returned to the owner: although the duty, whatever the extent of it might be, was not undertaken gratuitously." The first count alleges, that, by reason of the defendant's breach of duty, certain dishonest persons, in the absence of the plaintiff, were admitted [260] into the house, and obtained access to the apartments so hired as aforesaid, who converted and carried away the plaintiff's goods. That clearly is too remote a damage according to the authority of *Fears v. Wilcock*, 8 East, 1. Erle, C. J., in *Dunsey v. Richardson*, 3 Ellis & B. 149, also observes on the remoteness of the danger. The second count is even worse than the first. It sets up a usage under which it is said the defendant had a licence to enter and shew the apartments: but it alleges nothing to fix the defendant with liability for the wrongful act of a third person. [Erle, C. J. It seems to treat usage and license as synonymous.]

Archibald, contra. Both counts, it is submitted, are good. The first count states that the plaintiff hired certain furnished apartments of the defendant, and brought

thereto certain luggage and effects, and that the defendant, neglecting his duty in that behalf, took so little care of the plaintiff's goods that certain dishonest persons were in the plaintiff's absence admitted into the house, and stole the plaintiff's goods. The question is, what is the duty of a lodging-house keeper in regard to the taking care of the goods of a lodger. There is, no doubt, a distinction in this respect between the case of a lodging-house keeper and an innkeeper. A very large amount of responsibility is cast by law upon the latter. But it can hardly be said that none is cast upon the former. At all events, there must be some obligation on him to take some sort of care of the outer door and of the access to the house generally: and he must be answerable in some way for the omission or neglect to perform that duty,—such, for instance, as was held in *Chapman v. Rothwell*, 1 Ellis & B. 168, viz. not to have a trap-door open in the passage leading to the street. [261] He clearly must be bound to take such due and proper care of the goods of a lodger as a prudent owner might be expected to take of his own property. The second count goes somewhat further than the first. It alleges that which amounts substantially to an actual bailment of the goods to the landlord, for his benefit: it states a usage and licence for the landlord to enter the apartments for the purpose of shewing them to persons who might be desirous of taking them. Under such circumstances it must be presumed that the landlord was bound to take some care of the lodger's goods. In *Blakenmore v. The Bristol and Exeter Railway Company*, 8 Ellis & B. 1035, Coleridge, J., in delivering the judgment of the court, speaking of the degree of care required in the case of a loan, says,—“It may, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower: the borrower, therefore, is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything which may be defined as legal fraud.” Cases have arisen as to the liability of an innkeeper where horses have been left at the inn after the departure of the guest: and there it is put, not upon the ground of the public character of the inn-keeper, but on the ground of a bailment for his benefit: see Bacon's Abridgment, Inns and Innkeepers (C.), pl. 5, where it is said: “If a man comes to an inn with a horse which he rides, and leaves it with the host and goes away from the inn for several days, and in his absence the horse is stolen, yet shall the host be charged with it, because he had benefit by the continuance of the horse with him, inasmuch as he is to be paid for it: and so the owner is a sufficient guest to maintain the action.” In the notes to *Goggs v. [262] Bernard* (2 Lord Raym. 909, Com. 133, 1 Salk. 26, 3 Salk. 11, Holt, 13), in Smith's Leading Cases, 4th edit., p. 167, it is said: “With respect to depositum, which it will be recollected is a bailment without reward, in order that the bailee may keep the goods for the bailor, the law respecting the bailee's responsibility may be summed up in the words in which Lord Holt concludes his observations on that head of bailment, viz. ‘if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.’” The opinions of all the judges in *Dansey v. Richardson* are in favour of the existence of some degree of responsibility on the part of the lodging-house keeper. “Low as the duty of a boarding-house keeper may be,” says Lord Campbell, “with respect to the case of the goods of a guest, compared to that of an innkeeper, I cannot go so far as to say that in no case can he be liable for the loss of goods by the negligence of a servant, although he was not guilty of any negligence in hiring or keeping the servant. I by no means say, that, if the loss of the plaintiff's dressing-case arose from the servant having by mistake left the door ajar when he intended to shut it, the defendant must be liable for the loss: but I think there may be negligence in a servant in leaving the outer door of a boarding-house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is a danger that thieves may enter and steal the goods of the guests. If he employs servants to perform this duty while they are performing it they are acting within the scope of their employment, and he is answerable for their negligence. He is not answerable for the consequences of a felony, or even a wilful trespass, com-[263]-mitted by them; but the general rule is, that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do: and I am not aware how the keeper of a lodging-house should be an exception to the rule. He is by no means bound to the same strict care as an

innkeeper; but, within the scope of that which he ought to do, I apprehend that he is equally liable whether he is to do it by himself or his servants." The language of Coleridge, J., in *Dansey v. Richardson*, shews that, in the opinion of that learned judge, the law imposes upon a person in the situation of this defendant at least the duty of taking such care of the house, and of the goods of a guest or lodger therein, as a prudent owner would take of his own property. "Whether," he says, "I am staying at an inn or a boarding-house, there is ordinarily neither more nor less of an express bailment of my goods to the master of the house: in both cases the custody of the goods, such as it is, is incident to myself being there as guest, and this is in consideration of valuable reward: while, in the case of an innkeeper, there is, in the absence of any lawful excuse, a necessity to receive me, which does not exist in regard to the boarding-house keeper." Taking it at the lowest, this declaration shews a breach of that sort of duty. Unless the keepers of lodging-houses are responsible in the way suggested, the position of a lodger will be perilous in the extreme.

Thompson, in reply, was desired by the court to confine himself to the second count. No case can be found which imposes upon one man a legal liability for the act or default of another, unless there exists between them the relation of principal and agent or master and servant. The second count alleges a licence to the landlord to admit strangers; that neces-[264]-sarily involves a licence to strangers as well as to the landlord to enter the apartments; consequently, there can be no pretence for charging the latter for the felonious acts of the former.

ERLE, C. J. I am of opinion that our judgment in this case should be for the defendant. In the first count the plaintiff claims to be entitled to recover on the mere relation of lodger with the landlord, and assumes that the law creates a duty on the part of the latter to take due and proper care of his lodger's goods. To ascertain whether there is any such duty created by the law, we must look for authorities. Now, it is clear that no case or treatise or judge has ever affirmed that proposition. On the contrary, in the first resolution in *Culpe's case*, 8 Co. Rep. 32, shews that the liability for the safe keeping of the property of a guest is restricted entirely to the case of an innkeeper keeping a common inn, and the way-faring traveller using the inn as a way-farer; and the judges have distinctly laid down the rule that a mere lodging-house keeper is not liable for the loss of his lodger's goods, even though they are stolen by a member of his own household; much less if they are taken by a stranger. The reason why the law makes an innkeeper liable for the loss of his guest's goods in olden times was, that the way-faring guest has no means of knowing the neighbourhood or the characters of those he may meet with at the inn. It was therefore thought right to cast that duty on the host. Knowing that this is one of the liabilities he incurs, the innkeeper can make such charges for the entertainment of his guests as will compensate him for the risk: and it may be observed that, unless the law cast upon him this burthen, a dishonest innkeeper might be tempted to take advantage of a wealthy traveller. None of these reasons can apply to the case of [265] a lodging-house keeper: and the law has never been so laid down. Although it has not been contended that there is any absolute duty on the part of the keeper of a lodging-house to take care of a lodger's goods, it is said that it is his duty to take such due and proper care of them as a prudent owner might reasonably be expected to take of his own goods, and that the defendant has failed in the performance of this duty on the present occasion. I am most particularly averse from affirming for the first time the proposition that a lodging house keeper has a duty cast upon him by law to take care of his lodgers' goods. I foresee great difficulties in so holding: and I think it would be casting upon him an undefined responsibility which would be most inconvenient. Considering that lodgers consist of persons of all classes, —the highest as well as the lowest,—one can hardly exaggerate the mischief which would ensue from holding that the lodging-house keeper was responsible for the safety of his lodger's goods. It would be impossible to lay down any definite test of this liability: each case must be left to the discretion or the caprice of the jury. The habits of a lodging-house keeper must vary according to the situation of the premises, and a variety of other circumstances. At watering-places, for instance, it would be exceedingly inconvenient if the doors were kept locked all day. So, in sea-port towns, where lodgers come suddenly and depart at short notice, the duty contended for here would be most preposterously onerous. If, on the other hand, the law is that the lodger must take care of his own goods, it only imposes upon him the same care that he is bound to

take as he walks the streets. He may always secure his valuables by carrying them about with him or by placing them specially in the custody of the keeper of the house. *Calpe's case* is fons juris upon this sub-[266]-ject, and is a direct authority against the plaintiff. Then again, in *Dansey v. Richardson*, the proposition came to be conceded, that a boarding-house keeper was bound to take a certain degree of care of the goods of a guest: and the contention on the part of the defendant was, that, even if the law imposed on her the obligation to take such a reasonable degree of care of the goods of her guests as a prudent owner might reasonably be expected to take of his own property, still there was an entire absence of evidence to shew that she had been guilty of a breach of it. The whole tenor of my judgment in that case is distinctly to the effect that there is no such liability cast upon the keeper of a boarding-house, and that it would be an unreasonable thing to make a person responsible for the safety of goods which are never intrusted to his custody at all: and I am strongly opposed to the imposition of such a liability upon a lodging-house keeper. The other judges who differed from me in the case of *Dansey v. Richardson* were only taking up the proposition which was assumed there, but was not the proposition in dispute in the case. But, assuming that there was some such duty cast upon the defendant, they say there was no evidence of a breach of it. Then, if there be no such duty in a lodging-house keeper to take care of the goods of his lodger, resulting from the relation between them, is there such a duty where, as is alleged in the second count, the lodger, being about to quit, allows the landlord to enter the apartments for the purpose of shewing them to any person who might be desirous of hiring them. I am of opinion that there is not. The allegation here is open to the same objection as that in the first count. If there be no liability on the part of the lodging-house keeper to take care of the goods of a lodger, all difficulty may be obviated by the lodger putting his [267] valuables out of sight. But, if the rule of law were as is contended on the part of the plaintiff, it would be in the power of a lodger by conniving with a dishonest person to impose upon the landlord an unlimited responsibility, for which there is no precedent. The duty alleged in the second count is equally vague with that set up in the first; and, to hold the lodging-house keeper to be responsible would be impliedly saying that he undertakes to guarantee that the persons whom he admits to view the apartments shall do no wrong. I do not think this judgment at all interferes with the liability of the lodging-house keeper where the loss of his lodger's goods has resulted from gross negligence on the part of the former: but, where a lodging-house keeper has done nothing which amounts to misfeasance, I know of no authority or principle upon which he can be held responsible for the mere absence of care.

BYLES, J. I also am of opinion that the defendant is entitled to judgment upon both these demurrers. In both counts of the declaration the attempt is, as it seems to me, to remove one of the antient land-marks of the law: it being clear since *Calpe's case*, 8 Co. Rep. 32, that an innkeeper is under a legal obligation to take due care of the goods of his guest, but that a boarding or lodging-house keeper is not. The first resolution in that case is as follows:—"It was resolved pro totum curiam this term, that, if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it: for, the words of the writ which lieth against the hostler are, Cum secundum legem et consuetudinem regni nostri Angliæ hospitatores qui hospitia com' tenent ad hospitandos homines, [268] per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipsius A. precii 40s. infra hospitium ejusdem B., &c. inventum, pro defectu ipsius B. ceperunt, &c. Vide Registr' fol. 105, inter Brevia de Transgr., and F. N. B. 94 A. B., by which original writ (which is in such case the ground of the common law) all the cases concerning hostlers may be decided. For, 1. It ought to be a common inn; for, if a man be lodged with another (who is not an innholder) upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it; for, the words are hospitatores qui com' hospitia tenent, &c." In the case of a lodging-house keeper, therefore, if the lodger be robbed by a servant of the lodging-house keeper, the latter is not responsible for it. That is consistent with principle as with authority. There is no contract on the part of the lodging-house keeper to take

care of his lodger's goods; nor is there any bailment; and there is no precedent for the imposition of such a liability upon him. It is true, as the plaintiff's counsel has contended, that the declaration here alleges that the defendant did not take such care as a prudent owner would take of his house. But, if such an allegation were sufficient to charge him, the effect would be to render a lodging-house keeper responsible for every robbery committed within his door. It seems to me that it is a wholesome rule, that, if the goods are at an inn, the innkeeper is responsible for them, but that, if they are in a mere lodging-house, the lodger shall be bound to take care of the goods [269] himself. A contrary decision would cast upon lodging-house keepers a frightful amount of liability. I have chambers in an inn of court, or rooms in a college: if I am robbed, can I charge the benchers or the trustees because they or other servants have neglected to keep the outer gate locked, or have permitted dishonest persons to enter? Surely not. There is no sound distinction between the two cases. For these reasons, I am of opinion that the first count of this declaration cannot be sustained. The second count alleges that the abstraction of the plaintiff's goods took place through the negligence of the defendant in shewing the apartments to a stranger. But the count states that this was done in pursuance of a licence granted to the defendant in the ordinary course of business between a lodging-house keeper and his lodger. It seems to me, therefore, that the second count is even weaker than the first; and that all the observations which apply to the first count apply equally to the second, with this addition, that in the latter all that is alleged to have been done by the defendant was done with the licence and consent of the plaintiff. How can it be possible under such circumstances to hold that the lodging-house keeper is responsible for the honesty of all strangers? For these reasons, I think the defendant is entitled to judgment on both counts.

KEATING, J. I also am of opinion that the defendant is entitled to judgment on both these demurrers. The first count is not supported by any of the authorities cited on the part of the plaintiff: but, on the contrary, it is directly opposed to the generally received doctrine from *Calje's case*, 8 Co. Rep. 32, down to the present time. It was expressly resolved there, that, though an innkeeper is responsible for the safety of the goods of a guest, a lodging-house keeper is not. The proposition [270] is repeated by Lord Holt in *Parker v. Flint*, 12 Mod. 255, in still stronger terms than in *Calje's case*. "If," says his Lordship, "one come to an inn, and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and, as such, is not under the innkeeper's protection; but, if he eat or drink there, it is otherwise, or if he pay for his diet there, though he do not take it there." It is clear from these two authorities that the first count of this declaration cannot be sustained. The case of *Dunsey v. Richardson*, 1 Ellis & B. 168, has been cited. But, after the explanation given by my Lord, that case clearly is no authority for the maintenance of this action. Then, the second count is in truth only a repetition of the first, with an immaterial variation. It is still a count charging the defendant with having been guilty of negligence and want of due care. The licence is alleged in a very peculiar way. The count does not state that the licence to shew the apartments was given by the plaintiff to the defendant: but that there is a usage for the landlord to have licence, whether the tenant be present or absent, to enter and shew the apartments to any person or persons proposing to become the future tenant or tenants thereof. The general rule in such a case being that the lodger should take care of his own goods, there is nothing, as it seems to me, in the second count to shift that responsibility to the shoulders of the lodging-house keeper. For these reasons, I concur with my Lord and my two learned Brothers in giving judgment for the defendant on both counts.

Judgment for the defendant.

[271] HAWKINS v. RIGBY AND OTHERS. May 5th, 1860.

[S. C. 29 L. J. C. P. 228; 2 L. T. 243; 6 Jur. N. S. 1208. Explained, *Sinclair v. Great Eastern Railway Company*, 1870, L. R. 5 C. P. 135.]

Although there is no inflexible rule to restrain the master from allowing more than one counsel on a reference, such allowance is not to be encouraged: and, where the master has disallowed a second counsel, the court will not interfere.—Where the

arbitrator, pursuant to a power reserved to him by the order of reference, directed an inspection of the defendants' books by an accountant, and the master, on taxation of the plaintiff's costs, disallowed the attendance of the plaintiff's attorney on those occasions, the court made a rule for a review,—the arbitrator (Keating, J.) reporting that the general expenses of the reference were thereby much diminished.

The plaintiff had been employed by the defendants, who were contractors for extensive railway and break-water works at Holyhead, as their superintendent, at a salary of 600*l.* a year and a sixth of the profits realized by certain contracts. At the termination of the plaintiff's employment, differences arose between the parties, involving various questions of law and fact as to what contracts the plaintiff was entitled to a participation in the profits of, and the amount of profits realized by the defendants under them. The plaintiff having brought an action, the cause and all matters in difference were by consent referred to an arbitrator,—then one of Her Majesty's counsel, now a judge of this court,—who was to be at liberty to employ such accountants, valuers, and other persons to assist him in the reference as he should think fit.

Two counsel, a Queen's counsel and a junior, appeared before the arbitrator on each side : and, by direction of the learned arbitrator, with a view to the diminution of the expenses of the reference, Mr. Coleman, the accountant, was employed to go through the defendants' books at their counting-house to ascertain what were the profits made by them on contracts in which the plaintiff was interested, and to report to him (the arbitrator) the result.

These meetings at the defendants' counting-house were also attended on the plaintiff's behalf by his attorney, in order to prepare himself for the meetings before the arbitrator.

The order of reference was dated in December, 1854 ; and the arbitrator made his award in February, 1860, finding that the plaintiff had a good cause of action [272] against the defendants to the amount of 9320*l.* (the sum reported to the arbitrator by Mr. Coleman) ; and he ordered that the defendants should pay that sum to the plaintiff, and also the costs of the action and of the reference and award, and also the costs incurred by the accountant so employed by him.

The master, on taxing the plaintiff's costs under the award, allowed him 872*l.* 4*s.* 6*d.* which sum included 221*l.* 7*s.* 6*d.* the accountant's costs. He, however, allowed only one counsel's attendance before the arbitrator, — striking out the fees paid to the second counsel, together with the drawing, copying, &c. the briefs and documents for his use,—and he disallowed the costs of the plaintiff's attorney's attendance at the counting-house of the defendants as above-mentioned.

M. Smith, Q. C., on a former day, moved for a review of the taxation. He submitted that, although there did not seem to be any precedent in this court for the allowance of more than one counsel attending a reference, it was not an inflexible rule to allow one only, and the practice of the courts of Queen's Bench and Exchequer seemed to have been to allow two where the magnitude of the questions at issue required it. [Willes, J. I remember a case of *Penniger v. Davies*, in the Exchequer, where I attended as counsel before a learned arbitrator together with Sir F. Kelly and Mr. Martin, —Sir F. Thesiger, Mr. Hill and Mr. F. Robinson appearing on the other side,—though the amount of damages awarded was some 2000*l.* less than the sum awarded here. Master Park intimated that there was no case in this court where more than one counsel had been allowed, upon a reference : but he mentioned a case in the Queen's Bench where two had been allowed, the number of witnesses called amounting to one hundred and twenty. Keating, J. There certainly [273] were very intricate matters of inquiry in this case ; and, if ever there was a case which would justify the retaining of two counsel, this was that case.] It was but reasonable under the circumstances that the arbitrator should have the same amount of professional assistance that the court would have had. The attendance of the plaintiff's attorney at the counting-house of the defendants for the purpose of enabling him to shorten the inquiry before the arbitrator, clearly ought not to have been disallowed. [Keating, J. I directed the inquiry to take place in that way, in order to shorten the case and to reduce the expenses of the meetings before me : and it certainly had that result.] A rule nisi having been granted,

Lush, Q. C., now shewed cause. The court will not interfere with the master's

discretion as to the allowance or disallowance of counsel. Here, he has thought one enough: and the court have no materials before them to enable them to see that he has erred in this respect. Four witnesses only were examined for the plaintiff, besides the plaintiff himself. After the plaintiff's case was closed, the arbitrator, in exercise of power conferred upon him by the order of reference, directed the employment of an accountant to ascertain, by examination of the defendants' books, the amount of profit realized by the defendants on the contracts in the profits of which the plaintiff was entitled to participate. The arbitrator has acted upon the accountant's report, and the costs incurred by him are allowed against the defendants. The number of witnesses called on the part of the defendants was eight. If, therefore, it were usual to allow two counsel, this is not a case for that exercise of discretion. [Byles, J. I understand the practice of this court to have been uniform in this respect. Erle, C. J. I [274] should be extremely indisposed to raise a question upon such a subject. As to the second ground, however, the attendance of the plaintiff's attorney at the defendants' counting-house with the accountant undoubtedly effected a considerable saving in the inquiry before the arbitrator; and therefore, I think that should have been allowed.] If the plaintiff had got an inspection of the defendants' books in the usual way, he would not have got the costs of it; and this was the principle upon which the master proceeded in disallowing these costs. [Keating, J. This was an exceptional case. If the evidence which was rendered unnecessary by the course I directed, had been taken before me in the ordinary way, the defendants would have had to pay a great deal more.]

M. Smith, Q. C., in support of the rule. There is no inflexible rule as to the number of counsel to be allowed on a reference. In the Queen's Bench and Exchequer this is certainly so. In a case which occurred in the former court a few days ago, two counsel were allowed: and in a case of *North v. The Great Northern Railway Company*, in the Exchequer, I have the taxed bill, in which two counsel were allowed. There is also a case of *Crookes v. Gore*, 1 Hurlst. & N. 14, in which two counsel were allowed. So, in this court, in a case of *Bryson's Executors v. The National Provident Institution*, the costs of two counsel attending before an arbitrator were charged and allowed (a). Seeing the importance of the inquiry in [275] this case, —as testified by the learned arbitrator himself, now a member of this court,—it cannot be contended that this was not a proper case for the exercise of a liberal discretion in this respect. Then, as to the expenses of the plaintiff's attorney's attendance with the accountant at the defendants' counting-house inspecting the books, seeing the great saving of the general cost of the reference which was thereby effected, it is not too much to ask that those attendances should be allowed.

ERLE, C. J. I think the rule should be made absolute for a review of the taxation so far as regards the costs of the plaintiff's attorney's attendance at the counting-house of the defendants,—my Brother Keating, who was the arbitrator, having reported to us the circumstances under which those attendances took place, and the great saving of expense which resulted from them. As to the allowance for two counsel attending the reference, I think we ought not to interfere. The general practice of this court has been to allow one counsel only in such cases: and the Master, seeing, according to the external signs, that one counsel only was needed in this case, has disallowed the second. If it were to be a matter of discussion in each case whether the circumstances justified two counsel or not, much difficulty and perplexity would ensue. I should certainly be very loth to allow the salutary rule of allowing one counsel only to be broken in upon. The mischief which would result in the many cases would hardly compensate the advantage in the few.

BYLES, J. I am of the same opinion. In declining to make this rule absolute for a review of the taxation in respect of the disallowance of the second counsel, we are laying down no new rule, but are only adhering [276] to the practice of our own court. Looking to the general interests of the suitors, I agree with my Lord in thinking the rule a very salutary one.

(a) There was also a case in this court a few years ago, of *Daries v. Pratt*, in which Whately, Q. C., the arbitrator, held his sittings in public in the Vice-Chancellor's Court, where two counsel and consultations and additional briefs and documents were allowed to a very large extent: see the taxed bill in *Scott's Costs*, 1st edit. p. 201.

KEATING, J. It is important to adhere to the practice of the court : and I see no ground for making even this case an exception.

Rule absolute accordingly.

WALE v. THE WESTMINSTER PALACE HOTEL COMPANY (LIMITED).

April 30th, 1860.

[Referred to, *In re Sion College*, 1887, 57 L. T. 745.]

A company established by a private act of parliament for the erection of an hotel, having in the course of their works obstructed certain antient lights of the plaintiff, the latter gave them notice under the 68th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), requiring them to summon a jury to assess the amount of compensation due to him for the injury to his property ; and, on their failure to do so, sued them for the penalty :—Held, that the action was not maintainable, the Lands Clauses Consolidation Act, 1845, not being incorporated either expressly or by implication into the private act.

This was an action against the defendants, a company incorporated under a private act of parliament, for obstructing the plaintiff's lights, and also for neglecting to proceed upon a notice given to them by the plaintiff under the 68th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

The first count of the declaration stated, that the plaintiff, before and at the time of the committing of the grievance thereafter next mentioned, was, and from thence hitherto had been and still was lawfully possessed of a certain messuage or tenement, public-house, and premises, with the appurtenances, in which said messuage or tenement, public-house and premises, during all the time aforesaid, there were and still of right ought to be divers antient windows through which the light and air during all the time aforesaid ought to have entered, and until the committing of the said grievance thereafter next mentioned did enter, and still of right ought to enter, into the said messuage [277] or tenement, public-house, and premises, for the convenient and wholesome use, occupation, and enjoyment thereof : Yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of the said messuage or tenement, public-house, and premises, with the appurtenances, wrongfully and injuriously erected and raised, and caused and procured to be erected and raised, certain walls and buildings near to the said windows, and wrongfully and injuriously kept and continued the said walls and buildings so there erected and made for a long time, to wit, from thence hitherto ; by means of which premises the said messuage or tenement, public-house, and premises, with the appurtenances, during all the time aforesaid were, and still are, greatly darkened, and the light and air were and are hindered and prevented from coming and entering into and through the said windows into the said messuage, or tenement, public-house, and premises, and the same had thereby been rendered and was close, uncomfortable, unwholesome and unfit for habitation ; and the plaintiff had been and still was greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage or tenement, public-house, and premises, with the appurtenances, and he lost the services of his wife, whose health was seriously injured by reason of the premises, and was put to expense in and about her cure, and was and is otherwise injured.

The second count stated, that, by an act of parliament made and passed in the session of parliament held in the 21st and 22nd years of the reign of Her present Majesty, called the Westminster Palace Hotel Company's Act, 1858 (21 & 22 Vict. c. 3), a certain [278] undertaking was authorized, and the said act authorized the purchase or taking of lands for the said undertaking, and the defendants were by the said act the promoters of the said undertaking, and impowered to execute the same : that, after the passing of the said act, the plaintiff became and was, and still is, entitled to compensation in respect of an interest of the plaintiff in a certain messuage and land of the plaintiff at Tothill Street, Westminster, in the county of Middlesex, which was injuriously affected by the execution of certain works by the defendants under the said act, and for which the defendants had not made satisfaction under the pro-

vision of the Land Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), of the said Westminster Palace Hotel Company's Act, 1858, or any act incorporated therewith; that thereupon the plaintiff claimed as compensation for his said interest in the said messuage and lands so injuriously affected a sum of money exceeding 50l., to wit, 200l., and desired to have such question of compensation settled by a jury, and gave notice in writing of such his desire to the defendants, then being the promoters of the said undertaking, stating in such notice the nature of his said interest in the said messuage and land in respect of which he claimed compensation, and the amount of the compensation claimed, to wit, the said sum of 200l.; and that the defendants were not willing to pay the amount of compensation so claimed, and did not enter into a written agreement for that purpose, nor did they within twenty-one days after the receipt of such notice (which period had elapsed) issue their warrant to the sheriff of the said county of Middlesex to summon a jury for setting the same in the manner provided by the statute in such case made, and the defendants therein wholly failed and made default: Averment, that the plaintiff had done all things on his part, and that all things on his part necessary to [279] happen had happened, to entitle him to have a jury summoned for settling the compensation payable by the defendants to the plaintiff for and by reason of his said interest in his said messuage and land being so injuriously affected as aforesaid; and that the time for the defendants to issue their warrant to the said sheriff to summon such jury had elapsed; and that the defendants, having made default as aforesaid, had become liable to pay to the plaintiff 200l., the amount of compensation so claimed as aforesaid; and that the plaintiff had done all things necessary on his part to entitle him to be paid the same by the defendants; and that the time for the defendants to pay the same had elapsed; yet that the defendants had not yet paid the same, or any part thereof. Claim, 200l.

The defendants pleaded, to the first count, —first, not guilty,—secondly, a denial of the alleged right, —thirdly, that the alleged grievances were committed under the authority and in exercise of the powers of an act of parliament passed in the session of parliament held in the eighth and ninth years of the reign of Her present Majesty, intituled the Westminster Improvement Act, 1845 (8 & 9 Vict. c. clxxviii.), and the Westminster Palace Hotel Company's Act, 1858; and to the second count a denial that the plaintiff was entitled to compensation as alleged.

The defendants also demurred to the second count, the ground of demurrer stated in the margin being, “that, neither by the act referred to in that count, nor by any other act, is any provision made entitling the plaintiff to compensation, or requiring the company to cause a jury to be summoned for assessing the amount of such compensation.” Joinder.

Bovill, Q. C., in support of the demurrer (a). The de-[280]-fendants are a company incorporated under the Limited Liability Act; and they are charged in the first count of the declaration with having obstructed certain ancient lights of the plaintiff, and in the second count with having neglected, upon due notice given to them for that purpose, to take the necessary steps to cause the compensation claimed by the plaintiff to be assessed under the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The 1st section of that act, after reciting that “it is expedient to comprise in one general act sundry provisions usually introduced into acts of parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for

(a) The points marked for argument on the part of the defendants were as follows:—

“That, under the provisions of the Westminster Palace Hotel Company's Act, 1858, the plaintiff was not entitled to demand compensation for the alleged injury to his premises:

“That the second count is framed in an entire misconception of the effect and provisions of that act, which is not an act enabling the company to execute works or acquire land for the execution of works, and does not incorporate nor is subject to the provisions of the Lands Clauses Consolidation Act, 1845, but is merely an act for giving sanction and effect to a lease by the Westminster Improvement commissioners to the defendants of a piece of land for the purpose of building an hotel:

“That the company had no authority to issue a warrant to the sheriff requiring him to summon a jury for the assessment of compensation to the plaintiff; and that the issuing of any such warrant would have been a mere nullity.”

the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves," enacts "that this act shall apply to every undertaking authorized by any act which shall hereafter be passed, and which shall authorize the purchase or [281] taking of lands for such undertaking, and this act shall be incorporated with such act; and all the clauses and provisions of this act, save so far as they shall be expressly varied or excepted by any such act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other act which shall be incorporated with such act, form part of such act, and be construed together therewith as forming one act." The 68th section enacts, that, "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein: and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of [282] the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." This provision applies exclusively to undertakings which without the aid of the statute could not be carried on. The undertaking in question does not come within that description. The Westminster Palace Hotel Company's Act, 1858, passed at a time when the property in the hands of the Westminster Improvement commissioners was in a state of considerable embarrassment. The title of the act is, "An act for confirming and giving effect to an agreement for a lease by the Westminster Improvement Commissioners of land in Victoria Street and Tothill Street, in the city of Westminster, to the Westminster Palace Hotel Company, Limited," &c. The preamble recites that the Westminster Improvement Commissioners, under the powers and provisions of the Westminster Improvement Acts of 1845, 1847, 1850, 1853, and 1855, or some of them, had entered into an agreement with the Westminster Palace Hotel Company, Limited, for the granting by the commissioners and the accepting by the company a lease for ninety-nine years, at a yearly rent of 1050*l.*, of a piece of land in Victoria Street and Tothill Street, in the city of Westminster, part of the estate of the commissioners, in order to the building thereon by the company of an hotel and offices, and of an adjoining piece of land; [283] that the land comprised in the agreement was affected by certain mortgages, bonds, and judgments; that proceedings were pending in equity against the commissioners, the decrees or orders in which did or might affect the land comprised in the agreement; that there were not when the recited agreement was entered into any mortgages, judgments, suits, decrees, or orders which affected the lands comprised in the agreement other than those specified in the schedules to the act, but those incumbrances, and the bonds or claims made in respect thereof, prevented the company from acquiring a good and marketable title to the land by such a lease as the commissioners had so agreed to grant; that the land comprised in the agreement was at present void land producing no income whatever to the commissioners; that the commissioners were indebted to the extent of insolvency to the mortgagees, judgment-

creditors, bond-holders, and others, who were together creditors to the commissioners for a large aggregate amount; that the company and the commissioners were desirous, and it would be greatly to the benefit of the creditors of the commissioners, that the recited agreement should be confirmed, subject to the provisions of this act, and should be carried into effect by a lease which would be unimpeachable by the creditors of the commissioners; and that the objects of the act could not be attained without the authority of parliament. The 2nd section confirms the recited agreement and empowers the commissioners to grant the lease. The 3rd section enacts that "the rent reserved by the lease so granted by the commissioners and accepted by the company should be incident to the reversion immediately expectant and to take effect on the determination of the term thereby granted." The 4th section enacts that "the term of ninety-nine years created by the lease so [284] granted by the commissioners and accepted by the company should take effect as the first term and interest in the land and hereditaments comprised therein, and the company and their assigns might and should hold and enjoy the same for that term subject to the rent, covenants, and provisos respectively reserved and contained in and by the lease, but freed and discharged by that act from all mortgages, judgments, suits, decrees, orders, incumbrances, liabilities, claims, and demands whatsoever affecting the same land and hereditaments, or any part thereof, or any estate, term, or interest therein, or affecting the commissioners or their assigns in respect of the same." And the 5th section provides, that, subject to the lease, those mortgages, judgments, &c., were to be as valid as if the act had not passed. In effect the act is like an ordinary estate bill. Its object was to enable the company to acquire a good and indefeasible title to the land. There is nothing in it which authorizes the company to obstruct lights or otherwise injuriously to affect the premises of adjoining owners. [Byles, J. Do the Westminster Improvement Acts incorporate the Lands Clauses Consolidation Act, 1845?] The first of those acts, 8 & 9 Vict. c. clxxviii., s. 1, does. The act now under consideration does not incorporate the Lands Clauses Consolidation Act, 1845, nor does it enable the company to take any land. The 8th clause of the agreement (which is set out in the first schedule to the act) provides that "the ground-rent of 1050l. is not to be abated by reason of any compensation to be paid to the owners of land in Tothill Street under the 68th section of the Lands Clauses Consolidation Act, 1845, by reason of their lands being injuriously affected by the erection of the said building." But, at the time that agreement was prepared, it was contemplated that the company would ask certain powers which the [285] legislature did not think fit to grant them. There is no power conferred upon the company by this act to deprive any individual of any legal right: nor is there any clause in any of the Westminster Improvement Acts to enable the commissioners to authorize their lessees to do any act which would otherwise be illegal. One of the points intended to be urged on the other side is, that the Lands Clauses Consolidation Act, 1845, whether incorporated or not, applies to this act, and to the undertaking authorized thereby. But this act authorizes no undertaking, and therefore does not come within the interpretation clause (s. 2) of the 8 & 9 Vict. c. 18. [Byles, J. You would say that "incorporated therewith" is synonymous with "inserted therein." Precisely so.

Griffiths, *contra* (a). The general act is without any [286] direct provision therein

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), is incorporated with the Westminster Palace Hotel Company's Act, 1858 (21 & 22 Vict. c. 3):

"2. That the Lands Clauses Consolidation Act, 1845, whether incorporated or not, applies to the Westminster Palace Hotel Company's Act, 1858, and the undertaking thereby authorized:

"3. That the Westminster Palace Hotel Company's Act, 1858, authorized an undertaking, and the taking of land for the purpose of such undertaking, within the meaning of the Lands Clauses Consolidation Act, 1845:

"4. That the Lands Clauses Consolidation Act, 1845, applies to every undertaking authorized by any act thereafter passed, and which shall authorize the purchase or taking of lands for such undertaking, and shall be incorporated with such last mentioned act; and the Westminster Palace Hotel Company's act, 1858, authorized the defendants to accept and take a certain lease of lands as therein mentioned for

to that effect incorporated in every special act authorizing works by a public company. The language of the 1st section is very strong; and the provision was expressly inserted for the purpose of avoiding the necessity for repeating all these provisions in the special acts. [Keating, J. If the provisions were only meant to be applicable if inserted in the special act, one can hardly see the use of the words at all.] The language of the three acts of 1845, cc. 16, 18, and 20, is substantially the same. Unless there are words in the special act to prevent its application, the Lands Clauses Consolidation Act is to apply. This company is clearly incorporated for the purposes of an undertaking within the meaning of the interpretation clause of the 8 & 9 Vict. c. 18. The act authorizes the taking of land by the company for the purpose of the undertaking. The Lands Clauses Consolidation Act is, at all events, inferentially incorporated. The lease is to be granted by the commissioners acting under their acts of parliament, which expressly incorporate the provisions of the Lands Clauses Consolidation Act; and the 68th section of that act is referred to in the agreement itself. [Erle, C. J. I should have thought that these provisions of the Lands Clauses Consolidation Act only applied to something which the act authorized the company to do,—for instance, to divert a street, or raise the level of a water-course, or the like. This act does not exempt the company from any rule of law as to their building. Its object is to validate their title to the site of the premises: but it does not authorize them to do anything thereon which any other person could not do. I always thought a party could not have compensation under these clauses, [287] where a common-law remedy existed. If you have a remedy at common law for a grievance, you need not resort to the act of parliament.] What the plaintiff complains of is, the obstruction of his lights by the building which the company are authorized to erect. He puts his claim both ways. In his first count he sues at common law, and is met by a plea setting up the act of parliament: and his claim under the statutory provision is met by an argument that the act has no application.

Bovill, Q. C., in reply. The 68th section of the Lands Clauses Consolidation Act, 1845, can have no application here. That act was intended to apply to undertakings of a public nature, and not to a private speculation like this. There is not a single clause in the Westminster Palace Hotel Company's Act which authorizes anything that the law does not already authorize. [Keating, J. All that the act does is, merely to give the lease priority. Erle, C. J. It postpones the right of the mortgages and other incumbrancers during the continuance of the lease.]

Cur. adv. vult.

²ERLE, J., now delivered the judgment of the court:—

The declaration in this case complained in the first count of an injury to the plaintiff's house by the erection of certain buildings by the defendants, which darkened the windows of his house. The second count, alleging the execution of certain works by the defendants under the powers of the Westminster Palace Act, 1858, and that the premises of the plaintiff had been injuriously affected thereby, set forth proceedings by the plaintiff under the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, to [288] compel the defendants to make compensation; and then claimed the sum of 200l., as mentioned in his notice, by reason of the neglect of the defendants to summon a jury within the time prescribed by the act.

The defendants pleaded to the first count, and demurred to the second.

The Westminster Palace Hotel Company's Act, although referred to generally in the declaration as if a public act, provides expressly by its 15th section that it shall not be a public act: but we understand both parties to be desirous that the opinion of the court should be given upon the question between them as if any amendments necessary in that respect had been made in the declaration: and that the question is, whether the Hotel Company's act incorporates the provisions of the Lands Clauses Consolidation Act, 1845, or so much of them as to make the alleged injury to the plaintiff the subject of compensation to be ascertained under the 68th section of that statute, or whether such inquiry still remains the subject of an action at common law,

the purposes of and to carry out the undertaking therein mentioned, and being passed subsequently, the first-mentioned act applies, and by its terms shall be and is incorporated with the last-mentioned act."

in which the plaintiff might recover the amount of any damage he may actually have sustained.

We are of opinion that the Westminster Palace Hotel Company's Act does not incorporate any of the provisions of the Lands Clauses Consolidation Act, 1845. By its express provisions the company's act is not a public act. Its object is merely to give the lease granted by the Westminster Improvement Commissioners to the company a priority over certain charges and incumbrances to which it might otherwise have been postponed; and the preamble recites that its doing so will enure greatly to the benefit of the creditors of the commissioners. It appears to us in all its provisions to be rather in the nature of a private estate bill than of an act intended to incorporate the [289] provisions of a statute applicable only to the acquisition of lands for undertakings of a private nature.

We think, therefore, the defendants are entitled to judgment.

Judgment for the defendants.

TOWNLEY v. JONES. May 3rd, 1860.

[S. C. 29 L. J. C. P. 299; 6 Jur. N. S. 1159.]

The plaintiff's attorney having without reasonable excuse neglected to instruct counsel or to appear at the assizes when the cause was called on, in consequence of which the plaintiff was nonsuited,—the court granted a new trial only upon the terms of the attorney paying the costs of the day out of his own pocket.

This was an action for alleged negligence on the part of the defendant, in not providing proper machinery at the shaft of a mine, whereby the plaintiff sustained an injury. The cause of action accrued on the 10th of December, 1857: but the writ was not issued until the 24th of June, 1859. Notice of trial was given on the 6th of February, 1860, for the York Assizes, being a month before the commission day. The cause stood No. 8 on the list, and was called on at about 10 o'clock in the morning of the second day of the assizes. The plaintiff's attorney not being in attendance, and no counsel being instructed by him, but the defendant's attorney being there with his counsel, the plaintiff was nonsuited. The plaintiff's attorney did not arrive at York until 6 o'clock in the evening.

T. Jones, on a former day in this term, obtained a rule nisi for a new trial on payment of the costs of the day.

Cross now shewed cause. He submitted that the affidavit in support of the motion disclosed no sufficient or satisfactory reason for the absence of the plaintiff's attorney when the cause was called on.

T. Jones was heard in support of the rule.

[290] ERLE, C. J. The plaintiff's attorney had ample time to prepare his briefs and instruct counsel; and he had no right to speculate on the time the cause would be called on. If, however, he will undertake within a fortnight to pay the costs of the day out of his own pocket, the rule may be absolute; otherwise, it will be discharged.

The rest of the court concurring.

Rule accordingly.

JOHN ELLIS, *Appellant*; JASON WOODERIDGE, *Respondent*. April 23rd, 1860.

[S. C. 29 L. J. M. C. 183; 6 Jur. N. S. 1017; 8 W. R. 437.]

The 24th section of the general highway act, 5 & 6 W. 4, c. 50, enacts, "that the surveyor of every parish shall, with the consent of the inhabitants in vestry assembled, secure horse causeways and foot causeways by posts, blocks, or stones fixed in the ground, or by banks of earth cast up, or otherwise, from being passed over and spoiled by waggons, wains, carts, or carriages, at the cost of the parish." Held, that this section contemplated the erection of posts, &c. against footways, causeways, and bridleways by the side of carriage-ways, for the purpose of protecting them against injury or damage by waggons, &c., but did not contemplate the erection of

posts, &c. at the extremities of such ways, for the purpose of protecting the causeways, bridle-ways, and footways from trespassers.

This was a case stated for the opinion of the court at the instance of the informant, pursuant to the provisions of the 20 & 21 Vict. c. 43.

At a petty session of the peace holden in and for the division of Gore, in the county of Middlesex, on Wednesday, the 17th of August, 1859, before two justices acting in and for the said county and the division aforesaid, Jason Woodbridge was charged in and by a certain information, "For that, on the 29th of July last, at Pinner, in the said county, he, being then and there the surveyor of the highways of Pinner aforesaid, did then and there wilfully neglect his duty as [291] such surveyor, by not putting up posts on a certain bridleway and footway leading from Pinner to Eastcott, to secure the same from being passed over and spoiled by waggons, wains, carts, or carriages, the same being a public bridleway and footway only, contrary to the form of the statute 5 & 6 W. 4, c. 50, whereby he had rendered himself liable to a penalty of not exceeding 5l." And the said parties respectively being then present, the said information was duly heard by the justices: and upon such hearing they adjudged that the said information should be dismissed with costs.

The informant having pursuant to the statute given the justices notice, and required them to state and sign a case setting forth the facts and grounds of their determination upon the hearing of the said information, in order that he might take the opinion of this court thereon, the said justices, pursuant to such notice and the provisions of the statute, stated and signed the following case:—

At the hearing of the said information, the informant cited the 5th section (the interpretation clause) of the 5 & 6 W. 4, c. 50, which enacts "that the word 'highway' shall be understood to mean all roads, bridges (not being county bridges), carriage-ways, cart-ways, horse-ways, bridle-ways, foot-ways, cause-ways, church-ways, and pavements." And also the 24th section, whereby it is enacted "that the surveyor of every parish shall, with the consent of the inhabitants in vestry assembled, secure horse-causeways and foot-causeways by posts, blocks, or stones fixed in the ground, or by banks of earth cast up, or otherwise, from being passed over and spoiled by waggons, wains, carts, or carriages, at the cost of the parish." And also the 81st section of the same act, whereby it is further enacted, "that, if any gate across any public cartway shall be less than ten feet wide, or any gate across any [292] public horseway shall be less than five feet wide, clear between the posts thereof, then and in every such case, upon notice in writing from the surveyor to the person to whom the gate shall belong, left at the dwelling-house of such person or his steward or agent, requiring him to enlarge the same, if such person should neglect, for the space of twenty-one days after such notice shall have been left as aforesaid, to remove or enlarge such gate, he shall forfeit a sum not exceeding 10s. for every day he shall so neglect to remove or enlarge such gate as aforesaid."

The informant also put in an extract from an award made by certain commissioners appointed in pursuance of the 43 G. 3, intituled "An act for dividing, allotting, and inclosing the open and common fields, commons, and waste-grounds, within the parish of Harrow, in the county of Middlesex," who thereby set out a roadway in the words following:—

"No. 65. Road to Eastcott.

One other private carriage road and public bridleway and footway, of the breadth of 25 feet, branching out of the last-described road No. 64, and extending in a westward direction over the north side of Pinner Marsh, to the extent thereof, and thence southward and again westward over Down field to a bridleway set out in the parish of Ruislip."

The situation of this private carriage-way and public bridleway and footway is in the hamlet of Pinner, in the parish of Harrow, and is of the width of 25 feet, between the boundary hedges of the land; that on the north side being of old inclosures, and that on the south side of land inclosed by the commissioners, and leads from a bye-road in the hamlet of Pinner to a bye-road in the parish of Eastcott.

Some years ago a small quantity of gravel was laid along the centre of it, of the width of six or seven [293] feet, the remainder on each side being green sward. It is used as a cartway by the farmers going to and returning from their land abutting

on each side. It meets and is joined at the boundary of the hamlet of Pinner by a public bridleway only, set out by commissioners appointed by an act of 44 G. 3, c. 45, intituled "An Act for inclosing lands in the parish of Ruislip, otherwise Riselip, in the county of Middlesex," in the words following:—

"The old public road to Uxbridge.

"No. VI. Public bridleway.

"And we have set out and appointed one public bridleway of the breadth of twenty feet, branching out of the lane at Field End, Eastcott, between the allotment to Mrs. Catherine Hatchett and Mr. Daniel Wilshen, and extending in a south-eastward direction to the boundary of the hamlet of Pinner and Ruislip."

It was also given in evidence by the informant, that, for the last forty years, posts had been placed across the said public bridleway and footway at the end of the said private carriage-way, and at the boundary of Pinner and Ruislip at the point where it meets the public bridle-way belonging to the parish of Ruislip; and that they had been put up from time to time at the cost of the hamlet of Pinner by the surveyor for the time being, and so maintained until about two years ago; since which time, for want of their restoration, the private carriage way and public bridle-way and footway had been used as a public highway by persons travelling over them in carriages, to the detriment of the public bridle-way and footway.

On the part of the defendant, it was admitted that posts had been from time to time put up at the boundary of the parish, but that about two years ago the then-existing posts were forcibly removed; that they had been reinstated six several times at a con-[294] siderable expense (on two occasions with iron posts), and as often destroyed; that a reward had been offered for the apprehension of the offenders, and every other step taken by him as the surveyor of the highways of Pinner to sustain the said road as a private carriage-road and public bridle-way and footway; and that men had been apprehended in the act of cutting the iron posts asunder at midnight, and, on being taken before the magistrates, asserted that they had a right to the free use of the road in question for the whole width of twenty five feet as a public footway, that they were exercising that right, and that the magistrates had therefore no jurisdiction.

The 80th section of the 5 & 6 W. 4, c. 50, enacts "that the said surveyor shall and he is hereby required to make, support, and maintain, or cause to be made, supported, and maintained, every public cartway leading to any market-town twenty feet wide at the least, and every public horseway eight feet wide at the least, and to support and maintain every public footway by the side of any carriage-way or cartway three feet wide at the least, if the ground between the fences, including the same, will admit thereof."

The justices were of opinion—first, that the 24th section of the 5 & 6 W. 4, c. 50, contemplated the erection of posts, &c. against footways, causeways, and bridle-ways by the side of carriage-ways, for the purpose of protecting them against injury or damage by waggons, wains, carts, or carriages, and does not contemplate the erection of posts, &c. at the extremities of such ways, for the purpose of protecting the causeways, bridle-ways, and footways from trespassers,—secondly, that the said section does not intend the protection by posts of private carriage or other ways against trespassers from adjoining public ways,—thirdly, that the commissioners acting under the Harrow Inclosure Act [295] having set out a certain space of ground of the width of twenty five feet as a public bridleway and footway, as well as a private carriage road, without describing the boundaries of each, it was not competent to the surveyor of highways to determine such respective boundaries by erecting posts at the extremities of such ways,—fourthly, that, the public claiming *bonâ fide* a right of user of the entire way, it was a question of title, and consequently they, the justices, had no jurisdiction.

For these reasons they dismissed the complaint; whereupon the opinion of the court of Common Pleas is required as to whether or not the said justices were correct in point of law in their determination as aforesaid, or as to what should be done in the premises.

Karslake, for the appellant. By the interpretation clause, s. 5, of the General Highway Act, 5 & 6 W. 4, c. 50, it is provided that the word "highways" shall be understood to mean "all roads, bridges (not being county bridges), carriage ways,

cartways, horseways, bridle-ways, footways, causeways, churchways, and pavements." The clause imposing the penalty sought to be enforced by this information is the 24th, which provide, that, "if any surveyor or district surveyor or assistant surveyor shall neglect his duty in anything required of him by this act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding 5l." The 24th section,—which provides for the erection of posts,—enacts, "that the surveyor of every parish, other than a parish the whole or part of which is within three miles of the general post-office in the city of London, shall, with the consent of the inhabitants of any parish in vestry assembled, or by the direction of the justices at a special sessions for the highways, cause (where there are [296] no such stones or posts) to be erected or fixed in the most convenient place where two or more ways meet a stone or post, with inscriptions thereon in large legible letters, not less than one inch in height and of a proper and proportionate breadth, containing the name of the next market-town, village, or other place to which the said highways respectively lead, as well as stones or posts to mark the boundaries of the highway, containing the name of the parish wherein situate: and that the surveyor of every parish shall, at the several approaches or entrances to such parts of any highways as are subject to deep or dangerous floods, cause to be erected graduated stones or posts, as he shall judge to be necessary, for the guiding of the travellers in the best and safest track through the floods: and also to secure horse causeways and foot-causeways by posts, blocks, or stones fixed in the ground, or by banks of earth cast up, or otherwise, from being passed over and spoiled by waggons, wains, carts, or carriages; and the said surveyor shall be reimbursed, out of the moneys which shall be received by him pursuant to the directions of this act, the expenses of providing and erecting and of keeping in repair such stones, posts, or blocks already erected or fixed, or which may hereafter be erected or fixed." The 80th section enacts "that the said surveyor shall and he is hereby required to make, support, and maintain, or cause to be made, supported, and maintained, every public cartway leading to any market-town twenty feet wide at the least, and every public horseway eight feet wide at the least, and to support and maintain every public footway by the side of any carriage-way or cartway three feet wide at the least, if the ground between the fences including the same will admit thereof: provided, nevertheless, that nothing herein contained shall require any surveyor to make or form any public [297] footway without the consent of the inhabitants in vestry assembled." The 81st section enacts, "that, if any gate across any public cartway shall be less than ten feet wide, or any gate across any public horseway shall be less than five feet wide, clear, between the posts thereof, then and in every such case, upon notice in writing from the surveyor to the person to whom such gate shall belong, left at the dwelling-house of such person or his steward or agent, requiring him to enlarge the same, if such person shall neglect for the space of twenty-one days after such notice shall have been left as aforesaid to remove or enlarge such gate, he shall forfeit a sum not exceeding 10s. for every day he shall so neglect to remove or to enlarge such gate as aforesaid." The magistrates held that, as the causeway in question was not by the side of the carriage-way, it was not within the act. They were probably induced to arrive at this conclusion by the fact of s. 80 speaking of a footway by the side of a carriage-way, where the legislature so intended. [Willes, J. The 72nd section seems to be more to the purpose. It enacts that, "if any person shall wilfully ride upon any footpath or causeway by the side of any road, made or set apart for the use or accommodation of foot-passengers, &c.," he shall for every such offence forfeit and pay any sum not exceeding 40s. over and above the damages occasioned thereby.] A horse-causeway may be a highway within the act.

J. A. Russell, *contra*, was not called upon.

ERLE, C. J. I am of opinion that the decision of the magistrates in this case was right. The 24th section of the 5 & 6 W. 4, c. 50, upon which the first point arises, applies to the case of a horse or foot causeway running parallel to or by the side of a public carriage-way; in which case the surveyor is required to [298] cause such horse or foot causeway to be separated by posts or stones or banks of earth from the carriage-way, in order to prevent its being trespassed upon by waggons, wains, carts, or carriages; and to mark out what is so set apart for equestrians and foot-passengers, so that persons using the way with wheeled carriages may not find it convenient to deviate from the way allotted to them. I think the legislature never intended to cast upon the surveyor the duty to fortify the mouth or entrance of every horse or foot-

causeway with posts or other things so as to render it impossible for wheeled carriages to trespass thereon. They were already sufficiently protected by the ordinary provisions of the law. It is difficult to see how the surveyor is to perform the duty supposed to be cast upon him. The Pinner people seem to be determined to assert their right to have a carriage-way where there is only a foot and bridle-way. I do not think the surveyor is bound to erect fortifications strong enough to resist the trespass, or to call for the aid of the posse comitatus; but that the only duty imposed upon him by this section is, to put up posts, stones, or banks of earth, to mark the foot or horse-way where it runs parallel with the carriage-way.

WILLIAMS, J. I am of the same opinion. The owners of the soil may erect posts to guard the entrance of the foot or horse-way; but the surveyor is not called upon to do so. I entirely agree with the construction which my Lord has put upon the 24th section of the 5 & 6 W. 4, c. 50. The law is made for cases which arise in the usual and ordinary state of things, and is not directed against trespasses committed by waggons and carriages going along places where they have no shadow of right to go.

BYLES, J. I do not say that the words of the 24th [299] section are not large enough to admit of the construction sought to be put upon them by the counsel for the appellant: but I do not think it is the construction which the legislature intended. I think that section was merely intended to apply to horse and foot causeways running parallel with the carriage-way, and that the object of it was to protect persons riding or walking there from the inconvenience of having wheeled carriages driven along the same line of causeway.

KEATING, J., concurred.

Appeal dismissed, with costs.

PHILLIP ALFRED WILLIAMS, *Appellant*; RICHARD WHEELER, *Respondent*.
April 25th, 1860.

On the 27th of April, A., who sold flour on commission for the defendant, a miller, verbally contracted to sell the plaintiff 150 sacks at 29s. per sack, no time being named for the delivery. The defendant repudiating A.'s authority, on the ground that his instructions to him limited him to 30s. per sack, disputes arose between the parties; and eventually, on the 8th of June, the defendant agreed to deliver the flour, which he accordingly did, and sued for and recovered the price. The plaintiff then commenced an action against the defendant in the county-court to recover the difference between the contract price and the price at which he had been obliged to purchase other flour, on the defendant's default. The judge found that the flour had not been delivered within a reasonable time; but he held that either the plaintiff must be considered to have allowed the defendant an extension of time for the performance of the original contract, or that the delivery of the flour had relation to a new contract taking effect from the time when the defendant signified his intention to execute the order; and that the defendant was entitled to judgment:—Held, that the decision of the county-court judge was correct.—The case of *Leroux v. Brown*, 12 C. B. 801, observed upon.

This was an action brought by the appellant in the county-court of Monmouthshire holden at Tredegar, to recover the sum of 50l. as special damage sustained by him by reason of the defendant's not having performed the contract herein mentioned.

The plaintiff carries on the business of a retailer of [300] flour and general shop-keeper at Beaufort Iron Works and Abertillery, in the county of Monmouth. The defendant is a miller and wholesale flour merchant, and carries on his business at Lug Bridge Mills, near Hereford. On the 27th of April, 1859, one John Jones, who was employed by the defendant to sell flour for him on commission, solicited an order from the plaintiff, and the plaintiff verbally agreed with him to purchase 150 sacks of the defendant's flour, at 29s. per sack. The defendant was in the habit of telling his agent Jones from time to time the price at which he was to sell; and, on the 21st of April, he desired Jones not to sell any more flour under 30s. per sack. Jones, however, having had no previous dealings with the plaintiff, thought it best to abate 1s. per sack in the price, in order to secure a new customer. At the time of making the contract, the plaintiff mentioned to Jones that his terms were cash with two months'

discount. Immediately after the sale, the price of flour rapidly advanced, and soon reached the price of 40s. per sack.

On the 6th of May, the plaintiff wrote to the defendant desiring him to send 50 sacks of the flour to Ebbwvale Station, and 100 to Abertillery, as soon as possible, as he wanted it badly. But the defendant, instead of sending the flour, sent one Peake, another of his agents, to the plaintiff on the 7th of May to tell him (and who told him accordingly) that the defendant would not deliver the flour, as it had been sold by Jones contrary to his the defendant's orders. The following correspondence then took place between the plaintiff and his attorney (Mr. C. Lloyd) on the one side, and the defendant on the other:—

“Mr. Wheeler.

“Beaufort Iron Works, May 9th, 1859.

“Sir,—Mr. Peake called here last Saturday, and [301] told me that you were not going to send the 150 sacks best seconds ordered through Mr. Jones. I now beg to say that, if the flour is not delivered by the end of this week, I shall buy elsewhere, and sue you for the difference.—Awaiting your reply, &c., “P. A. WILLIAMS.”

The defendant replied as follows,—

“Lug Bridge Mills, 10th May, 1859.

“Sir,—In reply, should have supposed the explanation given you by Mr. Peake sufficient to have convinced you that Jones was acting on his own account and responsibility; for, on April 25th, I wrote him positive instructions, and as he did not attend to them or written orders by letter of April 21st, anything he did after said dates I repudiate, and am in no way answerable for what he may have done. I would be the last man on earth to try and be off a bargain if carried out in accordance with my instructions. What would you think of one of your young men, if you gave him positive orders to sell tea at 4s. per pound, and he sold it in your absence at 3s.? I think you would have a very bad opinion of the seller, and not very first rate of the purchaser. You had, therefore, better see Jones. If he sold you flour, he probably will carry out his sale, and not look to me. “R. WHEELER.”

The plaintiff again wrote as follows,—

“Beaufort Iron Works, 11th May, 1859.

“Sir,—Yours of yesterday just to hand. Contents being anything but satisfactory, I have only to repeat what I stated in my letter of the 9th instant, and beg to refer you to same. “P. A. WILLIAMS.”

Then there ensued a correspondence between Mr. [302] Lloyd as attorney for the plaintiff, and the defendant. It was as follows,—

“Abergavenny, 24th May, 1859.

“Sir,—I am instructed by Mr. P. A. Williams, of Beaufort, to apply for 75l. damages claimed by him for your non-fulfilment of contract in sending him the 150 sacks of flour bought of you in April last through your agent Mr. Jones. I am in full possession of the circumstances connected with the contract, and am of opinion that you have behaved badly towards Mr. Williams, to say the least. Mr. Williams is willing to take the flour now: but you must signify your intention of sending it, by return of post, or remit me the above sum, with 6s. 8d. the costs of this letter, within three days from the date hereof, or I shall issue a writ against you. This letter is without prejudice to further proceedings. “J. SAYCE, for C. LLOYD.”

To this the defendant replied as follows,—

“Lug Bridge Mills, 27th May, 1859.

“Sir,—In reply to your letter of the 24th instant, I should have supposed that any fair or honest man would have been satisfied with the explanation I gave your client. Jones was no agent of mine after the 25th of April last; and, if he sold flour to your client, it was not with my knowledge or consent: and I can only refer you to him. I had more flour sold April 25th than my mill will make for 14 days hence. I have been sending off flour this day sold in March last. “R. WHEELER.

“P.S.—I may mention that I gave Jones notice ten days ago flour he sold contrary

to my orders previous to April 25th, 1859, I should sue him for the difference. He has not replied to it. I regret Mr. Williams could not have seen Jones, and have satisfied himself.

"C. Lloyd, Esq."

[303] The plaintiff's attorney again wrote as follows,—

"Abergavenny, 1st June, 1859.

"Williams and Yourself.

"Sir,—I received your letter, but am at a loss to understand what you mean when you say Jones was no agent of yours, for you know you have delivered flour to other parties sold on the same day as my client bought. In fact, everybody knows Jones was your agent. I have no desire to plunge you into a law-suit; and, in order to enable you to offer some terms for settling this matter, I shall wait a few days for your reply before I commence legal proceedings. Undoubtedly it is a matter you ought to settle; for, it will do you great injury, Mr. Williams having a large circle of acquaintance.

"J. SAYCE, for C. LLOYD."

To this the defendant replied,—

"Lug Bridge Mills, 2nd June, 1859.

"Gentlemen,—In reply, I have sent Mr. Peake purposely over to John Jones on the subject of your client's business, and have given him your letter to hand this day to shew Jones; and, as I have said before, if I am to send the flour, which your client shall know one way or the other, say this week, then, if the flour is to go I shall sue Jones for the difference, he having sold contrary to my orders, and under price, which I can prove by a written letter, and discharged him on April 25. With reference to your client's acquaintance to do good or harm, I pass over. During thirty years I always fulfilled my engagements to the letter of fairness; and if I did not think Jones had acted the knave or fool (say the former), there would not have been any hesitation on my part to have delivered the goods, that is to say, as soon as practicable, even though I may have been a loser of 20s. per [304] sack. I only within the last few days completed the delivery of the whole of the flour sold in March and April; therefore, it could not have been delivered, if double the price had been offered, before the next week.

"RICHARD WHEELER.

"Messrs. Sayce & Lloyd."

The plaintiff's attorney again wrote,—

"Abergavenny, 3rd June, 1859.

"Williams and Yourself.

"Sir,—I received yours, and am glad that you have taken the wise course of moving in this matter towards an amicable settlement; more especially as you intimate that you have travelled thirty years through the troubled waters of a miller's life without having disgraced your useful and indispensable fraternity; and thereby setting a good example to others to follow the same laudable course of conduct. And I sincerely hope that Mr. Williams will have no cause to complain of your deviation therefrom, to that of injustice, dishonour, and unmanliness. If it be inconvenient to deliver the flour at once, I shall be glad to know how you propose to do so, in order that I may acquaint Mr. Williams thereof, who will I am sure meet you in any spirit of fairness. Whatever your secret instructions were to your agent, Mr. Williams has nothing to do with: and you may naturally suppose Mr. Williams was annoyed, believing that you were trying to get rid of the contract because it turned out not so favorable to you as expected.

"J. SAYCE for C. LLOYD."

The defendant replied as follows,—

"Lug Bridge Mills, 8th June, 1859.

"Gentlemen,—In reply, I beg to say that I deputed Mr. Peake to settle the matter relative to the sale of [305] flour made by John Jones contrary to my orders; and Mr. Peake wrote Mr. Williams, your client, to meet him last Saturday at 12 o'clock, at Messrs. Williams & Herbert's, Pontnewynydd, to hear and explain the nature of

the sale. He did not attend. Jones met him: and I have now directed that not only Mr. Williams's flour is to be delivered, but all Jones so sold, and he will have to make good the difference. If one is entitled to the flour, the whole are. And each purchaser except your client has had notice to the said effect, on condition that I am put in possession this week of approved funds agreeable to the terms of sale; if not, the sale is void.

"There are parties Jones sold to I would not trust. I know your client to be trust-worthy; and, if he agrees to pay cash on delivery, and that this I have this week, the flour shall be sent at least as soon as I can get it ready: and I hope Mr. Williams will send me 150 bags of his to put it in, as I really cannot get my sacks home, and have had occasion to send out so many this last month, am almost at a stand-still for some of them.

"R. WHEELER.

"Messrs. Sayce & Lloyd."

The plaintiff's attorney again wrote on the 9th of June,—

"Sir,—I received yours of the 8th instant, and am glad that you have settled it. Mr. Williams wrote to me some short time ago, saying that you may send 100 sacks of the flour to Abertillery station, and the other 50 to Ebbwvale, as the carriage will make no difference. I will write to him about sacks, and whatever is usual he will do, I have no doubt.

"J. SAYCE, for C. LLOYD."

"Abergavenny, 11th June, 1859.

"Sir,—I have heard from Mr. Williams, who says [306] that he has never hitherto found sacks to put flour in, and cannot do so now, as he has not got any. He says that yours shall be returned immediately, his warehouse getting very empty because you have not fulfilled your contract sooner. The flour was to be delivered by you at cash less two months' discount; and these are the usual terms, as you well know. Please send some ten or twenty sacks, if not more, as he is in want of it. Send the first to Ebbwvale. He could not meet your agent Peake, as he did not get his note in time. Of course Mr. Williams has sustained a loss through the contract not having been performed.

"J. SAYCE, for C. LLOYD."

On the 17th of June, the defendant wrote to the plaintiff, as follows,—

"Lug B. Mills, 17th June, 1859.

"Sir,—The 150 sacks of flour you say John Jones sold you on my account at 29s. net cash is duly forwarded to your address, viz. 100 to Abertillery, 50 to Ebbwvale, and shall thank you for your cheque for same. I cannot make you out an invoice, as whatever your cheque is short of my quoted price to Jones, I shall immediately call on him to make good the difference.

"R. WHEELER."

"Mr. P. Williams."

The plaintiff also put in the following letter from the defendant to his agent Jones:—

"Lug Bridge Mills, 12th May, 1859.

"Mr. Jones. Sir,—Mr. P. Williams seems determined to have the flour if possible. Mr. Pratt is legally entitled to have his as per sale-note, therefore you need not see him; and the other parties are morally entitled to have theirs: but, if I am to send it, I hereby give you notice that I shall charge you with the amount you have sold under my quoted price and written instructions to you: see letters of April 25, [307] not to sell under 35s. Now, you have said a good deal about the respectability of your friends; and, if they turn out as you represent, they probably will share with you in the loss. If you were to see Messrs. Williams & Herbert and J. Williams, if they would give 32s., and you sink your commission, I would for the sake of peace be at the loss of the difference. This is without prejudice to any ulterior steps in this affair, and hope you will succeed in a friendly termination in this matter.

"R. WHEELER."

Upon receipt of the defendant's letter of 17th of June, the plaintiff wrote to the

defendant, telling him to apply to Mr. Lloyd (his attorney) for the money due to him, as Mr. Lloyd was instructed to settle it.

On the 25th of June, Mr. Lloyd's clerk (Mr. Sayce) wrote as follows,—

“Abergavenny, 25th June, 1859.

“Sir,—Mr. Williams has been with me, and claims 58l. 10s. for damages sustained by him by your not fulfilling your contract. As you did not send in the flour, he was obliged to buy, as follows:—

“30 sacks at 40s.	.	.	.	.	.	£60	0	0
120 sacks at 36s.	.	.	.	.	.	216	0	0
							£276	0	0
Flour bought of you, 150 sacks at 29s.	.	.	.	.	.	217	10	0
							£58	10	0
Two months' discount on 217l. 10s.	.	.	.	.	.	1	16	3
							£60	6	3

“I have also 5l. or 6l. to charge for costs to Mr. Williams, which I think you ought to pay. Upon hearing from you, I will remit you the balance, namely, 157l. 3s. 9d. either by banker's draft or otherwise as [308] you may desire. I think Mr. Williams is legally entitled to greater damages; but, as he only wishes to be placed in the same position as if you had fulfilled your contract as you ought, he is content with that sum. This letter must be without prejudice to further proceedings, in case you do not accept of this offer.

“J. SAYCE, for C. LLOYD.”

Mr. Lloyd's letter of the 24th of May was tendered in evidence by the defendant after his own letters of the 2nd of June and the 8th of June had been put in on the part of the plaintiff; and, it having been objected by the plaintiff's attorney that this letter was inadmissible, the judge overruled the objection, and received it.

The plaintiff shortly after the defendant refused to execute the order given to Jones did buy 150 sacks of flour at the price of 276l., to supply the place of that which he had ordered from the defendant, thereby incurring a loss of 58l. 10s. by the non-performance of the defendant's contract.

On the 28th of June, the defendant sued out a writ of summons in the court of Queen's Bench against the plaintiff, which was indorsed with the following particulars of claim:—

“1859. June 14. 25 sacks of flour.
16. 75 do. do.
17. 50 do. do.

150 at 29s. 217l. 10s.

“Costs 2l. 12s. 6d.

The plaintiff paid the amount so indorsed upon the writ, and then commenced this action for the damages sustained in consequence of the defendant's delay in performing the contract.

Upon this state of facts, the judge of the county-court found that the flour had not been delivered [309] within a reasonable time after the making of the verbal contract: but he held that either the plaintiff must be considered to have allowed the defendant an extension of time for the performance of the original contract, or that the delivery of the flour had relation to a new contract taking effect from the time when the defendant signified his intention to execute the order; and that the defendant was entitled to judgment.

The questions, therefore, for the opinion of the court, are,—first, whether the construction put upon the correspondence by the county-court judge was right, and whether the effect of the correspondence and of the previous repudiation of the verbal contract by the defendant was as found by the county-court judge. Secondly, if not, whether the binding contract took effect from the time when the verbal contract was

entered into by force of the subsequent delivery, so as to make the defendant liable for a breach of contract in not delivering the flour within a reasonable time after the verbal contract.

If the court should be of opinion that the first of these questions should be answered in the negative, and the second in the affirmative, then judgment was to be entered for the plaintiff, damages 50*l*. But, if the court should be of opinion that the first question should be answered in the affirmative, or the second in the negative, then the present judgment was to stand.

Brett, for the appellant (*a*). On the 27th of April, one Jones, who sold flour on commission for the de-[310]fendant, contracted (not in writing) to sell the plaintiff 150 sacks at 29*s*. per sack, no time being named for the delivery. The defendant, repudiating the authority of Jones, on the ground that his instructions to him were to sell for not less than 35*s*. per sack, disputes arose between the parties; and eventually, on the 8th of June, the defendant agreed to deliver the flour. In the meantime the market-price for flour had advanced considerably, and the plaintiff had been compelled to purchase other flour. The 150 sacks having been delivered, the defendant sued the plaintiff for the price, which the latter then paid; and he brought his action in the county-court to recover from the defendant the difference between the contract price and the [311] price at which he was compelled by the defendant's default to buy. The county-court judge found that the flour had not been delivered within a reasonable time: but he held that either the plaintiff must be considered to have allowed the defendant an extension of time for the performance of the original contract, or that the delivery of the flour had relation to a new contract taking effect from the time when the defendant signified his intention to execute the order; and that the defendant was entitled to judgment. It is submitted that there has been a miscarriage on the part of the judge. It will be contended that, the contract not being in writing, there was in point of law no contract at all until the delivery and acceptance of the flour. The 17th section of the Statute of Frauds, 29 Car. 2, c. 3,—which enacts “that no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l*. sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized,”—relates merely to the evidence to be given of the existence of the contract. That was so decided, upon the 4th section,

(*a*) The points marked for argument on the part of the appellant, were as follows:—

“1. That the verbal contract made by Jones on behalf of the respondent, having been expressly adopted and ratified by the respondent in his letter of the 17th of June, and by his acting on it in delivering the flour agreed to be delivered by that contract, and in receiving the payment agreed on by that contract, was the binding contract between the parties:

“2. That the fact of the original contract having been a verbal contract only does not make it less the contract between the parties,—the difficulty of proving it at the trial having been overcome by proof of those facts which took it out of the provision in the Statute of Frauds as to contracts only verbal; the Statute of Frauds being an enactment relative only to the evidence of contracts, and not affecting the contracts themselves:

“3. That the correspondence set forth in the case does not, upon a true construction of it with reference to the admitted facts in the case, properly bear the construction put upon it by the county-court judge:

“4. That there is no evidence upon the face of such correspondence, properly construed, or otherwise, in the case, that the appellant ever gave time for the fulfilment of the original contract: nor is there any evidence of any other contract being adopted by the appellant with regard to the flour than the original verbal contract made with Jones, and ratified by the respondent:

“5. That the contract between the parties being the verbal contract entered into by Jones, and ratified by the respondent, it took effect from the date of its being so made by Jones, and so makes the respondent liable in damages for not delivering the flour within a reasonable time from that date.”

by this court, in *Leroux v. Brown*, 12 C. B. 801, where it was held that an action will not lie in the courts of this country, to enforce an oral agreement made in France (and valid there), which, if made here, could not, by reason of the Statute of Frauds, have been sued upon. [Erle, C. J. That seems contrary to the decision of the Exchequer in *Carrington v. Roots*, 2 M. & W. 248, which was confirmed by *Reade v. Lamb*, 6 Exch. 130.] Those cases were considered by *Leroux v. Brown*. [Byles, J. The [312] words in the 4th and 17th sections are different: in the former, they are, "no action shall be brought: but in the latter, they are, "no contract shall be allowed to be good." Erle, C. J. Unless the requirements of the 17th section are complied with, it is no contract at all. Willes, J. It will not suffice to produce a writing made after the commencement of the action: *Bill v. Bament*, 9 M. & W. 36. Now, if it were only procedure, a writing made after the commencement of the action would be as good as one made before.] Jervis, C. J., in *Leroux v. Brown*, says: "There is no dispute as to the principle which ought to govern our decision. My Brother Allen admits, that, if the 4th section of the Statute of Frauds applies, not to the validity of the contract, but only to the procedure, the plaintiff cannot maintain this action, because there is no agreement, nor any memorandum or note thereof, in writing. On the other hand, it is not denied by Mr. Honyman, that, if the 4th section applies to the contract itself, or as Bullenot (*a*) expresses it, to the solemnities of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made, but not in England. Looking at the words of the 4th section of the Statute of Frauds, and contrasting them with those of the 1st, 3rd, and 17th sections, this conclusion seems to me to be inevitable." And Maule, J., says: "It is said that the 4th section is not applicable to this case, because the contract was made in France. This particular section does not in terms say no such contract as before stated shall be of any force; it says, [313] no action shall be brought upon it. In their literal sense, these words mean that no action shall be brought upon such an agreement in any court in which the British legislature has power to direct what shall and what shall not be done: in terms, therefore, it applies to something which is to take place where the law of England prevails. But we have been pressed with cases which it is said have decided that the words 'no action shall be brought,' in the 4th section, are equivalent to the words 'no contract shall be allowed to be good,' which are found in another part of the statute. Suppose it had been so held, as a general and universal proposition, still I apprehend it would not be a legitimate mode of construing the 4th section, to substitute the equivalent words for those actually used. What we have to construe, is, not the equivalent words, but the words we find there. If the substituted words import the same thing, the substitution is unnecessary and idle: and, if those words are susceptible of a different construction from those actually used, that is a reason for dealing with the latter only. It may be, that, for some purposes, the words used in the 4th and 17th sections may be equivalent; but they clearly are not so in the case now before us: for, there is nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we can say is, that they prohibit the courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract." [Willess, J. *Carrington v. Roots* certainly intended to decide that both the 4th and the 17th sections [314] have the same effect. Lord Abinger says: "The contract cannot be available as a contract at all, unless an action can be brought upon it." Erle, C. J. I observe that the paragraph in 1 Smith's Leading Cases, 4th edit. 231, in which the case of *Leroux v. Brown* is mentioned, concludes with a quare. Willess, J. How does this point arise? The judge in effect finds that the agent Jones had no authority to make the contract.] It is not denied that Jones was the defendant's agent. Without the assent of both parties, there could be no new contract. The plaintiff never assented to any alteration of the terms of the contract of the 27th of April, but, on the contrary, always

(a) *Traité des Statuts réels et personnels*, tom. 2, tit. iv., ch. 2, observ. 46, p. 459.

asserted his right to insist on its fulfilment. The circumstance which could be at all relied on by the defendant as a rescission of the original contract is, the expression in the letter of the plaintiff's attorney of the 24th of May, in which he says,—“Mr. Williams is willing to take the flour now:” but that was a mere offer conditional on the defendant's signifying his intention by return of post; which was not done. Besides, that letter was stated to be “without prejudice.”

Gray, for the respondent, was not called upon (a)¹.

[315] ERLE, C. J. I am of opinion that the conclusion come to by the county-court judge was correct, and that this appeal must be dismissed. I do not found my judgment on the point raised upon the Statute of Frauds; nor do I think it necessary to enter into any consideration as to the cases of *Carrington v. Roots*, *Reade v. Lamb*, and *Leroux v. Brown*, because I think the judgment of the county-court judge upon the construction of the correspondence set out in the case is a clear and sound judgment. It appears that the original contract by which Jones agreed to sell to the plaintiff 150 sacks of flour at 29s. per sack, at two months' credit, was made by Jones without the authority of the defendant; his instructions being to sell at not less than 30s. Now, I admit that the plaintiff would not be bound by the private instructions given by the defendant to his agent (a)². But, after much correspondence between them, and much discussion on the subject,—the plaintiff, on the one hand, insisting upon the performance of the contract, and the defendant, on the other hand, repudiating it,—the defendant writes to the plaintiff's attorney on the letters of the 8th of June, offering to deliver the flour on being paid cash for it; and to that proposition the attorney by a letter of the 9th on the part of his client assents. Some further discussion ensues, and ultimately, on the 14th, 16th, and 17th of June, the flour was delivered upon the terms of the new contract created by the letters of the 8th and 9th. The defendant having delivered the whole 150 sacks, the plaintiff claims to deduct 58l. 10s. from the contract price, as damages alleged to have been sustained by him from the nonfulfilment of the original contract by the defendant. I am of opinion that the county-court judge took a sound view of the cor-[316]-respondence in holding that the plaintiff was not entitled to recover.

WILLES, J. I also am of opinion that this appeal must be dismissed on the ground stated by my Lord. The point of law sought to be raised upon the Statute of Frauds is an extremely nice one; but it is one upon which it is not necessary on the present occasion to offer any opinion, though I cannot help observing that I should require much more argument to satisfy me that a contract made in France without writing, which is valid by the French law, is incapable of being enforced in an English court, by reason of the requirements of the English law as to the formalities of contracts made in England. The general rule is that *locus regit actum*. And, though I fully recognize the principle upon which the judgment of this court in *Leroux v. Brown* professes to be founded, viz. that the procedure is regulated by the *lex fori*, I am not satisfied that either of the sections of the Statute of Frauds to which reference has been made warrants the decision. We must, however, act upon *Leroux v. Brown* until it is overruled by a court of error.

BYLES, J. For the reasons stated by the Lord Chief Justice, I entirely concur in the opinion he has expressed.

KEATING, J. I also concur in thinking that the county-court judge came to a right conclusion upon the facts.

Appeal dismissed, with costs.

(a)¹ The points intended to be argued on the part of the respondent, were as follows:—

“1. That the goods were not delivered under the original contract, but under a new contract entered into while the original contract was not binding, and under which new contract the plaintiff cannot recover the damages conditionally assessed:

“2. That there is evidence to warrant the above finding; and the judge has found it:

“3. That, where a contract for the sale of goods is not a good contract, on account of the requisites of the Statute of Frauds not being complied with, but becomes good by a delivery and acceptance of the goods or part of them, the contract is not complete in point of law till the delivery; and there is no obligation under the contract to deliver within a reasonable time from the verbal part of the contract.”

(a)² See Story's *Principal and Agent*, § 127, and note.

[317] *GARDNER v. ABEL CHAPMAN, JOSEPH ANDERSON, JOSEPH ANDERSON THE YOUNGER, AND JAMES M'HENRY.* May 8th, 1860.

[S. C. 29 L. J. C. P. 281; 6 Jur. N. S. 1254.]

A composition deed made in alleged pursuance of the 224th section of the Bankrupt Law Consolidation Act, 1849, contained a clause which was to operate to defeat any action brought by a creditor,—whether one who had executed the deed or not,—by making the bringing of such action *ipso facto* a release and forfeiture of the debt: and also a clause enabling any creditor, by leave of the inspectors, notwithstanding the former provision, to bring an action, and, in case of success, to receive dividends upon the amount recovered:—Held, that the operation of these clauses was to establish a double inequality,—first, in respect of the power of the inspectors to allow an action or not, at their discretion,—secondly, in respect of the possible misapplication of the assets in payment of the costs of such creditors as might by leave of the inspectors bring actions and recover judgment: and, consequently, that the deed was not valid.

This was an action for money payable by the defendants to the plaintiff for goods sold and delivered to the defendants by the plaintiff and one William Milburn, deceased, for work and materials, money lent, money paid, money had and received, interest, and money found due on accounts stated.

Chapman and the two Andersons (*a*) pleaded, amongst other pleas, fourthly, that, before and at the time of the making of the deed of arrangement thereafter mentioned, and for six calendar months next before the suspension of payment by the defendants thereafter mentioned, the defendants were traders liable to the bankrupt laws, and carried on business, to wit, as provision merchants, in Southwark, in the county of Surrey, and that, at the time of the making of the said deed, the defendants were indebted to the plaintiff and the said William Milburn, deceased, and to the plaintiff, in respect of the said causes of action, and also to divers other persons in divers sums of money which they were then unable to pay in full; and that, after the Bankrupt Law Consolidation Act, 1849, the defendants suspended payment, and that theretofore, and more than three calendar months before this suit, to wit, on the 5th of February, 1855, by a certain deed then entered into between the defendants and their creditors touching the said defendants' liabilities and their release therefrom, and the distri-^[318]bution, inspection, conduct, management, and mode of winding up their estate, and being such a deed of arrangement as when signed by or on behalf of six sevenths in number and value of those creditors whose debts amounted to 10l. and upwards would be as effectual and obligatory in all respects upon all creditors who had not signed the same as if they had duly signed the same, according to the said act of parliament,—it was provided and agreed, and the several creditors parties thereto respectively covenanted, that, unless and until the said deed should become void by virtue of a proviso thereafter contained for making void the same, they the said creditors parties thereto respectively, or who should become bound thereby, would not sue or prosecute any action at law against the said defendants parties thereto for or on account of the whole or any part of the debt or debts then due and owing by the said defendants parties thereto to the said creditors or any of them; and that, in case the said creditors, or any of them, should in any respect fail to observe that covenant, then and in every such case, and immediately thereupon, the debt or debts of the creditor or creditors by whom the said covenant should be broken should become absolutely forfeited and irrecoverable in law or equity, and the same creditor or creditors should thereforward cease to be entitled to have, maintain, or make any claim or demand in respect thereof, either by virtue of the said indenture or otherwise, and that that covenant should accordingly operate and enure, and might be pleaded in bar as a good and effectual release and discharge of such debt or debts, and all claims and demands in respect thereof: Averment, that the said deed was a deed or memorandum of arrangement between them and their creditors within the meaning and provisions of the said act of parliament, and was duly executed ^[319]by six sevenths in number and value of the creditors of the said defendants whose debts

(a) There were similar pleas by the defendant M'Henry.

amounted to 10l. and upwards, being such sufficient number as was required in that behalf, and had never become void under the proviso thereinbefore referred to or otherwise, and was still in full force; and that all things happened and were performed and done, and all times elapsed before this suit, required by the said act of parliament to make the said deed an obligatory instrument within the terms of the said act upon all the creditors of the said defendants: and that more than three calendar months before this suit the plaintiff had due notice from the said defendants of the said deed, and of the said defendants' said suspension of payment, according to the provisions of the said act, and could and might have executed the said deed in respect of the said causes of action: and then and thereby, and by force of the said act, the said deed became and was and is obligatory on the plaintiff as if he had duly signed the same, and the claims of the plaintiff in the declaration mentioned were thereby barred and determined.

Second replication to the fourth plea of Chapman and the two Andersons,—that the same defendants carried on business in partnership together under the style or firm of Allen & Anderson, as in the said deed mentioned: and that the same defendants, before and at the time the said deed was executed, also carried on business in partnership with the defendant M'Henry under the style or firm of James M'Henry: that the causes of action in the declaration mentioned were causes of action which accrued to the plaintiff from all the defendants jointly as members of the said firm of James M'Henry: and that the said deed in the same defendants' fourth plea mentioned was and is to the tenor following, that is to say,—“This indenture [320] made the 5th day of February, 1855, between Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, of, &c., provision merchants, trading under the style or firm of Allen & Anderson, of the first part, Richard Sanderson, of, &c., bill-broker, John Green Elsey, of, &c., and Raymond Pelley, of, &c., of the second part, the several persons who are respectively creditors of the said parties hereto of the first part on account of their said firm of the third part, the several persons who are respectively creditors of the said Joseph Anderson separately, of the fourth part, the several persons who are respectively creditors of the said Abel Chapman separately, of the fifth part, and the several persons who are respectively creditors of the said Joseph Anderson the younger, of the sixth part: Whereas, the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, are indebted on account of the co-partnership business carried on by them under the aforesaid firm, to the several persons parties hereto of the third part, in various debts or sums of money, some of which are secured by bills of exchange or other securities which will speedily become due, and which said debts or sums of money the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, are at present not able to pay in full: And whereas the several partners of the said firm are or may be indebted to divers persons on their respective separate accounts: And whereas the said firm of Allen & Anderson having suspended its payments on the 6th day of October, 1854, a meeting of creditors of the said firm was held on the 15th day of November, 1854, at which meeting a statement of the affairs of the said firm was submitted: and thereupon it was unanimously resolved by the creditors present that the affairs of the said firm should be wound up under inspection, and that the said persons parties [321] hereto of the second part should be inspectors for that purpose: and it was resolved that a proper deed of inspectorship, providing for the winding up, administration, and distribution of the joint estate of the said firm and the separate estate of the partners thereof according to the rules in bankruptcy, and as if bankruptcy had taken place on the 6th day of October, 1854, and with all the usual clauses, should be prepared and approved by the inspectors, and that a dividend should be paid as early as possible upon such deed being executed, and further dividends from time to time when 5 per cent. should be in hand: and it was further resolved that no creditor signing or assenting to the said resolutions should be prejudiced with respect to his rights and remedies against third persons, or with respect to any security or lien he might have for his particular debt: And whereas, pursuant to such resolutions, these presents have been prepared, settled, and approved on behalf as well of the inspectors as of the said parties hereto of the first part, and of the creditors, for the purpose of regulating the realization and final liquidation of the affairs of the said firm as hereinafter provided: And whereas it has been agreed that the respective private or separate estates of the said parties hereto of the first part shall be available for the purposes of these presents, subject

to the payment, satisfaction, or discharge of any liens, charges, or incumbrances existing thereon, and of their respective private or separate debts, liabilities, or engagements, in like manner as the surplus of a partner's separate estate would be available in case of bankruptcy: Now this indenture witnesseth, that, in pursuance of the said resolutions and agreements, and in consideration of the covenants hereinafter contained on the part of the creditors of the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, [322] each of them the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger doth hereby, for himself, his heirs, &c., covenant and agree with and to the said parties hereto of the second part, and each of them, their and each of their executors, &c., in manner following, that is to say, that they the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, and each of them, shall and will to the best of their and his ability and power during the continuance of this present arrangement, manage, transact, and conduct to a conclusion the liquidation of the affairs and estate of their said firm, and also the separate affairs and estate of each of them the said partners therein, for the benefit of their creditors: and shall and will for that purpose use their best endeavours to sell and convert into money, collect, receive, and recover as speedily as possible all the real and personal estate, debts, moneys, goods, rights, credits, and effects now belonging or owing to them or either of them, and shall and will make, do, and execute all such contracts, acts, deeds, and assurances as shall be necessary for such purposes: and further that they the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, and each of them, shall and will, in the management, transaction, and conduct of such liquidation, sale, conversion, collection, and receipt, and as to the times of such sale and conversion, from time to time attend to, observe, and act on such directions as the inspectors or inspector shall give: and further shall and will, subject to such directions and the provisions hereinafter contained, administer the said estates and effects in manner hereinafter provided, that is to say,—It is hereby agreed and declared,

First. All the moneys, cheques, bills of exchange, and notes of hand, and securities for money which shall be received and got in from the produce of the said [323] partnership estate and effects or otherwise, and which shall not be laid out, invested, or applied as hereinafter directed or authorized, shall forthwith from time to time be paid or deposited into or with the house or firm of Willis, Percival, & Co., or to such other bankers as shall be approved of or directed by the said inspectors or inspector, to be carried or placed to the account or credit and in the joint names of the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, or, if the inspectors or inspector shall so direct, then to the joint account and credit and in the joint names of such other persons (inclusive or not inclusive of the inspectors or either of them) as the inspectors or inspector shall direct, in order that the same may be applied as hereinafter mentioned.

Second. The said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, and each of them, shall forthwith make out and deliver to the said inspectors a full account of their partnership and separate estates and assets, and of their and each of their debts, and give notice to their several creditors of the said suspension of payment, and of these presents, and shall and will from time to time, on or before the first day of every calendar month, or as soon thereafter as conveniently may be, make out and sign a true and perfect account in writing of all moneys, bills, notes, and other securities received and paid by them and each of them during the preceding month on account of their said partnership or the assets thereof: and also shall and will, within fourteen days next after the expiration of every quarter of a year, or as soon after as conveniently may be, the first quarter of a year to be calculated from the day of the date of these presents, make out and sign a true and perfect account or statement in writing of all and every sums or sum of money received and paid, and goods, wares, and [324] merchandizes sold and disposed of by them and him, and also of all such other transactions as shall have occurred or taken place during the quarter of a year, in the conduct of or in reference to the said partnership business, estate, and effects, and their respective separate estates and assets hereby covenanted to be liquidated, and which shall be necessary or material to be known to the said inspectors in order to their being enabled from time to time to form a competent judgment of the affairs of the said partnership: and also shall and will deliver a copy of such monthly and quarterly accounts and statements respectively

unto the said inspectors, or to one of them, to the intent that the same may be laid before the creditors parties hereto when and as the said inspectors or inspector shall think fit.

Third. The said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, or either of them, shall not nor will at any time or times hereafter during the continuance of this present arrangement, without the consent in writing of the inspectors for the time being acting under these presents, or one of them, enter into or undertake or become engaged or concerned in any new contract, undertaking, trade, or business whatsoever, so as to charge or make liable the said partnership estate or effects, except such contracts, undertaking, or business as shall be essentially necessary for getting in and disposing of the said estates and effects, and liquidating, concluding, arranging, winding-up, and closing the said affairs, transactions, and engagements, in pursuance of these presents, under the direction of the said inspectors or inspector: nor shall, nor will, save as herein authorized or provided, or as allowed or authorized by the said inspectors or one of them, do or knowingly suffer to be done otherwise than by means or in consequence [325] of legal compulsion or duress, any act, deed, matter, or thing whatsoever whereby any creditors or creditor of them the said parties hereto of the first part shall or may obtain any security or securities for his her, or their debt or debts or any part thereof, or any preference or priority of payment thereof or any part thereof before any other or others of them.

Fourth. The said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger shall and will keep proper books of accounts relating to the said partnership estate and effects, and also of their separate estate and assets hereby covenanted to be liquidated, and the management and disposal thereof, and therein make or cause to be made true and proper entries of all their respective receipts, payments, and disbursements, and of all such other transactions, matters, and things as shall be requisite in order to shew the true state and condition of the said partnership estate and effects, and of the assets applicable to the satisfaction of the debts thereof; and shall and will preserve all letters received by them respectively, and make and keep copies of all letters sent by them and him to all and every of the correspondents of the said firm or other person or persons whatsoever respecting their affairs or conduct in such partnership business, and preserve all other papers and writings relating to the same; and also shall and will permit the inspectors or inspector for the time being from time to time and at all times during the continuance of this arrangement to examine and inspect the said books of account, letters, papers, and writings, or any of them; and shall and will from time to time when and as often as they the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, or either of them, shall be thereunto required by the inspectors or any of them, shew and report to them or him the true state and condition of the [326] accounts and of all the proceedings relating to the said co-partnership business and estates, and also the said separate estates and assets.

Fifth. The said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, and each of them, shall and will when thereunto required by the inspectors and inspector for the time being, or any of them, and whenever so required, verify the truth of such accounts by a statutory declaration; and, generally, shall and will at all times and in all respects attend to and act upon such directions or suggestions as the inspectors or inspector shall from time to time or at any time give relative to the said business and estate, and to the sale and realization of the said property and effects.

Sixth. The moneys to arise from the liquidation of the separate estates of the said parties hereto of the first part respectively shall be applied first in the payment and satisfaction of the costs of the sale and conversion thereof respectively; and all such moneys shall be paid into such bank as aforesaid, to be distributed and applied, after satisfaction thereof of such costs, in or towards satisfaction of the debts of the said parties hereto of the first part respectively, with such priority of the separate debts as would be allowed in bankruptcy, and as hereinafter mentioned.

Seventh. The surplus moneys to arise from the joint estate and assets of the said firm or partnership of the said parties hereto of the first part, and also the surplus proceeds, if any, of the said separate estates, after payment of the said separate debts respectively, shall from time to time, after payment of costs and expenses hereby authorized, be divided amongst and paid to the said joint creditors, according to the

rules of division applicable in case of bankruptcy, as if the parties hereto of the first part had become bankrupt on the [327] said 6th day of October, 1854; and creditors or persons who would be entitled to prove in such bankruptcy shall be deemed creditors for the amounts they would be entitled to prove, and the creditors shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and the moneys to arise from the joint and separate estates and assets of the said parties hereto of the first part shall be distributed amongst the creditors in like manner as the same would be distributed in bankruptcy.

Eighth. All the said moneys, bills, notes, and securities to be paid or deposited unto or with the said house or firm of Willis, Percival, & Co., or other bankers as aforesaid, shall there remain, and shall not nor shall any part thereof be drawn there-out or taken therefrom, except by some cheque or cheques, order or orders, and excepting only for the purposes of these presents, and shall not be drawn or taken contrary to any order or direction which may have been given by the inspectors or inspector for the time being to the said parties hereto of the first part, or either of them: nevertheless, it is hereby agreed and declared, that any of the moneys to arise from the said partnership estate and business, and which shall not be immediately applicable to the payment of a dividend to creditors, may from time to time, with the consent of the inspectors or inspector, if they or he shall think it advantageous for the said partnership estate, be laid out and invested temporarily in the purchase of government funds, East India or Exchequer Bonds, or Exchequer bills, or other securities approved of by the inspectors,—the same to be applicable from time to time for the purpose herein declared touching and concerning the moneys and securities which shall be paid or deposited into or with the said house or firm of Willis, Percival, & Co., or such other bankers as aforesaid, whenever need or occasion shall require.

[328] Ninth. It shall be lawful for the inspectors or inspector for the time being, and also for the said parties hereto of the first part, or either of them, with the consent of the said inspectors or inspector, to employ such accountants, agents, solicitors, and clerks as may be deemed necessary to aid in the investigation or advise on the affairs of the said liquidation, and to act or assist in the conduct thereof, and each of the said parties hereto of the first part shall be allowed to retain or shall be paid out of the moneys arising from the liquidation of the estate, whilst he shall be employed in such liquidation, for his trouble and assistance therein, such a sum as the said inspectors or inspector for the time being shall judge proper and sufficient.

Tenth. And it is hereby agreed and declared by and between all the parties hereto, that all and every the moneys, bills, notes, and securities belonging to, or which shall be received or arise for or in respect of the said partnership estate or business and the liquidation thereof, shall be held and paid and applied for the purposes hereinafter directed concerning the same, that is to say,—first, to pay and satisfy the costs, charges, and expenses of making and completing these presents,—secondly, in the payment of the said allowance, if any, to the said parties hereto of the first part, and of all other costs, salaries, and expenses of accountants, solicitors, agents, clerks, servants, and other persons who have been employed by or on behalf of the said parties hereto of the first part, or the said inspectors, upon and subsequent to the said 6th day of October, 1854, in investigating or advising on the affairs of the said partnership, or whom hereafter it may be necessary or advisable to employ in the conduct of the said liquidation, and all costs and expenses otherwise attending the execution of the provisions and powers herein contained in relation to the said partnership estate, assets, and liabilities, and also all costs and expenses incident to the sale, disposition, collecting in, or receiving of the said co-partnership estate or assets, or in winding up the said business thereof,—thirdly, the surplus or residue of the said moneys to arise shall be applied in payment of dividends to the creditors as herein directed, until satisfaction of their debts, with interest,—fourthly, and the ultimate surplus, if any shall remain after the disbursements and payments herein authorized or directed to be made, and after satisfaction or payment to the said creditors of their respective debts, with interest for the same after the rate of 5l. per cent. per annum, shall be retained by or paid to the said parties hereto of the first part, their executors, &c., according to their respective shares and interests therein, and subject to their respective rights and obligations inter se, and particularly in reference to any surplus of their respective estates which may have been brought or applied in aid of the partnership assets, in the same manner as if their partnership

engagements had been closed by themselves uncontrolled by any provisions herein contained: Provided always and it is hereby declared and agreed by and between all the said parties to these presents, that, notwithstanding the trusts or directions aforesaid, it shall and may be lawful to and for the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, with the sanction of the said inspectors or either of them, out of the moneys which shall be subject to the said directions, to pay and discharge in full such debts or salaries as are or would be payable in full if the estate were being administered in the court of bankruptcy.

Eleventh. The first dividend out of the moneys arising from the joint estate and assets shall be paid [330] unto the joint creditors, their executors, &c., forthwith, so far as such moneys have been realized, and dividends shall afterwards from time to time be made amongst the creditors and their respective executors, &c., as often as there shall be sufficient in hand to pay 5 per cent. on the debts or amounts payable to them, or earlier if the inspectors or inspector shall so direct, until such creditors shall have received 20s. in the pound on their respective debts, and interest as aforesaid.

Twelfth. And, generally, it is the express agreement and understanding of all the said parties to these presents that the said moneys and assets to be produced by the liquidation shall be payable and distributable to and amongst all such of the creditors of the parties hereto of the first part, in such and the same manner as the same would be payable and distributable, and the same rights and equities shall prevail and govern any disputes and questions amongst the said creditors in relation to their said debts, and between the said creditors and the said parties hereto of the first part, as if an adjudication in bankruptcy had been made against the said parties hereto of the first part on the 6th day of October, 1854; and that any application of the said moneys and assets herein specially directed to be made, which may not be exactly in accordance with the rules of bankruptcy if such adjudication had been made as aforesaid, shall be deemed to be qualified, altered, or controlled by this present provision.

Thirteenth. The said parties hereto of the first part, or any of them, shall have full power and authority, with the consent in writing of the said inspectors or inspector for the time being, to make any composition and allow time for the payment of any debts, and to submit to arbitration on behalf of themselves or him-[331]-self, or on behalf of the said creditors parties hereto, or any of them, as the case may be, any and every difference or dispute which may arise relating to the claims of creditors or other persons on the said partnership estate, whether holding or not holding any bills or securities, and to their right to claim against the said partnership estate, or against the said parties hereto of the first part, and to the amount of their debts or claims, and all other disputes and differences which may arise with any person or persons whomsoever respecting the estate of the said parties hereto of the first part, or any of them, or any demand thereon, or in any manner relating thereto, and to abide by and perform the award in every such arbitration; and, further, it shall be lawful for the said parties hereto of the first part, or any of them, with the consent in writing of the inspectors or inspector, or for the inspectors or inspector in the name and as the attorneys or attorney of the said parties hereto of the first part, or any of them, in case they or he shall neglect so to do on request of the inspectors or inspector, to take and use all such legal and equitable courses or means of action or suit or otherwise, or by defending any action, suit, or claim, as shall appear to be necessary for the purpose of ascertaining and adjusting the true amount or validity of any debt or debts, liability or liabilities, claimed to be due from the said parties hereto of the first part, or any of them; and, further, it shall be lawful for any creditor party hereto, during the continuance of this arrangement, with the consent in writing of the inspectors or inspector, to commence or institute any action or suit for the recovery of any debt claimed by such creditor, and the amount, if any, recovered in such action or suit, shall be the amount on which dividends shall be payable under these presents, but such creditor shall not be entitled by [332] such action or suit to recover or obtain payment other or more than such dividends and any other lien or security he may have previously held.

Fourteenth. Provided always, and it is hereby further agreed that it shall be lawful to and for the said parties hereto of the first part, or any of them, with the sanction of the inspectors or inspector for the time being, out of the moneys arising

from the said joint or separate estates respectively, to pay any person or persons having any lien or liens or other securities or security on any part of the said estates respectively, the full amount of the moneys due to him, her, or them, and for which he, she, or they shall have any such liens or lien, securities or security, for the purpose of getting possession of the estate whereon the same may subsist discharged therefrom, so as that the moneys so to be paid do not in the estimation of the inspectors or inspector exceed the value of the estate subject to such lien or security, and to keep down the interest due or to become due on such liens or securities; and also, for the better preserving the benefit of any such estate, to borrow money for the purpose of paying off any such liens or securities; and to secure the re-payment of the money borrowed, with interest, by transfers of any such liens or securities paid by means of the money so borrowed, or by creating new or further liens thereon.

Fifteenth. All debts and sums of money owing by the said parties hereto of the first part, or for which they or their heirs, estates, or effects are or may be liable, and which are or shall or may be payable at any future time or times, or on any event ascertained or not now ascertained, or on any contingency, and which would be the subject of valuation in the case of bankruptcy, may be valued, and the value thereof determined either by reference to any actuary or [333] accountant or by arbitration in the usual manner, as the said inspectors or inspector for the time being may think fit; and the sum which shall be determined as the immediate value of any such future or contingent debt or liability to be determined as aforesaid, shall be considered as the sum actually due and owing to the creditor, who shall be paid dividends in respect of such immediate value in satisfaction of such future or contingent debt.

Sixteenth. All creditors of the said parties hereto of the first part who shall hold any bill or bills of exchange, promissory note or notes, upon which any other person or persons shall be liable for the payment of the money thereby secured, shall be considered as executing these presents conditionally, and shall not directly or indirectly be bound or concluded by their respectively executing the same, unless and until such third party or parties shall assent to these presents or the arrangement hereby made, the same being signed by such creditors respectively without prejudice to the rights and remedies of the creditors so conditionally signing against such party or persons respectively; but such conditional signature shall be construed as merely expressing the assent of the last-mentioned creditors to be parties to these presents when they shall have obtained the assent of such third party or parties as aforesaid to the execution hereof by such creditor or creditors respectively, without prejudice to his or their rights or remedies against any person or persons other than against the said parties hereto of the first part, their executors or administrators; and dividends shall be retained for creditors so conditionally signing, to be paid as soon as such assent shall be obtained.

Seventeenth. And it is hereby further agreed and declared between and by the said parties hereto, that, in case of any event not herein or hereby particularly [334] provided for, or in case the inspectors or inspector for the time being may deem it prudent to have further directions or powers concerning the said liquidation or concerning the exercising or fulfilling by the parties hereto of the first part of any of the agreements herein contained, it shall be lawful for the inspectors or inspector for the time being from time to time, upon fourteen days' notice to be given by advertisement in the *London Gazette*, or by circular letter addressed to the respective creditors parties hereto, and sent by or through the post in London, or left for them at their respective or last known places of abode or business, as such inspector or inspectors shall think fit, to summon a general meeting of the said creditors parties hereto, and of the agents, attorneys, or persons authorized to act for any of the same creditors, so far as the same shall be known by the said inspectors, at such place and on such day and time as the said inspectors or inspector for the time being shall think fit; and at such meeting so summoned all and every the said creditors whose debts shall not have been satisfied shall have a right to be present and to vote and concur in the orders and resolutions proposed to or at such meeting, either by themselves or by their respective agents thereto lawfully authorized by writing; and at each such meeting it shall be lawful for the inspectors or inspector to offer and propose any matters or things wherein they or he, or the parties of the first part, or either of them, shall want the direction, advice, and concurrence of the said creditors, and to vote thereon; and the resolutions, rules, or determination of the major part in number and value of such

creditors then present whose debts shall not have been satisfied, or their agents, who are hereby authorized and empowered to enter into and make any rules, orders, or resolutions, or to give any [335] further powers and authorities to the said inspectors or inspector, or to the parties of the first part, or either of them, as occasion shall require, with a view to the benefit of the said creditors, shall be binding and conclusive upon all the creditors now or hereafter to be bound by these presents, as if they had been present and had voted and concurred therein; and the inspectors and inspector for the time being, and the parties of the first part, are respectively authorized to act pursuant thereto, in the same manner as if such rules, orders, resolutions, powers, and authorities had been mentioned in those presents, so that the same shall not be inconsistent with the rules of distribution of bankrupts' estates in cases of bankruptcy.

Eighteenth. The powers of the inspectors or inspector to direct the mode of liquidation, and from time to time to authorize and permit all such matters and things to be done as they or he shall think beneficial or for the interest of the creditors, and especially as to the time and mode of realization of any of the assets, shall be effectual and conclusive, without calling any general or other meeting of the said creditors, and without having any further or other power from the said creditors than what is given and contained in these presents, such acts not being inconsistent with the rules of distribution of bankrupts' estates in cases of bankruptcy.

Nineteenth. The majority in number and value of the said creditors parties hereto executing these presents, or otherwise to be bound hereby, and whose debts shall not have been satisfied, may at any time, by writing under their hands, require the inspectors or inspector for the time being to convene a general meeting of the said creditors parties hereto; and the said inspectors or inspector shall within the space of fourteen days next after such requisition convene a [336] meeting accordingly in the manner hereinbefore provided for calling meetings, and shall, if required, at such meeting, report the progress, acts, and transactions in and about the partnership affairs and premises; and every such meeting shall have the same powers as if the same had been called by the inspectors or inspector for the time being without such requisition.

Twentieth. If at any time before the final settlement and liquidation of the said co-partnership affairs the inspectors or inspector for the time being, or a majority of two thirds in number and value of the creditors parties hereto or to be bound hereby, whose debts shall not have been satisfied, shall by writing under their respective hands require the persons parties hereto of the first part, or any of them, to convey, transfer, and assign to such persons as shall be named in such writing, in trust for the benefit of the said creditors parties hereto, according to the provisions herein contained, all the then remaining estate and assets of them the said parties hereto of the first part, or any of them, herein covenanted to be liquidated, or which shall have arisen therefrom, then and in such case the persons or person to whom such request in writing shall be addressed shall with all convenient speed thereafter, at the expense of the said estate and assets, in such manner as counsel shall advise or require, well and effectually convey, transfer, and assign all the remaining assets or effects of them the said parties of the first part, or any of them, unto the persons so to be named, in trust to sell, dispose of, and convert the same into money, and receive the same, and to apply the produce thereof for the benefit of the said creditors respectively in a just proportion according to the provisions of these presents, and in full satisfaction thereof, rendering the surplus, if any, after [337] full satisfaction of the said debts and the expenses of the trusts to the persons parties hereto of the first part, according to their respective interests in the same; and, in case the inspectors, or such majority of the said creditors, shall require the said remaining estate and effects to be conveyed, transferred, and assigned, then each of them the said parties hereto of the first part, for himself, his heirs, &c., only, hereby covenants and agrees with the said parties hereto of the second part, and with each of them, and with the inspectors and inspector for the time being, to convey, assign, and transfer the same accordingly, and also to deliver over to the persons so to be named all the deeds, books of account, vouchers, bonds, bills, notes, and other securities, letters, writings, matters, and things containing part of or in any wise relating to the said remaining estate and assets, or in any manner relating to the affairs of the said liquidation; and also to do all such acts, and give all such information and explanation, and execute all such deeds containing all powers and provisions, including powers of appointing or naming new or other trustees in cases of

vacancy of the office, as shall be considered necessary or expedient for vesting the property in the persons so to be named, and also for enabling them to recover, receive, and give effectual discharges for the same, and to act in and about the premises in all respects free from the interference or control of the parties hereto of the first part, or any of them, as counsel shall in that behalf advise or require; and in that case, and immediately upon and simultaneously with the execution of deeds considered necessary or expedient by counsel for effectually vesting the said remaining estate and assets in the persons so to be named, and for enabling them to recover, receive, and give effectual discharges for the same, the said persons parties hereto of the first [338] part and each of them, and their representatives, shall by force of these presents alone be released and discharged from all further obligation to act in liquidating and winding up their affairs, and from all further liability under their covenants herein contained, and from all claims and demands by the said creditors or their respective representative or representatives on account or in respect of such affairs or covenants, or the debts due to such creditors, or otherwise in respect of the premises; and these presents may be pleaded as a release accordingly: Provided always, that, in estimating the number and value of creditors requisite for calling or voting at meetings, or for requiring such conveyance, transfer, and assignment of the remaining estate and effects as aforesaid, or for any other purpose of these presents, creditors holding any mortgages or liens on any of the property or effects of the said parties hereto of the first part, or any of them, shall be accounted creditors for such amount only as after allowing the value of the property comprised in the respective mortgages or liens shall appear to be due to them respectively over and above such value, and so that, in the case of creditors the value of whose respective mortgages or liens shall exceed the amounts due on the security of such mortgages or liens, such creditors shall not for such purposes as last aforesaid be taken into account in the value of creditors in respect of their debts which shall be secured by such mortgages or liens.

Twenty-first. That if, before the 31st day of December, 1855, the said affairs of the said parties hereto of the first part shall not have been finally concluded and wound up, the said parties to these presents of the first part, or their representatives, shall be at liberty to convey, transfer, and assign to the inspectors or inspector, or to such other persons as shall be nominated [339] by them or him, all the remaining estates, assets, and effects of the said parties hereto of the first part hereby covenanted to be liquidated, and all moneys which shall have been produced therefrom, in trust to sell, dispose of, and convert into money and receive the same respectively, and to apply the produce for the benefit of all the creditors in a just proportion according to the amount of their respective debts and to the provisions of these presents, and in full satisfaction thereof, and in trust to render the surplus, if any, after full payment of all the said debts and the expenses of the said trust, to the parties hereto of the first part and their representatives, according to their respective interests in the same, and to execute all such acts and deeds for effectually vesting the same estate, assets, and effects respectively in the said inspectors or inspector or persons so to be nominated, and for enabling them or him to recover, receive, and give effectual discharges for the same as could or might be required from the parties to these presents of the first part, if such conveyance, transfer, and assignment were made and executed by them in pursuance of any requisition under the provision firstly hereinbefore contained in respect of a conveyance, transfer, and assignment of the estates and assets of the said parties hereto of the first part: and in that case, immediately upon and simultaneously with the execution of the deeds considered necessary or expedient by counsel for effectually vesting the said remaining estate, assets, and effects in the said inspectors or inspector or person so to be nominated, and for the purpose of enabling them to recover, receive, and give effectual discharges for the same, the said parties hereto of the first part, their heirs, &c., and every of them, shall by force of these presents alone be released and discharged from all further obligation to act in the winding up their [340] affairs, and from all further liability under the covenants herein contained, and from all claims and demands by the said creditors or their representatives on account or in respect of such affairs or covenants, or the debts due to such creditors, or otherwise in respect of the premises; and these presents may be pleaded as a release accordingly: Provided further, and it is hereby also agreed and declared, that, if the said parties hereto of the first part shall under the provisions hereinbefore contained execute in trust for the creditors such conveyance, transfer, or assignment as

hereinbefore is mentioned, then and in that case the said parties hereto of the first part and their respective representatives shall thenceforth be entitled to be indemnified and saved harmless, in the first place out of their estate, assets, and effects so conveyed, assigned, or transferred, or by the creditors taking the benefit thereof, from and against all costs, charges, damages, losses, and expenses to be sustained, incurred, or occasioned by or unto them the said parties hereto of the first part, or their representatives, or any or either of them, by reason of the use of the names or name of them or either of them or otherwise in or for the purpose of receiving, recovering, or retaining such assets, estates, or effects, in any action, suit, or other proceeding which may be maintained, prosecuted, or carried on for that purpose.

Twenty-second. And it is hereby expressly declared and agreed by and between the parties to these presents, that, in case any adjudication in bankruptcy shall hereafter be made against the said parties hereto of the first part, or any of them, under or by virtue of which all or any part of the estate, property, assets, and effects hereby agreed to be got in, realized, and applied for the benefit of the creditors, shall be taken and applied for the benefit of the creditors under any [341] such bankruptcy, so as to prevent the arrangement made by these presents from being carried into effect; and if, prior to such adjudication, any dividend or dividends shall have been paid by virtue of or in consequence of these presents, then the creditors who shall have received the same shall respectively be admitted as creditors for their respective debts now due to them, except and deducting thereout so much thereof as they may have received as a dividend or dividends under these presents or from other sources than the said estate and effects, it being hereby agreed that the amount of all dividends received by such creditors under or in consequence of these presents shall in the event of bankruptcy be considered only as so much money received in discharge to the extent of their respective principal debts; and such creditors shall be allowed to prove for the whole of their respective debts, after deducting therefrom such moneys so received as dividends or otherwise as aforesaid.

Twenty-third. Provided always, and it is hereby agreed and declared, that, if any or either of the inspectors hereby appointed or to be appointed as hereinafter mentioned shall die, or go to reside abroad, or become unwilling or incapable to act in the exercise of the trusts, powers, or objects of these presents, then and as often as it shall happen, it shall be lawful to and for the surviving or continuing inspectors or inspector, or the executors or administrators of the last surviving inspector, to nominate and appoint any one or more fit or proper person or persons, whether a creditor or creditors or not of the said parties hereto of the first part, or of any of them, to be an inspector or inspectors either with the surviving or continuing inspectors or inspector or alone as the case may be: and every inspector so appointed shall thenceforth act in the execution of these presents and the trusts, powers, [342] and objects thereof, as fully and effectually to all intents and purposes as if he had been originally appointed by these presents.

Twenty-fourth. And this indenture further witnesseth that, in further pursuance of the said agreement, and in consideration of the premises hereinbefore contained, each of them the said several creditors parties hereto respectively, doth hereby, for himself and herself, and for his and her heirs, executors, administrators, partner and partners, only, but not one of them for the other or others of them, or for the heirs, executors, or administrators, partner or partners, of the other or others of them, covenant, promise, and agree with and to the said parties hereto of the first part, that, immediately after these presents shall be discharged from the proviso hereinafter contained for making void the same, or upon the execution by the said parties hereto of the first part, or their representatives, of such deed or deeds as in the events hereinbefore provided shall be considered necessary or expedient by counsel for effectually vesting in trust and for the benefit of the creditors of the parties hereto of the first part, and enabling the person or persons so nominated in trust for that purpose to recover, receive, and give effectual discharges for, the assets, estate, property, and effects of the said parties hereto of the first part, then, immediately and simultaneously, upon either of the said cases happening, they the said creditors parties hereto or who shall be bound hereby, or their representatives, shall and will by such deed or deeds, instrument or instruments, as counsel on behalf of the said parties hereto of the first part, or their representatives, shall advise, effectually release and discharge the said parties hereto of the first part and their representatives from all and all manner of

actions, &c., claims and demands whatsoever, both at law and in equity, or [343] otherwise howsoever, which they the said creditors, or any of them, or their or either of their heirs, &c., now have or hath, or hereafter shall or may have, challenge, claim, or demand against the said parties hereto of the first part, or any of them, or their or any of their heirs, &c., or their or any of their estates or effects, for or by means or on account of all and every or any of the debts to them or any of them now due and owing from the said parties hereto of the first part, or of any interest, exchange, or commission due or demandable for the same, or of any other matter, cause, or thing whatsoever in respect of the said debts or any of them: and that, in either of the cases aforesaid, the present covenant may, without the execution of any such deed or instrument of release, be pleaded and given in evidence against the said creditors, or any or either of them, as an actual release, and be so accepted and treated against the said creditors or their representatives.

Twenty-fifth. And, further, that, unless and until these presents shall become void by virtue of the proviso hereinafter for that purpose contained, they the said creditors parties hereto respectively or who shall become bound hereby, or any or either of them, or their or any of their partner or partners, or the heirs, executors, or administrators of them or any of them, shall not nor will sue, arrest, or cause to be sued, imprisoned, or arrested, or commence or prosecute any action or actions, suit or suits, at law or in equity, or other proceedings, or obtain or endeavour to procure to be obtained any adjudication in bankruptcy against the said parties hereto of the first part, or any of them, their or any of their heirs, &c., or to make or sue out any attachment or sequestration of or upon them or any of them, or their or any of their estates and effects, for or an account of the whole or any part of the debt [344] or debts now due and owing by the said parties hereto of the first part, or any of them, to the said creditors or any of them: and, in case they the said creditors, or their representatives, or any or either of them, shall in any respect fail to observe this covenant, then and in every such case, and immediately thereupon, the debt or debts of the creditor or creditors by whom or whose representatives the said covenant shall be broken shall become absolutely forfeited and irrecoverable in law or equity, and the same creditor or creditors shall thenceforward cease to be entitled to have, maintain, or make any claim or demand in respect thereof, either by virtue of these presents or otherwise: and this present covenant shall accordingly operate and enure, and may be pleaded in bar, as a good and effectual release and discharge of such debts or debt, and all claims and demands in respect thereof.

Twenty-sixth. Provided always, and it is hereby further agreed and declared between and by the parties to these presents, that, in case and so soon as the inspectors or inspector for the time being acting under these presents shall at any time certify by writing under their or his hands or hand that there has been default in observance or performance of the covenants hereinbefore contained on the part of the said parties hereto of the first part, or any of them (and although there may have been no default by the other or others of them), or shall at any time before the 31st day of December, 1855, or any subsequent period which the said inspector or inspectors for the time being shall from time to time appoint, —and which they or he are and is hereby authorized by any writing under their or his hands or hand to appoint for that purpose, certify by writing under their or his hands or hand, that a proportion in number or value of the creditors of the said parties hereto of the first part, or of either of [345] them, sufficient to bind the whole, have not executed these presents, or duplicate thereof, or a deed of similar effect, then and in either of the said cases this present indenture, and every covenant, article, matter, and thing herein contained, shall, except as to any acts, deeds, matters, or things theretofore made or done in pursuance of these presents, cease, determine, and be void to all intents and purposes whatsoever, anything herein contained to the contrary thereof in any wise notwithstanding.

Twenty-seventh. Provided also, and it is hereby agreed and declared between and by the said parties hereto, that, whenever in these presents the term "the inspectors" is used, it shall be taken to mean the inspectors hereby or hereafter to be appointed as the case may be: and that the inspectors or inspector now or hereafter to be appointed under or by virtue of these presents shall be protected and saved harmless by and out of the said estate and effects, or by the said creditors parties hereto, according and in proportion to the amount of their respective debts, against or

in respect of all transactions and personal engagements, matters, and things whatsoever, which they or he shall lawfully do or cause to be done, or enter into, direct, or sanction, in or concerning the said estate and effects, by virtue or in pursuance of these presents; but so that no creditor shall by virtue of this engagement be liable to pay a larger sum than he hath received or shall be entitled to receive from the said liquidation; and that they the said creditors and every of them, and their and his heirs, executors, administrators, partners, and assigns shall and will from time to time and at all times allow and confirm the same in all respects; and that the inspectors now or hereafter to be appointed shall not be answerable or accountable for any others or other of them, but each of [346] them for his own acts, neglects, and defaults only; and that they the said inspectors shall not, nor shall any of them be answerable or accountable for any money or other property or effects unless the same shall be actually received by or delivered into their actual custody, and that they or any of them shall not be answerable or accountable for any misfortune, loss, or damage which may happen in the execution of these presents or relative thereto, unless the same shall happen by or through their or his own wilful acts or default respectively: and also that the said parties hereby of the first part and the said inspectors shall by and out of the moneys which shall come to their respective hands, or otherwise arise from the said liquidation by virtue of these presents, be reimbursed all costs, charges, and expenses which they or any of them shall or may suffer, sustain, expend, or be put unto in or about the execution of all or any of the aforesaid trusts or powers, or otherwise by virtue of these presents.

Twenty eighth. Provided always, and it is hereby agreed and declared between and by the parties to these presents, that nothing herein contained shall extend to prevent the said creditors parties hereto, or any of them, or their or any of their respective partner or partners, or their or any of their respective heirs, &c., from enforcing or otherwise obtaining the full benefit and advantage of any mortgage, claim, charge, or lien which they or any of them now have or hath upon any estate or effects whatsoever, or from suing, prosecuting, or otherwise proceeding against any person or persons other than or together with the said parties hereto of the first part, their heirs, &c., who is, are, or shall or may be liable to or accountable for the payment or making good to any of the creditors of all or any part of their respective debts, either as drawers, indorsers, or acceptors of any bill or bills of exchange [347] or promissory note or notes, or as being jointly or separately bound in any bond or bonds, obligation or obligations, or other instrument or instruments, or as being liable or accountable for the payment of such debt or debts without having subscribed any bill, bond, or other instrument whatsoever, or otherwise howsoever, as if these presents had never been made, and for conformity's sake, but for conformity's sake alone, the said parties hereto of the first part, or either of them, their or either of their heirs, &c., may be joined in any such proceeding as last aforesaid.

Twenty-ninth. Provided lastly, and it is hereby agreed and declared that it shall be lawful for any creditors of the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, holders of bills or notes drawn, accepted, or indorsed by them, and on which any other person or persons are also liable either as drawers, acceptors, or indorsers thereof, notwithstanding they shall have executed these presents as creditors in respect of the said bills or notes, to abandon all claim in respect thereof against the estate of the said Joseph Anderson, Abel Chapman, and Joseph Anderson the younger, and to resort to the estate of such other person or persons, provided that such creditors shall not have received any dividend under these presents, or, having received any such dividend, shall refund the same.

The plaintiffs also demurred to the fourth plea, the ground of demurrer stated in the margin being, "that the deed in the fourth plea mentioned appears by the plea not to be a valid deed within the arrangement clauses of the Bankrupt Law Consolidation Act, 1849: and that a deed of arrangement is not within the said act, if it contains a provision whereby it is provided that a creditor who has not signed the deed, and who brings an action, is deprived of all benefit under the deed. Joinder.

[348] The defendant Joseph Anderson, Abel Chapman, and Joseph Anderson the younger took issue on the above replication, and demurred to the replication,—the ground of demurrer alleged being "that the deed is valid, and operates as a discharge notwithstanding the matters in the replication mentioned; and that the replication is bad, and no answer to the plea." Joinder.

Mellish (with whom was Edward James, Q. C.), for the plaintiff. The question is, whether the deed set in the replication to the fourth plea is a good deed within the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which enacts that "every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10l. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always that every creditor shall be accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." Now, the 25th clause of [349] this deed in substance provides, that, if any creditor party thereto, or who should become bound thereby, should take any proceeding against either the person or the property of the debtors for the recovery of his debt, the debt should become absolutely forfeited and irrecoverable in law or equity, and the creditor so proceeding should lose all benefit under the deed. In *Macnaught v. Russell*, 1 Hurlst. & N. 611, the court of Exchequer rather intimated that such a stipulation would render the deed void: and in *Legg v. Chesebrough*, ante, vol. v, p. 741, this court held that such a clause was not binding upon a non-signing creditor,—it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. It is not competent to the debtors by a deed of this sort to put a non-signing creditor in a worse position than one who has signed. [Wilde, Q. C., contra, referred to the 12th clause of the deed, which provides that "the money and assets to be produced by the liquidation shall be payable and distributable to and amongst all such of the creditors of the parties hereto of the first part in such and the same manner as the same would be payable and distributable, and the same rights and equities shall prevail and govern any disputes and questions amongst the said creditors in relation to their said debts, and between the said creditors and the said parties hereto of the first part, as if an adjudication in bankruptcy had been made against the said parties hereto of the first part on the 6th of October, 1854; and that any application of the said moneys and assets herein specially directed to be made, which may not be exactly in accordance with the rules of bankruptcy, if such adjudication had been made as aforesaid, shall be deemed to be qualified, altered, or controlled by this present provision."] That clause [350] relates only to the distribution. [Williams, J. If the deed affords a defence as a deed of composition, the defeasance clause may be rejected.] The fourth plea rests entirely upon the defeasance. To make the deed a good deed under the arrangement clauses, it must provide that as soon as six sevenths in number and value of the creditors have signed the deed, and it has thereby become binding on all the creditors whether they have signed or not, there shall be a general release. A deed so signed must operate exactly as bankruptcy and certificate. Here, the signing creditors are simply bound by the contract not to sue: nobody releases, except by bringing an action. The 228th section,—which provides "that the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed in like manner as in bankruptcy; and no creditor shall be prejudiced or affected by being a party to any such deed or memorandum of arrangement as aforesaid, or by the same being obligatory upon him as to his right or remedy against any person other than such trader; and every person who would be entitled to prove in bankruptcy shall be deemed a creditor within the meaning of the provisions of this act with respect to arrangements by deed,"—has always been held to limit the operation of the 224th section. In bankruptcy, a creditor who brings an action does not thereby lose his right to participate in the assets of the bankrupt. What right, then, can the signing creditors have to confiscate the debt of a non-signing creditor? The 12th clause was probably inserted for the purpose of obviating the difficulty which arose with regard to certain provisions of the deed in *Irving v. Gray*,

3 Hurlst. & N. 34. This point was raised again in *Snodin v. Bone*, 4 Hurlst. & N. 391; but the court gave no opinion upon it.

[351] J. Wilde, Q. C. (with whom was Milward), *contra*. Undoubtedly the 25th clause applies equally to the non-signing creditors as to those who are parties to the deed. That clause operates in the first instance as a covenant not to sue, and in the second as a discharge or release of the debt if the creditor shall sue; and, if it stood there, there can be no objection to the deed. Signing and non-signing creditors are placed in the same position: the release applies to both, if they choose to sue. The 228th section,—which is the only one qualifying the 224th,—applies entirely to the distribution of assets: there is nothing in it which at all touches the matter now under discussion. The whole scheme of these arrangement clauses is, that the entire body of creditors shall be bound by what is agreed to by six sevenths, who are to determine what is the most beneficial for the whole. [Williams, J. It may be very reasonable that those who are to share in the assets should be bound by such restrictions as they may choose to impose amongst themselves: but the question is whether it is competent to them to exclude a non-signing creditor who elects to sue?] The 25th clause applies equally to the creditors signing as to those who do not. It is vital to a scheme of this sort that the debtors shall not be harassed by actions: and, if the estate is improperly administered under the deed, the creditor has a remedy under s. 229. [Byles, J. The question is whether a creditor shall by suing lose his right to share in the assets.] It is but just that he should. Besides, the question is not so much what is reasonable, as what have the parties stipulated. The 12th clause of the deed operates as a general interpretation clause. If, therefore, the defeasance clause be vicious, the 12th clause renders it innocuous. In *Irring v. Gray*, 3 Hurlst. & N. 83, Martin, B., asks, “Do you contend that the court must go through the deed and decide what is [352] reasonable between the debtors and their creditors? Where is any authority given to the court to set aside a deed providing for the distribution of the whole estate amongst all the creditors, and assented to by six sevenths of the creditors?” [Williams, J. We may set that off against what the same learned judge says in *Macnaught v. Russell*, 3 Hurlst. & N. 618,—“Suppose the creditor claims 500l., and the trader denies that he owes the creditor more than 300l., is the latter to be deprived of his debt because he seeks to establish his claim by an action?”]

Bovill, Q. C., and Murray, appeared for the defendant M’Henry, but were not heard.

Mellish, in reply, referred to *Tetley v. Taylor*, 1 Ellis & B. 521.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court (a):

The question in this case was, whether a composition deed made in alleged pursuance of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 224, upon the insolvency of the defendants, and which was executed by the requisite majority of their creditors, is valid as against those who have not assented to it.

It may be assumed that the deed provided for the distribution of the whole of the debtors’ property. It was, however, alleged on the part of the plaintiff to be invalid, by reason of certain clauses inserted therein, which, as he contends, are unequal in their operations: one of those clauses, being that upon which the defence is founded, professes to defeat any action brought by a creditor, whether one who has signed the deed or not, [353] by making such action *ipso facto* a release and forfeiture of the debt. The other clause entitles any creditor, by leave of the inspectors, and notwithstanding the clause already stated, upon which it is in fact an exception, to bring an action, and, in case of success, to receive dividends upon the amount recovered.

Now, the conjoint effect of those clauses, is, first, that a creditor who has not executed the deed, and whose debt is disputed either in the whole or part, has no remedy by action to establish his right, except at the discretion of the inspectors, who may take upon themselves to decline either to let him execute the deed and receive dividends as a creditor, or bring an action: and, secondly, that the inspectors have a discretionary power to allow any other person to sue, and, if he recovers judgment, then they are to pay him dividends in respect of his debt, and also costs, which together with the debt will make up the sum recovered by him.

(a) The judges present at the argument were,—Williams, J., Willes, J., Byles, J., and Keating, J.

This establishes a double inequality, first, in respect of the power of the inspectors to allow an action or not at their discretion; secondly, in respect of the possible misapplication of the assets in payment of the costs of such creditors as may by leave of the inspectors bring actions and recover judgment.

We cannot, therefore, say that the deed does in respect of the particular clauses upon which the question turns relate to the equal distribution of the debtors' assets amongst the creditors in payment of their debts only, so as to be within the operation of the statute, the construction of which has been settled by the decisions referred to in the argument, to the effect that an arrangement deed, to be binding upon dissenting creditors, must relate to and provide for such a distribution.

Judgment for the plaintiff.

[354] JACKSON v. KIDD. April 16th, 1860.

The fact of a defendant being under terms to take short notice of trial does not absolutely preclude him from applying to change the venue, where the case is in other respects a fit one for the exercise of the judge's discretion under the 182nd section of the Common Law Procedure Act, 1852.

This was an action for a money demand. The defendant applied to Blackburn, J., at Chambers, to change the venue from London to Liverpool, upon an affidavit merely stating that all the defendant's witnesses resided at the latter place. The learned judge dismissed the summons, on the ground that the defendant was under terms to take short notice of trial.

C. Hutton now moved upon the same affidavit. He referred to *De Rothschild v. Schabston*, 8 Exch. 503, where Pollock, C. B., stated the following as regulations come to by the judges,—“First, that, in their opinion, it is more convenient, as a general rule, that the application to change the venue by rule or summons may be made before issue joined; provided that this shall not prejudice either party from applying after issue is joined to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county. Secondly, that a defendant, in his affidavit to obtain the rule nisi to change the venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but that he may if he pleases rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shews that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed.” [Willes, J. I protest against these being called resolutions of the judges. Many of the judges have repudiated them.] [355] Before the passing of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), there were two modes of changing the venue,—upon the common affidavit, and upon special grounds. Then came the Common Law Procedure Act, the 182nd section of which enacted that “the court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the venue is laid; and, such order being suggested on the record, the trial may be had accordingly.” [Byles, J. To induce a judge to make such an order, three things are necessary,—first, that the defendant's witnesses reside at the place to which it is sought to change the venue,—secondly, that the plaintiff's witnesses also reside there,—thirdly, that the cause of action arose there. In two of these particulars the affidavit on the present occasion is defective.]

ERLE, C. J. I am of opinion that there ought to be no rule to change the venue in this case. This being an action for an ordinary money demand, the cause of action cannot be said to have arisen in one county more than in another; and the defendant comes after he has been put under terms to accept short notice of trial; and he makes this application after a judge at Chambers has expressed an opinion that under all the circumstances the venue ought not to be changed. The principle by which the judges have been guided since the passing of the Common Law Procedure Act, 1852, is this, that, if it be made to appear that there will be great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place to which it is sought to change the venue, the judge is at full liberty to exercise his discretion in the matter, and to make the order if he

sees fit. The affidavit upon which this [356] motion is founded does not, however, comply with these requisitions.

WILLES, J. I also am of opinion that this application ought not to be granted. Under very special circumstances, where there is a great preponderance of convenience to both parties in so doing, even after the defendant has entered into an undertaking to take short notice of trial, an order for changing the venue may be made. The rule is as laid down in *Haythorn v. Bush*, 2 Dowl. P. C. 240, viz. that, in an action on a bill of exchange, the defendant is too late to change the venue after an order for time on the usual terms, and an undertaking to try at the sittings, though it is sworn that all the witnesses reside in the county to which the venue is required to be moved, is undoubtedly the general rule. After such an undertaking, the burthen lies on the defendant to shew special circumstances to induce the court or a judge to change the place of trial.

BYLES, J., and KEATING, J., concurring,
Rule refused (a)¹.

[357] FLUESTER v. McCLELLAND AND ANOTHER. May 7th, 1860.

[S. C. 29 L. J. C. P. 237; 2 L. T. 243; 6 Jur. N. S. 1375; 8 W. R. 497.]

The 211th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, provides that the person and property of a trader petitioning under the private arrangement clauses shall be protected from "all process:"—Semble, that this means process by way of execution against his person or his goods, and does not extend to prohibit a judgment-creditor from registering his judgment under the 1 & 2 Vict. c. 110, s. 13.—At all events, the court will not, on summary application, interfere to strike out such an entry, inasmuch as the creditor would thereby be precluded from taking the opinion of a court of error.

The defendants, being traders, and unable to meet their engagements, on the 19th of December, 1859, petitioned the court of bankruptcy under the 211th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and on the same day an order was made for protecting the persons and property of the defendants from all process until the 2nd of January, which protection was subsequently renewed until the 24th, and thence until the 15th of July. The petition was duly supported by an affidavit in the form given in the schedule to s. 212, and a private sitting was, pursuant to s. 213, appointed for the 24th of January for the proof of debts, and the proper steps were taken for the purpose of obtaining the consent of the required number of creditors (ss. 214, 215) to an arrangement. The proposal being accepted,—to pay a composition of 6s. in the pound, by certain instalments,—an order of confirmation was duly made by the commissioner pursuant to s. 216. According to the resolution come to at the last meeting, the defendants were to retain possession of their property and effects to enable them to realize the same for payment of the composition. Part of the property consisted of leaseholds, which it was necessary to sell for the purpose of paying the last two instalments of the composition. A sale having been effected, the purchaser declined to complete the purchase, in consequence of the plaintiff having on the 2nd of January, 1860, obtained a judgment in this action against the defendants for 67l. 15s. 6d. debt, and 5l. 11s. costs, and registered the same on that day with the registrar of judgments, as a charge upon the defendants' property.

[358] J. Brown, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the entry of the judgment should not be struck out of the register, on the ground that such entry was an infringement of the defendants' protection order. [Erle, C. J., on granting the rule, observed that the judgment was not "process," but that the judgment and registration together operated as a distringas.]

F. Russell now shewed cause. The question is, whether the registering a judgment, so as to make it a charge on the debtor's real estate (a)² under the statute 1 & 2 Vict. c. 110, s. 13, is "process" within the 211th section of the Bankrupt Law Con-

(a)¹ See *Chulee v. Bradley*, 13 C. B. 604, and *Cartwright v. Frost*, 3 Hurlst. & N. 278.

(a)² The charge embraces leaseholds: see *Prideaux on Judgments*, 4th edit. p. 61.

solidation Act, 1849, 12 & 13 Vict. c. 106. That section prohibits the issuing of any process against the person or property of the bankrupts. Now, the only process which could affect the person of the bankrupts would be a *ca. sa.*; and the process which would affect their property would be a *fi. fa.* or an *elegit*. [Erle, C. J. Would an order under the 1 & 2 Vict. c. 110, s. 14, for charging the bankrupts' stock or shares be process?] Probably it would. [Erle, C. J. That would be analogous to process against the land. Willes, J. We lately held in a case of *Nicholls v. Rosewarne*, ante, vol. vi., p. 480,—where the question was whether mining shares were shares in a public company,—that we ought not to interfere to set aside an order under s. 14, for charging such stock, inasmuch as by so doing we should be precluding the judgment-creditor from taking the opinion of a court of error upon the point.] The court would not set aside an unexecuted *fi. fa.* or *elegit*. Neither would they interfere to deprive a party of the benefit of a mortgage upon the estate of [359] the debtors. If this entry be set aside, therefore, the judgment-creditor will be placed in a worse position than if the judgment-debtors had become bankrupts. Without clear words, the court will not interfere with a vested right. [Byles, J. If we were to make this rule absolute, the judgment-creditor would have no means of questioning the propriety of our decision: whereas, if we leave matters as they are, the utmost harm that can happen will be that the parties will be put to some expense.]

J. Brown, in support of the rule. "Process" is susceptible of a signification wide enough to embrace that which has been done in this case. In *Blackmore's case*, 8 Co. Rep. 157 b., Lord Coke says,—“And be it known that this word ‘process’ is taken in law in two significations,—in one largely, and in the other strictly: and in the large sense it is taken for all the proceedings in all real and personal actions, and in all criminal and common pleas.” [Erle, C. J. Chief Baron Comyns, after citing that passage, —Com. Dig. Process (A. 1),—adds, “But, generally, it imports the writs which issue out of any court to bring the party to answer, or for doing execution.” For some purposes,—as, for instance, for the purpose of amendments, the word “process” may be construed largely; but, when one speaks of process against the person or property, it means a writ of execution.] In *Bellhouse v. Mellor*, 4 Hurlst. & N. 116, effect was given by the court of Exchequer to a similar order. [Wilkes, J. That, no doubt, was process.] If the word “process” in this case is to bear only the narrow construction contended for on the other side, the very object of these private arrangement clauses will be wholly frustrated. The registration of the judgment is ancillary to the *elegit*: for, one of its objects is, to prevent the debtor from [360] parting with the land after the judgment and before the issuing of the writ: 1 & 2 Vict. c. 110, s. 19. [Erle, C. J. No doubt the registering of a judgment presents an obstacle to the debtor's availing himself of the private arrangement clauses of the Bankrupt Act.] Unless this court can grant the relief prayed, there is practically none. It was clearly intended, that, in making these arrangements, the bankrupt should be left in the uncontrolled possession and enjoyment of his property. [Byles, J. Possibly the parties may be in a better position when they have obtained a certificate.]

ERLE, C. J. I have come to the conclusion that this rule should be discharged. I am of opinion that the signing and registering of the judgment in this case do not constitute “process” from which the person and property of the defendants are protected by the 211th section of the 12 & 13 Vict. c. 106, which enacts that any trader unable to meet his engagements with his creditors may present a petition, setting forth the true cause of such inability, and praying that his person and property may be protected from “all process” until further order. Is the registry of a judgment process? Directly it is not. In terms it is not. “Process” there means a writ of execution. Mr. Brown presses us to go beyond the words of the section, and to construe it according to its spirit and intention, which he contends to be to this effect,—to enable a debtor, wishing to be protected, without going through the ordeal of a bankruptcy, but by his own voluntary act of filing a petition under the arrangement clauses, to create a charge upon his property, and so stave off every creditor. This would be putting into the hands of a debtor a power which he might use for a fraudulent purpose. These clauses, no [361] doubt, tend much to the benefit of creditors, in the case of an honest debtor: but a course of legislation which applied itself to that particular class only would not be a very successful one. Being in doubt, I think that in a case of this sort we are bound to follow the words of the statute, and not to go beyond them.

WILLES, J. I am of the same opinion. This is entirely a new question. It is impossible to say that the matter is not so doubtful as to be deserving of a solemn decision in the usual course of law. It may be so decided. If process were to issue against these defendants in violation of the 211th section of the statute, I have no doubt as to their right to come to this court for relief: or, possibly, they might bring trespass. So, with reference to any proceeding taken to enforce this judgment, in the sense of execution against their property. If this judgment ought not, by reason of the 211th section of the Bankrupt Act, to have been registered, the court in which the proceeding is taken may possibly interfere to prevent injustice being done. But, this being a fair question, and it being open to the defendants to question the validity of the registration by another mode, I think this court ought not to exercise its summary jurisdiction in the manner prayed.

BYLES, J. I am of the same opinion. If there had been a writ of *fi. fa.* or *ca. sa.* issued upon this judgment, the case would no doubt have fallen within the words of the 211th section of the 12 & 13 Vict. c. 106, and we should have been entitled to interfere. But we must not forget that the judgment-creditor has rights, as well as the judgment-debtor. I can see great inconvenience and danger which might ensue from our taking upon ourselves to act upon this sum-[362]-many application. I think the word "process" in this section is not to be construed as it might possibly be construed in a remedial statute, but according to its ordinary legal meaning: and, so construing it, I do not think it can fairly be said to comprehend the entry of a judgment on the register of judgments. *Nicholls v. Roscorano*, ante, vol. vi., p. 480, constitutes a precedent which, I think, may well guide us upon this occasion. We ought not, upon a rule of this sort, to decide a novel point of difficulty, when by so doing we would be depriving the parties of an opportunity of obtaining the opinion of a court of error upon it.

KEATING, J. I entirely concur in the opinions expressed by my Lord and my learned Brothers, on the single ground that this is not a point which ought to be summarily decided on motion, when there are other means of determining it more solemnly and more satisfactorily.

Rule discharged.

RUSSELL AND OTHERS v. NICOLOPULO AND ANOTHER. April 25th, 1860.

[S. C. 8 W. R. 415.]

A contract for the sale in London of a cargo of Taganrog wheat then lying afloat at Queenstown, in Ireland, contained the following provisions,—“In case of any dispute, this contract not to be void: it being agreed by buyers and sellers to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision. The above cargo is accepted on the report and samples of Messrs. Scott & Co. of Queenstown:—Held, that this latter stipulation amounted to a warranty that the bulk was equal to the report and samples: and was not merely a representation that the report was the genuine report of Scott & Co., and the samples taken by them.

This was an action for an alleged deceit on the sale of a cargo of wheat.

The first count of the declaration stated, that whereas before and at the time of the making of the [363] agreement thereafter mentioned, the defendants were the owners of a certain cargo of wheat then lying afloat at Queenstown, in Ireland, which the plaintiffs had not before or at the time of making the said agreement any opportunity of inspecting: and whereas the defendants before the time of making the said agreement had caused their agents, to wit, Messrs. Scott & Co., to take samples thereof, and to report upon the same: and whereas the said samples and report were before the making of the said agreement handed by the defendants to the plaintiffs: and the plaintiffs said that thereupon an agreement was entered into between the plaintiffs and the defendants in the words and figures following, that is to say,—“London, December 9th, 1858. Bought from Messrs. Nicolopulo & Co., of London, on account of Messrs. J. N. Russell & Sons, Limerick, the cargo of Taganrog Ghirka wheat, shipped per ‘Barticola’ from Taganrog, say 5300 chetwerts, as per bill of lading dated 23rd August, at the price of 39s. 6d. (say, thirty-nine shillings and

sixpence, less 37l. 14s.) per quarter of 492 lbs., delivered, including freight and insurance (the latter free of war risk) to Limerick, now at Queenstown for orders; reckoning 100 chetwerts equal to 72 qrs., until weight be ascertained. No charge for dunnage, 2½ commission, paid by sellers. Payment in London, in cash, less interest 5 per cent. per annum for the unexpired term of two months from this day, in exchange for bills of lading and policies of insurance effected with approved underwriters, but for whose solvency sellers are not to be responsible. In case of any dispute, this contract not to be void; it being agreed by buyers and sellers to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision. The above cargo is accepted on the report and samples of Messrs. Scott & [364] Co. of Queenstown. Alexander & Co." Averment, that the said Messrs. Nicolopulo & Co. of London in the said agreement mentioned, were and are the defendants, and that the said Messrs. J. N. Russell & Sons, Limerick, in the said agreement mentioned, were and are the plaintiffs, and that the said cargo mentioned in the said agreement was the cargo mentioned in the introductory part of this declaration, and that the report and samples in such agreement also mentioned were the report and samples also respectively mentioned in the introductory part of this declaration: that the defendants broke their said agreement, in this, to wit, that the said cargo was not at the time of making the said agreement, or at the time of making the said report and taking the said samples, or at any other time, in accordance with the said report and samples: but the said cargo then was, and always had been, of an inferior quality, and in a condition wholly different from that represented by the said report and samples, and inferior thereto; and, by reason of the premises, the said cargo was of much less value to the plaintiffs than it would have been had the same been in accordance with the report and samples; and, by means of the premises, it became and was necessary for the plaintiffs to unship and reload it, whereby they were obliged to expend large sums of money, and were deprived of great gains and profits which would otherwise have accrued to them.

The second count stated that the defendants, by falsely, fraudulently, and deceitfully representing to the plaintiffs that a certain report purporting to be a report upon a certain cargo of wheat was a true and faithful report, and that certain samples then exhibited to the plaintiffs as samples of such cargo had been fairly taken, sold the said cargo to the plaintiffs; whereas the said report was not a true and faithful [365] report, nor had the said samples been fairly taken, as the defendants at the time of making the said representations well knew; whereby the plaintiffs were induced to give a much greater price for the said cargo than they otherwise would have done; and that, by means of the premises, the plaintiffs were damaged as in the first count more particularly mentioned. Claim, 2000l.

The defendants demurred to the first count, the ground of demurrer stated in the margin being, "that the contract set out in the first count does not contain any warranty either that the report was true or that the bulk was equal to the samples." Joinder.

Mellish, in support of the demurrer (*a*). The question is whether there is in this contract a warranty on the part of the sellers that the report was a true report and the cargo equal to the samples. It is submitted that it is not, but that it is enough that the report is a genuine report of Scott & Co., and that the samples were genuine samples taken by that firm. The contract relates to a cargo of wheat coming from the Black Sea; and, seeing the length of the voyage, it is always doubtful what will be the condition of the wheat. Both buyer and seller being in equal ignorance in this respect, the seller usually gets the cargo examined by persons who are well known; and their report and the samples drawn by them are handed to [366] the purchaser. All that the contract means is, to warrant the genuineness of the report and samples, not that the former is in all respects true and the latter equal to the

(*a*) The point marked for argument on the part of the defendants was as follows:

"That the words in the agreement, 'The above cargo is accepted on the report and samples of Messrs. Scott & Co. of Queenstown,' do not amount to a warranty that the bulk was equal to the samples, or that the report was correct, but merely to a warranty that the report was the report of Scott & Co., and that the samples had been taken from the cargo by them."

sample. If the purchasers had required such a warranty, they might have stipulated for it in terms.

Bovill, Q. C. (with whom was Honyman), *contra* (a). The plaintiffs bought the cargo in question by sample. [Willes, J. And a report, which did not shew whether the wheat was sea-damaged or not.] The only object of the report, was, to identify the samples. Upon those samples the plaintiffs bought. [Byles, J. There is nothing but the samples to shew the quality of the wheat. Erle, C. J. The contract gives the weight per quarter.] That is given as a mere approximation to the measure of the wheat,—a mode of converting the chetwerts into quarters. The word “accepted” in the bought-note means “bought.” The plaintiffs do not accept the wheat, but the contract. [Erle, C. J. What is the word in the sold-note?] In all probability there was only one contract.

Mellish was heard in reply.

ERLE, C. J. I am of opinion that the plaintiffs are entitled to judgment. The contract is to be construed [367] according to the intention of the parties. The buyers state that they accept the cargo on the report and samples of Messrs. Scott & Co. The counsel for the defendants contend that all that the sellers intended to warrant, was, that the report was the genuine report of Messrs. Scott & Co., and that the samples were in truth drawn by those gentlemen. It does not occur to me that that would be a very material stipulation for the buyers: but it would be material for the buyers to stipulate that they buy by sample, and also to stipulate that their acceptance of the contract is made upon the faith of the report which has been handed to them. Unless they have the warranty of the report and the samples, there is nothing whatever to guide the buyers.

WILLES, J. I am of the same opinion. The language here used amounts to a warranty that the report and the samples together fairly represent what the cargo was. I do not say that the entire bulk must necessarily equal the sample: there may be a certain amount of sea-damage. But, if the report does not qualify the sample, it is a warranty to that extent. The only security the purchasers have is in the fact of their attention being drawn to the report and the samples; and the whole transaction is ascertained and regulated by the representations therein contained.

BYLES, J. I also think our judgment must be for the plaintiffs. It is not unworthy of observation not only that the defendants had not seen the cargo at the time of making the bargain, but that they could not see it. The terms of the contract clearly amount to a warranty that the report and the samples shall fairly represent the quality of the cargo.

KEATING, J. I am of the same opinion. Possibly [368] there may be some usage of the corn-market to warrant the construction sought to be put upon this contract by Mr. Mellish. But we can only construe it according to the plain and ordinary meaning of the words which the parties have used. I entirely concur with my Lord and my learned Brothers, that the language in question amounts to a warranty that the cargo will agree with representations contained in the report coupled with the samples.

Judgment for the plaintiffs.

BESSANT v. THE GREAT WESTERN RAILWAY COMPANY. April 18th, 1860.

The plaintiff folded his sheep in a field adjoining a railway, using the quickset hedge forming the company's fence as one side of the inclosure. Some of the sheep escaping through a small hole in the hedge, got upon the railway, and were killed:—Held, that the company were liable, and that it was no misdirection to tell the jury that by s. 68 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict.

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“1. That the language of the contract in itself amounts to a warranty by the defendants that the cargo was equal to the report and samples:

“That, even supposing that such is not the proper construction of the contract, taken by itself, yet, when the state of things existing at the time of the contract, as disclosed on the declaration, is looked at, it is apparent that such is the true construction of the contract.”

c. 20), the company were bound to keep their fences sufficiently strong to prevent sheep and cattle from straying out of the adjoining lands,—the jury having found as a fact that the fence was insufficient.

This was an action against the Great Western Railway Company, charging them in the first count with a neglect to maintain a sufficient fence between their railway and the plaintiff's land adjoining, in consequence whereof certain sheep of the plaintiff strayed on to the line, and were killed.

There was also a count for the wrongful conversion of the plaintiff's sheep.

The defendants pleaded not guilty, and not possessed, and also payment into court of 20l. on the second count.

The cause was tried before Martin, B., at the last Spring Assizes for the county of Dorset, when the following facts appeared in evidence:—The plaintiff was possessed of a turnip-field of about thirty acres adjoining the Great Western railway, upon which he [369] had folded sheep in the usual way, with hurdles on three sides, the quickset-fence of the railway forming the fourth side, which was left without hurdles. Between the hedge and the plaintiff's field was a ditch, which belonged to the company; and the plaintiff had placed his hurdles at the two sides of the inclosure across this ditch up to the hedge. On the 16th of November last, the plaintiff's sheep, 145 in number, got through a small gap in the quickset-hedge on to the railway, when a train running down the line got amongst them and killed twenty five of them.

On the part of the plaintiff, reliance was placed on the 68th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, which enacts that, "the company shall make and all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway," that is to say, amongst others, "sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates, made to open towards such adjoining lands, and not towards the railway, and all necessary styles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:" and it was contended that the fact of the sheep escaping on to the railway was conclusive to shew that the fence was insufficient.

For the defendants several competent persons, who had inspected the fence, were called, and stated that the fence was amply sufficient for all ordinary purposes; but they all said that it was not a proper fence to rely on for the folding of sheep.

In his summing up, the learned judge read the 68th section, and observed that it seemed to him that no language could be plainer,—that the company were to make and maintain such a fence as would prevent the sheep and cattle of the owners of adjoining lands from straying thereout. "I do not say," continued his lordship, "that the fence must be sufficient to keep in a hunter. But the broad question is, whether or not the fence was a sufficient fence,—was it such a fence as the company were bound by the act to make? It strikes me, that, if the use to which the adjoining land is put is such (being an ordinary use) as to render a stronger fence necessary, it would be the duty of the company to provide it; and to place hurdles along it if necessary."

The jury returned a verdict for the plaintiff (assessing the value of the sheep at 40s. each) for 30l. beyond the 20l. paid into court.

Kinglake, Serjt., now moved for a new trial on the ground of misdirection. He submitted that the learned judge should have told the jury that it was enough if the company kept their fence in an efficient state to restrain cattle from escaping under ordinary circumstances; whereas, the way in which the case was left to them led them to believe that the 68th section cast upon the company the duty of maintaining a fence sufficient for a fold-fence.

ERLE, C. J. I am of opinion that there should be no rule. I do not perceive that the learned judge laid down any proposition of law about which any doubt can be entertained. The duty of the railway company in respect of fences is defined and regulated by the [371] 68th section of the 8 & 9 Vict. c. 20. That section was read and explained to the jury: and I cannot say that the learned judge's direction is open to exception because he may have failed to present to the jury every illustration

which it is susceptible of. I think it was properly within the province of the jury to say whether the fence was such as an adjoining land-owner using his land according to the accustomed course of farming had a right under the statute to have. It seems to me that the question was substantially left to the jury in the only way in which it properly could be left.

WILLES, J. I am entirely of the same opinion. I think the law is well shewn by the course of pleading. In Chitty on Pleading, vol. 3, p. 498, there is a replication to a plea of escape of cattle through defect of fences, that the defendant's cattle were "wild, ungovernable, and unruly, and used to break down banks, mounds, and fences in good repair, and that the said cattle of the defendant, at the said several times when, &c., through their said wild, ungovernable, and unruly disposition, broke down the said mounds, banks, and fences between the said close of the plaintiff and the said close of the defendant, the same then being well and sufficiently maintained and in good repair as aforesaid, and through the breach of the said banks, mounds, and fences so made by the said cattle of the defendant as aforesaid, the said cattle, at the said several times when, &c. entered into the said close of the plaintiff," &c. &c.

BYLES, J. I am of the same opinion. It seems to me that the question left by my Brother Martin to the jury was the only one which could safely be left, viz. was the fence such a one as the act of parliament [372] required the railway company to make and maintain? That must be a right direction in substance. The folding of sheep in a turnip-field is a thing which frequently happens in the course of good husbandry. If it renders a stronger or closer fence than the ordinary quickset-hedge necessary, I think it was the duty of the company to provide it. The substance of the summing-up is,—was the fence such a fence as the company were by the act bound to have? I recollect a case, somewhere about the year 1858, where a similar action was brought against a railway company, where a bull had leaped over an iron fence six feet high, and the plaintiff had a verdict, and held it.

KEATING, J. I also think the direction of the learned judge to the jury in this case was sufficient.

Rule refused.

KEENE v. BEARD. May 1st, 1860.

[S. C. 29 L. J. C. P. 287; 2 L. T. 240; 6 Jur. N. S. 1248; 8 W. R. 469. Dicta commented on, *Hopkinson v. Forster*, 1874, L. R. 19 Eq. 76. Referred to, *Currie v. Misa*, 1875-76, L. R. 10 Ex. 169; 1 App. Cas. 554. Adopted, *M'Lean v. Clydesdale Banking Company*, 1883, 9 App. Cas.]

A cheque on a banker, payable to bearer, is a negotiable instrument, and passed by indorsement, so as to entitle a holder to sue the indorser thereon, as in the case of a bill of exchange.

This was an action by the bearer against the payee and indorser of a cheque.

The declaration stated that one Thomas S. Bodenham, on the 10th of March, 1859, made his draft or order in writing for the payment of money, commonly called a cheque on a banker, and directed the same to certain persons trading as bankers by the name and style of the Union Bank of London, and thereby required them to pay to the defendant or bearer the sum of 11l., and then delivered the said draft or order to [373] the defendant, who then indorsed and delivered the same to one George Lewis, who transferred and delivered the same to the plaintiff, who then became and was and still is the lawful bearer thereof; and the said draft or order was duly presented for payment, and was dishonored, of which the defendant had due notice, but did not pay the same.

To this declaration the defendant demurred, the ground of demurrer being "that the defendant, by indorsing the cheque to Lewis, did not render himself liable to an action upon the cheque at the suit of a third party or bearer thereof upon the dishonor thereof, and that the declaration discloses no good cause of action." Joinder.

Grant, in support of the demurrer. A banker's cheque is a chose in action, and not assignable at common law: still less can it be made the subject of an action as upon an implied contract, as here. The only innovation upon this rule of the common law arose in the case of bills of exchange, which were negotiable by the law of nations, which, like the maritime law and the ecclesiastical law, has become incorporated into

the law of England. The custom of merchants with regard to the negotiability of bills of exchange was long applied exclusively to foreign bills. To remedy that defect, the statute 9 & 10 W. 3, c. 17, was passed. [Byles, J. Do you say that the negotiability of inland bills depends upon that statute?] It is submitted that it does. [Byles, J. That statute renders them liable to be protested.] In Buller's *Nisi Prius*, 7th edit. 272 a., it is said that "it was doubtful whether inland bills of exchange were within this custom of merchants; but by 9 & 10 W. 3, c. 17, and 3 & 4 Anne, c. 9, they are put upon the same footing with foreign bills." And see *Tassell v. Lewis*, 1 Lord Raym. [374] 743, and per Treby, C. J., in *Bromwich v. Lloyd*, 2 Lutw. 1588, and *Grant v. Vaughan*, 3 Burr. 1516. There are, however, broad and marked distinctions between a bill of exchange and a cheque. These are very clearly pointed out in a very elaborate and learned judgment delivered by Parke, B., in a case of *Ramchurn Mullick, App., Luchmeechand Radakissen, Resp.*, 9 Moore's P. C. 48, 69. "The authority," he says, "on which reliance is placed on the part of the appellant in support of the doctrine contended for, is that of *Robinson v. Hawksford*, 9 Q. B. B. 52, which is the case of a cheque presented some days after it was drawn, to the banker, and not paid, in consequence of the countermand of the drawer; and the court held that, if the drawee continued solvent, and no damage had arisen from delay of presentment, the drawer continued liable. If this had been a decision on a regular bill of exchange, payable on or after sight, it would have been a strong authority for the plaintiff in error. It is not, however, the case of a bill of exchange, but of a banker's cheque, which is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance; in the ordinary course it is never accepted: it is not intended for circulation; it is given for immediate payment: it is not entitled to days of grace: and though it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker; and, in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of [375] a bill of exchange payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that place. There is a very good note on this subject in the case of *Serle v. Norton*, 2 M. & Rob. 404, as to the difference between cheques and bills of exchange. We do not think that the case of a cheque is similar to that of regular bills of exchange, inland or foreign, drawn payable at or after date." There is this further difference between a bill of exchange and a cheque, that, as between the drawer and the holder of the latter, the drawer is not discharged by any delay in its presentment short of six years, unless some loss or injury is occasioned to him by such delay: *Robinson v. Hawksford*, 9 Q. B. 52; *Laws v. Rund*, ante, vol. iii., p. 442. [Erle, C. J. The acceptor of a bill is always liable to the end of the six years.] No doubt. So, there is a difference in the case of a lost bill or note and a lost cheque: *Walmesley v. Child*, 1 Ves. sen. 341. Then, this is not like the case of a bill of exchange accepted payable at a banker's. There, the banker pays as agent of the acceptor: in the case of a cheque, he pays as debtor. The acceptor of a bill stands in a very different position from the drawee of a cheque. In the case of a bill, time given to the acceptor discharges all the other parties, whether they be prejudiced by the delay or not. In the case of a cheque, however, delay in presentment, which is a giving of time to the banker, does not discharge the drawer. In *Bishop v. Young*, 2 Bos. & P. 78, 83, Lord Eldon, C. J., says: "Looking at the effect of a bill of exchange, it seems very reasonable to hold that, although the acceptor be primarily liable, yet that he is not liable for his own debt, but for that of another. The drawer owes the debt; and, if the drawee refuse to accept, an action may be immediately brought against the drawer. If the drawee does accept, the transaction amounts to no more than an undertaking on [376] his part to pay the debt of the drawer, and on the part of the holder to resort to the acceptor, to be paid out of the effects of the drawer in his hands before he resorts to the drawer himself." But, in the case of a cheque, the drawer is the party primarily liable, and not the banker on whom it is drawn, who pays his own debt only when he honors the cheque. There is also a difference between an overdue bill and a stale cheque. In *Rothschild v. Corney*, 9 C. B. 388, the plaintiff was, by means of a fraud,

induced to pay away two cheques on his banker, amounting to 1330l. Six days after the date of the cheques, the defendants, acting *bonâ fide*, gave cash for them to a third person (who had not given value for them), presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money, it was held that the cheques could not be treated as bills overdue, and therefore taken by the defendants at their peril, but that the real question in the cause was, whether they had acted *bonâ fide* and with due caution. Littledale, J., says: "It has been urged as matter of law, that a party taking a cheque overdue has it with the same title and no other as the person from whom he receives it. But, although the rule of law certainly is so with respect to bills of exchange and promissory notes, I think it cannot be applied to cheques." A cheque payable to bearer cannot be indorsed: per Lord Mansfield, in *Grant v. Taulghan*, 3 Burr. 1524, and per Yates, J., 1529. [Byles, J. A bill once indorsed in blank is payable to the bearer: and yet there is no absurdity or inconsistency in its having subsequent indorsements.] Properly, no bill can be indorsed which is not in the body of it made payable to order. A promissory note payable on demand the most resembles a cheque: but even between these there are some points of difference. "If," says Parke, B., in *Brooks v. Mit* [377]-*shell*, 9 M. & W. 18, "a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But, a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily." In *Gibson v. Minet*, 1 H. Black. 621, Heath, J., says: "A bill payable to bearer is more comprehensive than a bill payable to order, inasmuch as it comprises all the special appointees to whom a bill of the latter sort may be directed. It was, however, decided in the case of *Hodges v. Sheward*, 1 Salk. 125, at a time when a bill payable to bearer was not deemed to be within the custom of merchants, that a bill payable to a certain person, or bearer, could not by an indorsement of the first payee be converted into a bill payable to order, so as to charge the drawer. The obvious reason is, that it was the intention of the drawer to frame a bill payable to bearer, and he could not be charged beyond his original undertaking." [Byles, J. *Grant v. Taulghan*, 3 Burr. 1516, and *Miller v. Rier*, 1 Burr. 452, over threw all that.] In *Dixon v. Borill*, 3 Macqueen's House of Lords Cases, 1, the question was whether a note in the following form was a negotiable instrument,—"I will deliver 1000 tons of iron, when required after 18th of September next, to the party lodging this document with me:" and Lord Cranworth, in giving judgment, says: "The effect of such a document, if valid, is, to give a floating right of action to any person who may become possessed of it. Now, I am prepared to say that this cannot be tolerated by the law either of Scotland or of England. The only cases in which such an action can be sustained, are those on bills of exchange and promissory notes, depending on the law-merchant in the case of [378] bills of exchange, and on the statute 12 G. 3, c. 72, s. 36, in the case of promissory notes. * * * Bills of exchange have been made an exception for the convenience of trade; but it is an exception not to be extended. The drawer of a bill gives to the indorsee a better title than his own, and this leads or may lead to many ill consequences; but mercantile convenience has sanctioned it. No such necessity, however, exists in the case of other contracts; and there is no authority to warrant it." [Erle, C. J. Iron-warrants are a very long way from the matter in hand. Byles, J. They are not drafts or orders for the payment of money. Erle, C. J. The simple question here is, whether a cheque does not fall within the class of bills of exchange.] *Dixon v. Borill* was cited merely for the principles which Lord Cranworth says govern the form of bills of exchange: to make a negotiable instrument, there must be a drawer and a drawee. [Erle, C. J. Is not the banker in the nature of a drawee? The moment you can predicate of an instrument that it is negotiable, has not the transferee a title which will enable him to sue upon?] In *Gorgier v. Mierille*, 3 B. & C. 45, 4 D. & R. 641, where a foreign prince gave bonds whereby he declared himself and his successors bound to every person who should for the time being be the holders of the bonds for the payment of the principal and interest in a certain manner,—it was held that the property in those instruments passed by delivery, as the property in bank-notes, exchequer-bills, or bills of exchange payable to bearer; and that, consequently, an agent in whose hands such a bond was placed for a special purpose might confer a good title by pledging it to a person who did not know that the party pledging was not the real owner. [Keating, J. In

Smith's Mercantile Law, 6th edit. p. 206, a cheque is defined to be "a bill of exchange addressed to a [379] banker, and payable to a certain person, or bearer, or order." There is, however, no authority cited for that passage. In *Lewin v. Edwards*, 9 M. & W. 720, 1 Dowl. N. S. 639, where it was held, that, where the drawer of a bill indorses it in blank, and delivers it to A., who passes it without a fresh indorsement to B., B. cannot maintain an action of debt on it against the drawer, —Parke, B., says: "Unless the holder of a banker's cheque can sue the maker of it in debt, the present plaintiff cannot recover; but for that there is no authority." [Byles, J. That turned upon the form of the action.] In *Moore v. Bartrup*, 2 D. & R. 25, 28, the court say: "By the general rule of law, a banker's cheque is not money; it is a mere chose in action, not assignable, and not recoverable by action." [Keating, J. That passage is not to be found in the report of that case in 1 B. & C. 5. *Mills v. Odby*, 3 Dowl. P. C. 722, was also referred to, and elicited from Erle, C. J., a remark that there the action was between the immediate parties, which gave rise to the relation of universal application to all negotiable instruments.

G. Denman, contra, was not called upon. He, however, referred to Story on Promissory Notes, §§ 487, 488, 489, 492, 497, and 498.

Cur. adv. vult.

ERLE, C. J. I am of opinion that the plaintiff is entitled to judgment on this demurrer. The action is brought by the holder or bearer of a cheque against the payee and indorser. The declaration states that one Bodenham on a certain day made a draft or order in writing for the payment of money, commonly called a cheque on a banker, and directed the same to certain persons trading as bankers, and thereby required them to pay to the defendant or bearer the sum of 11l., [380] and then delivered the said draft or order to the defendant, who then indorsed and delivered the same to one Lewis, who transferred and delivered the same to the plaintiff, who then became and was and still is the lawful bearer thereof. It then goes on to allege that the said draft or order was duly presented for payment, and was dishonoured. The point urged by Mr. Grant on the argument of the demurrer was, that a cheque is not to be classed with bills of exchange so far as to be capable of creating a liability in an indorser to the person who may be the holder or bearer of the instrument. I think he has failed to establish that proposition. A cheque is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker; and, though in practice the banker does not accept the draft, he might for ought I know do so. A cheque has also some of the incidents of a bill of exchange, if not all, as in respect of its paying by delivery, and also in respect of a bona fide holder taking it for value having a better title than the person from whom he received it. Having these incidents of a bill of exchange, has it the further incident of being capable of passing by indorsement? that is, where the indorsement is made, not by merely placing the name of the party on the back of the instrument, but doing so with the intention of passing the title to it, and of incurring all the usual liabilities of an indorser of a negotiable instrument? It is admitted here that the defendant's name was placed upon the cheque *animo indorsandi*; and therefore our judgment for the plaintiff is in accordance with the real intention of the parties. The indorser intended to give to the indorsee the security of his name and liability on the instrument. I also think our decision is in accordance with the law, when we hold that a cheque is a negotiable instrument, and capable of indorsement.

[381] BYLES, J. I am of the same opinion. I conceive that a cheque is in the nature of an inland bill of exchange payable to the bearer on demand. It has nearly all the incidents of an ordinary bill of exchange. In one thing it differs from a bill of exchange: it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas, it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange. There is another difference between the two instruments, — in the case of a bill of exchange, the drawer is discharged by default of a due presentment to the acceptor; but, in the case of a cheque, the drawer is not discharged by a delay in the presentment, unless it be shewn that he has been prejudiced thereby, for instance, by the failure of the banker on whom it is drawn. In all other respects a cheque is precisely like an inland bill of exchange. Mr. Grant is in error when he supposes that the negotiability of inland bills of exchange rested entirely on the statute 9 & 10 W. 3, c. 17. It reposes on the law merchant, as it had been understood, and applied for at least a hundred years before the passing of

that statute. Bills of exchange indorsed in blank, and promissory notes payable to bearer, were well known instruments. So, the bonds and notes of foreign states and princes are all treated in this country as negotiable instruments, and are available in the hands of persons taking them for value. That being so, it seems to me to be clear that a cheque falls within the class of ordinary bills of exchange: and, if so, why may it not be indorsed, so as to impose upon the indorser the ordinary liabilities which flow from the indorsement of a negotiable instrument? No inconvenience can result from our holding this; for, it was [382] distinctly decided in *Wayman v. Bowd*, 1 Camp. 175, that, in an action against the maker of a promissory note payable to A. B. or bearer, if the declaration states that A. B. indorsed the note to the plaintiff, the indorsement,—that is, an indorsement *animo indorsandi*,—must be proved. So, in *Story on Promissory Notes*, § 132, it is said, that, “Although a note payable to bearer is transferable by mere delivery, it may also be transferred by indorsement of the payee, or of any other subsequent holder. In such a case, the indorser incurs the same liabilities and obligations as the indorser of a negotiable note payable to order, from many of which, in the case of a mere transfer by delivery, he is exempt.” It is true that a man’s name may and very often is written on the back of a cheque or bill without any idea of rendering himself liable as an indorser. Indeed, one of the best receipts is the placing on the back of the instrument the name of the person who has received payment of it. Such an entry of the name on the instrument is not an indorsement. So, a man frequently puts his name on the back of a bank-note. In all these cases, the act of writing may or may not be an indorsement, according to circumstances. All that we mean to decide on the present occasion is, that, where a man indorses an instrument of this sort, *animo indorsandi*, and delivers it so indorsed to a third person, he renders himself liable to be sued upon the instrument, as indorsee, by any subsequent holder. I entertain no doubt whatever upon the subject; and I do not think any mischief or inconvenience can result from our so deciding. I may add that I do no injustice to the able argument of Mr. Grant when I observe that it would have been deserving of more attention if it had been addressed to the court a hundred years ago.

KEATING, J. I also am of opinion, upon all the authorities, that a cheque is an instrument which is capable of being indorsed, and that the payee, if he indorses it with intent to make himself liable as an indorser, as is alleged in this declaration, is chargeable as such at the suit of any subsequent *bonâ fide* holder.

Judgment for the plaintiff.

SCHUSTER AND OTHERS v. WHEELWRIGHT. May 5th, 1860.

Where a judge at Chambers has in the exercise of his discretion made an order to change the venue, the court will not interfere unless it be manifest that he has acted upon a misconception of the facts.

The plaintiff had shipped two bags of specie on board a vessel called the “*Stalwart*.” The “*Stalwart*” being burnt, and the specie being taken on board another vessel at sea, it was agreed between the master of the “*Stalwart*” and the salvor that it should be referred to a gentleman at Liverpool to say what should be awarded in the shape of salvage. He awarded to the salvor one of the two bags.

An action was thereupon brought against the now defendant, the captain of the vessel in which the specie was originally shipped, for the conversion, the venue being laid in London. Upon an application on behalf of the defendant to Crompton, J., at Chambers, that learned judge ordered the venue to be changed to Liverpool, upon an affidavit that the plaintiffs’ cause of action (if any) did not arise within the city of London or in the county of Middlesex; that it would be absolutely necessary, for the proper defence of the action, to adduce the evidence of several witnesses, some of whose places of abode were at Whitehaven, in the county of Cumberland, and the others in or near Queenstown, in Ireland; and that it would be attended with great and needless expense to the defendant for [384] the necessary travelling-expenses and loss of time of such witnesses attending the trial of the cause, if the same should be tried in London; that the trial of the cause would be attended with considerably smaller cost if held at Liverpool, which could be reached by steamer both from Queenstown and Whitehaven; and that, the trial being of a mercantile character, it would also in the judgment and

belief of the deponent be very conducive to the fair trial thereof to hold the same at Liverpool.

Honyman, on a former day in this term, obtained a rule nisi to rescind that order, on the ground that the affidavit upon which it was made did not warrant it.

Milward now shewed cause. The learned judge having in the exercise of his discretion made the order, the court will not interfere. It was so expressly decided in *Cartwright v. Frost*, 3 Hurlst. & N. 278. Martin, B., there said: "I believe that I should not have made the order: but my Brother Watson has done so; and it is a better practice, if the discretion of a judge has been exercised on a matter of this kind, that his decision should be final, than that we should review it." Bramwell, B., said,—"Probably I should not have made the order; but I do not know what influenced my Brother Watson's mind. When a mistake occurs at Chambers, it is desirable that it should be set right, if it is worth the expense of doing so. But, in a case like the present, I think it is better to lay down the rule that the court will not interfere to set aside the judge's order." And Channell, B., added,—"The matter was clearly one in which the learned judge had a discretion. A judge at Chambers does not always decide simply on the affidavits before him: it is by no means unusual for him [385] to act on the admissions of the parties." [Byles, J. There certainly is no reason that I can see why the cause should be tried at Liverpool rather than in London. Erle, C. J. Nor am I aware that there is any general rule to preclude the court from interfering in a proper case with the exercise of discretion by the judge in a matter of this sort.] In *Begg v. Forbes*, 13 C. B. 514, a judge at Chambers having made an order to change the venue from Middlesex to London, upon an affidavit stating that the action was brought for alleged breach of duty on the part of the defendants as the plaintiff's agent in the sale of indigo, that the sale took place in London, that the cause of action (if any) arose there, and that in the judgment and belief of the deponent the cause ought to be tried by a jury of merchants in London,—the court refused to disturb it.

Honyman, in support of the rule. The plaintiff has a right to lay the venue where he pleases, and the court will not interfere to deprive him of that right, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue: *Hollisell v. Hobson*, ante, vol. iii., p. 761. [Erle, C. J. I think, where a learned judge has exercised a discretion in the matter, the party seeking to impugn it should shew the court some clear reason for thinking that it had not been well exercised.] Our affidavit shews that we have several witnesses who reside in London, and that the removal of the cause to Liverpool will entail upon us the necessity of employing fresh counsel. It is manifest, therefore, that convenience, so far as the plaintiff is concerned, greatly preponderates in favor of having the cause tried in London.

ERLE, C. J. Without saying what would have been [386] my opinion if this had been an original motion to change the venue, I think, that, a learned judge having in the exercise of his discretion made the order, the burthen of shewing that he has acted upon a misconception is cast upon the plaintiff. He has failed to do this, and therefore I think his rule must be discharged,—the costs to be defendant's costs of the cause in any event.

The rest of the court concurring,

Rule discharged accordingly.

PROCTOR AND OTHERS v. WILLIAMS AND OTHERS. May 1st, 1860.

The court will not sanction an award which has been made ex parte, —one of the parties having withdrawn from the reference in consequence of the arbitrator (a layman) insisting, in spite of his protest, to retain the services of an attorney to assist him at the hearing.

This was an action by the plaintiffs, who are miners, against the defendants, the owners of mines in Staffordshire, for work and labour in getting ironstone from the defendants' mines. The defendants paid into court 17l. 1s. 3d., and, as to the residue, pleaded never indebted, payment, and a set off, for moneys due to them from the plaintiffs for rent of cottages, and goods sold, &c. The cause was ripe for trial at the

last Summer Assizes at Stafford, when it was agreed to refer it by an order of Nisi Prius in the usual terms to one Yardley, a mining agent. The first meeting was appointed to take place before the arbitrator at Wolverhampton on the 26th of October last; and on the 21st, the defendants' attorney received from Messrs. Duignan & Elsworth, attorneys of Walsall, a letter in the following terms:—

[387] “*Proctor v. Williams.*

“Dear Sir,—We believe Mr. J. Yardley has been appointed arbitrator in this cause, and that an appointment has been made to proceed at the Swan Hotel, Wolverhampton, on Wednesday next, at 10. Mr. Yardley has requested our Mr. Duignan to attend for the purpose of advising him on any legal questions that may arise: and we shall feel obliged by your forwarding to us, at your earliest convenience, a copy of the pleadings, or a copy of the particulars (if any), and of the order of reference.”

The parties with their respective counsel and attorneys met at the time and place appointed for the purpose of proceeding with the reference. Finding Mr. Duignan sitting at the side of the arbitrator, the defendants' counsel inquired what he was there for: and, on Duignan's saying he was there for the purpose of assisting Mr. Yardley, the defendants' counsel protested against the cause being tried before any one but the appointed arbitrator, adding that the understanding between the parties was, that no legal gentleman should be employed. Mr. Yardley thereupon said: “Mr. Duignan is not here to advise me, but to take notes of the evidence, as I myself am not expert at taking notes: in fact, he is here simply as my clerk.” The defendants thereupon proposed to pay the expense of employing a short-hand writer for that purpose; but they objected to any legal gentleman being so employed.” Mr. Yardley then asked Mr. Duignan whether or not he was entitled to have him there: to which that gentleman answered,—“It is quite in your discretion whether you keep me in the room or not. I advise you to do as you think proper.” Upon this Mr. Yardley said: “Then I shall go on with the case.” The defendants' counsel formally protested against this determination of the arbitrator, and with-[388]-drew. The arbitrator proceeded *ex parte*, Mr. Duignan being present: and ultimately he made an award in favor of the plaintiffs.

Gray, in Michaelmas term last, on behalf of the defendants obtained a rule calling upon the plaintiffs to shew cause why the award should not be set aside, on the ground of misconduct in the arbitrator, in calling in an attorney as his adviser and assessor contrary to the agreement of reference and the protest of the defendants, and that he had made his award in the absence of the defendants, and without hearing their evidence and the evidence of their witnesses.

Pigott, Serjt., and Kenealey, shewed cause. The conduct of the arbitration is entirely in the discretion of the arbitrator: he is entitled to take any adviser he pleases. [Erle, C. J. Has the court ever sanctioned an award made under the advice of an attorney whose presence had been objected to?] What right had the defendants to object to Mr. Duignan? Who is to determine what legal advice the arbitrator shall take? [Erle, C. J. I should strongly advise any arbitrator not to insist upon the presence of an obnoxious person. The judgment the parties stipulated for here was, Mr. Yardley's judgment.] Plus any advice he might choose to take for his guidance. [Willes, J. Have you any case where the interference of an attorney has been permitted, except for the purpose of making the award formal and correct? I can find none. This proceeding on the part of the arbitrator gives the parties a different tribunal from that which they bargained for.] In Russell on Arbitration, 2nd edit. 204, it is said: “By the general principle of law, one who has an authority from another to do an act for him must execute it himself, and cannot transfer it to a [389] third person, this maxim being expressed ‘*delegatus non potest delegare* ;’ for, this being a confidence and trust reposed in the party, cannot be assigned to a stranger, of whose ability and integrity he for whom the act is to be done can form no opinion. The particular authority conferred on an arbitrator forms no exception to this general rule, for it is but a naked power. He must, therefore, perform his duties in person: he may neither delegate them to another, nor elect others to act with him, unless the submission expressly authorize such a course. But, though an arbitrator may not delegate his authority, that is, agree beforehand to be bound by what another may

decide, the cases are numerous to shew that an arbitrator may submit a material question affecting the merits of the case to another, and, after hearing his opinion, adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers." [Willes, J., referred to *Emery v. Wase*, 5 Ves. 846, 8 Ves. 504 (a).] In numerous cases, an arbitrator has been held to be justified in taking the opinion of counsel to guide him: see *Goodman v. Sayers*, 2 Jac. 249; *Soulsby v. Hodgson*, 3 Burr. 1474; *In re Hare*, 6 N. C. 158, 8 Scott, 367. That which was done in the last-mentioned case was infinitely more objectionable than what was done here.

Huddleston, Q. C., and Gray, *contra*, were not called upon.

ERLE, C. J. I feel not the smallest misgiving in saying that we shall be properly administering the law by making this rule absolute. It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal. Here is a lay arbitrator chosen by the parties; and he begins [390] with a stipulation that he shall have a lawyer at his elbow to assist him from time to time with his advice. Looking at the way in which Mr. Duignan forced his attendance on the parties after he was objected to by one of them, and at the contradictory reasons by which he sought to justify his presence, I think the defendants were perfectly justified in saying that the tribunal was not the tribunal of their selection, and not a satisfactory one. I think a decision come to by the arbitrator in such a manner as this is not one which a court of justice ought to force on the parties. I cannot help observing that the gentleman who advised Mr. Yardley to adopt the course he did seems to have a very improper sense of his duty.

WILLIAMS, J. I also think that this rule should be made absolute. I do not impute moral impropriety to the arbitrator: but I think he has been guilty of legal misconduct. When the parties agreed to have their dispute settled by a lay arbitrator, I think either of them had just ground for remonstrance when they found that a legal gentleman was to be present throughout the proceedings for the purpose of regulating the conduct of the arbitration. On the objection being made, the arbitrator at first said Mr. Duignan was attending in the capacity of his clerk. The defendants then proposed that Mr. Duignan's place should be taken by a short-hand writer: but the arbitrator persisted in retaining him there as his legal adviser. Under these circumstances, I think the defendants were perfectly justified in withdrawing from the reference. And, upon the whole, I think it is reasonable to say that the conduct of the arbitrator in insisting on retaining Mr. Duignan, was such misconduct as to justify us in setting aside the award.

WILLES, J. I am entirely of the same opinion. I [391] am satisfied that the tribunal before which the defendants were called upon to proceed was not the tribunal by whose decision they agreed to be bound.

KEATING, J. I also think that the arbitrator was not justified in going on after the defendants had in consequence of the course he thought proper to take withdrawn from the reference.

Rule absolute, without costs.

PHILLIPS AND ANOTHER v. DICKSON. April 21st, 1860.

[S. C. 29 L. J. C. P. 223; 2 L. T. 185; 6 Jur. N. S. 401. See *The Englishman and the Australia*, [1895] P. 214.]

Advantage cannot be taken of the 5th section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, upon motion.

The 5th section of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), enacts that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of any creditor, in any action or other proceeding at law or in equity, in order to

obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person [392] who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

Coleridge, on behalf of the defendant, moved for a rule under the above section calling upon the plaintiffs to shew cause why they should not forthwith assign to the defendant any judgment, specialty, or security now held by them or either of them in respect of the debt for which judgment was recovered in this action, and particularly a duplicate judge's order, dated the 23rd of June, 1859, made in the Matter of Messrs. Phillips & Son, and others, on the ground that such judgment so recovered had been since paid and satisfied by the defendant. The application,—which had been already made to Crompton, J., at Chambers, and refused,—was founded upon an affidavit which stated in substance, that, in the year 1852, a company called the Melbourne Gold and General Mining Association was established in London, and that General Sir J. C. Chatterton and Lieutenant-Colonel L. S. Dickson (the now defendant) were two of the members of the managing committee of the said association; that Messrs. Bristow & Co. and Mr. Ellaby were the solicitors of the said association; that, in November, 1852, an action at law was commenced against certain members of the said committee, including the said General Chatterton and Lieutenant-Colonel Dickson, who were [393] defendants thereto, and that such action was defended by Ellaby on behalf of the said committee; that some of the members of the committee, and defendants to the said action, being dissatisfied with Ellaby's conduct of the action, instructed Messrs. Phillips & Son to substitute themselves as attorneys for the defendants in the action in place of Ellaby, and to continue their defence to that action; that Phillips & Son accordingly became the attorneys for the defendants in the action, which resulted in a verdict for the plaintiffs; that the bill of costs of the now plaintiffs in reference to the said business amounted to the sum of 370l. 17s. 6d., and that there was paid during the progress and in respect thereof 168l. 8s. 4d., leaving 202l. 9s. 2d. alleged to be due from the members of the said committee, including General Chatterton and Lieutenant-Colonel Dickson, in respect thereof; that a signed bill of costs was in October, 1853, delivered by the now plaintiffs to General Chatterton and Lieutenant-Colonel Dickson; that the committee (including General Chatterton and Lieutenant-Colonel Dickson) instructed the plaintiffs from time to time to act in their behalf in various other matters of business connected with the association, and the committee became indebted to the plaintiffs in the sum of 581l. 15s. for costs alleged to have been incurred by them in respect thereof; that the association was unsuccessful, and, towards the end of 1854, its offices were given up, and it ceased to have any place of business or any secretary; that the bill of costs last mentioned was on or about the 15th of May, 1856, delivered to the chairman of the association; that an action was commenced against Lieutenant-Colonel Dickson upon such bill on the 25th of June, 1859, the writ being indorsed as follows,—

	£	s.	d.
[394] "To balance of account delivered 24th October, 1853	202	9	2
Interest thereon from the 5th February, 1856, to the 25th June, 1859.	34	5	11
Bill delivered the 15th of May, 1856.	581	14	0
Interest thereon from date of delivery to the 25th of June, 1859	90	9	10
	<hr/> £908 18 11" <hr/>		

that the said action came on to be tried before Erle, C. J., and a special jury, at the sittings at Guildhall after Michaelmas Term, 1859, when a verdict was taken for the plaintiff by consent for 500l., but no judgment was to be entered up except on default by the defendant in the performance of certain terms; that the costs of the plaintiffs in that action were taxed at 171l. 15s. 8d.; that, default having been made by the

defendant, judgment was signed on the 28th of January, 1860, and execution issued; that the said judgment-debt and costs, together with the costs of execution, &c., were on the same day paid to the plaintiffs; that Messrs. Phillips & Son, on the 8th of January, 1859, issued a writ against General Chatterton, out of the Irish court of Queen's Bench for the recovery of the selfsame balance of 202l. 9s. 2d. due on the said bill of costs, and for the selfsame bill of costs amounting to 581l. 15s.; and that the proceedings in that action were on the 23rd of June, 1859, stayed by an order of Erle, J., as follows:—

“Upon hearing the counsel for General Sir J. C. Chatterton, Bart., and Messrs. Phillips & Son, I do order that all further proceedings herein and in Ireland be stayed, on payment of 550l. by General Sir [395] J. C. Chatterton to Messrs. Phillips & Son in manner following,—viz. 50l. down, 50l. in a fortnight or month, and 50l. every four months, till paid; such payments to be secured by a life-policy for 500l., to be assigned to H. D. Phillips as trustee to pay Messrs. Phillips & Son in the first place such 550l., or balance remaining unpaid at death, and, in the next, in trust for John Hollingshed, official manager, or Messrs. Willoughby; with a covenant by General Chatterton to pay premiums in the usual way; and that, in default of payment of the said instalments, the balance unpaid to become due; with liberty to Messrs. Phillips & Son to appropriate the payments to such parts of their claims as they please; but that this order be without prejudice to any rights Messrs. Phillips & Son may have against any other persons in respect thereof, without costs on either side; and that no further recourse be had against the said General Chatterton.”

The affidavit further stated that a demand on behalf of the defendant had been duly made of an assignment to him of the said order of the 23rd of June, 1859, and of every judgment, specialty, or other security now held by the said Messrs. Phillips & Son in respect of the said bills of costs for which the said actions were brought, but that the said Messrs. Phillips & Son had declined to comply therewith.

It was submitted that this was a case in which the defendant was entitled to avail himself of the 5th section of the Mercantile Law Amendment Act. [Erle, C. J. The object of the motion is, to put an obstacle in the way of the plaintiffs' proceeding against General Chatterton. If the general had been a co-defendant here, the case would have been within the statute. Byles, J. Colonel Dickson may obtain contribution from General Chatterton without our assistance. Willes, J. No power is given by the statute to apply to the court [396] on motion for an order. Possibly you may have a remedy by action; but this court has no power to decree specific performance, direct or indirect.] If any one is entitled to go on against General Chatterton, it is Colonel Dickson. He is, therefore, the only person who can apply. [Willes, J. You must request the plaintiffs to assign; and, if they refuse, you may bring an action, and then the opinion of a court of error may be taken. Keating, J. Why cannot General Chatterton apply to the court to stay the proceedings against him on the judge's order, on the ground that the plaintiffs have already recovered the whole amount from Colonel Dickson?] It may be a question whether the plaintiffs have recovered the whole amount they are entitled to.

Per Curiam. The defendant's only way of availing himself of this provision of the statute is by an action. At all events, we think it cannot be done by a summary motion. And we ought not hastily to assume a jurisdiction which practically has the effect of depriving the opposite party of the opportunity of taking the opinion of a court of error.

Rule refused.

[397] THE EUROPEAN AND AMERICAN STEAM-SHIPING COMPANY, LIMITED,
v. CROSSKEY AND OTHERS. Jan. 27th, 1860.

[S. C. 29 L. J. C. P. 155; 6 Jur. N. S. 896; 8 W. R. 236. See *Morgan v. Bolt*, 1863, 1 N. R. 271; *In re Hopper*, 1867, L. R. 2 Q. B. 375.]

Where two arbitrators are empowered to appoint an umpire, such appointment must be the act of the will and judgment of the two, and must not be the result of chance or lot.—Two arbitrators met for the appointment of an umpire. Each proposed one, but, though both were assumed to be fit persons to be appointed, neither of the arbitrators would consent to withdraw his nominee. It was then

agreed between them that the names should be written upon two slips of paper and placed in a hat, and that the one first drawn should be the umpire. This having been done, the two arbitrators went together to the person chosen, and requested him to act.—Held, that one of the parties to the reference was entitled, upon these facts coming to his knowledge, to revoke his submission.

J. Brown, on a former day in this term, obtained a rule calling upon the plaintiffs to shew cause why the defendants should not be at liberty to revoke the submission to arbitration in this case, or why an umpire or a third arbitrator should not be appointed by the court pursuant to the 12th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 (a).

[398] The facts disclosed by the affidavits were as follows:—Certain matters in difference between the parties had been agreed to be referred to the arbitration of George Broom and George Harvey Jay, accountants, and such umpire as should be selected by them before entering upon the reference; whose award, or the award of any two of them, should be binding. Broom was the arbitrator appointed by the plaintiffs; Jay by the defendants. Shortly after their appointment Messrs. Broom and Jay met for the purpose of selecting an umpire. They agreed as to the requisite qualifications for an umpire in such a case; but they could not agree as to the person to be appointed. Broom wrote the name of one Webb on a piece of paper, and Jay in like manner wrote the name of one Edwards; and they exchanged papers. Some discussion then arose as to the relative merits of the two parties thus named: and, eventually, neither being willing to recede from his nomination, it was agreed between them that the two papers should be placed in a hat, and that the person whose name was first drawn should be the umpire. Webb's name being drawn, Broom and Jay went together to him and requested him to act as umpire, which he consented to do; and thereupon the arbitration proceeded before the three. After six or seven meetings had been held, the circumstances under which Webb's appointment had taken place coming to the knowledge of the defendants, the latter declined to proceed any further with the reference.

J. Wilde, Q. C., Hannen, and Kaye, now shewed [399] cause. It may be conceded that a bare appointment of an umpire by lot is illegal. It has repeatedly been so decided: see *In re Cassell*, 9 B. & C. 624, 4 M. & R. 555, *Ford v. Jones*, 3 B. & Ad. 248. But that rule cannot apply where the parties have acquiesced in the appointment by attending meetings before the umpire. [Williams, J. In a case of *In re Jamieson and Binns*, 4 Ad. & E. 945, it was held, that, where arbitrators have decided the choice of an umpire by tossing up, the acquiescence of parties subsequently to the choice, and before the reference is proceeded in, does not render the appointment valid, unless the

(a) Which enacts that, "if in any case of arbitration, the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not shew that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one: or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not shew that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one:—then, in every such instance, any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be; and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference, and make an award, as if he had been appointed by consent of all parties."

parties acquiescing have knowledge of all the circumstances under which the choice was made.] Looking at all the circumstances, it cannot be said that this was a pure appointment of an umpire by lot; the arbitrators having agreed beforehand that both the persons named were fit and proper persons to be chosen as umpire, and both having afterwards gone to Webb, the person upon whom the lot fell, to request him to undertake the duty. In *Neale v. Ledger*, 16 East, 51, the two arbitrators having each proposed a third, and neither of them liking to abandon his own choice, though not disapproving of the other's choice, they agreed to toss up which of the two proposed should be nominated: and the award made by one of the arbitrators originally appointed and the third thus chosen, was upheld by the court, — Lord Ellenborough distinguishing the case from the case of a tossing up which of the two should nominate a third. That case was referred to and distinguished in *Re Cassell*, but not expressly overruled.

Lush, Q. C., and Brown, in support of the rule. The arbitrators were deputed to select, to exercise their unbiassed judgment and discretion in the choice of an [400] umpire, not to draw lots. The cases are clear and uniform in the condemnation of such a course. Thus, in the case of *In re Cassell*, 9 B. & C. 624, 4 M. & R. 555, a submission was made to two arbitrators and to such third person as they should appoint; the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third, and, not being able to concur in such appointment, it was agreed between them that each of them should name two, and that the names of the four should be put into a hat, and that the name drawn should be the third arbitrator; and the arbitrator was so appointed. The award was made by one of the arbitrators originally named and the person so appointed by the two: and it was held that the appointment of the third arbitrator was bad, inasmuch as the choice of the third ought to have been the act of the will and judgment of the two, and matter of choice, not chance. Lord Tenterden, in giving the judgment of the court, lays down this general rule, — “The parties to the reference expect the concurring judgment of the two in the appointment of a third; and we think it better not to decide the present case upon any nice ground of resemblance to or difference from the others, which might lead to discussion and litigation in other cases, but to lay it down as a general rule, that the appointment of a third person must be the act of the will and judgment of the two, must be matter of choice and not of chance, unless the parties consent to or acquiesce in some other mode.” [Erle, C. J. Two arbitrators being about to name an umpire, and mutually relying upon and respecting each other's judgment, one suggests a man and assures the other that he is a fit and proper person to be appointed, and the other, relying upon that representation, assents to his appointment.] It is submitted that that will not do: the party appointing the arbitrator has a right to [401] the exercise of the judgment and discretion of the person he has selected to represent him on the reference. [Williams, J. You would say that the transaction in effect amounts to this, — that, when they meet to choose an umpire, Jay says to Broom, “I have such confidence in you, that, upon your representation and assurance, I think Webb a very fit man to be tossed up for.”] It really amounts to no more than that. In *In re Holson and Dreyry*, 7 Dowl. P. C. 569, where the appointment of an umpire was by lot consented to by the attorney's clerks, but not by the attorneys themselves, or their clients, the appointment was held bad, although the parties, in ignorance of the mode of appointment, had attended the arbitrator. Littledale, J., there says: “It was finally settled in *In re Cassell*, after a review of the previous decisions, that, where two arbitrators were appointed, with power to name a third, and the two appointed placed the names of four persons in a hat, and drew one out, who was appointed, such an appointment was bad. As a general rule it was laid down ‘that the appointment of the third person must be an act of the will and judgment of the two, and must be a matter of choice, and not of chance:’ but Lord Tenterden adds, ‘unless the parties consent to or acquiesce in some other mode.’ In the case of *Ford v. Jones*, 3 B. & Ald. 248, which was a subsequent case, Lord Tenterden says, “The principle laid down in the case of *In re Cassell* appears to me very sound, that the appointment of an umpire must be matter of choice, and not of chance. I thought the rule had been so clearly stated in that case as to exclude all subtle distinctions for the future.” However, Lord Tenterden's hopes do not seem to have been realized, for, in *In re Turno and Bird*, 5 B. & Ad. 488, 2 N. & M. 328, the consent of the parties was held sufficient to make an appointment by lot valid: [402] and the same was decided in *In re Jamieson and Binns*, 4 Ad. & E. 945, though, in that

case, the appointment was held bad, as the parties had not a knowledge of all the circumstances under which the choice was made. The exception, therefore, of Lord Tenterden in *In re Cassell* has been adopted by the courts. I think, perhaps, it would have been well if it had not been. However, I must adopt it also in the case now before me." In a still more recent case of *In re Greenwood*, 9 Ad. & E. 699, it was held, that, where arbitrators are empowered to choose an umpire, and, having differed in their nominations, make the appointment by lot, and then inform the litigating parties "that they have mutually chosen" A. B. to be umpire, and the parties there-upon assent to the choice, neither party is bound by such acquiescence, if given in ignorance of the real state of facts. And Lord Denman says: "The presumption, at all events, is against the election of an umpire by lot. Such a transaction should at least be fully explained. It should appear that each arbitrator exercised his judgment on the fitness of the person to be ballotted for, and that the parties knew of the course about to be adopted. Here, it is not clear that the parties had that advantage, or that each of the arbitrators knew both the persons proposed as umpires. The litigating parties, it appears, were told that the arbitrators had chosen Atkinson: but that, if implying that they had exercised their judgment, might be a complete misrepresentation." Here, there was no exercise of judgment by Mr. Jay. He appears to have left the fitness of Webb entirely to the judgment and discretion of Broom. The only judgment he himself exercised in the matter was upon the honor and truthfulness of his opponent. He was clearly guilty of a breach of the duty he was appointed to perform, in thus surrendering his judgment.

[403] ERLE, C. J. I am strongly of opinion that the case of *Neale v. Ledger*, 16 East, 51, was well decided, and am very determined to act upon it whenever a case shall be brought within it. But here I am not clear that Jay, in assenting to the fitness of Webb to be the umpire, was not entirely surrendering his own judgment, and putting faith in Broom. I am, therefore, unable to distinguish the case from *In re Cassell*, 9 B. & C. 624, 4 M. & R. 555, and the deliberate judgment there come to by Lord Tenterden, against his first impression, that the parties to the reference expect the concurring judgment of the two in the appointment of a third, and, as a general rule, the appointment of the third person must be the act of the will and judgment of the two,—must be matter of choice, and not of chance. And, that decision having been at least twice since recognized, I felt it impossible to yield to my own notions of the matter. The rule will, therefore, be absolute for a revocation of the submission.

The rest of the court concurring,

Rule absolute accordingly (a).

End of Easter Term.

[404] MEMORANDA.

In the Vacation after last Hilary Term, the Hon. Sir William Henry Watson, Knt., one of the Barons of the Exchequer, died.

In Easter Term, James Plaisted Wilde, Esq., one of Her Majesty's Counsel learned in the Law, was appointed a Baron of the Exchequer in the room of the late Mr. Baron Watson.

Upon receiving the Coif, he gave rings with the following motto:—"Veritas victrix." The learned Baron shortly afterwards received the honor of knighthood.

[405] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN TRINITY TERM, IN THE TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banco in this Term, were,—Erle, C. J., Williams, J., Willes, J., and Byles, J.

IMRIE AND ANOTHER v. CASTRIQUE. 1860.

[S. C. 30 L. J. C. P. 177; 4 L. T. 143; 9 W. R. 455: Affirmed in House of Lords, L. R. 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1. See *Godard v.*

(a) See *Crosskey v. The European and American Steam-Shipping Company*, 6 Jurist, N. S. 1190, where the proceedings at law were stayed by injunction.

Gray, 1870, L. R. 6 Q. B. 149; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 239; *Messina v. Petrocchino*, 1872, L. R. 4 P. C. 157; *Meyer v. Ralli*, 1876, 1 C. P. D. 370; *The Mecca*, 1879-81, 5 P. D. 33; 6 P. D. 106; *De Mora v. Coucha*, 1885-86, 29 Ch. D. 301; 11 App. Cas. 541; *In re Trufort*, 1887, 36 Ch. D. 600; *Alcock v. Smith*, [1892] 1 Ch. 268; *The Dictator*, [1892] P. 311; *The Nautik*, [1895] P. 124; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 462; *Minna Craig Steamship Company v. Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 60, 460; *Pemberton v. Hughes*, [1899] 1 Ch. 793.]

A., a British subject, and the owner of a British ship, whilst she was on a voyage transferred her to B. by a bill of sale. The master had in the meantime, while at Melbourne, drawn a bill for necessities for the use of the ship upon his owner in England, which the latter declined to accept, and which was dishonoured at maturity. The ship having in the course of her voyage touched at Havre, the holder of the dishonoured bill indorsed it to a French subject residing there, and the latter commenced proceedings against the master in the Civil Tribunal of that place, and against the ship, under the judgment of which court (confirmed on appeal) the vessel was sold,—B.'s claim to intervene as transferee of the ship being disallowed:—Held, —reversing the decision of the court of Common Pleas, —that the proceeding in the French court was a proceeding in rem, and therefore the sale under its decree passed the property in the ship, however erroneous the judgment might have been.

Error upon a judgment of the court of Common Pleas on a special case stated pursuant to a judge's order. See the case, ante, p. 1.

[406] The case was argued in the Exchequer Chamber on the 29th and 30th of November, 1860, before Cockburn, C. J., Wightman, J., Martin, B., Bramwell, B., Channell, B., Hill, J., and Blackburn, J.

Mellish (with whom was C. Hutton), for the plaintiffs in error, the defendants below, submitted that the judgment of the court below was erroneous, upon the following grounds,—first, that the judgment of the court of appeal in France was a judgment in rem by a court of competent jurisdiction, and that, there having been no fraud practised in procuring it, whether right or wrong, it was binding upon all the world,—secondly, that, assuming that the judgment of the French court was a judgment in personam, the plaintiff below having taken proceedings before the tribunals of that country for the purpose of asserting his right to the vessel which was the subject in dispute, and the French court having decided against his claim, and decreed a sale of the vessel, that sale was binding upon him, and passed the property in the vessel to the purchasers under that judicial sale. He referred to Abbott on Shipping, 10th edit. 135, *The Wataga*, 1 Swabey, Adm. R. 165, the notes to *Hughes v. Cornelius* (2 Show. 232) and *The Duchess of Kingston's case* (20 Howell's State Trials, 355) in 2 Smith's Leading Cases, 4th edit. 604, 612, the Code de Commerce, tit. 9, §§ 311, 320, the case of *The Bold Buccleugh*, *Harmer, App., Bell, Resp.*, 7 Moore's P. C. 267, Story's Conflict of Laws, §§ 521, 522, *Hart v. M'Namara*, 4 Price, 154, n., *The Attorney-General v. Norstedt*, 3 Price, 97, *Scott v. Shearman*, 2 Sir W. Bla. 976, *The Segredo*, or *Eliza Cornish*, 1 Eccl. & Adm. R. 36, and *Cannell v. Scwell*, 5 Hurlst. & N. 728, 29 Law J. Exch. 350.

Manisty, Q. C. (with whom was Holl), contra. He [407] submitted that the proceeding in the French court against Benson was, at all events in its inception, a proceeding inter partes, and not in rem; that, assuming it to have been a proceeding in rem, the decision was the result of a contemptuous disregard of the English law, which ought to have governed the construction of the contract, and was in direct violation of the law of nations; and that the sale, which was directed to satisfy a supposed maritime lien which had no existence, passed no property in the ship to the defendants below. He referred to *Simpson v. Fogo*, 29 Law J., Ch. 657, Story on Bills, § 152, Story's Conflict of Laws, §§ 312, 323, 586, *Buchanan v. Rucker*, 1 Campb. 63, 9 East, 192, *Dalglish v. Hodgson*, 7 Bingh. 495, 5 M. & P. 407, *Nocelli v. Rossi*, 2 B. & Ad. 757, *Rymer v. Druce*, 23 Beavan, 145, *Pollard v. Bell*, 8 T. R. 134, *Bird v. Appleton*, 8 T. R. 562, *Kitchen v. Irvine*, 28 Law J., Q. B. 46, *Morris v. Robinson*, 3 B. & C. 196, 5 D. & R. 34, Taylor on Evidence, § 1538, 2 Smith's Leading Cases, 633, MacLachlan's Law of Merchant Shipping, 40, and the statutes 8 & 9 Viet. c. 80, and 17 & 18 Viet. cc. 104, 120. He also observed upon *Cannell v. Scwell*, 5 Hurlst. & N.

728, 29 Law J., Exch. 350. [Blackburn, J., referred to the case of *The Neptune*, 3 Knapp's P. C. 94, as an authority clearly defining the maritime law.]

Cur. adv. vult.

COCKBURN, C. J. I am of opinion that the judgment of the court of Common Pleas must be reversed.

The facts, so far as they are material to the decision, may be briefly stated. In the year 1854, the master of a British vessel, the "*Ann Martin*,"—to recover the value of which the present action is brought,—in consideration of necessities supplied to [408] the ship at Melbourne, in the course of a voyage from this country to Australia and back, drew a bill of exchange on his owner in this country, one J. B. Claus, which bill the owner, having in the meantime mortgaged the vessel and fallen into difficulties, declined, on its presentment, to accept.

The vessel having arrived at Havre, in the course of her voyage home, the holder in this country of the bill drawn by the master transferred it to Troteux & Co., French subjects resident at Havre, with a view to take advantage of the law of France, by which a ship becomes liable to seizure for necessities supplied in the course of a voyage on the contract of the master. Troteux & Co. thereupon instituted a suit before the Tribunal de Commerce of Havre, against Benson, the master, and against the ship, for the amount of the bill. The court, by a judgment of the 15th of May, 1855, condemned Benson, in his capacity of master, with, as it is termed, a "privilege on the ship," in the amount of the bill; and, as a consequence of the judgment, and in pursuance of it, the ship was seized and detained in the custody of the court.

The amount due not being paid by the master, it became the object of Troteux & Co. to obtain a sale of the ship to satisfy the judgment; and as by the law of France this could only take place on the confirmation of the judgment of the Tribunal de Commerce, and an order for the sale of the ship, by the Civil Tribunal of the district, proceedings were taken to obtain such confirmation and order.

At this stage of the proceedings, it became necessary that notice should be given to those who by the ship's papers appeared to be the owners of the vessel, and that such persons should be summoned before the court. By the ship's papers and the certificate of registry Claus appeared to be the sole owner: but, [409] Claus having become bankrupt, notice was given not only to him, but also to Bird, his assignee; and both were summoned to appear before the tribunal within a period of two months. At the expiration of this period, neither of these parties appearing, judgment was given by default, confirming the sentence of the Tribunal de Commerce, and ordering the sale of the ship by public auction in the presence of one of the judges of the civil court, who was to receive the biddings and pronounce the adjudication in respect thereof. Notice of this judgment was given to Bird, the assignee, and another opportunity was afforded him to appear to oppose the sale. But, the bankrupt and his assignee had ceased to have any interest in the ship, Claus, as has before been adverted to, having, prior to his bankruptcy, and while the ship was on her voyage, mortgaged the vessel by bill of sale to one Harrison, who had again transferred his interest by bill of sale to one Emley, who had finally assigned in like manner to the plaintiff. The transfers to Harrison and Emley had been duly registered; but the transfer to the plaintiff remained unregistered at the time of these proceedings.

The suit before the French tribunals having arrived at this point, Castrique, the plaintiff below, in September, 1855, before the sale of the vessel as ordered by the Civil Tribunal had taken place, instituted before the same tribunal a suit to replevy the ship. The court, however, by a judgment of the 19th of April, 1856, dismissed the suit, on the ground that it was impossible that by the law of England a transfer of the property in a ship could take place in the course of a voyage, to the prejudice of creditors, or without the transaction being indorsed on the certificate of registry, or appearing on the papers of the vessel.

[410] Against this decision the plaintiff appealed to the superior court at Rouen: but that court, though in the meantime the opinion of the Attorney-General of England as to the English law had been obtained and was brought to its knowledge, confirmed the decision of the inferior court, and dismissed the appeal.

A sale of the ship thereupon took place; after which, the vessel having come into the hands of the defendants, residents in this country, the plaintiff, Castrique, having demanded possession of it from the defendants, brings his action for the conversion

of it, on the ground that a court of justice in this country ought not to give effect to the judgment under which the sale took place.

The case of the plaintiff divides itself into two main branches. First, it is said that the judgment of the French court was a judgment, not in rem, but in personam; and that, being a judgment in personam, and not between the parties to this suit, and at the same time palpably and beyond all question erroneous, as also contrary to natural justice, it is competent to a court of this country, when called on to give effect to it, to review it on the merits. Secondly, it is said, that, even if this judgment should be held to be a judgment in rem, the circumstances under which it was given involve so serious a departure from justice, and so striking a disregard of the comity of nations in the refusal by the court to give effect to the law of England, by which alone the incidents of this contract ought to have been determined, that an English court ought not to respect a judgment, although in rem, which, in itself plainly unjust, has proceeded upon a contemptuous disregard of the law of this country. Besides which it is said that this judgment, though in rem, ought to be treated as null, as being in open violation of natural justice.

[411] The court of Common Pleas, in giving judgment for the plaintiff below, has held this to be a judgment in personam. After the fullest consideration, I can come to no other conclusion than that it is a judgment in rem.

It is true that the suit out of which this judgment arose appears to have been in its inception a proceeding in personam, so far as the master of the vessel was concerned: but it was at the same time in terms a suit against the ship; and in this respect it appears to us clear that it was a proceeding in rem. It is plain, from the narrative of the proceedings set forth in the case, that, according to the French law, a mixed suit, directed both against the master and against the ship, may, after judgment obtained against the master, be converted into a suit against the ship alone. For, Benson, the master, having admitted the debt, and consented to judgment, and the Tribunal de Commerce having condemned him in his capacity of master, and also the ship by way of maritime lien (for, such, as I shall shew further on, must be taken to be the sense and effect of the words "*par privilège*"), all further proceedings against the master are dropped. He is declared free from arrest, to which, as a foreigner liable to a Frenchman on a bill of exchange, he would otherwise have been subject, and the subsequent proceedings before the Civil Tribunal are directed against the ship alone. At this stage, the owners of the vessel are for the first time made parties to the suit,—not for the purpose of fixing them with any personal liability, but to afford them an opportunity of resisting a judgment directed specifically against the vessel.

It is, no doubt, true, that a judgment of this sort, which simply decrees the sale of a particular chattel, to satisfy a money demand, hardly falls within the strict definition of a judgment in rem, inasmuch as it [412] does not determine the status of the chattel with reference to property, or vest the property at once in the claimant, as a condemnation of the court of Exchequer in a revenue cause vests the property in the Crown, or the sentence of a court of Admiralty in a matter of prize vests the property in the captors. But it is strictly analogous to the sentence of a court of Admiralty on a claim of salvage, or in a suit on a bottomry-bond. In both the latter there is a money demand, on which the court first adjudicates, and in satisfaction of which it decrees the sale of the ship. If such a decree is a judgment in rem, it is difficult to discover any ground for saying that the decree ordaining the sale of this ship is to be considered in the light merely of an execution to satisfy a judgment establishing a pecuniary liability. Indeed, it seems impossible to find two proceedings more closely analogous than the proceeding on a bottomry-bond and the present suit in its ulterior stage. Both are proceedings on the hypothecation or quasi hypothecation of a vessel: in both a money liability has first to be established: in both the remedy is by a judgment decreeing the sale of the vessel. Except that, in the one case, the hypothecation is by express agreement under a particular instrument, and that, in the other, it arises by the operation of the French law on a debt incurred on behalf of the ship, the proceeding and the result are in substance essentially the same.

Now, the sentences of the court of Admiralty in the matter of maritime liens have always been considered as judgments in rem. And in one sense they properly are so: for, the purpose of the suit and the effect of the judgment are to afford a remedy, not by execution against the person or the general estate of the defendant,

but by the appropriation of a specific chattel to satisfy the plaintiff's claim. Being unable to see any [413] distinction between such a judgment and the present, the only conclusion I can arrive at is, that this judgment is a judgment in rem.

In forming this opinion, I have thus far confined attention entirely to the proceedings set forth in the special case, inasmuch as upon the evidence contained therein our judgment ought in strictness to be formed. But I own that it is not without considerable satisfaction to my mind, that, on looking attentively into the French law, I find the fullest confirmation of the conclusion at which I have arrived on the case. There can be no doubt, that, by the law of France, the master of a merchant-vessel has authority, if the necessities of the vessel in the course of the voyage require it, not only to take up money on bottomry, or, as it is called, "*sur le corps et quille du vaisseau*"—on the body and keel of the vessel—in other words, expressly to hypothecate the vessel, but also by a general contract for repairs or necessities, or money advanced on account thereof, to bind the vessel, so that the owner cannot, even by selling to an ignorant and *bonâ fide* purchaser,—at least till the vessel has made a voyage on account of the latter,—deprive the creditor of his right to have the vessel condemned and sold to satisfy his claim. The 191st article of the Code de Commerce places both the bottomry and the general contract of the master on the same footing, making the ship liable in respect of each; while the proceedings for the condemnation and sale of the ship, provided for by the 197th and following articles, are alike in both cases. It is true that the lien of the creditor is termed, not an *hypothèque*, but a *privilege*,—a term generally applied in French law to the preference given to certain descriptions of creditors over others, rather than to the right of a creditor in respect of a specific thing belonging to the debtor. It appears, [414] however, both from the code and its commentators, that the term "*privilege*" is thus applied out of deference to a technical rule of French law adopted by the code, that there cannot be a "*hypothèque*," properly so called, in moveables (see Code Civil, b. 3, ch. des Hypothèques, articles 2114, 2118, 2119). At the same time, art. 2120 expressly excepts mercantile vessels from this provision: and the Code de Commerce, while it places, as I have already stated, bottomry contracts and general contracts of the master on account of the ship on the same footing as "*privileged*," not only charges the ship with both descriptions of debt, but actually gives a preference to the latter class over the former. (See art. 190, where the word used is "*affectés*," a term which we are told in the *Repertoire de Jurisprudence*, *ad verbum*, is constantly used in French legal language as synonymous with "*hypothecated*.") The code goes on to provide (see articles 193, 196) that the sale of the ship by the owner to a third party shall not prejudice the right of the creditor: and, lastly (see articles 197 *et seq.*), it entitles the creditor, after an order made by the court for payment, on payment not being made, to have the ship seized, and, on proper proceedings being taken, to an order for sale, to satisfy his demand.

It may, in passing, be observed, that, by the 199th article, where there is a "*privilege*" on a vessel, the order for payment, in order to found the subsequent decrees for the seizure and sale of the ship, may be made on the captain instead of on the owner; which accounts for this suit having been originally instituted against the captain. Practically, the result is, that this charge on the vessel is to all intents and purposes an hypothecation, the *droit d'hypothèque* consisting, according to the French jurists, in the right of a creditor in a thing otherwise the property of his debtor, [415] whereby he is entitled to follow it into whosoever hand it may pass, and to have it seized and sold to satisfy his claim. (See *Repertoire de Jurisprudence*, *ad verb.* "*Hypothèque*.") It seems to me impossible to doubt that a proceeding to enforce such a right is a proceeding in rem.

This being established, the contention of the plaintiff, founded on the assumption of this judgment being in personam, necessarily fails; and I proceed to consider whether the circumstances under which this judgment in rem was pronounced were such that a court of law ought to refuse to give effect to it.

It is not disputed that a judgment in rem obtained without fraud, and pronounced by a competent court, is generally binding upon all the world: but it is contended, that, in this case, an exception should be made to the rule, on the ground that, it being clear that the incidents of the contract entered into by the master on behalf of his owners were to be governed by the *lex loci* of the contract (in this instance the law of England), the French court knowingly and intentionally set that law at naught,

thereby violating the comity of nations, by virtue of which alone the judgments of the tribunals of one country are respected by those of another.

It is unnecessary to pronounce any decision upon the principle of law involved in this argument. It is right to say, that, if it were, some members of the court are strongly disposed to think, that, even if the fact on which the argument turns were made out, it would not afford a reason for questioning the validity of a judgment in rem. Others, on the other hand, —if it could be shewn, that in a case in which the effect of a contract was to be determined by the *lex loci contractus*, a foreign court perversely insisted on applying its own law, being in conflict with the former, thereby out-[416]raging the principle of international comity in a manner amounting in fact to a species of judicial misconduct,—are by no means prepared to say that in such a case it would not be the duty of a court in this country to refuse to recognize the binding efficacy of such a judgment; not, indeed, by way of reprisal towards the foreign tribunal, but to protect our own fellow-subjects from injustice. It is, however, unnecessary to lay down any such principle in the present instance, as we are all agreed that the plaintiff's case falls altogether short of establishing the fact on which this branch of the argument depends.

It is alleged that the French courts have shewn a contemptuous disregard of the law of England,—the only law properly applicable to the case,—first, in holding, that, upon the mere contract of the master for necessities, a charge upon the vessel follows by operation of law,—secondly, in holding that no transfer of a vessel could take place while the ship was on her voyage, to the prejudice of creditors, or without such transfer appearing on the ship's papers,—propositions which, though in accordance with the French law, are wholly incorrect with reference to the law of this country.

With regard to the first of these objections, it is to be observed that the point was never raised at all before the Civil Tribunal of Havre, under the decree of which court the sale of the vessel took place. The plaintiff, Castrique, so far as we can gather from the account of the proceedings contained in the special case, confined himself to the production of his bill of sale, conceiving that that alone was sufficient to establish his right to the ship. The distinction between the French law and our own as to the hypothecation of a ship by the act of the master, does not appear to have been at all adverted to. It cannot, therefore, be [417] said that the court in this particular intentionally disregarded the law of this country.

Upon the other point, there was, no doubt, an express decision, and one inconsistent with the English law. But it does not at all appear that the court set aside the law of England as inapplicable: it simply misconceived it. The law of England, put forward by French advocates, was probably expounded in a very imperfect manner, and without the production of authority to support a position which to French judges would probably seem altogether untenable. The court, therefore, too hastily concluded that the law of England must be what, according to their view, the law of every mercantile community ought to be. But, in deciding that the transfer of property in the ship could not be made during the absence of the ship on a voyage, so as to affect the right of third parties, and that the transfer was invalid because it was not indorsed on the certificate of registry, the court professing to be acting on the law of England, not to be setting up the law of France as overriding it. All that can be said, therefore is, that they have misconceived the English law, and that the judgment was erroneous. But the result of the authorities on this subject clearly establishes that a judgment in rem of a foreign tribunal, turning on a question of English law, cannot, though erroneous, be questioned by a court in this country, any more than if, turning on the law of the country to which the tribunal belonged, it had been erroneous with reference to the latter.

It is true, that, upon the appeal to the superior court at Rouen, the principles of the English law with reference to these two questions were brought to the attention of the court; and that the court nevertheless confirmed the decision of the court of Havre. We are, unfortunately, left in total ignorance as to what [418] arguments were used, or what topics were discussed, before the court at Rouen: as also as to the extent of its jurisdiction and powers. It may be that the court did not consider itself authorized to receive evidence or to act upon materials which had not been adduced before the court below. Or it may have been, that, on the law of England being more fully gone into, a difficulty was started as to the right of Castrique to

intervene in the suit, arising from the fact of his having omitted to complete his title by registering his bill of sale,—a circumstance not brought to the attention of the Attorney-General when his opinion was taken for the guidance of the French court; but one which was not unlikely to be brought forward by the opposite party on the hearing, and which I think that we at all events ought not to overlook in considering how far a French court was bound to admit Castrique to intervene to recover back the ship.

Now, by the express enactment of the 8 & 9 Vict. c. 89, the act in force at the time the bill of sale to Castrique was executed, such an instrument is rendered to all intents and purposes inoperative in the absence of registration. And, though it is said, that, in the interval between the execution of the bill of sale and the hearing before the French court, viz. on the 1st of May, 1855, the statute of the 17 & 18 Vict. c. 104, had come into operation, and that, under that statute, registration of the mortgage was no longer indispensable to its validity, it is, on the other hand, to be observed, that, not only may this construction of the later statute be open to discussion, but, furthermore, it may well be contended that the operation of the later act would not be retrospective on a mortgage executed while the prior act was in force; and, indeed, the legal advisers of Castrique appear,—as may be gathered from the questions put to the [419] Attorney-General,—to have considered the validity of the bill of sale as depending on the provisions of the earlier act.

In the face of these difficulties, it seems impossible to say that the court of appeal acted with a perverse regard to the English law. It appears to me open to very serious doubt,—although on grounds altogether different from those taken by the court at Havre,—whether Castrique in the then state of his title had any legal right to intervene to contest the decree directing the sale of the ship in satisfaction of the claim of Troteux & Co. And, if this should have been the view taken by the court of appeal, they might well be of opinion that the appeal fell to the ground, and that it became therefore unnecessary to determine the question raised as to the liability of the ship on account of the contract of the master for necessaries. Or, it may have been, that, this question not having been mooted before the Civil Tribunal of Havre, the court either was or considered itself unauthorized to entertain it.

It appears to me, therefore, that no sufficient case has been made out of intended disregard of English law, to warrant us in withholding from a judgment in rem the universally binding authority which has always been allowed to such judgments by the courts of this country,—an authority the importance of upholding which I fully recognize, seeing what confusion and inconvenience would ensue if property in a chattel established in one country should be held invalid in another, and thus be subject to variation as the chattel happened to be found in one country or the other.

The argument that this judgment should not be respected because contrary to natural justice, as adjudging the property of the plaintiff to be liable to satisfy the debt of Claus, is scarcely deserving of notice. It is obviously unreasonable to say that a maritime lien [420] which is recognized by the law of many European maritime states, and which is so closely analogous in character to that which arises under our own law on a bottomry-bond, can be contrary to natural justice.

The only remaining ground of exception taken on the argument,—that the decree for the sale of the vessel was made without Castrique, the party interested, having had notice to appear,—is equally untenable. In the first place, there was nothing on the ship's papers, or the ship's registry, to shew that Castrique had any interest in the ship. In the second place, by means of the replevin suit, which by the law of France he was enabled to institute, he was placed in exactly the same position as if he had been made a party to the original suit. He failed only because he was unable to satisfy the court of his right to intervene to prevent the sale of the vessel.

For these reasons, I am of opinion that the judgment of the court of Common Pleas must be reversed, and judgment entered for the plaintiff in error, the defendant in the court below.

I have to add that my Brothers Wightman, Channell, Hill, and Blackburn concur in this judgment, and in the reasons on which it is founded.

MARTIN, B. This is an appeal from the judgment of the court of Common Pleas upon a special case. The action was trover for a vessel called the "Ann Martin," a British ship, of which a person called Claus, a British subject, was in the years 1853 and 1854 the registered owner. In December, 1853, the vessel was sent by Claus on

a voyage to Australia under the command of one William Benson; and he on the 8th of June, 1854, drew a bill of exchange upon Claus for 6011 16s. 6d., payable to Messrs. Lewis or order, for the disbursements of the ship. The bill was dishonoured by Claus, and [421] neither accepted or paid. On the 30th of November, 1854, Claus duly made and executed a bill of sale of the ship by way of mortgage to one Harrison, to secure payment of a bill for 4000l., discounted by Harrison for Claus. This bill of sale was registered on the 2nd of December, 1854. On the 2nd of February, 1855, Harrison transferred his interest in the ship to one Emley, which transfer was registered on the 3rd of February, 1855: and on the 9th of April, 1855, Emley transferred his interest to the plaintiff. This transfer was registered on the 13th of April, 1857, and not before. On the 11th of May, 1855, Claus became bankrupt. The bill for 4000l. was dishonoured at maturity.

On the 4th of May, 1855, the ship arrived at Havre; and thereupon a person called Behrends, who was then the holder of the dishonoured bill (drawn by Benson), indorsed it to Messrs. Troteux & Co., French subjects resident in France. Whilst the ship was at Havre, Messrs. Troteux & Co. commenced a suit against the said Benson on the bill in the court of the Tribunal de Commerce at Havre, and against the ship. Benson appeared in the suit, but allowed judgment to go by consent; and, on the 15th of May, 1855, the following judgment was recorded in the court:—"At the suit of Troteux, on a bill for 6011. 16s. 6d. drawn by Captain Benson, of the 'Ann Martin,' at Melbourne, the 8th day of June, 1854, at eight days sight, on George Claus, Liverpool, and indorsed to the plaintiff on the 7th day of May, 1855. Whereas the claim of Troteux is founded upon a regular document emanating from Benson himself, and undisputed by him: And whereas the bill in question was drawn by Benson, in his capacity of captain of the ship 'Ann Martin,' in payment for necessaries supplied to that vessel, and that there is occasion to grant his prayer to be perfected from personal arrest: The tribunal condemns Benson in his capacity of cap-[422]-tain of the vessel 'Ann Martin,' and by privilege on that vessel, to pay to the plaintiff the sum of 6011. 16s. 6d., being in French money 15135fr. 75c., the amount of the bill drawn at Melbourne on the 8th of June last by William Benson, payable at Liverpool eight days after sight. Signified and registered at the office (registry) of Havre. Condemns him, moreover, to pay the interest as of right, with costs."

"The ship was seized in the port of Havre in pursuance of the said judgment, and detained in the custody of the said Court of Commerce. The special case proceeds to state that neither Claus nor Harrison nor Emley or the plaintiff were ever served with any summons or process to appear or defend the suit, nor had they any opportunity of appearing or objecting to the judgment, nor was it necessary by the law of France that they should be served with such summons, or have such an opportunity afforded them. The case then states, that, according to the law of France, a sale of the said ship could only take place after the judgment of the Court of Commerce was confirmed and the sale of the ship ordered by a judgment of the Civil Tribunal of the district in which the Court of Commerce was situated: and the sale would have to take place at the said Civil Tribunal, and in the presence of one of the judges of the court delegated to receive the biddings and pronounce the adjudication; and the persons appearing to be the owners of the ship by the ship's papers were entitled to be summoned and heard before the said Civil Tribunal.

Troteux & Co. accordingly caused Claus, who appeared by the ship's papers and the certificate of registry to be the sole owner, and William Bird, his official assignee, to be personally summoned before the Civil Tribunal of Havre; and two months' time was given for their appearance. They did not appear; and, on [423] the 16th of August, 1855, a judgment by default was given and recorded in the said Civil Court, by which the seizure of the ship was confirmed, and it was ordered that the ship should be sold by public auction to the highest bidder, at the sittings for sales of the said Civil Tribunal, in the presence of one of the judges duly delegated by the said judgment to receive the biddings at such sale of the said ship, and to pronounce the adjudication in respect thereof. Notice of this judgment was served upon Bird, and he had another opportunity of appearing and opposing the sale of the ship.

Neither Troteux & Co. nor the Civil Tribunal had at this time any notice that either Harrison or Emley or the plaintiff had any interest in the ship; nor were they served with any summons or process to appear or oppose the proceedings before the Civil Tribunal; nor had they any opportunity of appearing or objecting to the said

proceedings, or of defending the title or property in the ship, except by bringing such a suit as is hereafter mentioned to have been brought by the plaintiff.

On the 22nd of September, 1855, the plaintiff duly and according to the law of France prosecuted in the Civil Tribunal of Havre a suit in the nature of a suit to replevy the said ship, and to release her from such custody and detention as aforesaid. Upon the hearing of this suit, the facts and documents before stated were proved, and evidence given respecting the law of England: and, on the 19th of April, 1856, judgment was given against the present plaintiff. The judgment is very long, and is stated in the special case,—ante, p. 10.

The plaintiff duly appealed from this judgment to the Court of Appeal at Rouen: upon the hearing of which appeal, in addition to the evidence given before [424] the Civil Tribunal of Havre, an opinion of the then English Attorney-General upon a case laid before him was given in evidence. It is needless to state it here: it seems to us to be a correct statement of the English law. Vide ante, p. 17.

On the 3rd of March, 1857, the Court of Appeal at Rouen gave judgment in the appeal as follows,—“Adopting the reasons contained in the judgment of the Civil Tribunal at Havre on the 19th April, 1856, we confirm the same, and condemn the appellant to the fine and costs.”

On the 29th of May, the ship, under and in pursuance of an order of the Civil Tribunal at Havre, was sold by public auction at Havre. The defendants were the highest bidders at the sale, and became and were adjudicated to be the purchasers. They had no notice or knowledge of the plaintiff's title, were bonâ fide purchasers for value, and paid the purchase-money into court. The plaintiff was present at the sale, and bid for the ship through an agent, and gave no notice that he objected to the sale.

The defendants, being British subjects, brought the ship to Liverpool, and caused her to be re-registered in their names on the 15th of July, 1857.

On the 20th of August, the plaintiff demanded possession of the ship from the defendants, and upon their refusal brought this action. He has also since that time commenced an action in the French courts to recover the purchase-money paid into the court at Havre, which is still pending.

The court was to be at liberty to draw any inference that might be drawn by a jury: and the question is, whether the plaintiff is entitled to recover from the defendants the ship.

The ground of the judgment in the court of Common Pleas was, that the proceedings of the French courts [425] were in personam, and not in rem: but the court state, that, if the French courts, upon proceedings of the latter character, determined that the ship was charged with a privilege or lien for the advances, and liable to be sold to defray them, then, unless it appeared upon the face of such proceedings that the judgment was void, it could not be questioned, even by persons who like the plaintiff were not before the court. In this I concur (a).

The leading authority is *Hughes v. Cornelius*, 2 Show. 232, where it was decided that the sentence in a foreign court of Admiralty, decreeing a ship to be lawful prize, is conclusive, and therefore, though erroneous, the owner could not recover the value of the ship in trover against the vendee. And the court put the case of a judgment in rem of the court of Exchequer as analogous and equally conclusive. This shews that it is not necessary that the court should be one professing to decide according to the law of nations; but that it is sufficient if the court has jurisdiction according to the municipal law of the country to which it belongs. The rule seems well stated as to moveable property, in Story on the Conflict of Laws, ss. 592, 593, viz. that whatever the court having jurisdiction on the subject determines as to the right or title, or whatever disposition of the property it makes by sale or transfer or other act, will be held valid in every other country where the same question comes directly or indirectly before any other foreign tribunal, and the judgment acting in rem shall be held conclusive upon the title and transfer and disposition of the property itself, in whatever place the same may be found, and by whomsoever it may be questioned. A case, *Novelli v. Rossi*, 2 B. & [426] Ad. 757, was supposed to be to the contrary; but it is not. The judgment of the foreign court there was not in rem at all. It was

(a) The view taken by Cockburn, C. J., seems to be based upon the assumption that the plaintiff, Castrique, was before the court.

a judgment of a court in France, as to the operation of the cancellation of the acceptance of a bill upon the rights and liabilities of the parties to it, which the court of King's Bench held not to be conclusive in an action upon the bill in this country. The questions, therefore, in the present case are,—first, had the French courts jurisdiction? and, secondly, were their proceedings in rem? These are both questions of fact; and the materials for us to decide them, are, the statements in the special case, and these exclusively. I think it quite clear that the courts had jurisdiction. As already observed, the jurisdiction required, is, that it has been conferred upon the court by the municipal law of the country to which it belongs. And, upon the statements in the case, the clear inference is, that the French courts proceeded in the exercise of their lawful and accustomed jurisdiction. I also think the proceedings were in rem. This is also a question of fact. The original suit in the Tribunal de Commerce of Havre was not only against Benson on the bill, but “against the ship:” and the judgment is against him in his capacity of captain, and “par privilège sur ce navire.” The nature of the “privilege” is referred to in *Abbott on Shipping*, p. 121, 6th edit., and is a species of lien or hypothèque conferred by the civil law, and giving a privilege or right of payment upon the value of the ship, without any instrument of hypothecation or any express contract subjecting the ship to such claim. By virtue of this judgment, the ship was taken possession of by the court. But by the law of France a sale cannot be made until the original judgment has been confirmed and the sale ordered by the judgment of the Civil Tribunal of the district. This judgment was [427] also given; and accordingly the ship was sold to the defendants, and the purchase-money paid by them into the court,—every step and form required by the law of France and the judgment of the court being strictly complied with. I feel constrained to differ from the judgment of the court of Common Pleas upon the conclusion to be drawn from these facts. I think they shew that the original suit was one in rem, to enforce this “privilege” or lien against the ship, although it was also in personam against the captain on the bill, and that the French courts gave judgment affirming the lien, took possession of the ship, and sold her to the defendants, not in execution upon the judgment debt, but in enforcement of the original hypothecation or lien. Upon these facts, it appears to me that the proceedings in substance were in rem, and that, by the judgments of the French courts the ship was charged with the “privilege” or lien, and sold to satisfy it: and, upon the principles of law above mentioned I think the title of the defendants to the ship is good, and cannot be successfully questioned by the plaintiff. I do not think the case of *The Bold Buccleugh*, 7 Moore, P. C. 267, analogous.

It was urged on the part of the plaintiff that the proceedings were contrary to natural justice, inasmuch as neither the mortgagee nor the parties claiming under him were cited to appear or had an opportunity of being heard in the French courts. This is not so. The original owner and his assignee in bankruptcy were the only parties supposed to be interested in the ship who were known; and they were both personally summoned; and before the sale the plaintiff had the opportunity, and in fact did bring forward and submit his rights to the Civil Tribunal of Havre, and afterwards to the Court of Appeal at Rouen. It is true they decided against him wrongly, according to English [428] law, which all the French courts agreed ought to govern the case. But we do not sit as a court of error upon these judgments. No court except a superior court of appeal in France is competent to reverse them. They are, no doubt, erroneous judgments; but they are not void; nor is there any evidence that the French courts wished to decide the questions submitted to them otherwise than in accordance with English law. The judgments of the French courts are, like the judgment of the Admiralty court which was in question in *Hughes v. Cornelius*, 2 Show. 232, erroneous; but they are not therefore the less conclusive: and it is not a matter of surprise or just blame that the courts of France should commit an error in administering the law of a foreign country.

It was further urged that the sale of the ship, the property of a mortgagee, to pay the disbursements of the voyage, was of itself contrary to natural justice. I cannot concur in this. I cannot say that a rule of the civil law, which prevails in Scotland, and generally throughout Europe, and which in substance puts the necessary disbursements of the ship on a voyage upon the same footing as the law of England puts salvage, is of itself necessarily unjust, although the municipal law of England differs from it.

There was a question upon which the court of Common Pleas declined to give an opinion, viz. the effect of the sale itself. The case of *Cannell v. Sewell*, 5 Hurlst. & N. 728, 29 Law J., Exch. 350,—the judgment in which was not delivered when the judgment in this case was given,—may have a material bearing upon such a question, should one arise.

There was another point discussed at the Bar, to which I will shortly refer. The mortgage was transferred to the plaintiff on the 9th of April, 1855, but was not registered until the 13th of April, 1857. The [429] act for the registering of British vessels in force in April, 1855, was the 8 & 9 Vict. c. 89, the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), not coming into operation until the 1st of May, 1855. The suit in the French courts was commenced on the 22nd of September, 1855; and the point was, whether the plaintiff's title was governed by the 8 & 9 Vict. c. 89, or the Merchant Shipping Act, 1854. I think it was governed by the 8 & 9 Vict. c. 89. This act was repealed by the 17 & 18 Vict. c. 120; but it was provided by the 4th section that the repeal should not affect any security duly given or anything duly done before the act came into operation, which, as regards this matter, was the 1st of May, 1855. The security of the mortgage, and the transfer of it to the plaintiff, were both duly given and done before this date; and the Merchant Shipping Act, 1854, had therefore nothing to do with them. To give acts of parliament a retrospective operation, the enactment must be clear.

It was said that the case was one of great hardship upon the plaintiff, and that it ought to have been decided according to the English law. This is true. But, on the other hand, it may be said it would be a great hardship upon the defendants to deprive them of the ship. They honestly bought her at public auction held under the authority of the French courts, the plaintiff himself being present, making no objection, and bidding for her by his agent. Which is the greater hardship, it may be difficult to say. But it is our duty to decide between the parties upon the known, fixed, and established rules and principles of law, by a steady adherence to which the right of property and all other rights are most effectually secured and maintained.

I cannot but think that it would be very inconvenient, and of mischievous consequence, if the title to a [430] ship, acquired through the deliberate judgments and acts of the courts of France, could be questioned in the courts of any foreign country.

BRAMWELL, B. I think this judgment should be reversed. The question seems to me to be concluded by *Cannell v. Sewell*, 4 Hurlst. & N. 5. In the judgment of the majority of the court in that case, it is said,—p. 744,—citing the Lord Chief Baron,—“If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.” I therefore take that to be the law laid down by authority. I give my humble concurrence to it, thinking it to be correct and consistent with convenience and good sense. Then I have not a doubt that in this case the vessel was disposed of in a manner binding according to the law of France, where it was. Indeed, I do not understand this to be denied in the argument on behalf of the plaintiff. Then, I repeat, if so, the case is governed by *Cannell v. Sewell*. Inquiry whether what took place was a judgment in rem, is an inquiry as to what is the name by which the proceeding should be called, and in every sense immaterial, as appears by the commencement of the judgment in *Cannell v. Sewell*. I think, however, it was a judgment or proceeding in rem: that is to say, I think the proceeding was, if against the master, also against the ship; and the ship was specifically ordered to be sold, not as the master's ship, or the debtor's ship, but as being the ship on which there was a lien or privilege. It is expressly stated that the suit was against Benson and the ship. The judgment declares that the bill was drawn by him as captain of the ship, and for necessities supplied to that vessel, and that there is occasion to grant his prayer to be perfected from personal arrest; and he is condemned in his capacity of captain of that vessel, and by privilege on that vessel. It seems to me, therefore, that the suit was not of the same character as the one in question in the case of *The Bold Buccleugh*, and I think it a judgment in rem.

This leads me to the consideration of a remark in the judgment of the court below, which it is necessary to notice, as it seems to me to have caused what I must, with great respect, consider the error of the judgment there. It is said,—ante, p. 39,—“Such a sale (of A.'s vessel in execution of B.'s debt) in this country would be

wholly void as against A.: and we are not informed that the law of France differs in this respect from our own." This remark assumes that the sale in France was a sale of A.'s vessel in execution of B.'s debt. I have said I think it was not, and that I also think the question immaterial. But, if the assumption of the court below is right, viz. that the sale in France was a sale of A.'s vessel in execution of B.'s debt, how can it be said, "We are not informed that the law of France differs in this respect from our own?" The proceeding itself so informs us, because it is clear that the ship was specifically dealt with as liable to pay the debt sued for; and the proceeding is not like our *fieri facias*, which, being directed against the goods of B., would give no authority to sell those of A.

I take the case, therefore, either way: and, whether it is considered as a proceeding in rem or a proceeding whereby A.'s vessel is made to pay the debt of B., I find, that, in either view, "the property was disposed of in a manner binding according to the law of the country where it was;" and so the case is governed by *Cammell v. Sewell*.

As to whether the judgment of a foreign court could be disregarded if it appeared to proceed on a contemptuous disregard of our law, it is not necessary [432] to express any opinion, as this did not. On the contrary, the French courts profess an intention to act on the recognition of our law: and there is no ground for suggesting any mala fides in that profession, though, speaking with all respect, they have not shewn much discretion in carrying it into execution.

I wish to add, that it is not to be supposed that I differ from anything that has been said by the Lord Chief Justice or my Brother Martin: but I think that this case is governed by *Cammell v. Sewell*. I did think the rule there laid down a very wholesome rule; and I thought it right to say so.

COCKBURN, C. J. The result is, that the judgment of the court of Common Pleas is reversed.

Judgment reversed.

[433] CHRISTIAN SOPHIA SIMPSON, Administratrix of William Simpson, Deceased, v. ARTHUR HYDE DENDY. April 23rd, 1860.

[S. C. 6 Jur. N. S. 1197. Referred to, *Central London Railway v. City of London Land Tax Commissioners*, [1911] 2 Ch. 480.]

A conveyance by the lord of part of the demesne of the manor described the land as "All that piece or parcel of meadow ground commonly called or known by the name or description of Chamberlain's Field, containing by estimation 3a. 3r. 35p., be the same more or less, and abutting towards the west on Hall Lane." The deed also contained the following general words,—"Together with all ways, &c., and appurtenances to the said messuage, &c., lands, &c., belonging, or therewith used, possessed, occupied or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or as appurtenant or belonging thereto."—Upon a special case, in which it was provided that the court should be at liberty to draw inferences as a jury, it appeared that the grantee of Chamberlain's Field and those claiming under him had for sixty years used a small strip of land lying between the field and Hall Lane as a place of deposit for manure, that about the year 1841, the present owner cut and converted to his own use a tree which grew thereon, and that in 1843 he inclosed the strip. On the other hand there was evidence that the lord of the manor had both before and since the date of the conveyance exercised various acts of ownership, by making grants thereof, and giving to the owners of the adjoining lands licences to inclose, over other similar strips of land by the road side, in other parts of the manor, the nearest of which was about three quarters of a mile distant from the spot in question:—Held, that the conveyance of Chamberlain's Field was sufficient to pass to the grantee the slip of land beyond the fence, and the soil to the centre of Hall Lane adjoining:—Held also, that, assuming the language of the deed to be doubtful or ambiguous, the evidence of user by the grantee and those claiming under him was sufficient to outweigh the presumption in favor of the lord

arising from the acts of ownership by him on other parts of the waste of the manor similarly situated.

This was an action of trespass for breaking and entering the plaintiff's close, in the parish of Hendon, in the county of Middlesex, known as Chamberlain's Field, otherwise Fourteen Acre Field, and removing certain posts thereon. The defendant pleaded that the close was his close, soil, and freehold, and justified the removing the posts as incumbering the same; upon which issue was joined.

The case was originally tried before Jervis, C. J., at the sittings at Westminster after Michaelmas Term, 1855, when a special verdict was found.

The special verdict came on to be argued before the Exchequer Chamber in Trinity Vacation, 1856, when that court held, that, upon a question whether a piece of waste land lying between a highway and the plaintiff's inclosed land, belonged to the plaintiff or to the lord of the manor, grants by the lord of other slips of waste land on either side of the same road, abutting on inclosed lands of the lord himself and of other persons, [434] were admissible for the purpose of shewing that the locus in quo was part of the waste of the manor, without shewing continuity.

The Lord Chief Justice having upon that occasion registered the evidence, the court awarded a venire de novo: see *Dendy v. Simpson*, 18 C. B. 831.

The cause came on for trial at the sittings in Middlesex after Michaelmas Term, 1856, before Cockburn, C. J., and a special jury, when a verdict was found for the plaintiff, by consent for 40s., with all usual certificates, subject to the opinion of the court upon the following case:—

The plaintiff was tenant to General Dalmer under the lease hereinafter set forth, of a freehold farm called the Sunning Hill Farm, situate in the parish and manor of Hendon, in the county of Middlesex, lying on the right-hand side going from Church End to Page Street of a lane called Hall Lane, leading from Church End, in the said parish and manor, to Page Street, also in the same parish and manor.

The piece of land mentioned in the declaration is a triangular piece of land, which, until its inclosure by the plaintiff as hereinafter mentioned, lay open and uninclosed, along the side of Hall Lane, on the right-hand side of the gravelled carriage-way, and between the said carriage-way and the fence of Chamberlain's Field hereinafter mentioned, and was and is situate within the manor of Hendon.

In the 27th year of the reign of George II., the manor of Hendon, and the impropriate rectory of Hendon, and the advowson of the Vicarage of the parish church of Hendon, and divers messuages, farms, lands, tenements, and tithes situate and arising within the manor and parish of Hendon, including Sunning Hill Farm, and certain property hereinafter mentioned to have been conveyed to one Henry Flitcroft, and also cer-[435]-tain property hereinafter mentioned as Lot. No. 11, were by an act of parliament passed in that year (c. xix.), intituled "An act for vesting the manor of Hendon, settled on the marriage of the Earl and Countess of Powis on them and their issue, in trustees, to be sold towards discharging the debts and incumbrances of William late Marquis of Powis, and for settling the barony and lordship of Powis, in the county of Montgomery, in lieu thereof, to the same uses; and for other purposes," vested in Edward Herbert and Brooke Forrester, their heirs and assigns, on certain trusts for sale.

In October, 1756, Herbert and Forrester, in pursuance of the said act of parliament, caused the manor and the demesne lands thereof, and also the said tithes and advowson, to be put up to sale by auction under certain particulars of sale.

The first catalogue is a catalogue of "All the demesne lands of the Duke of Powis, deceased, situated in the parish and within the manor of Hendon, containing, according to a survey lately made by Mr. J. Crow, 1226a. 2r. 23p.," which it states, by order of the trustees of the Duke's will, and also by virtue of an act of parliament, will be sold by auction by Mr. Langford, at his house, in the Great Piazza, Covent Garden, on the 19th and 20th October, 1756, divided into 18 lots. The title-page states (inter alia) that "printed catalogues, with plans of each lot, may be had of Mr. Messeder, at North End, and at Mr. Langford's, in the Great Piazza aforesaid;" and it is announced in a foot-note, that "the lordship of the valuable and extensive manor of Hendon, with all its fines, quit-rents, privileges, and rights of advowson to the church of Hendon, and also all the great tithes of the said manor, will be sold at Mr. Langford's on the Thursday and Friday following."

[436] Lot 9 in the said catalogue is the Sunning Hill Farm, and was as follows :—

Numbers referring to plan.	Names of the lands.	Quality of the lands.	Quantity of the lands.			Yearly value.		
			a.	r.	p.	£	s.	d.
	John Cole and Daniel Kemp, tenants at will.							
	JOHN COLE.							
42	The farm at Church End, the house part brick and part lath and plaster, tiled, in good repair. A shed adjoining with two good barns, one of 4 boarded the other of 7 boarded, and tiled, and a yard . . .							
46	Nearer Sunning Hill	Meadow . . .	0	1	16			
47	Middle ditto	Meadow . . .	8	0	35			
48	Further ditto	Meadow . . .	6	3	32			
49	Chamberlain's Field	Meadow . . .	11	1	31			
50	Nearer or First Newark	Meadow . . .	3	3	35			
51	Second ditto	Meadow . . .	6	0	12			
52	Third ditto	{ Arable and Meadow . . .	3	0	17	94	7	7
53	Further ditto	Meadow . . .	5	3	25			
54	Little Downage Wood	Arable . . .	6	1	1			
		Arable . . .	5	1	2			
	DANIEL KEMP.							
8	Barn Field	Arable . . .	5	2	8			
9	The barn and yard in ditto	Meadow . . .	9	3	17			
10	The eight acres by Barn Field meadow	Meadow . . .	0	1	12			
		Meadow . . .	8	0	36			
		Acres . . .	80	3	11			
	Of this lot there are of meadow		60	2	23			
	" " arable		20	0	28			
			80	3	11			

To be put up at the sum of 2300l.
In the hedge-row of this lot are 170 trees of oak and 25 of elm timber, valued at 59l.

[437] Lot 10 was as follows :—

Numbers referring to plan.	Names of the lands.	Quality of the lands.	Quantity of the lands.			Yearly rents.		
			a.	r.	p.	£	s.	d.
	John Nicoll, of Page Street, tenant on lease for 7, 14, or 21 years from Michaelmas, 1743, to a parcel of land adjoining Hall Lane.							
76	The Corner Mead	Meadow . . .	3	1	6			
77	The Long Slip	do.	2	1	20			
78	St. Fain Field, formerly in three	do.	8	2	11			
79	Lady Field, formerly in two	do.	11	2	25			
80	Broad Mead	do.	16	2	4			
81	The Four Acres	do.	4	2	14			
82	Nearer Lay Field	do.	6	1	13			
83	Further Lay Field	do.	7	0	13			
			60	1	26			

To be put up at the sum of 1550l.
The timber in the hedge rows of this lot, consisting of 170 oaks and 38 elms, is
esteemed worth 60l.

Lott 11 was as follows :—

Numbers referring to plan.	Names of the lands.	Quality of the lands.	Quantity of the lands.			Yearly value.		
			a.	r.	p.	£	s.	d.
	Daniel Kemp, tenant at will to a parcel of land adjoining to Hall Lane.							
13	Little Breach	Meadow . .	3	3	32			
15	Great Breach	{ Meadow and	12	1	27			
16	Red Barn Field, in which is a barn, five bay boarded, and tiled, in very good repair	{ Arable . .	5	1	8			
17	The Eight Acres by Red Barn Field .	Meadow . .	10	3	37	63	7	3
18	The Quaker's Ten Acres	Meadow . .	8	1	23			
		{ Meadow and	7	3	4			
		{ Arable . .	2	3	0			
21	Deer Acre	{ Meadow and	8	2	34			
		{ Arable . .	1	2	0			
		Acres . .	61	3	5			
	Meadow in this lot		52	0	37			
	Arable		9	2	0			
		Together . .	61	3	5			

To be put up at the sum of 1700l.

There are 65 trees of oak timber in this lot, valued at 19l.

[438] The second catalogue is a catalogue of the great tithes of the manor and parish of Hendon, to be sold on the 21st and 22nd of October, 1756.

The third catalogue is, "particulars of the lordship and manor of Hendon, in the county of Middlesex, with all the fines, quit-rents, royalties, privileges, and right of advowson to the church of Hendon, which by order of Edward Herbert and Brooke Forrester, trustees under the will of the Duke of Powis, deceased, and also by virtue of an act of parliament, will be sold by auction by Mr. Langford, on Friday, the 22nd of October, 1756, beginning immediately after the sale of the last lot of the great tithes." The particulars state that "to the manor of Hendon belong courts leet and courts-baron. It has also annexed to it as many royalties, privileges, rights, &c., and enjoys the same in as full and ample a manner as any manor in England;" also, that "the aforesaid manor, as by a survey lately made by Mr. J. Crow, consists of 8204a. 3r. 20p.

At the sale of the 19th of October, Henry Fliteroft became the purchaser of the premises hereinafter mentioned to have been conveyed to him comprised in Lot 10 of the particulars: and accordingly, by indentures of lease and re-lease, bearing date the 20th and 21st of April, 1757,—the release being made between Herbert and Forrester of the first part, Arthur Earl of Powis of the second part, Henry Fliteroft of the third part, and James Clutterbuck of the fourth part,—the said Herbert and Forrester, in pursuance of the said act of parliament, conveyed to Fliteroft in fee certain lands within the manor of Hendon, comprising, amongst others, two closes called respectively the Three Cornered Mead, and the Long Slip, and numbered respectively 76 and 77, by the description of "All that piece or parcel of meadow ground commonly called or known by the name or description of the [439] Three Corner Mead, containing by estimation 3a. 1r. 6p., be the same more or less, abutting, &c., towards the east on a piece or parcel of ground lately sold and conveyed or intended to be conveyed to William Dalmer, and now in the occupation of John Cole, towards the West on Hall Lane, towards the north on a piece or parcel of ground called Lower Strattons, belonging to and in the occupation of John Nicholl, and towards the south on Hall Lane aforesaid; also all that piece or parcel of meadow ground commonly called or known by the name or description of the Long Slip, containing by estimation 2a. 1r. 20p., be

the same more or less, abutting towards the east on three pieces or parcels of ground called Upper Slattons, Middle Slattons, and Lower Slattons, belonging to and in the occupation of the said John Nicholl, and towards the west on Hall Lane aforesaid.

The property comprised in the said conveyance to Flitcroft, by virtue of divers *mesne* conveyances, became and was vested in Amos James Fletcher, who was the owner thereof at the time of the cutting down of the tree herein mentioned, and still is such owner.

At the said date William Dalmer became the purchaser of Sunning Hill Farm; and the following contract was thereupon entered into between him and Herbert and Forrester.

“19th day of October, 1756.

“Whereas a farm at Church End, in the parish of Hendon and county of Middlesex, consisting of a messuage, and shed adjoining, with three barns and a yard, and twelve closes or parcels of land, containing together 80a. 3r. 11p., and now in the occupation of John Cole and Daniel Kemp, part of the demesnes of William late Duke and Marquis of Powis, deceased, situate in the parish and within the manor of Hendon aforesaid, and all trees and underwood growing on the said pre-[440]-mises, being Lot 9 in the printed catalogue of the said demesne lands, were this day by order of Herbert and Forrester, the trustees of the estates of the said William Duke and Marquis of Powis, put up to public sale or auction pursuant to notice for that purpose given in the *London Gazette* and other public papers; at which sale or auction William Dalmer was declared to be the best bidder or purchaser of the said premises at the sum of 2730l.: And whereas the said William Dalmer hath, in pursuance of the conditions of the said sale, deposited the sum of 273l. into the hands of Mr. Langford in part payment of the sum of 2730l. so agreed to be given by him the said William Dalmer as aforesaid for the absolute purchase of the said premises: Now, these presents witness, and it is hereby agreed by the said William Dalmer to and with the said Herbert and Forrester, in manner following, that is to say, that on the said Herbert and Forrester making a good title to the said premises, and conveying and assuring to the said William Dalmer, his heirs or assigns, at the expence of the said William Dalmer, his heirs or assigns, all those the said messuage, land, and premises mentioned or comprised in the said Lot 9, with their appurtenances, and all their and each of their estate, right, title, and interest therein and thereto, on or before the 25th of March next ensuing, free from all incumbrances committed by them or either of them, He the said William Dalmer shall and will pay unto them the said Herbert and Forrester, or as they shall direct, on or before the 25th of March next ensuing the date hereof, the sum of 2457l., being the residue of the said sum of 2730l. agreed to be given by the said William Dalmer for the purchase of the said premises at such sale as aforesaid; And that, upon non-payment of the said sum of 2457l. at the time hereinbefore limited for payment thereof, the said sum of 273l. so deposited as [441] aforesaid shall be forfeited to the said Herbert and Forrester, their heirs and assigns, and they are to be at liberty to resell the same premises to any other person or persons whatsoever, agreeable to the conditions of the said sale: And the said Herbert and Forrester do hereby promise and agree to make and execute to the said William Dalmer, or to whom he shall direct, and at his the said William Dalmer's expence, proper conveyances of the said messuage, lands, and premises comprised in the said Lot 9, free from all incumbrances as aforesaid, upon his the said William Dalmer paying to the said Herbert and Forrester the sum of 2457l., being the remainder of the said sum of 2730l. agreed to be given for the purchase of the said premises as aforesaid, “on or before the said 25th day of March next; and that the said W. Dalmer shall be allowed an interest of 3l. per cent. upon the said sum of 273l. by him deposited as aforesaid, from Christmas Day next until the time of completing the said conveyance: And also that the said William Dalmer, his heirs or assigns, shall be entitled to the rents and profits of the said premises by him purchased as aforesaid from the said 25th of March next, to which time all taxes, parish rates, and other incumbrances shall be cleared to the said William Dalmer.”

By indentures of lease and release bearing date the 20th and 21st of April, 1757, the release being made between Herbert and Forrester of the first part, the Earl of Powis of the second part, the said William Dalmer of the third part, and James Clutterbuck of the fourth part, —the said Herbert and Forrester conveyed to the said

William Dalmer in fee, the said Sunning Hill Farm, by the description of (amongst others) "All that piece or parcel of meadow ground commonly called or known by the name or description of Chamberlain's Field, containing by estimation [442] 3a. 3r. 35p., be the same more or less, abutting towards the north on a piece or parcel of meadow and arable ground hereinbefore mentioned called Second Newarks, towards the east on the before-mentioned piece of meadow ground called Nearer or First Newarks, towards the south on the before-mentioned piece of meadow ground called Further Sunning Hill, and towards the west on Hall Lane." "All which said messuages or tenements, and farm, lands, tenements, meadows, pasture ground, tithes, hereditaments, and premises hereinbefore particularly mentioned and described, and thereby granted and released or mentioned so to be, with the appurtenances, are situate, lying, and being, arising, happening, renewing, or increasing, in or within the manor, lordship, parish, town, hamlet, precincts, or territories of Hendon aforesaid, and now are or late were in the tenure or occupation of John Cole and Daniel Kemp, their undertenants or assigns, and were late the estate and inheritance of William Lord Marquis of Powis, the father, and William Lord Marquis of Powis the son, or one of them, and were held and enjoyed by them in unity of possession with the manor or lordship and rectory of Hendon, and accepted, reputed, or taken as part, parcel, or member thereof: Together with all ways, waters, watercourses, watering places, trees, woods, underwoods, commons, common of pasture, easements, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said messuage or tenement, farm house, lands, tithes, hereditaments, and premises hereby granted and released, or intended so to be, or any of them, or any part or parcel thereof, belonging or in anywise appertaining, or therewith used, possessed, occupied, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or as appurtenant or belonging thereunto, and in as full, ample, and large a manner as the said John Cole and Daniel Kemp, or any other of the late tenants or occupiers of the said premises, or any part thereof, lately held, occupied or enjoyed the same."

The property so conveyed to William Dalmer became by virtue of divers mesne conveyances vested in General and Colonel Dalmer, the landlords of the plaintiff.

The following leases of the said Sunning Hill Farm have from time to time been granted by the persons who were from time to time the owners thereof, to different persons, viz., a lease of the 29th July, 1799, by Joseph Dalmer to Michael Coombes and Thomas Partridge, for twenty-one years,—a lease of the 14th of November, 1820, from General and Colonel Dalmer to Edward Nicoll, for twenty-one years,—a lease of the 22nd April, 1834, from General and Colonel Dalmer to Edward Nicoll, for seven years,—and a lease of the 5th of July, 1843, from General and Colonel Dalmer to the plaintiff, for twenty-one years from the 29th of September, 1842.

In the aforesaid leases of the 29th July, 1799, and 14th of November, 1820, the farm is described as consisting, amongst others, of "All that piece or parcel of meadow or pasture ground called or known by the name of Chamberlain's Field, containing by estimation 3a. 3r. 35p., be the same more or less."

In the lease of the 22nd of April, 1834, the farm is described as consisting amongst others, of "Chamberlain's Field, 3a. 3r. 35p., be the same more or less."

In the lease of the 5th of July, 1843, the farm is similarly described.

Upon the said sale the said James Clutterbuck became the purchaser of the manor of Hendon, and premises comprised in the conveyance next hereinafter mentioned: and by indentures of lease and release, bearing date the 20th and 21st of April, 1757, —the [444] release being made between Herbert and Forrester of the first part, Henry Arthur Earl of Powis of the second part and James Clutterbuck of the third part, the said Herbert and Forrester, in pursuance of the said act of parliament, conveyed to Clutterbuck, in fee, "All that the manor or lordship, or reputed manor or lordship, of Hendon, in the county of Middlesex, with all and singular the rights, members, and appurtenances thereof and thereunto belonging, together with all courts-leet and courts-baron, views of frankpledge, fines, fees, amerciaments, perquisites, and profits of courts-leet and courts-baron: and also all and all manner of chief-rents, quit-rents, rates, and other rents, reversions, duties, and services, as well of free as of copyhold tenants, heriots, escheats, reliefs, waifs, estrays, goods and chattels of felons and fugitives and condemned persons, outlaws, felons of themselves, forfeitures, deodands, treasure-found, fines of concord, and all other fines, and the assize and assay of bread, wine; and all

commons, wastes, waste-grounds, trees, woods, underwoods, heath, furze, free-warren, moors, marshes, ways, watercourses, fishings, fishing-places, fairs and markets, tolls, and all other rights, royalties, jurisdictions, franchises, liberties, privileges, commodities, emoluments, and hereditaments whatsoever, of whatsoever kind, species, or nature they be, or by what names soever they are or may be known or called, to the said manor or lordship, or reputed manor or lordship, of Hendon aforesaid belonging, incident, or in any wise appertaining, or therewith or with any part or parcel thereof now or at any time heretofore held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof, by virtue of any charter, gift, grant, confirmation, conveyances, usage, or custom whatsoever, or otherwise howsoever; And also [445] all that the advowson, donation, gift, free disposition, right of patronage and presentation of, in, and to the vicarage of the parish church of Hendon aforesaid, in the said county of Middlesex, with the rights, members, jurisdictions, and appurtenances thereof, as therein mentioned."

The before-mentioned lease and release of the 20th and 21st of April, 1757, from Herbert and Forrester to William Dalmer were registered in Middlesex on the 27th of April, 1757,—Book 2, No. 128; and the before mentioned lease and release of the manor from Herbert and Forrester to Clutterbuck was registered in Middlesex on the 28th of April, 1757,—Book 2, No. 158. The memorials contained no plans, nor was it usual at that period to put plans on the memorials.

By deed-poll bearing date the 21st of April, 1757, Clutterbuck declared himself to be a trustee of the manor and premises comprised in the last-mentioned conveyance for David Garrick; and by divers mesne conveyances the last-mentioned manor and premises became vested in John Bond; and by virtue of the will of John Bond and of an act of parliament passed in the 1 G. 4. (c. 37), intitled "An act for vesting the manor of Hendon and other estates devised by the will of John Bond, Esq., deceased, in other trustees, to be sold; and for enfranchising copyhold estates holden of the said manor: and for applying the produce upon the trusts declared by the said will," the said manor and premises were conveyed by William Lowndes, Richard Lowndes, William Morse, and Richard George Baker, to Samuel Dendy, in fee.

The said Samuel Dendy, by his will, bearing date the 28th of March, 1846, duly executed, &c., devised the said manor of Hendon, and other property comprised in the said conveyance to Clutterbuck, to the defendant in fee, and died on or about the 15th of [446] April, 1846, without having revoked or altered his said will.

The defendant and those through whom he claims have from time to time held courts and otherwise acted as lords of the said manor, and are to be taken to be the lords of the said manor.

The defendant gave in evidence the following court-roll of the said manor:—

Hendon, to wit.

Visus Francëpleg. cum cur. Wilmi Dñi Crauen, Joh'is Crauen, Armiger, et Wilmi Gibson, ciuis et mercator scissor. London, dño man'ij p'dict' tent. apud Hendon p'dict', die Martis pxi'm ante fest' Pentecost., videlt. octavo die Junij, anno regni Dñi nri Caroli, Dei grac. Anglie, Scocie, Francie, & Hib'nie, Regis, fidei defensor, &c., decimo septimo, coram Rob'to Blackwell, gen'oso, Sen' ibm.

"Homage.

* * *

"Cum ad cur tent. p man'io p'dict' die Lune, decimo die Maij, anno regni Dñi nri Caroli, Dei grac. Anglie, Scocie, Francie, et Hib'nie, Regis, fidei defensor, &c., decimo septimo, comptum fuit p'd homagium, tunc et ibm qd vicesimo quinto die Maij, anno Dñi 1640, anno Dñi Regis nunc Anglie, Scocie, Francie, et Hib'nie, decimo sexto, Ricus Nicoll, de Milspit, tunc vn customar tenen man'ij p'dict., extra cur. p virgam sursumredd in manus Dñi man'ij p'dict' p manus Jacobi Marше et Daniel Marше, de Millers Land, dnor' customar. tenen. ejusdem man'ij, secundum consuet. ejusdem man'ij tot itt mesuagium sive tenem' sui in Hendon p'dict' vocat, Copt Hall, una cum increment' quod nup. habuit exta vast duora adversus tenen' p'dict' ac omn' horria, stabula, pomaria atrea, simul cum vn peell prati eidem messuag sive tenem' adjuugen et specta'n, vocat Borge, que nup huit ex sursumreddicōne Joh'is Story; Ac etiam itt dua clausa ter et bosci, vocat Borden's, que [447] nup huit ex sursumreddicōne Thome Nicoll, de Ridgway, nexnon omnia illa dua clausa ter et bosci, vocat Birts, que nup huit ex sursumreddicōne Ric'i Marше, de Finchley; Ac etiam omnia illa tria clausa ter

et bosci, vocat Slattons, existeñ ptem. et pcellam de Slatton's tenemen', et adjungen p'dict dñ clauß vocat Birts, quiquidem tres clauß p'dict Riçus Nicoll nup hñit ex sursumreddicōne Joh'is Braynt, cum omñ et singul' suis p'tiis quæ omñ p'missa jaceñ et existeñ sunt ppe Page Streate, infra man'm p'dict, et continent insimul p'estimacōnem trigint' et oct' aer ter' et bosci, plus vel minus, ad opus et usum Ranulphi Nicoll, de Page Streate, fil' p'dict Riçi, et hered' et assignat' dict' Ranulphi in ppetuu, secundum consuet' man'ij p'dict: pviso semp' qd si p'dict Riçus Nicoll revocabit hanc sursumreddicōnem, q'd tunc hec sursumreddicō vacua erit et nullius effect, aut aliter in omñ suo robore et effectu staret. Et p'sentat' esse in cur secundum consuet' man'ij p'dict. Et ulterius p'sentat' est p homağ ad hanc cur. q' p'dict Riçus Nicoll mori est, et non revocavit hanc sursumreddicōnem: Et ad eandem cur' p'dict Ranulphus Nicoll pei se ad omnia et singula p'missa p'dict sic p' sursumreddit. cum ptiñ tenent' admitti, sed pro certis causis admissio ejus tunc respitabatur usq' ad pxiñ cur. Et modo venit p'dict Ranulph Nicoll, et pei se ad omnia et singula p'missa p'dicta sic p' sursumreddic, cum omnibus et singulis suis p'tinencijs, tenent' admitti, cui Dñi p sen^{iam} suū concesser' inde sesinam p virgam, Habend et tenend p'fato Ranulpho Nicoll, hered et assign' suis, in ppet de dñis, ad voluntat dñom secund consuet' man'ij p'dict (salvo iure cuiuslibet) reddent et faciend inde dñis annuat' ad dies et terminos infra man'ii istud annat' separat' reddit, consuetud, et serviç inde prius debiti et de jure consuet. Et p'dict Ranulphus Nicoll concordavit cum Dñis p fine p tale statu; et in-[448]-gressu suū sic in p'missis hend put pat' in margine: et admissus est inde tenens; fecitq' Dñis fidelitat'."

The reception of this evidence was objected to by the plaintiff on the ground that the court-rolls of the manor were not admissible in evidence against any one but a copyhold tenant of the manor: and also that evidence was inadmissible of acts of ownership exercised by the lord over pieces of waste not contiguous to or connected with the locus in quo. This and the other pieces of evidence objected to by the plaintiff were received by the Lord Chief Justice, subject to the said objections, and were to be taken into consideration by the court or not as the court might think that the objections to the said evidence were valid objections or otherwise.

The defendant also proved, subject to the same objections, an admission of Thomas Nicoll to the same premises on the 15th of May, 1804, which admission is as follows:—

"Manor of Hendon, in the County of Middlesex, 15th May, 1804.

"The court-leet with view of frankpledge and general court-baron of John Hinley, and John Biggerstaff, the younger, gentlemen, lords of the said manor, held in and for the same manor, on Tuesday next before the Feast of Pentecost, that is to say, the 15th day of May, 1804, before Richard Lowndes, Esq., steward of the said manor:

"Whereas, at a court-leet or view of frankpledge, with the general court-baron, held in and for this manor, the 14th day of May, 1782, Susannah Nicoll, spinster, was admitted tenant to All that piece or parcel of ground waste of the manor aforesaid lying near the mansion-house of the said Susannah Nicoll, commonly called by the name of the Green Lane, containing by estimation 90 perches in length, and 20 [449] feet in breadth (more or less), as the same parcel of ground is or was inclosed with a ditch from the waste, with all and singular the appurtenances: And whereas, at a court-leet or view of frankpledge, with the general court-baron, held in and for this manor the 24th day of May, 1803, the jury found and presented the death of the said Susannah Nicoll; but who was her heir they knew not, therefore the first proclamation was made for the heirs or devisees of the said Susannah Nicoll to come into court and be admitted; but no person came, therefore the first proclamation and default were recorded [and so of a second and third proclamation and default]: Now, at this court, and sitting the court, comes Thomas Nicoll, of Page Street, within this manor, Esq., in his own proper person, and brings into court here the last will and testament of the said Susannah Nicoll, deceased, bearing date the 2nd of February, 1793, whereby it appears she gave and devised in the words following, that is to say, —'I give and devise all such and so many and such part and parts of the premises hereinbefore devised to the said John Nicoll and Joseph Finch, and their heirs, as are or be of customary or copyhold tenure, unto my said cousin Thomas Nicoll, his

heirs and assigns,' as by the said will may more fully appear: Whereupon the said Thomas Nicoll humbly prays the lords of this manor to admit him tenant to the said copyhold or customary premises above mentioned: To whom the lords of this manor, by the hands of their said steward, do grant and deliver seisin thereof by the rod, according to the custom of their said manor, To hold the said premises, with the appurtenances, unto the said Thomas Nicoll and his heirs according to the form and effect of the said will, To be held of the lords by the rod, at the will of the lords, according to the custom of this manor, by the yearly and other rents, fealty, [450] suit of court, and other services for the same heretofore due and of right accustomed: And he gave to the lords for a fine as appears in the margin, and is admitted tenant accordingly; but his fealty is respited until, &c."

Similar surrenders and admissions at various intervals down to the present time, and that the same premises were at the time of action brought in possession of the lord's grantees, who paid quit-rents for the same, were put in and proved.

The defendant in like manner proved, subject to the same objections, an admission on the 15th day of May, 1804, of Thomas Nicoll to "All that piece or parcel of ground, waste of the manor aforesaid, lying before a messuage called Copthall, containing by estimation 5p. 10f. in length, and 4p. 4f. in breadth (more or less), and three elm-trees thereupon growing, as the same parcel of land is inclosed with posts and rails, with the appurtenances."

The defendant also proved, subject to the same objections, other similar admissions to the same premises at various intervals down to the present time, and that the same premises were at the time of action brought in possession of the grantees, who paid quit-rents for the same.

The defendants also proved in like manner, subject to the same objections, the admission of Thomas Nicoll, of Page Street, at a general court-baron of the manor held on the 15th of May, 1804, to "All that piece or parcel of ground, waste of the manor aforesaid, lying before the tenement called Slattons, containing by estimation 40 perches in length and 3p. 10f. in breadth, more or less, and forty-four elms thereupon planted and growing, with the appurtenances."

The defendant in like manner proved, subject to the same objections, similar admissions at various intervals [451] down to the present time to the said last-mentioned premises, and that the same at the time of action brought were in possession of the lord's grantees, who paid quit-rents for the same.

The defendant also proved in like manner, subject to the same objections, licences from the lords of the manor for the time being, to inclose different parts of the waste, and other admissions of the several persons hereinafter mentioned to several pieces of land at Church End.

A description of such licences and admissions, as taken from the court-rolls, was as follows, viz.

An admission of the 19th of November, 1700, of Benjamin Brown to a piece of land.

"Maner de Hendon, in com. Middx. Lib. 25, fo. 94.

"Cui Baron p^o nobit viri Willie S. Herbert, ar. comunit vocat Dom Mountgomery, dom. maner p^od. idm teni in & p: ead manarijo die Martis, ante festum Set. Catherin existen, decimo nono die Nobris, annoq Dom. 1700, annoq regn Dom. nro Willie tertij, Dei gra Angl, Scot., Franc., & Hibnie, Regis, fidei defens., &c., duo-decimo, coram Henrico Chauncy, mit servient ad legem, seneschat ibidm, ab inde adjournat usq ad tertiam diem Decembr px^o sequen, & ab inde tunc adjurnat usq ad diem Martis, decem. quart die Januair px^o sequen.

"Adm. Benjamin Browne.

"Ad hanc cui compt & p^osentat est p homag ejusd cui sup sacm cor q'dom maner p^od p et cum assensu et cōsensu homag p^od sup humit petiōn Benjamin Browne vñ customar teneñ maner p^od, ex gra & favor suo p seneschat suū p^od concessit eid Benjamin Browne hered et assignat suis, totam ill peciam sive peellam terre vasti manerii de Hendon p^od, adjungen ad tenement vocat y^o (Garden Plott, prope Ecclesiam pochiale de Hendon p^od, contin vñ pticat, sive plus sive minus, sicut ead [452] peell teri, inclus est cum fossa ex vasto, cum oib, & singul ptinentiis eid peell spectan vel

ptineñ. Et postea ad istam eandē cūr venit p^d Benjamin Browne in pp^o p^oson sua, & humit peti^t &c. admitti teneñ ad p^omiss p^d, cum ptiñ. Cui dom. p seneschaff suū p^d concessit ac liberavit inde seisiñ p virg, Hend et tenend p^omiss p^d, cum ptiñ, eid Benjamin Browne, hered & assign suis in ppetuum, de dom. p virg, ad vo^t doñ, secund cons maneñ p^d, p fid, sect cūr, et annuat redd 1^d. & at serviç inde prius debi^t & de jure consuet; et p ingrū suo inde dat doñ de fiñ put patet, &c: Et adñ est inde teneñ, et fecit fid.”

An admission of the 1st of December, 1730, of the Rev. Edward Saunders and others.

“Maneñ de Hendon, in com. Midxie.

“Cūr baron presideñ et gubⁿat hospi^t sol sumptibz & impeñs Thome Guy, a^r, dñor manerij p^d, tent in et pro manerio p^d primo die Decembris, anno Dñi millesimo septingesimo trecesimo, cof Knightley d’Anvers, ar, seilli ib^m.

“Ad hanc cūr veneñ Reverendus Ed. Saunders, Clericus, &c., customa^r teneñ maneñ p^d, et fiduciarij pro charitate m^{tr}i Daniel, et humilime petierunt admitti ad om̄ illam peciam vasti super quo Ptochotrophia, ançce Almshouses, sunt edificat cū gardino adinde ptiñ: Et sup hoc compertū fuit per homagij p^d quod non erit ad dampnū dñor sive tenentiū suor talem concessionem facere: Ideoq dñi maneñ p^d, p senelt suor p^d, cum assensu homagij, p^d concesser eisdem Ed. Saunders, &c., p^d vasti p^d cū ptiñ, & eis liberaver inde sesinam p virgam, Habend et tenend eisdem Ed. Saunders, &c., et heredibz, eo^r tenend de dñis per virgam, ad voluntatem Dñor scđm consuetud manerii p^d, per redd., sect cur, & alia servitia inde prius debita, et de jure consueta: sed nichil de fine dederunt quid pro charitate; et admissi sunt inde tenentes.”

An admission of 24th of December, 1765, of John Bennett to a piece of land.

[453] “Manor of Hendon, in the County of Middlesex.

“24th Dec. 1765. Lib. 34, fo. 43.

“The general court-baron of David Garrick, Esq., lord of this manor, holden at the sign of the Grey Hound, in and for this manor, on Tuesday the 24th day of December, 1765, before Thomas Wyld, Esq., steward of this manor:

“At this court comes John Bennett, a customary tenant of this manor, in his proper person, and prays the lord thereof to grant unto him and his heirs a piece of the lord’s waste lying and adjoining to the east end of the almshouses situate and standing at Church End within this manor, containing 2½ poles in length, and in depth from the front to the ditch 2½ poles, with intent to build thereon a school-house for the education of poor children: To whom the lord of this manor, by his said steward, by and with the consent of the said homage, doth grant and deliver seisin thereof by the rod, To hold the same unto the said John Bennett and his heirs, to be held of the lord by the rod, at the will of the lord, according to the custom of this manor, by the yearly rent of 1s., fealty, suit of court, and all other services by which the customary tenants of this manor hold; and, being for a charitable use, the lord remitted the taking of any fine.”

An admission of 21st of November, 1837, of the Rev. Theodore Williams and others, to the same,—who were the tenants on the roll at the time of the action being brought.

A licence of the 22nd of May, 1792, from the lord of the manor to James Ranken to inclose a piece of land.

“Manor of Hendon, in the County of Middlesex.

“22nd May, 1792.

“The court-leet, or view of frankpledge, with the general court-baron of John Bond, Esq., lord of this manor, held [454] in and for the same on Tuesday before the Feast of the Pentecost, that is to say, the 22nd day of May, 1792, before Joseph Neeld, steward of the said manor:

“William Richardson, bailiff.

“The lord of this manor, with the consent of the tenants, doth grant licence to

James Ranken of Mill Hill, within this manor, Esq., one of the customary tenants of this manor, to inclose a parcel of the lord's waste of this manor lying at Church End within this manor, fronting the alms-houses, and adjoining his own estate, containing by admeasurement 11 poles: Now, at this court, and sitting the court, comes the said James Ranken in his own person, and humbly prays the lord of this manor to admit him tenant of the said parcel of waste ground so granted to him as aforesaid; To whom the lord of this manor, by his said steward, doth grant and deliver seisin thereof by the rod, To hold the same, with the appurtenances, unto the said James Ranken, his heirs and assigns for ever, to hold of the lord by the rod, at the will of the lord, &c., at the yearly rent of 2s., fealty, &c."

A licence of the 3rd of June, 1794, from the lord of the manor to John Bennett, of Burrows, to inclose a piece of waste.

"Manor of Hendon, in the County of Middlesex.

"3rd June, 1794. Lib. 36, fo. 164.

"The court-leet, or view of frankpledge, and the general court-baron of John Bond, Esq., lord of this manor, held in and for the same, on Tuesday before the Feast of the Pentecost, that is to say, the 3rd day of June, 1794, before Henry Collingwood Selby, Esq., deputy of Joseph Neeld, chief steward of the said manor:

"At this court the lord of the manor, with the consent of the tenants, doth grant licence that John Bennett, of Burrows, within the manor, may be admit-[455]-ted to inclose with railing two ponds adjoining his freehold at Burrows aforesaid, within this manor, as the same are fenced round; he the said John Bennett having and always reserving to all persons the free use of the pond called Coney Burrow Pond next the almshouses, with liberty of access thereto for water, as heretofore."

A licence of the 14th May, 1782, to Joseph Nicoll, to inclose a piece of the waste.

"Manor of Hendon, in the County of Middlesex.

"14th May, 1782. Lib. 35, fo. 60.

"The court-leet, or view of frankpledge, with the general court-baron of the Right Hon. Charles Lord Camden, the Right Hon. Richard Rigny, John Pattison, and Albany Wallis, Esqs., held in and for the manor aforesaid on Tuesday next before the day of Pentecost, that is to say, on the 14th day of May, 1782, before Thomas Wyld, Esq., steward thereof:

"At this court the homage give leave and consent that Joseph Nicoll, one of the customary tenants of this manor, inclose 10 poles of ground, part of the waste belonging to the lords of this manor, including the pond, situate at Church End, within this manor, with the lords' consent:

"Afterwards at this court, and sitting the court, comes the said Joseph Nicholl into court in his own proper person, and humbly prays the lords of this manor to admit him tenant to all those said 10 poles of waste-ground, including the said pond, and liberty to inclose same: To whom the lords of this manor, by their said steward, do grant and deliver seisin thereof by the rod, according to the custom of this manor (but not to inclose the said pond so as to prevent all or any of the tenants of the lords of this manor making use thereof for watering of cattle, but to leave a sufficient part thereof open for that purpose), To hold to the use [456] of the said Joseph Nicholl his heirs and assigns for ever, To be held of the lords by the rod, at the will of the lords, according to the custom, at and under the yearly rent of 1s., fealty, suit of court, and all other services: and he gave to the lords for a fine as appears in the margin."

An admission of the 28th of May, 1816, of Thomas Nicoll to the same, who was proved to pay quit-rent and to do the usual suits and services as copyholder.

A licence of the 20th of May, 1817, from the lord to the Rev. W. M. Trinder, to inclose a piece of waste.

"Manor of Hendon, in the County of Middlesex.

"20th May, 1817. Lib. 40, fo. 35

"The court-leet or view of frankpledge and general court-baron of William

Lowndes, Esq., lord of the said manor, held in and for the same on Tuesday next before the feast of Pentecost, that is to say, on the 20th day of May, 1817, before Richard Lowndes, Esq., steward of the said manor :

“The lord of this manor, with the consent of the tenants, doth grant licence to the Rev. W. M. Trinder, &c., four copyhold tenants of this manor, to inclose a piece or parcel of waste land lying at Church End within this manor, bounded on the north by the road leading from Vicarage Vent to the church, on the east by a way from the said road into a field called Ravensfield, on the south by the same field, and on the west by the garden of the school-house, and running from thence to the south and ending in a point,—the said piece of ground measuring 31 feet on the north, and 57 feet on the east side, and 66 feet on the west side, and containing in the whole $9\frac{1}{2}$ square yards or thereabouts : Now, at this court, and sitting the court, come the said W. M. Trinder, &c., and humbly pray the lord of this manor to admit them tenants to the [457] said piece or parcel of waste ground : To whom the lord of this manor, by the hands of the said steward, doth grant and deliver seisin thereof by the rod, according to the custom of this manor; To be held of the lord of this manor, by the rod, at the will of the lord, according to the custom of this manor, by the yearly rent of 6d., fealty, suit of court, and all other services therefore lawfully due : and they gave to the lord for a fine as appears in the margin, and are admitted tenants thereof accordingly ; but their fealty is respited until, &c. : Nevertheless, this grant is upon this condition, that a carriage-way of the width of 17 feet be left from the said road to the said field called Ravensfield, for the use of the owners and occupiers thereof.”

A licence of the 16th May, 1820, from the lord to William Stone Lewis to inclose a piece of waste.

“Manor of Hendon, in the County of Middlesex.

“16th May, 1820. Lib. 40, fo. 96.

“The court-leet, or view of frankpledge, and general court-baron of William Lowndes, Esq., lord of the said manor, held in and for the same on Tuesday next before the feast of Pentecost, that is to say, on the 16th day of May, 1820, before Richard Lowndes, Esq., steward of the said manor :

“The lord of this manor, with the consent of the tenants, doth grant licence to William Lewis, Esq., a copyhold tenant of this manor, to inclose a piece or parcel of the lord's waste of this manor, situate, lying, and being at Church End, within this manor, bounded on the north by the road leading from Vicarage Vent to the church, on the east by the copyhold land of the said Mr. Lewis, and on the west by the church path leading by a gate through Ravensfield, and opposite to the school-house, containing on the east side 52 feet, on the west side 52 feet 9 inches or thereabouts, [458] on the south 15 feet 9 inches, and on the north next the road 20 feet or thereabouts : And also licence to erect a close fence round a certain pond adjoining the same, and leaving a doorway through the said fence for the use of the inhabitants of the parish of Hendon at all times to get water from the said pond, and never closing or shutting up the same : Now, at this court, and sitting the court, comes the said W. Lewis in his own proper person, and humbly prays the lord of this manor to admit him tenant to the said piece or parcel of land above described ; To whom the lord of this manor, by the hands of the said steward, doth grant and deliver seisin thereof by the rod, according to the custom of this manor, to hold the said piece or parcel of land, subject to the restriction aforesaid, unto the said W. Lewis, his heirs and assigns for ever, according to the custom of this manor, To be held of the lord of this manor by the yearly rent of 6d., fealty, suit of court, and all other services therefore lawfully due : and he gave to the lord for a fine as appears in the margin, and is admitted tenant accordingly ; but his fealty is respited until, &c.”

An admission of the 25th of May, 1830, of Samuel Cornelius Fuller to a piece of waste.

“Manor of Hendon, in the County of Middlesex.

“25th May, 1830.

“The court-leet or view of frankpledge and general court-baron of Samuel Dendy, Esq., lord of the said manor, held in and for the same manor on Tuesday next before

the feast of Pentecost, that is to say, on the 25th day of May, in the 11th year of the reign of our Sovereign Lord George the 4th by the Grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, and in the year of our Lord 1830, before Nathaniel Morphett, gent., steward of the said manor.

"At this court, and sitting the court, the homage [459] find and present a certain deed-poll or surrender in writing (duly stamped) under the hand of W. S. Lewis, Esq. (a copyhold or customary tenant of this manor), in the words following, that is to say,—

"Manor of Hendon, in the county of Middlesex. Be it remembered, that, on the 29th of March, 1830, W. S. Lewis, of Gray's Inn, in the county of Middlesex, Esq. (a copyhold or customary tenant of this manor), comes without the court, and since the last court, and in consideration of the sum of 460l. of lawful money, &c., to him the said W. S. Lewis paid by S. C. Fuller, of, &c., surrenders into the hands of the lord of this manor by the rod, by the hands and acceptance of Nathaniel Morphett, gent., steward of the said manor, according to the custom thereof, All these three copyhold messuages or tenements, with the appurtenances, situate near the pound in the parish of Hendon, lying within and being parcel of this manor, to which copyhold premises the said W. S. Lewis was admitted tenant at a court-baron holden for the said manor on the 25th of November, 1823 : And also all that piece of ground formerly part of the lord's waste of this manor, containing by admeasurement ten perches, and adjoining to the pond, but not including the same, which said piece of ground adjoins the road leading to the almshouses, &c. : To which said copyhold premises secondly hereinbefore described and surrendered the said W. S. Lewis was admitted tenant at a court-baron holden for the said manor on the said 25th of November, 1823 ; And also all that piece or parcel of land late parcel of the lord's waste of this manor, situate, lying, and being at Church End, within this manor, bounded on the north by the road leading from Vicarage Vent to the Church, on the east by the copyhold land of the said W. S. Lewis secondly hereinbefore described and surrendered, and on the [460] west by a Church path leading to a gate through Ravensfield, and opposite to the school-house, containing on the east side 52 feet, on the west side 52 feet 9 inches or thereabouts, on the south 15 feet 9 inches, and on the north next the road 20 feet or thereabouts, To which said last-mentioned copyhold premises the said W. S. Lewis was admitted tenant at a court-baron holden for the said manor on the said 25th of November, 1823, with a license to erect a close fence round a certain pond adjoining the same road, leaving a door-way through the said fence for the use of the inhabitants of the parish of Hendon at all times to get water from the said pond, and never closing or shutting up the same : All which said copyhold messuages or tenements and pieces or parcels of land so surrendered by the said W. S. Lewis are more particularly described in the plan or ground-plot drawn in the margin hereof, &c., together with all ways, &c., And the reversion and reversions, &c., and all the estate, &c., of him the said W. S. Lewis of, in, and to all and singular the said copyhold or customary hereditaments and premises, and every or any part thereof, To the proper use and behoof of the said S. C. Fuller, his heirs and assigns for ever, according to the custom of the said manor, and to and for no other use, intent, or purpose whatsoever : Now, at this court, and sitting the court, upon the first proclamation being made, comes the said S. C. Fuller in his own proper person, and humbly prays the lord of this manor to admit him tenant to all those the said three copyhold messuages or tenements, with the appurtenances, situate near the pound in the parish of Hendon, lying within and being parcel of this manor (to which said copyhold premises the said W. S. Lewis was admitted tenant at the said court holden for the said manor on the 25th day of November, 1823, as aforesaid), with the rights, members, and appurtenances to the same [461] messuage, hereditaments, and premises belonging or appertaining, and so surrendered by the said W. S. Lewis to the use of the said S. C. Fuller as aforesaid ; To which said S. C. Fuller the lord of this manor, by the hands of his said steward, doth grant and deliver seisin thereof by the rod, according to the custom of this manor, To hold the same premises, with the appurtenances, unto the said S. C. Fuller, his heirs and assigns for ever, according to the form and effect of the aforesaid surrender, To be held of the lord of this manor by the rod, at the will of the lord, according to the custom of this manor, by the yearly rent of 4½d., fealty, suit of court, and all other services heretofore for the same due and of right accustomed : and he giveth to the lord for a fine as appears in the margin, and is admitted tenant thereof accordingly ; but his fealty is respited until, &c."

"Also at this court, and sitting the court, upon the first proclamation being made, comes the said S. C. Fuller in his proper person, and humbly prays the lord of this manor to admit him tenant to All that the said piece of ground formerly parcel of the lord's waste of this manor, containing by admeasurement 10 perches, and adjoining to the pond, but not including the same, which said piece of ground adjoins the road leading to the almshouses on the north, to copyhold premises lately belonging to the said W. S. Lewis, and to which the said S. C. Fuller hath this day been admitted, on the east, to freehold land late belonging to R. Palethorpe, since of the said W. S. Lewis, and now of the said S. C. Fuller, on the south, and to other copyhold ground late of the said W. S. Lewis, and to which the said S. C. Fuller is to be admitted at this court, on the west (to which said copyhold premises containing 10 perches the W. S. Lewis was admitted tenant at a court-baron holden for the said manor on [462] the 25th of November, 1823 as aforesaid), with the rights, members, and appurtenances to the same piece of ground belonging and appertaining, and so surrendered by the said W. S. Lewis to the use of the said S. C. Fuller as aforesaid; To which said S. C. Fuller the lord of this manor, by the hands of his said steward, doth grant and deliver seisin thereof by the rod, according to the custom of this manor, To hold the same premises, with the appurtenances unto the said S. C. Fuller, his heirs and assigns for ever, according to the form and effect of the aforesaid surrender, to be held of the lord of this manor by the rod, at the will of the lord, according to the custom of this manor, by the yearly rent of 1s., fealty, suit of court, and all other services heretofore for the same due and of right accustomed: and he giveth to the lord for a fine as appears in the margin, and is admitted tenant thereof accordingly; but his fealty is respited until, &c.

"Also at this court, and sitting the court, upon the first proclamation being made, comes the said S. C. Fuller in his proper person and humbly prays the lord of this manor to admit him tenant to All that the said piece or parcel of land late parcel of the lord's waste of this manor, situate, lying, and being at Church End, within this manor, bounded on the north by the road leading from Vicarage Vent to the church, on the east by other copyhold ground late of the said W. S. Lewis, and to which the said S. C. Fuller hath at this court been admitted, and on the west by a church path leading to a gate through Raven's Field, and opposite to the school house, containing on the east side 52 feet, on the west side 15 feet 9 inches or thereabouts, on the south 52 feet 9 inches, and on the north, next the road, 20 feet or thereabouts, to which the said last-mentioned copyhold premises the said W. S. Lewis was admitted tenant at a court-baron holden for the said manor on the 25th of November, 1823 (with [463] licence to erect a close fence round a certain pond adjoining the same road, &c.), with the rights, members, and appurtenances to the same piece of land belonging or appertaining, and so surrendered by the said W. S. Lewis to the use of the said S. C. Fuller as aforesaid; To which said S. C. Fuller the lord of this manor, by the hands of his said steward, doth grant and deliver seisin thereof by the rod, according to the custom of this manor, To hold the same premises, with the appurtenances (except and subject as aforesaid), unto the said S. C. Fuller, his heirs and assigns for ever, according to the form and effect of the aforesaid surrender, to be held of the lord of this manor by the rod, at the will of the lord, according to the custom of this manor, by the yearly rent of 6d., fealty, suit of court, and all other services heretofore for the same due and of right accustomed; and he giveth to the lord for a fine as appears in the margin, and is admitted tenant thereof accordingly; but his fealty is respited until, &c."

The defendant also proved the existence of an immemorial custom in the manor for the lord of the manor to grant wastes of the manor as copyholds.

In the year 1843 or 1844, the plaintiff, then being the tenant of the said Sunning Hill farm, inclosed the locus in quo, and, while so doing, was told by Mr. Jones, the bailiff of the lord of the manor, that he was taking in land that did not belong to him.

The plaintiff also proved by the evidence of witnesses who had known the locus in quo from twenty to sixty years, that it had during all that time been used by the owners of Chamberlain's Field as a place of deposit for manure, which lay there sometimes as long as two years, until wanted for the purposes of the farm. He also called the occupier of a farm adjoining his land, who proved that he had in the year 1841 cut [464] and sold an oak-tree which grew upon a similar strip of waste to and part of the locus in quo, which adjoined the land in his occupation.

The court was to be at liberty to draw any inference from the facts hereinbefore stated which a jury ought to draw.

The question for the opinion of the court is,—whether, upon the facts hereinbefore stated, or such of them as are not objectionable for the grounds of objection hereinbefore mentioned, the plaintiff was entitled to recover in this action. If the court should be of opinion, that, upon the facts hereinbefore stated, or such of them as the court should deem admissible in evidence, the plaintiff was entitled to recover, then the verdict was to stand as entered for the plaintiff, for 40s. and costs: but, if the court should be of a contrary opinion, then the verdict which had been entered for the plaintiff was to be set aside, and instead thereof a verdict entered for the defendant.

Huddleston, Q. C. (with whom was George Miller), for the plaintiff. The evidence offered on the part of the defendant of acts of ownership upon the wastes by the side of the road in other parts of the manor, was clearly inadmissible. The rule on this subject is thus stated in Taylor on Evidence, 2nd edit. § 104: "Waste land on the sides, and the soil to the middle of a high-way, are presumed to belong to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder. This rule, being founded on a supposition that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road, is liable to be rebutted by shewing that the road was originally dedicated by some other party; and the presumption may also be [465] repelled by proof that the lord of the manor, or even that a stranger, has exercised acts of ownership either over the spot in dispute or over other waste land in immediate connexion with it." To let in evidence of acts of ownership over wastes by the side of a road as proof of the lord's title to other similar wastes in other parts of the manor, it must be shewn, not merely that they are similar in character, but that there is such a degree of continuity as to justify the presumption that the whole belong to the manor: *Doe d. Barrett v. Kemp*, 2 N. C. 102, 2 Scott, 9. [Erle, C. J. When you can bring the several pieces into unity, any act of ownership exercised by the lord on one part is admissible to shew that the others also belong to him: *Stanley v. White*, 14 East, 332.] The general presumption is, that waste land which adjoins to a road, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder: *Doe d. Pring v. Pearsey*, 7 B. & C. 304, 9 D. & R. 908. Upon that principle, the presumption is that the slip of land in question belongs to the plaintiff, the owner of the adjoining inclosed land. Holroyd, J., in giving judgment in that case, says: "When a grant of land near to a road is made (even where it is inclosed and separated from the land adjoining), it appears to me that the *primâ facie* presumption is, that the land on that side of the fence on which the road is, passes likewise with it. Generally speaking, where an inclosure is made, the party making it erects his bank and digs his ditch on his own ground, on the outside of the bank. The land which constitutes the ditch in point of law is a part of the close, though it be on the outside of the bank. And if something further is done for his own convenience when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of unin-[466]-closed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed, that in point of law is a part of the close in which the inclosure is made. If any grant of such land, being copyhold, had been made before the inclosure, the subsequent grants would probably continue to be made in the same way, notwithstanding the inclosure, and all the land, both within and without the inclosure, would therefore pass by those grants. It seems to me, therefore, that the rule that waste land near a highway is to be presumed *primâ facie* to belong to the owner of the inclosed land next adjoining, is not confined to a case where the owner of that land is a freeholder, but extends equally to cases where the owner is a leaseholder or a copyholder. In either case, evidence may be given to rebut the *primâ facie* presumption." The general rule is also stated by Abbott, C. J., in nearly the same terms, in *Steel v. Prickett*, 2 Stark. N. P. C. 463, 468. And in *Jones v. Williams*, 2 M. & W. 326, the principle was applied to acts of ownership on the banks and bed of a river. The question is whether there is any evidence upon the face of this special case to rebut that presumption. Now, the only acts of ownership relied on here were upon a different road, and at a distance of at least three quarters of a mile from the spot in question. None was proved in Hall Lane, all the land in which, except a small piece,

is demesne land. It will be said that the admeasurement given in the plaintiff's conveyance would exclude this piece of waste : but it is to be observed that Chamberlain's Field is described in the conveyance to William Dalmer as containing 3a. 3r. 35p., "be the same more or less : " *The Marquis of Salisbury v. The Great Northern Railway Company*, ante, vol. v., p. 174. Dalmer's conveyance was registered before the conveyance of the manor to [467] Clutterbuck. And by the statute (a) the first registered instrument must prevail against one subsequently registered : see Sugden's Vendors, 13th edit. 599.

Honyman (with whom was Kinglake, Serjt., and Jones), for the defendant. It is conceded that evidence of acts of ownership over other parts of a continuous line of wastes, is admissible to shew that all the wastes belong to the lord. The evidence set out in this case shews acts of unqualified ownership over every piece that could be available. Hall Lane and Church End constitute one continuous line of road. Amongst other things, we shew a grant to one Fuller of 10 perches of the waste in Church Lane, adjoining his own freehold land. [Willes, J. That proves nothing, unless you shew the conveyance of the freehold to that person,—which peradventure excluded the slip of waste.] There are abundant authorities to shew that the presumption contended for on the other side does not apply as between a grantee of the demesne lands and the lord. The question simply is, what passes by the conveyance? The mere presumption of law is not enough : *Headlam v. Hedley*, Holt's N. P. C. 463. Bayley, J., in that case says,—“It is difficult in many cases to discover the origin of roads. They are sometimes made over waste or common lands, in which the rights of soil, subject to the public easement, are in the lord of the manor.” In *White v. Hill*, 6 Q. B. 487, where the lord of a manor had conveyed land to A., and afterwards other land to B., and it appeared that a narrow strip of land passed by one or other of the conveyances, but it was doubtful by which,—it was held that no presumption arose in favor of A., from the fact that the strip of land lay between a highway and land [468] undisputedly comprised in the conveyance to him. There is no ground for the presumption here ; for, it appears that there had been a survey and valuation of each particular field prior to the sale in October, 1756. The conveyance to Dalmer clearly shews that the trustees did not intend to convey half the soil of Hall Lane : for, the piece called Chamberlain's Field is described therein as “abutting towards the west on Hall Lane.” The slip of land in question is treated as part of Hall Lane. The conveyance was clearly (quoad hoc) a conveyance of Chamberlain's Field only. [Willes, J. The general words,—“Together with all ways, &c. and appurtenances to the said messuage, &c., lands, &c., belonging, or therewith used, possessed, occupied, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or as appurtenant or belonging thereunto,—are quite large enough to convey the road usque ad medium filum viæ. In note (2) to the case of *Smith v. Martin*, 2 Wms. Saund. 400 a., it is said,—“A man makes a feoffment of a house with the appurtenances, nothing passes by the words ‘with the appurtenances,’ but the garden, curtilage, and close adjoining to the house and on which the house is built, and no other land, although other land has been occupied with the house. And in the time of Henry the Eighth, it was usual to add these words, ‘and all lands, tenements, and hereditaments appertaining to the said house, and being occupied, let, or set with the same ;’ and by these words the land used to pass with the house.” Did any one ever see a conveyance of lands “together with a moiety of all roads thereto adjoining?”] The acts of ownership shewn on the part of the plaintiff,—such as, the placing a dung-heap on this slip,—do not amount to much. This would only happen occasionally ; and it may fairly be presumed from the small value of the slip that such an [469] act would not be objected to by the lord. But, when the owner of the adjoining field proceeded to inclose the slip in 1843, the lord interfered. As to acts of ownership, therefore, it is submitted that the evidence on the part of the defendant, as disclosed on the case, greatly preponderates.

Huddleston, Q. C., was not called upon to reply.

ERLE, C. J. I am of opinion that the plaintiff is entitled to our judgment. The duty which we are performing on this occasion is simply that of a jury, viz. weighing the presumptions on the one side and on the other, to see in whom is the ownership of the slip of waste in question. We do not profess to lay down any general rule of

(a) 2 & 3 Anne, c. 4, 5 Anne, c. 18, 6 Anne, c. 35, 8 G. 2, c. 6.

law with regard to the admissibility or effect of acts of ownership exercised by the lord of a manor on strips of waste in one part of the manor, as evidence of title to similar strips adjoining the road in another part of the manor. Assuming all the evidence set out here to be admissible, we have, sitting here as a jury, to weigh its relative value, and to see whether it preponderates in favour of the plaintiff or the defendant. I am of opinion that the presumptions in favour of the plaintiff clearly overbalance those on the side of the defendant. The ordinary presumption of law, as appears from the cases, is, that small strips of land lying between old inclosures and the highway, belong to the owners of the adjoining old inclosures. If there be nothing to rebut it, *prima facie* the presumption is so. The plaintiff and defendant here both claim under the same owner: the trustees of the Earl of Powis in 1756 conveying the Sunning Hill Farm, including the field called Chamberlain's Field, to William Dalmer, through whom the plaintiff derives title; and in 1757 conveying the manor to Clutterbuck, through whom the de-[470]-fendant derives title. Now, in the conveyance of the Sunning Hill Farm to Dalmer, Chamberlain's Field is described as "containing by estimation 3a. 3r. 35p., be the same more or less, abutting towards the west on Hall Lane,"—the strip of land in question lying between the fence of Chamberlain's Field and Hall Lane. Now, the presumption of ownership being as I have already observed, it is quite consistent with the language of this conveyance that it should vest in the grantee the soil of the road *usque ad medium filum*: for, when the lord, in whom was the freehold on both sides, conveys the land on one side describing it as abutting on Hall Lane, the presumably right construction of the deed is, that it passes to the grantee the soil *ad medium filum via*. Then it is said that the actual measurement of Chamberlain's Field within the fence corresponds exactly with the quantity professed to be conveyed by the deed, and therefore the slip without the fence could not pass by the descriptive words; nor could it pass as "appurtenant." But it is familiar knowledge that descriptions by quantity are frequently inaccurate; and skilful conveyancers always provide for this uncertainty by the insertion of the words "be the same more or less:" so that the form of the conveyance by no means excludes the presumption that the strip in question passed to the grantee. This, too, being a conveyance of demesne lands, a good deal of inconvenience would result from holding that this strip remained in the grantors. Then, beyond the conveyance, we have to consider the effect of the exercise of acts of ownership on the strip of land in question on the one side and on the other. Now, the value and importance of these must necessarily depend upon the nature and capability of the thing itself upon which they are exercised. A strip at the road side is often used by the occupier of the adjoining inclosed land as a place of de-[471]-posit for manure: and it appears from the evidence set out in this case that this strip had in fact been so used for sixty years, the heap lying there sometimes for two or three years. This, being almost the only exercise of ownership of which land so situate is susceptible, affords considerable presumption in favour of the plaintiff. I lay no stress upon the inclosure in 1843. In favour of the defendant's view, it is contended that the strip in question formed part of the waste of the manor of Hendon. No doubt, the wastes of the manor passed to Clutterbuck by the conveyance of 1857. But, was this part of the waste? There appears to be no large piece of waste with which it is connected, nor any similar small pieces near the spot. There is one piece about three quarters of a mile distant in one direction, and others about the same distance off in the other direction, which have been granted by the lords of the manor, some before and others since the year 1757. These grants or licences to inclose, assuming them to be admissible, are relied on as affording presumptions in favour of the defendant's right,—that all the land similarly situated is waste of the manor. But they are all a long way from the spot in question; and there is nothing which to my mind brings them in unity with the piece adjoining Chamberlain's Field. Against the combined presumptions the other way, I am unable to infer from the evidence on the part of the defendant that the strip of land in question belongs to the lord. The presumptions in favour of the defendant, fairly considered, do not in my opinion counterbalance the presumptions in favour of the plaintiff, and therefore I have come to the conclusion that the plaintiff is entitled to judgment.

WILLES, J. I am of the same opinion. I am disposed to think that the evidence referred to by Mr. Honyman [472] does establish that the strip of land in question was formerly part of the waste of the manor of Hendon. But, giving no opinion upon

the admissibility of that evidence, but assuming that it was properly admitted, I think it is quite clear that it passed by the conveyance to Dalmer in 1756. Mr. Honyman contends, that the strip of land in question could not pass by that deed, because the meadow called Chamberlain's Field thereby professed to be conveyed is described as "abutting towards the west on Hall Lane," and because the exact quantity of land within the fence between Chamberlain's Field and Hall Lane, satisfies the measurement given in the deed and in the plan in the margin thereof. I do not agree with Mr. Honyman in the construction which he puts upon the words of the conveyance; for, it appears to me that a conveyance of land described as abutting on a road passes a moiety of the soil of the road, unless there be something in the context to exclude it. It is like the case put in Rolle's Abridgment, Graunts (P.), pl. 6, "Si home grant un message vocatum Falstolfe Place prout undeque includitur aquis, per ceux parolls le soile del motes en que le ewe est passera. P. 9 Car. B. R., enter Stint & Morgan, per Curiam, resolve sur un trial al barr." And this received the assent of Chief Baron Comyns: see Com. Dig. Grant (E. 6). It appears to me, therefore, that the conveyance to Dalmer in 1756 passed this land, if at the time it was in the lord. But, suppose that not to be so, the utmost that can be said of the deed is, that it is ambiguous in its description of the land intended to be conveyed. Then we are thrown upon the general words of the conveyance,—"Together with all ways, &c., and appurtenances to the messuage, &c., lands, &c., belonging, or therewith used, possessed, occupied, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or as appur[473]-tenant or belonging thereunto." It appears to me that the parol evidence is strong to shew that this strip of land between the fence of Chamberlain's Field and Hall Lane was always used with and considered to be part of Chamberlain's Field. Wherever an old deed is ambiguous in its terms, modern user affords material aid in the elucidation of its meaning. I must confess I should have been better satisfied to have had a question of this sort settled by the verdict of a jury. But, upon the whole, the only conclusion I can come to upon the evidence submitted to us in this special case is, that the plaintiff is entitled to succeed.

BYLES, J., having been counsel in the cause in an earlier stage, took no part in the decision.

KEATING, J. I am of the same opinion. The words of the conveyance to Dalmer in 1756 are abundantly sufficient to convey the land thereby described and a moiety of the soil of Hall Lane adjoining thereto. That seems to me to be the fair and legitimate construction of the deed: and the user also seems to me to be unusually strong in support of that construction. The strip of land in question appears to have been used by the successive owners of Chamberlain's Field for a period of sixty years in the only way in which it was capable of being used, viz. as a place of deposit for manure for the convenience of the adjoining land. There were two other pieces of evidence which I also consider to be entitled to consideration, viz. the cutting of the tree in 1841, and the inclosure of the slip in 1843, ten years before this action was originally brought. In the case of a manor the lord of which, as appears from the extracts from the court-rolls, has been in the habit of looking after similar strips of waste in other places, I cannot help thinking that [474] these acts are deserving of attention. Upon the whole, it appears to me that the evidence on the part of the plaintiff was unusually strong, and, coupled with the conveyance, quite irresistible.

Judgment for the plaintiff.

RICHARDSON v. TRUNDLE. June 21st, 1860.

[S. C. 29 L. J. C. P. 310; 2 L. T. 568; 7 Jur. N. S. 28.]

Where a writ of *fi. fa.* has been executed, it is competent to the defendant to call upon the sheriff to return it.

David Keane, on a former day in this term, on behalf of the defendant, obtained a rule calling upon the late sheriff of Norfolk and James Greenacre, his officer, to shew cause why a side-bar rule should not issue directing him to return a writ of *fi. fa.* which had been executed, and under which the officer had claimed and received 4l. 9s. 6d. more for expenses than was allowed by law. It appeared that an action had been brought against the officer for extortion. He referred to *Edmunds v. Watson*,

7 Taunt. 5, where it was held, that, where goods have been taken under a fi. fa. the defendant is entitled to call on the sheriff to return the writ, whether the goods have been sold to another or redeemed by himself: Gibbs, C. J., saying,—“The defendant is entitled to have the writ returned, for this reason; the sheriff must return that he has levied the money, and shew what he has done with it, viz. that he has paid it over to the plaintiff; it will then appear that the defendant is discharged; but, until then, the defendant may be in some danger of further proceedings. I take it to be clear, that, where the plaintiff delivers a writ to the sheriff to be executed, and money is paid to the sheriff by the owner of the goods, the plaintiff is entitled to call on the [475] sheriff for a return of the writ; and the right of the defendant is reciprocal.”

R. E. Turner appeared for the late sheriff.

Hannen, for the officer, produced an affidavit stating that the alleged extortion arose from a mistake in putting down a sum of 4l. twice over, and that, when the mistake was pointed out to the officer, he immediately offered to refund the excess. He submitted that the application on the part of a defendant could only be made on some special ground. [Williams, J. Either party may call upon the sheriff to do his duty. Willes, J. The defendant must shew some special ground for calling on the sheriff to return the writ before it has been executed; but either party has a right to call for a return after the writ has been executed.] In *Williams v. Webb*, 2 Dowl. N. S. 904, it was expressly held that a defendant cannot call upon the sheriff to return a writ of ca. sa. issued against him, unless he shew some special ground for the application. Tindal, C. J., there says: “Where a defendant comes with such an application, he is bound to shew some particular circumstances to justify it. The defendant in this case has undertaken to bring no action in respect of the false arrest; then, what can be his object in seeking to obtain this writ to be returned? Circumstances may arise, no doubt, in which a defendant may come with such an application: where a writ has been executed, and years have passed away, and he may want to procure satisfaction to be entered on the roll, and neither the plaintiff nor his representatives can be found, and the court may require proof that the writ has been satisfied, then, perhaps, such a motion might be acceded to. But, if we granted this application on the ground on which it is sought to be sane-[476]-tioned, there is hardly any case in which we could refuse a similar motion.” And Maule, J., said: “The defendant, in fact, has no interest or right to interfere in the matter.” [Willes, J. In *Williams v. Webb*, the writ was a ca. sa. I find it stated in a note to *Wilbraham v. Snow*, 2 Wms. Saund. 47 a., n. (b), that, “where a compromise is entered into by the parties, neither of them can rule the sheriff: *Alchin v. Wells*, 4 T. R. 470: nor can the defendant rule him until after the object of the writ has been effected, except on special grounds,”—citing *Daniels v. Gompertz*, 2 Gale & D. 751, *Williams v. Webb*, 2 Dowl. N. S. 904, Watson’s Sheriff, 2nd edit. 81. The passage in the last-mentioned book is as follows, —“The party against whom the writ issued may rule the sheriff to return it after the object of the writ has been effected. But it seems that this could not be done by such party before that time, except on special grounds.”]

Keane was not called upon to support his rule.

WILLIAMS, J. I do not see how we can resist this application. Without meaning to give the least encouragement to these proceedings, the act of the officer here evidently being a mere slip, I think the defendant is entitled to have the return made.

The rest of the court concurring,
Rule absolute.

[477] TOWNSEND v. A. S. CROWDY. June 11th, 1860.

[S. C. 29 L. J. C. P. 300; 2 L. T. 537; 7 Jur. N. S. 71.]

Where a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself. A. agreed with B. to purchase his share of a partnership business for a given sum, payable by instalments, subject to diminution if the moiety of the profits of the business for a period of three years should be less than a certain amount. Having made a partial investigation of the partnership accounts, and believing that the profits had reached the amount named A. paid the

last instalment in full. Six months afterwards, the accounts having been more fully and accurately gone into, A. discovered that the profits were considerably less than the estimated amount:—Held, that, the payment having been made under a mistake of fact, A. was entitled to recover back from B. the sum paid in excess.

This was an action for money had and received to the plaintiff's use. The defendant pleaded never indebted.

By consent, the following case was stated for the opinion of the court:—

In the year 1851, the defendant and the defendant's brother (William Morse Crowdy), who had for many years previously been in practice in partnership as solicitors at Swindon, in the county of Wilts, took the plaintiff into their firm; the defendant having one half share in the business, and the plaintiff and the defendant's brother having respectively one fourth share. In the year 1855, it was agreed that the defendant should retire as from the 31st of December, 1854; and on the 14th of March, 1855, the partnership was dissolved by deed accordingly, and a new one was formed between the plaintiff, the defendant's brother William Morse Crowdy, and William Ormond. It was recited in the said deed (*inter alia*) that the defendant had sold one moiety of his share in the said business to the plaintiff for the sum of 300l., payable by six half-yearly instalments of 50l. each, on the 30th of June and the 31st of December in each of three years after the 31st of December, 1854, and the further sum of 450l., payable at the end of six calendar months next after the expiration of the said period of three years, with interest at 5l. per cent. from the expiration of the said period of three years; but that the last-mentioned sum was to be subject to a deduction therefrom of the amount (if [478] any) by which the total net profits to accrue during the same period from the two fourth parts of the said business to which the plaintiff would be entitled during such period should fall short of 1800l., which would be the amount of such net profits during the said period of three years, if they continued at their then estimated average of 600l. per annum; and that the payment of the said sums should be secured by the covenant of the plaintiff. The deed then contained the following covenant by the plaintiff with the defendant:—

“In pursuance of the said agreement in this respect, and in consideration of the sale and relinquishment by the said Alfred Southby Crowdy to the said James Copleston Townsend of his one fourth share and interest in the said co-partnership business, and of the covenants of the said Alfred Southby Crowdy hereinafter contained, and of all and singular the premises, he the said James Copleston Townsend, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said A. S. Crowdy, his executors, &c., in manner following, that is to say, that he the said J. C. Townsend, his heirs, &c., shall and will pay to the said A. S. Crowdy, his executors, &c., the sum of 300l. by instalments, namely, the sum of 50l. on the 30th of June, 1855, the further sum of 50l. on the 31st of December, 1855, the further sum of 50l. on the 30th of June, 1856, the further sum of 50l. on the 31st of December, 1856, the further sum of 50l. on the 30th of June, 1857, and the further sum of 50l. on the 31st of December, 1857, and, in case all or any or either of the said several sums shall not be paid on the several days on which the same are respectively hereby made payable as aforesaid, shall and will pay to the said A. S. Crowdy, his executors, &c., interest for such sums or sum, or any part thereof, so having become due and [479] remaining unpaid, after the rate of 5l. for every 100l. by the year, to be computed from the day or respective days on which such sum or sums so in arrear is or are hereby made payable up to the day on which the same shall be paid; And also shall and will, on the 30th of June, 1858, pay to the said A. S. Crowdy, his executors, &c., the further sum of 450l., with interest thereon at the rate aforesaid, to be computed from the 31st of December, 1857: Provided nevertheless, and it is hereby agreed and declared between and by the said A. S. Crowdy and J. C. Townsend, that, if one moiety of the whole of the net profits of the said partnership business of Crowdy, Townsend, & Ormond for the period of three years from the 1st of January, 1855, to the 31st of December, 1857, shall not amount in the whole to the sum of 1800l., then and in such case the said J. C. Townsend, his heirs, &c., shall be entitled to deduct from the said sum of 450l. hereinbefore covenanted to be paid by him on the 30th of June, 1858, such a sum as shall be equal to the difference between 1800l. and the actual amount of one moiety of the whole of such net profits as aforesaid for the said period of three years, and the balance only of the said sum of 450l. after such deduction

as aforesaid shall be payable by the said J. C. Townsend on the said 30th of June, 1858, with interest for such balance after the rate of 5l. per cent. per annum from the said 31st of December, 1857, in lieu of the full sum of 450l. and interest for the same; and, if the said difference between the sum of 1800l. and the actual amount of one moiety of the whole of such net profits as aforesaid for the period of three years shall amount to or exceed the sum of 450l., then and in such case no part of the said sum of 450l. hereinbefore covenanted to be paid by the said J. C. Townsend, his heirs, &c., on the 30th of June, 1858, shall be payable."

[480] And after some other covenants not affecting the question, the parties mutually covenanted (*inter alia*) as follows:—

"And further, that, up to and on the 31st of December, 1858, the said A. S. Crowdy, his executors, &c., or any person or persons on his and their behalf, not being a solicitor or attorney practising within twenty miles of Swindon, shall be entitled at all reasonable hours of the day to have access to all or any of the books of account and other books and documents of or in any wise relating to the business of the said late firm of Crowdys & Townsend, and the firm of Crowdy, Townsend, & Ormond, or either of them, and to examine and make copies of or extracts from the same or any of them; and also to have the said books and documents, or any of them, produced and shewn forth at such time or times and place or places, and to such extent, as may be reasonably required for the settlement of any question arising out of or relating to any matter or thing herein contained: but, nevertheless, the said A. S. Crowdy, his executors, &c., in exercising any such rights, shall interfere as little as may be with the user of such books and documents in the business of the firm of Crowdy, Townsend, & Ormond."

The half-yearly instalments of 50l. each were duly paid; and, on the 30th of June, 1858, without any previous application or communication from the defendant, the plaintiff paid 460l. 18s. 6d., to the defendant through the bankers, such sum being the remaining sum of 450l. with the half-year's interest due thereon. On the day before, viz. on the 29th of June, being the day on which the plaintiff remitted the 460l. 18s. 6d. from the country, he wrote to his agent in London, who is the defendant's nephew, as follows:—

[481] "Swindon, 29th of June, 1858.

"Dear Sir, —I have this day paid into your uncle's account, through Roberts & Co., the sum of 460l. 18s. 6d., being the balance due for the purchase of his share of the partnership, with interest thereon (less income-tax) to 30th inst. I believe the deed of dissolution of partnership under which the moneys were payable was deposited with you in London, as well as the new deed of partnership; and, if so, I shall be obliged by your procuring a receipt to be indorsed on the deed for all moneys due from me, and signed by your uncle.

"J. COPLESTON TOWNSEND.

"Jas. Crowdy, Esq."

And on Mr. James Crowdy having replied that the deed had not been deposited with him, the plaintiff wrote to him again, as follows:—

"Swindon, 8th of July, 1858.

"Dear Sir, —There was a deed of even date with our present deed of partnership, betwixt Mr. W. M. Crowdy, Mr. A. S. Crowdy, and myself, under which it was covenanted by me to pay Mr. A. S. Crowdy 750l. by instalments as therein mentioned, with interest on the last instalment, 450l., from 1st of January, to 30th of June, the time when it became due. This principal and interest I have paid; and, as I fancied you had this deed, as well as the partnership, I wrote to you on the subject. As it appears it is not in your hands, it may be in Mr. A. S. Crowdy's, or at any rate he well knows who has it; and perhaps you will be good enough to ascertain where it is, and suggest that the deed be either given up to me, the money due thereunder having been all paid, or that a receipt be indorsed thereon, and the deeds left in your custody; as I should wish, that, in the event of the decease either of myself or Mr. A. S. Crowdy, some evidence of payment should be extant.

"James Crowdy, Esq."

"J. COPLESTON TOWNSEND."

[482] This letter Mr. James Crowdy forwarded to the defendant, inquiring what answer he should give to it; whereupon the defendant saw Mr. Matthews, the gentle-

man who held the deed between the parties, and asked him to look it out, that he might indorse on it a receipt, which he prepared as follows,—

“1st of July, 1858. I acknowledge that I have received of Mr. J. Townsend the within-mentioned sum of 750l. by instalments as within provided, and also all interest due to me thereon.
“ALFRED S. CROWDY.”

Mr. Matthews was going to London when the defendant spoke to him; but he promised to look out the deed on his return. The defendant then wrote to his nephew, who replied to the plaintiff, as follows, inclosing a copy of the proposed receipt, as above,—

“London, June 14th, 1858.

“Dear Sir,—I find by a letter received to-day from Mr. A. S. Crowdy, in reply to mine forwarding him yours of the 8th inst., that the deed under which the 750l. was payable by you is in the hands of Mr. John Matthews, who is now from home; but so soon as he returns Mr. A. S. Crowdy will indorse upon it a receipt in the form inclosed.

“Mr. A. S. Crowdy asks me in the same letter to inquire as to debts due to the old firm, for the collection of which he believes that the above-mentioned deed provides. He would be glad to have in due course an account of how far these are collected.
“JAMES CROWDY.

“J. C. Townsend, Esq.”

To this letter, the plaintiff replied as follows,—

“Swindon, 15th July, 1858.

“Dear Sir,—I shall be quite satisfied with the proposed receipt when indorsed on the deed of dissolu-[483]-tion. With reference to the debts due to the old firm, I have from time to time given to Mr. W. M. Crowdy an account of all moneys received and paid by me on behalf of the firm up to the present time; and I understand he is preparing a similar account.
“JAS. C. TOWNSEND.

“James Crowdy, Esq.”

Within a few days afterwards, Mr. Matthews returned home, and produced the deed, when the defendant indorsed on it and signed the receipt in the form above stated accordingly.

The defendant placed the 460l. 18s. 6d. to his general account with his bankers; and in September, 1858, he purchased land, for the payment of which he drew 425l. from the bank. At that time the defendant had about 300l. standing to his credit, in addition to the 460l. 18s. 6d.

Down to the time when the defendant retired from the partnership, accounts were kept in the following manner,—Each partner kept a separate day-book, containing the receipts and payments by each partner; and these books were from time to time posted by a clerk into one joint cash-book; and, at the end of every year, a cash-balance was struck between the partners. “Bill Journals” were also kept, from which bills were made out to clients, and posted in a joint ledger. In 1855, after the defendant retired, a different system of book-keeping in some respects was adopted by the plaintiff and Ormond; but William Morse Crowdy (who was not in good health, and by the terms of the partnership-deed of the 14th of March, 1855, was at liberty to absent himself from the office when he thought fit, and was not obliged to devote more time to his profession than he pleased,) did not join in these accounts, but continued to keep his own accounts in his accustomed mode, and within about six [484] weeks of the end of every half-year, and sometimes oftener, sent an account on sheets of paper to his co-partners of the receipts and payments by him, and of the state of clients’ accounts. These accounts sometimes required further explanations and additions and corrections by William Morse Crowdy. An account of the above description was supplied by him before the end of 1857 to his co-partners, made up to the end of October, 1857: and, in February, 1858, he delivered to Ormond a similar account to the 31st of December, 1857. In June, 1858, the plaintiff personally investigated the partnership accounts, for the purpose of ascertaining the amount of the profits in the three years preceding the 31st of December, 1857, having before

him (inter alia) the accounts rendered by William Morse Crowdy to the end of October, 1857, but not the account of that partner to the 31st of December, 1857, which was then in the possession of Ormond, who was absent from home from May to July, 1858.

The plaintiff made an estimate of the business done by William Morse Crowdy in November and December, 1857, which estimate turned out to be substantially correct. The result of this investigation and calculation as then made by the plaintiff (which occupied parts of several days, and was reduced into written figures) shewed that a moiety of the net profits of the partnership business for the three years from the 1st of January, 1855, to the 31st of December, 1857, exceeded 1800*l.*; and, upon that calculation so made, and under the impression and belief that the said moiety of the profits amounted to 1800*l.*, the 460*l.* 18*s.* 6*d.* was paid to the defendant as already mentioned. Additional particulars and explanations and receipts and payments by William Morse Crowdy during some parts of the three years were supplied by him to his co-partners after June, 1858; so that, at [485] the period of the payment of the 460*l.* 18*s.* 6*d.*, as between William Morse Crowdy and the plaintiff and Ormond, the partnership accounts were not in fact, and were not treated by the partners as, finally settled to the 31st of December, 1857. The additional particulars, however, did not reduce the amount of net profits. Nevertheless, the mode of keeping the accounts made it difficult to ascertain with precise accuracy the profits to any given period.

Between October and December, 1858, the plaintiff, in consequence of a statement by his partner Ormond, made a fresh investigation and calculation of the partnership accounts for the three years ending the 31st of December, 1857; and, according to the calculation then made by the plaintiff, a moiety of the net profits of the partnership business for the period aforesaid amounted to a sum less than 1800*l.*

In October, 1858, the plaintiff's partner, Mr. Ormond, intimated verbally to the defendant, that the total net profits of the partnership were under 1200*l.* a year; but no communication was made by the plaintiff to the defendant until March, 1859, when the plaintiff's attorney addressed to the defendant a letter applying for payment of 288*l.* 19*s.* 3*d.*, the difference between 1800*l.* and 1511*l.* 0*s.* 9*d.*, the sum at which the plaintiff, as last above mentioned, calculated the amount of a moiety of net profits for the three years.

The defendant does not admit that one moiety of the whole net-profits of such business during the said three years fell short of 1800*l.* by the sum of 288*l.* 19*s.* 3*d.*

The question for the opinion of the court, was,—whether the plaintiff, having paid the sum of 450*l.* to the defendant on the 30th of June, 1858, in the manner and under the circumstances above stated, is now entitled to recover from the defendant the sum, if any, [486] which he might have claimed to deduct from such payment at that date.

If the court should be of opinion that he is, then judgment is to be entered for the plaintiff, with costs, including the costs of and incident to this case, for such sum as may be found due to him upon investigation of the accounts, as provided for by the judge's order.

If the court should be of a contrary opinion, or if, upon such investigation of the accounts, no sum shall be found due to the plaintiff, then judgment is to be entered for the defendant, with costs, including the costs of and incident to this case.

Macnamara (with whom was Montague Chambers, Q. C.), for the plaintiff (a).

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the plaintiff is entitled to recover from the defendant the sum which he might have claimed to deduct from the sum of 450*l.* paid by the plaintiff to the defendant on the 30th of June, 1858.

"2. That the plaintiff paid the whole amount of 450*l.* under a mistake of fact, and without any consideration, and is therefore entitled to recover the amount overpaid by him:

"3. That the case finds that the plaintiff paid the whole of the said amount upon a mistaken calculation and under the impression and belief that the said moiety of the profits amounted to 1800*l.*

"4. That the defendant has no right whatever to retain the amount overpaid by the plaintiff."

The ground upon which the plaintiff seeks to recover back this money is, that it was paid under a mistake of fact. The plaintiff supposed at the time of paying it that the sum he paid was the true amount due to the defendant; and there is nothing to shew any intention on his part to waive his right of inquiring into the matter. The subject has been so frequently discussed that the principle is [487] thoroughly ascertained and settled: the only difficulty is as to its application. Here, the case expressly states that the plaintiff paid the money under the impression and belief (which turned out to be mistaken) that the moiety of the profits for the three years amounted to 1800*l*. The rule is, that money paid under a mistake of fact may be recovered back, although the party paying it had the means of knowing that it was not due, or even once had actual knowledge, but had forgotten it at the time. This was distinctly decided in *Kelly v. Solari*, 9 M. & W. 54. That was an action brought by the defendant as one of the directors of the Argus Life Assurance Company, to recover from the defendant 197*l*. 10*s*. alleged to have been paid to her by the company under a mistake of fact, under the following circumstances:—The defendant's late husband, in the year 1836, effected a policy on his life with the Argus Assurance Company for 200*l*. He died on the 18th of October, 1840, leaving the defendant his executrix, having omitted (inadvertently) to pay the quarterly premium on the policy which became due on the 3rd of September preceding. In November, the actuary of the office informed Messrs. Bates and Clift, two of the directors, that the policy had lapsed by reason of the non-payment of the premium, and Clift thereupon wrote on the policy, in pencil, the word "Lapsed." On the 6th of February, 1841, the defendant proved her husband's will; and on the 13th applied at the Argus office for the payment of the sum of 1000*l*. secured upon the policy in question and two others. Messrs. Bates and Clift and a third director accordingly drew a cheque for 987*l*. 10*s*., which they handed to the defendant's agent, the discount being deducted in consideration of the payment being made three months earlier than by the rules of the office it was payable. Messrs. Bates and Clift stated in evi-[488]-dence that they had, at the time of so paying the money, entirely forgotten that the policy in question had lapsed. Under these circumstances the Lord Chief Baron expressed his opinion, that, if the directors had had knowledge or the means of knowledge of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it could make no difference; and he accordingly directed a nonsuit. But afterwards, on a motion to enter a verdict for the plaintiff, or for a new trial, his Lordship said: "I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question whether in reality the directors had a knowledge of the fact, and therefore that there should be a new trial, and not a verdict for the plaintiff, although I am now prepared to say that I laid down the rule too broadly at the trial as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say with precision what it amounts to: for example, it may be that the party may have the means of knowledge on a particular subject only by sending to and obtaining information from a correspondent abroad. In the case of *Billie v. Lumley*, 2 East, 469, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question, that, if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule, however, is, that, if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding: in that case, there can be no doubt that he is equally [489] bound. Then there is a third case, and the most difficult one,—where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them, that, if the directors once knew the facts, they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering must mean a knowledge existing in the mind at the time of payment." And Parke, B., said: "I think, that, where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the

payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Bayley, J., in the case of *Milnes v. Duncan*, 6 B. & C. 716, 9 D. & R. 731; and, with all respect to that authority, I do not think it can be sustained in point of law." That was followed by a case in this court, of *Bell v. Gardiner*, 4 Scott, N. R. 621, 4 M. & G. 11, where the dictum in *Milnes v. Duncan* is directly overruled; and also by a case of *Dails v. Lloyd*, 12 Q. B. 531. *Lucas v. Worswick*, 1 M. & Rob. 293, is to the same effect. [Williams, J. Notwithstanding *Kelly v. Solari* and the subsequent cases, the learned editors of Smith's Leading Cases, in the notes to *Marriot v. Hampton* (7 T. R. 269), where all the authorities are collected, still state it as a clear proposition,—4th edition, p. 340,—“that money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying [490] it.” Byles, J. In *Pettit v. Lloyd*, two settled accounts were ripped up.] The doctrine of laches, it is submitted, must now be considered as overruled. [Willes, J. The proposition may be stated thus,—“unless it be clear that the party making the payment intended to waive all inquiry into the facts.”] That would no doubt be the more correct qualification. [Erle, C. J. If the plaintiff had properly investigated the matter, he would have found that the profits had not reached the stipulated amount. It does not appear from the case very precisely how the mistake arose. The defendant's answer to the claim,—founded upon the cases of *Skyring v. Greenwood*, 6 D. & R. 401, 4 B. & C. 281, 1 C. & P. 517, *Shaw v. Pictou*, 4 B. & C. 715, 7 D. & R. 201, and *Harris v. Lloyd* 5 M. & W. 432,—is, that the plaintiff had ample opportunity to investigate the accounts, but neglected to avail himself of it, and that, relying upon the money being his own, the defendant has spent it. That merely shews that the plaintiff had means of knowledge, of which for some reason he omitted to avail himself: not that he meant to waive all inquiry into the facts. In *Bell v. Gardiner*, Tindal, C. J., says (4 Scott, N. R. 632): “Whatever our impression might have been with regard to the rule supposed to have been laid down in *Bilbie v. Lumley* and *Milnes v. Duncan*, it seems to me that the late case of *Kelly v. Solari* is quite decisive to shew that it was not essential to the validity of this plea that it should negative means of knowledge. In fact, after that case, which seems to have been well considered, the possession of means of knowledge can be regarded as nothing more than matter of observation to the jury. It would be difficult in many cases where a party has means of knowledge to say that he can deny that he has actual knowledge: but, at the same time, it is by no means conclusive, as a rule of law, that a man has knowledge [491] of a fact because he possesses the means of acquiring it.” And Cresswell, J., observing upon *Milnes v. Duncan*, says, (p. 636): “If the means of knowledge be, as a matter of law equivalent to actual knowledge, how can the question of laches intervene?” The principle was again discussed and acted upon in *Barber v. Brown*, ante, vol. i., p. 121.

Manisty, Q. C., for the defendant (a). The present [492] case stands upon totally different grounds from any of those relied on by the plaintiff. The simple question is, whether, taking all the circumstances into consideration, the plaintiff ought in

(a) The points marked for argument on the part of the defendant were as follows:—

“That the plaintiff is not entitled to recover for the following amongst other reasons,—because he had the means of ascertaining, and might by investigation have learnt the real state of the case, before the 30th of June, 1858; but, instead of doing so, he voluntarily waived inquiry into the actual result of the three years' business, and elected to pay upon an estimate made by himself:

“That, having done so, and paid the whole 150*l.*, he could not afterwards raise any question as to the net profits of the business during the three years ending the 31st of December, 1857, and that, at all events, he could not do so after the 31st of December, 1858:

“That this is not a case of payment under a mistake of facts on the part of the plaintiff, or under circumstances which entitle him to recover back any part of the money:

“That it would be against equity and good faith, as well as contrary to the intention of the parties, as the same is to be collected from the deed of the 11th of March, 1855, to permit the plaintiff to raise a question as to the profits, and to claim a deduc-

equity and good conscience to have the matter re-investigated, or the defendant be allowed to retain the money which the plaintiff has voluntarily paid him. The plaintiff had six months, with free access to the books and accounts of the partnership, to ascertain the amount of net profits. Having made his own estimate, and having paid the balance of the purchase-money, is it just that he should be allowed afterwards to say he has made a mistake? The position in which this claim puts the defendant is grievously onerous. Not only has he, relying on the correctness of the plaintiff's statement, disposed of the money, but the result of holding him liable to refund any excess will be, that, if it should turn out upon investigation that he has been overpaid 5l. or 10l., he will be saddled with a large amount of costs, although he has been entirely blameless. The case falls rather within the principle of *Brisbane v. Dacres*, 5 Taunt. 143, where Heath, J., speaking of *Marriot v. Hampton*, says,—"That was the case of *judicium redditum in invitum*; but this is a stronger case; for, the plaintiff is a judge in his own cause, and decides against himself; and he cannot be heard to repeal his own judgment." Lord Eldon, C., in *Bromley v. Hollaud*, 7 Ves. 23, approves Lord Kenyon's doctrine, and calls it a sound principle, that a payment voluntarily made is not to be recovered back." If this action will lie, it might have been brought at any time within six years. Is the party to remain in doubt during all that time? *Lucas v. Worswick* and *Bell v. Gardiner* were cases of forgetfulness of facts. There is nothing of the sort here. The plaintiff pays the money after such an investigation of the matter as he chose at the time to [493] make. In *Dails v. Lloyd*, the plaintiff had accidentally omitted to take credit for certain payments which he had made on the defendant's account. Here, it might very well be that the plaintiff preferred paying the 450l. balance to submitting his books to the inspection and investigation provided for by the deed. It is manifestly contrary to equity and good conscience to impose such a burthen as this upon the defendant after such a lapse of time.

Macnamara was not called upon to reply.

ERLE, C. J. I am of opinion that our judgment in this case should be for the plaintiff. He paid 450l. upon the faith of the moiety of the profits of the partnership business for the three years ending on the 31st of December, 1857, having amounted to 1800l. The 450l. was to become due only upon that state of facts; and the plaintiff in June, 1858, paid it in the belief that that state of facts did exist. After he had so paid the money, viz. between October and December of that year, upon going more minutely into the accounts, he discovered his mistake: and in March, 1859, he demanded back the sum which he conceived he had paid in excess. I think the plaintiff never intended when he made the payment in question to abandon his right of investigating the accounts. If he had done so, then, according to the cases, he could not be allowed to retrace his steps. But here the plaintiff only paid the money because he believed the fact to exist which would entitle the defendant to receive it. It seems, from a long series of cases, from *Kelly v. Solari*, 9 M. & W. 54, down to *Dails v. Lloyd*, 12 Q. B. 531, that, where a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which [494] he has neglected to avail himself. If there had been any stipulation that the amount of profits should be settled and ascertained by a given time, I should have been of opinion that it was not competent to the plaintiff afterwards to re-open the accounts, and demand back the money he had paid. But I do not find any such provision in the deed. Liberty is reserved to the plaintiff to examine the books: but I do not think the omission to exercise that right within any given time authorizes the defendant to retain this money. The fact of the claim being brought forward at a late period may seem to cast some slight suspicion on it: and, if there were any reason to suppose that the plaintiff had lain by and omitted to investigate the accounts until the complication of matters had operated injuriously

tion after the 31st of December, 1858, when by the terms of the deed the time during which the defendant could examine the books of the firm had expired:

"That the defendant, relying on the implied representation of the plaintiff that he was entitled to be paid the whole 450l. and interest, on the 30th of June, 1858, invested 425l., part of that sum, in the purchase of land; and that it would be inequitable now for the plaintiff to be permitted to recover back and to compel payment out of the general assets of the defendant of the sum demanded, 288l. 19s. 3d."

upon the defendant's position, the case might have fallen within some of the authorities which have been referred to by Mr. Manisty. But no such thing is suggested here.

WILLIAMS, J. I am entirely of the same opinion. No doubt, at one time the rule that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shewn that the party seeking to recover it back had been guilty of no laches. But, since the case of *Kelly v. Solari*, 9 M. & W. 54, it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry. Upon the facts of this case, I think the plaintiff is entitled to recover.

WILLES, J. I am of the same opinion. This is the simple case of one paying another money which both at the time suppose to be due, but which afterwards turns out in consequence of a mistake of fact on [495] the part of the payer, not to have been really due. In such a case the law clearly is that the money may be recovered back. The only distinction is between error or mistake of law, for which the payer is responsible, and error or mistake of fact, for which he is not.

BYLES, J. I am of the same opinion. *Kelly v. Solari* was distinctly recognized in *Bell v. Gardiner*, in this court, and by *Dails v. Lloyd*, in the court of Queen's Bench, to this extent, that you may always rip up accounts which have been settled between parties who have acted under mistake or misapprehension of the facts. I think these cases are based upon a perfectly sound principle. Suppose an executor whose testator's name was John Smith had a promissory note signed "John Smith" presented to him for payment, and he, mistakenly supposing it to be the note of his testator, paid it, would he not be entitled to recover back the money? Here, the money was paid by the plaintiff under a mistake, both parties being under an impression that it was due. That being so, it was manifestly against conscience that the defendant should retain it. The law very properly casts upon the person who makes the payment the burthen of shewing that it was made under a mistake. That being proved, it would be inequitable not to permit him to recover it back. All the three courts have held that the right to recover back money so paid is not fettered by the condition suggested, that there shall not only be absence of knowledge, but also absence of the means of knowledge of the facts. I have nothing to add as to the particular circumstances of this case, except that it appears to me to be eminently a case for the application of the principle now so well established in Westminster Hall.

Judgment for the plaintiff.

[496] FURNIVALL v. GROVE. June 9th, 1860.

[S. C. 30 L. J. C. P. 3.]

On the 4th of November, 1858, A. let certain premises to B. for a term of four years from Michaelmas preceeding, at a yearly rent payable quarterly, the agreement containing the following condition,—"The condition of this agreement being binding on the said B., is, that the said A. shall make good and support the floor of the warehouse of the said premises, &c., within twenty-eight days of the date of this agreement: if not done, this agreement to be void." Within the twenty eight days, A. entered with workmen, and afterwards departed, stating that he had made all secure. B. paid rent at Christmas and at Lady Day. Early in April, 1859, the warehouse floor having broken in, the attention of the commissioner of sewers was called to the state of the premises, and the result was that in May an order was made upon A., under the Metropolitan Buildings Act (18 & 19 Vict. c. 122), directing him to secure and repair the same. At the end of April, A. informed B. that he was about to pull down the premises, and offered to assist B. in removing his printing-presses and plant. After the date of the commissioners' order, A. entered the premises and pulled down the ground-floor storey (including the warehouse floor), and took no steps to replace or repair it. B. thereupon obtained other premises, and he and his undertenants were out, and on the 23rd of June, B. sent A. the key, with a letter stating that he had been forced out of the premises by A.'s wilful and unnecessary destruction of the warehouse floor, &c. A. received the key, read the letter, and said nothing, and a few days afterwards entered and pulled down the whole house, for the purpose of re-building it:—Held, that these facts shewed an agreement for a determination of the tenancy on the 23rd of June, and

consequently that A. could not sue for the quarter's rent.—Whether they amounted to a surrender or an eviction,—quære?

This was a proceeding in the nature of an appeal from the decision of the judge of the sheriff's court, London, under the following circumstances:—

The plaintiff sued the defendant in the sheriff's court, London, under the London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), the following being a copy of the particulars of the plaintiff's demand annexed to the plaint:

"1859. Lady Day to Midsummer Day last, one quarter's rent of 22 Harp Lane, according to agreement, 20l."

The case came on to be heard on the 27th of July, 1859, when the judge amended the plaint and particulars of demand, by inserting a count for use and occupation, that use and occupation being from Lady Day to Midsummer Day, 1859.

Upon the hearing of the plaint as amended, it was ordered that the plaintiff should recover from the defendant in respect of the said plaint and claim the sum of 20l. for debt, and 3l. 8s. 4d. for costs, which two sums have since been paid into court by the defendant, and now remain there.

[497] Afterwards, on the 26th of August, 1859, upon the application of the defendant's counsel, the judge ordered that his judgment should be set aside, and a new trial had between the parties. This order was made by consent, in order that a certiorari might be obtained by the defendant, and the cause thereby removed into this court, so that a case might thereafter be stated for the opinion of the court, under the Common Law Procedure Act, 1852, s. 46.

The defendant, in pursuance of the order of the sheriff's court, has obtained a certiorari; and the parties now state for the opinion of this court the following case:—

On the 4th of November, 1858, the defendant being then in the actual occupation of the premises therein described, the following agreement was entered into between the plaintiff and defendant,—

"Memorandum of agreement made and entered into this 4th day of November, 1858, between Thomas Furnivall, of, &c., for himself, his executors, administrators, and assigns, of the one part, and William Barnes Grove, of No. 22 Harp Lane, in the City of London, for himself, his executors, administrators, and assigns, of the other part, that is to say,—The said Thomas Furnivall hereby agrees to let to the said William Barnes Grove, who hereby agrees to hire or take as tenant of the said Thomas Furnivall for the term of four years the whole of the messuage or house No. 22 Harp Lane, Great Tower Street, with the appurtenances to the said messuage or house belonging, and the use of the fixtures belonging to the said Thomas Furnivall now or at any time hereafter in or upon the said premises, as yearly tenant to the said Thomas Furnivall, at and under the clear yearly rent of 80l., payable on the four usual quarter days of the said tenancy,—the first quarterly payment of the said rent [498] to be made on the 25th day of December next: And the said William Barnes Grove hereby agrees to pay all rates and taxes of every description in respect of the said premises during the tenancy (landlord's property-tax only excepted), and to paint, paper, and whitewash the said premises as often as occasion may demand, and to keep the same in good tenantable repair (damage by fire excepted): but, if such premises should be damaged or destroyed by fire, in that case the said William Barnes Grove shall not be called upon to pay any rent until such premises shall be repaired or rebuilt as the case may be: and not to carry on or permit to be carried on upon the said premises, or any part thereof, any noisome or offensive trade or business, nor do or suffer any act or thing whatsoever whereby or in consequence whereof the lease under which the said premises are now held may be forfeited or vacated or become void or voidable; and at the end of the said tenancy to leave and surrender to the said Thomas Furnivall, or his representatives, all the said premises, together with all the glass and other fixtures which now are or which at any time hereafter may be fixed or set up by the said Thomas Furnivall, in good plight and condition (reasonable fair wear and tear thereof and damage by fire excepted): The partitions dividing the attic storey into four rooms, and the raised floor taken down by the said William Barnes Grove, to be refixed and made good in a proper workmanlike-like manner at the end of the tenancy: And, should the rent not be paid in twenty-one days from the said quarter days, then and in that case the said Thomas Furnivall shall re-enter and have quiet posses-

sion. The condition of this agreement being binding on the said William Barnes Grove is, that the said Thomas Furnivall shall make good and support the floor of the warehouse of the said [499] premises, repair and make good frame and glass of skylight, and fix the present partitions of the same warehouse, within twenty-eight days of the date of this agreement: if not done, this agreement to be void.

“WILLIAM BARNES GROVE.

“Witness, George Herbert.

“THOMAS FURNIVALL.”

At the time of the making of the said agreement, the defendant was, as already stated, in the occupation of the premises by himself and his undertenants, the defendant occupying the upper part of the said house in the way of his business as a printer, a Mr. Hounsell occupying the ground-floor, and a Mr. Hitchcock the basement.

The plaintiff shortly after the date of the agreement, and within the twenty-eight days, entered on the premises with workmen to do the repairs agreed to be done by him, and shortly after left the premises, stating that he had made all good and secure.

The defendant paid the quarters' rent which became due respectively at Christmas Day, 1858, and at Lady Day, 1859.

In the early part of April, 1859, the tenants of the warehouse and cellars complained to the defendant that the floor of the warehouse had broken through. The defendant immediately gave notice thereof to the plaintiff. The plaintiff did not interfere. One of the undertenants thereupon gave notice to the commissioners of sewers of the city of London, who viewed the premises, and served the following notice on the plaintiff and defendant:—

“Metropolitan Buildings Act, 1855.

“Dangerous structures.

“To the owners and occupiers of the house and premises situate No. 22 Harp Lane, in the city of London.

“In pursuance of the provisions of the said act, I [500] hereby, as the principal clerk, and for and on behalf of the commissioners of sewers of the city of London, give you and each and every of you notice, that, it having been made known to the said commissioners that the structure situate as aforesaid is in a dangerous state, the said commissioners required a survey of the same to be made by a competent surveyor, who having certified that the floor of the ground-floor storey, and the girders and joists and other timbers connected therewith, are in a dangerous state, the said commissioners require you forthwith to take down or otherwise to secure and repair the same: And I further give you and each and every of you notice, that, if, for the space of six days from the service hereof, you fail to comply with the requisition of this notice, the said commissioners will make complaint thereof before a justice of the peace, to take such other proceedings in relation to the said structure as are authorized by the said act, and as may be necessary or expedient. Dated this fifth day of April, 1859.

“JOSEPH DAW.

“Sewers Office, Guildhall London.

“N.B.—This notice does not supersede the necessity of your giving the usual notice to the district-surveyor two days before commencing the work of re-building, &c., agreeably to s. 38 of the 18 & 19 Vict. c. 122, part 1.”

The plaintiff did nothing after the receipt of this notice: and shortly afterwards the contractor for the commissioners, under the order of the Lord Mayor, entered on the premises, and shored up the floors of the warehouse.

In the latter end of April, the plaintiff met the defendant, and informed him that he was about to pull the said premises down, and he said that if he (the defendant) would appoint a time, he (the plaintiff) would send him horses and carts to remove his printing-presses and other plant. Thereupon a discussion arose [501] between the parties, the effect of which was held by the judge of the sheriff's court, on the first trial, not to amount to a notice or licence to quit.

On the 9th of May, 1859, the defendant sent to the plaintiff the following letter:—

“22 Harp Lane, May 9, 1859.

“Sir,—I think it best to forward you two notices and a letter which have been

nailed upon these premises this day. The neglect by you to perform your agreement has led to this trouble and expense.

“W. B. GROVE.

“Mr. Thos. Furnivall.”

This letter was accompanied by a copy of the summons referred to in the order under the Metropolitan Buildings Act.

On the 12th of May, an order was duly made under the Metropolitan Buildings Act, s. 73.

The plaintiff, about the middle or latter end of May, and after the date of the order before referred to, took down and removed the ground-floor storey, and the joists and other timbers connected therewith, consisting of the warehouse floor and the joists of the same, and the partition of the staircase. The plaintiff personally superintended the operation. The defendant's undertenants were obliged to remove from the premises, and refused to pay any rent for the same.

The defendant declined to obey or assist in carrying out the order of the 12th of May. The plaintiff, so long as the defendant remained in the premises, took no steps to replace or to repair the said floor or other part of the said premises.

The defendant's business was interrupted by these operations. He sought and obtained other premises, and removed to them on the 15th June and following days. The defendant entirely vacated the premises on the morning of the 23rd of June, and sent the key to the plaintiff, with the following letter :—

[502] “22 Harp Lane, June 22nd, 1859.

“Sir, —I forward you the key of the premises in Harp Lane which you have forced me out of by your wilful and unnecessary destruction of the warehouse-floor, water-closet, and supports of the staircase, and then abandoning the place, evidently with the object of ejecting the whole of the tenants. You have succeeded thus far ; but the result of proceedings to be taken will decide whether a landlord can do such acts with impunity.

“W. B. GROVE.

“Mr. Thomas Furnivall.”

The plaintiff received the key, and read the defendant's letter in the presence of the defendant's messenger : and within a few days entered upon the premises, and pulled the whole down preparatory to re-building the same.

If the court should be of opinion that the plaintiff was entitled to recover for the quarter from Lady Day to Midsummer, 1859, he was to have judgment accordingly, with costs as between attorney and client.

If the court should be of opinion that the plaintiff was not entitled to recover, a nonsuit was to be entered, with costs as in ordinary cases, from and after the return of the certiorari.

John Thompson, for the plaintiff. The ground of the decision in the sheriff's court was, that the defendant's remedy, if any, was by cross-action. The ground on which the defendant seeks to defeat the plaintiff's claim is, that there has been a surrender in fact or by operation of law, or an eviction or a partial eviction. The first question therefore will be, whether there was any evidence of a surrender that could have been left to a jury. The mere delivery of the key does not amount to a surrender. In *Cannan v. Hartley*, 9 C. B. [503] 634, A. was tenant to B. of rooms for a term of years : upon the bankruptcy of B., A. sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told that it was the key of the rooms which A. had occupied : A. immediately quitted possession, and no further communication took place : it was held that this did not amount to a surrender by act or operation of law. Maule, J., there says : “In *Dodd v. Acklom*, 6 M. & G. 672, 7 Scott, N. R. 415, the defendant had complained of the rent, &c., being in arrear. An interview taking place, the tenant gave back the key, and the landlord accepted it. The jury having found that this amounted to a surrender and acceptance, the court refused to disturb the verdict. In that case, the jury had before them the fact that the plaintiff had accepted the key. Here, there is nothing but the fact of the key being brought to a clerk of the official assignee. It is contended that he was bound to receive anything brought to the office for his master. That may be so : but it does not follow that this was an acceptance by the master. But it is said that the conduct of the official assignee in not returning the key, amounted to an acceptance

of it. I do not think that the official assignee was bound to seek out the tenant for the purpose of rendering back the key. In *Dodd v. Acklom*, it was held that Dodd had authority to act for both. That sufficiently distinguishes that case from the present: and, if the jury had found a verdict establishing a surrender and acceptance, such verdict would have been found upon mere negations, and not upon evidence of anything done by the parties." That is precisely applicable here. [Byles, J. Something more was done here than was done in that case: for, the landlord enters upon the premises and pulls the whole down, preparatory to re-building [504] them.] Not until after quarter-day. The next question is, whether the conduct of the landlord amounted to an eviction. The agreement provided that the landlord should enter for the purpose of making good and supporting the floor of the warehouse. The commissioners of sewers, who were put in motion by the defendant or one of his undertenants having given the usual notices under the Metropolitan Building Act, 18 & 19 Vict. c. 122, s. 72, an order to repair was made upon the plaintiff, as owner of the premises, under s. 73, and the plaintiff proceeded accordingly to do the necessary repairs. [Willes, J. The plaintiff, by omitting to perform his contract, rendered those proceedings necessary.] The plaintiff's neglect might have been good ground for a cross-action; but it did not absolve the defendant from his liability to pay rent in respect of his occupation of the premises: *Smith v. Eldridge*, 15 C. B. 236. To constitute an eviction so as to operate a suspension of the rent, the entry of the landlord must be tortious: *Gilbert on Rents*, 178. Here, what was done by the plaintiff was done, not tortiously, but in obedience to a lawfully constituted authority. The law as to eviction is very fully gone into in the case of *Upton v. Townend*, 17 C. B. 30. [Byles, J. I thought the distinction was between an eviction from a part of the term and an eviction from a part of the premises.] In *Luckey v. Frant-kee*, 1 E. D. Smith (American), 47, it is laid down that the act of the owner in consenting to the removal of a wall standing upon his land, and being essential to the use of a part of the demised premises, does not, as between the lessee and the sub-tenant, operate as an eviction. [Willes, J. The law of landlord and tenant in New York is very lax.] A mere trespass by the lessor does not operate a suspension of the rent: *Hunt v. Cope*, Cowp. 242; *Roper v. Lloyd*, Sir T. Jones, 148. Nor will an ouster [505] under an order, as here, from the municipal authority: *Vochell v. Doncastell*, F. Moore, 891.

Prentice, contra (a). The liability of a tenant to pay rent notwithstanding the premises are out of repair, is not disputed. But here the agreement for the tenancy was conditional on certain things being done by the landlord: it was voidable at the election of the tenant, such election to be exercised within a reasonable time after breach. The landlord was to "make good and support the floor of the warehouse, &c., within twenty eight days of the date of the agreement; if not done, the agreement to be void." The first time the tenant had notice that the landlord had not performed his agreement was, early in April, 1859; and within a reasonable time,—regard being had to the nature of his business,—he exercised his option, and elected to treat the agreement as void, sending the key to the landlord, who accepted it, and entered. *Smith v. Eldridge* is an authority in favor of the defendant: it shews that the tenant was not liable under the original agreement. Upon the point of surrender or eviction, *Upton v. Townend* is also a strong authority for [506] the defendant. There, A. demised, under separate leases, two separate tenements to B., with a covenant on the part of A. to insure the premises, and to re-build in the event of their destruction by fire. B. demised one of the tenements to C., and the other to D.; and during their respective tenancies the whole premises were destroyed by fire. The premises were afterwards

(a) The points marked for argument on the part of the defendant were as follows:

"That he was not liable for the rent sought to be recovered, —that the facts shew a surrender in fact or by operation of law before the rent became payable, —that there was a total or partial eviction before the rent became payable, —that the premises were uninhabitable by the act or default of the plaintiff or otherwise, and there was no beneficial occupation during the whole, or at all events during a part of the time in respect of which rent is sought to be recovered, —that the defendant was entitled to determine the tenancy, and did determine the same before the rent became payable, —and that the plaintiff was not entitled to recover the whole of the rent, but could only recover on a quantum meruit."

re-built by A. pursuant to a new plan submitted to B., and approved of and signed by him. B., before the re-building, agreed to surrender the premises, and take a new lease of them in their altered state, which he afterwards did. The new buildings varied from the old ones, inasmuch as the area of C.'s premises was thereby decreased, and that of D.'s increased. It was held, that B. was not entitled to recover against C. and D., as for use and occupation, the rent accruing after the period at which the re-building had arrived at such a stage as permanently to alter the character of the respective premises,—the alterations in the subject-matter of the demises amounting to an eviction, to which he was a party. Williams, J., in giving judgment, there says: "There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction." [Williams, J. The acts done there necessarily operated a permanent exclusion of the tenant from a portion of the premises.] What was intended here? On the 23rd of June, the plaintiff takes the key, and keeps it; and he shortly afterwards enters and pulls down the premises. There was clearly either a surrender or an eviction on that day. In [507] *Grimman v. Legg*, 8 B. & C. 324, 2 M. & R. 488, A. demised to B. the first and second floors of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, B. told A. that she would quit immediately. The latter answered, she might go when she pleased. B. quitted, and A. accepted possession of the apartments. It was held that A. could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter, nor rent *pro rata* for the actual occupation of the premises for any period short of the quarter. "Where," said Bayley, J., "there is an express contract between the parties, nothing can be implied. The plaintiff, therefore, having destroyed his right to recover the rent according to the contract, has destroyed it altogether. Where a party by agreement engaged to pay freight on arrival at a specified port, and the ship never arrived at that port, but landed her cargo at an intermediate port, and it was accepted by the freighter,—it was held that the plaintiff was not entitled to recover a proportionable part of the freight for such part of the voyage as the ship performed; because, where there is not an express contract, the law will not imply one: *Cook v. Jennings*, 7 T. R. 381. So, in this case, the parties having entered into an express contract by which the rent was to be paid quarterly, I think the law will not imply a contract to pay rent for any period less than a quarter." [Byles, J. *Grimman v. Legg* and *Dodd v. Acklom*, though they have been very much reflected on, are still decisions. I was counsel in the latter case: and I must confess I was not satisfied with the conclusion the court came to.] In *Edwards v. Hetherington*, 7 D. & R. 117, R. & M. 268, the lessee of a house underlet the same at Lady Day to A., as tenant from year to year, and, before the end of [508] the half-year, put workmen into the house, with A.'s consent, for the purpose of repairing a party-wall, but the inconvenience occasioned thereby was so great that A.'s lodgers quitted the house, and he was obliged to take lodgings for his own family elsewhere, and, after paying the rent up to Midsummer Day, he remained in possession carrying on his trade till the 5th of July, and then quitted without notice to his landlord: and it was held that the latter could not maintain an action for use and occupation for the second half-year which had thus commenced, the jury finding that there had been no beneficial occupation.

Thompson, in reply. *Edwards v. Hetherington* must be considered to have been overruled by *Hart v. Windsor*, 12 M. & W. 68. The defendant by himself and his under tenants had the use and occupation of the premises whilst the two quarters ending respectively at Christmas, 1858, and Lady Day, 1859, were accruing; and these were paid without objection: and he continued to occupy until the day before the third quarter expired. If he had any right to elect to avoid the agreement, he should have exercised his option more promptly. What took place on that day clearly did not amount to a surrender by act and operation of law, which is thus described in the language of pleading,—“that is to say, by the defendant's then quitting the said messuage, &c., and every part thereof, with the licence and consent of the plaintiff, and relinquishing the possession and enjoyment thereof to the plaintiff, with the intention of putting an end to the same tenancy, and by the plaintiff's then

accepting such possession and enjoyment thereof, with the intention of putting an end to the same tenancy."—See *Morrison v. Chadwick*, 7 C. B. 266.

ERLE, C. J. The peculiar facts of this case appear to [509] me to entitle the defendant to judgment. On the 4th of November, 1858, he being then in the occupation of the premises, the defendant entered into an agreement with the plaintiff to become tenant for the term of four years at a yearly rent payable quarterly, at the usual times. One of the terms of that agreement was, that the landlord should, amongst other things, make good and support the floor of the warehouse within twenty-eight days. Within the stipulated period the plaintiff entered with workmen, and shortly afterwards left the premises, saying that he had made all secure. The defendant remained in, paying rent at Christmas, 1858, and Lady Day, 1859. During the currency of the third quarter, the defendant's undertenants complained that the floor was falling, and certain proceedings took place with respect to it under the Metropolitan Buildings Act. At the latter end of April, the plaintiff informed the defendant that he was about to pull the premises down, and offered to assist him in removing his presses and plant. The defendant, however, did not go out till the 23rd of June. He required time to get other premises. As soon as he had done so, he sent the key to his landlord, who kept it, and a few days afterwards entered and pulled down the premises. The inference I draw from these facts is, that the tenant was acting in the exercise of his right under the agreement to avoid the tenancy for the landlord's default in the performance of the condition on which it was made to depend. It seems to me that the tenancy was a failure, that the tenant went out with the consent of the landlord, and that there is an end to the claim of the latter for rent. I also incline to think that the landlord's coming in May, and pulling down the floor of the warehouse, &c., might well be considered in the nature of an eviction, if the premises were thereby rendered uninhabitable. Upon these [510] several grounds, I am of opinion that the defendant is entitled to judgment.

WILLIAMS, J. Upon the whole, I concur in thinking that our judgment should be for the defendant in this case: but I cannot say that I adopt all the views of my Lord. It seems to me that the defendant entering under the agreement of the 4th of November, containing a condition that it should be void if the landlord did not within twenty-eight days make good and support the floor of the warehouse, entered as tenant at will in the strict sense of the word, and that he so continued until he paid rent. At that time, —though it had not then been ascertained whether the landlord had performed the condition or not, —upon the facts I think it must be taken that it had not been performed. But the tenant chose to pay rent, and thereby turned himself into a tenant from year to year. That being so, the question arises whether that tenancy was got rid of before the 24th of June. I do not think the facts stated shew a surrender. The acts relied on for that purpose were, the plaintiff's acceptance of the key, and his subsequent re-taking possession of the premises for the purpose of pulling down and re-building them. All that appears about the key is, that the plaintiff received it. And, as to the re-taking possession, that did not happen until after the rent became due. It seems to me that there is no evidence here from which we can infer such an agreement as in *Gore v. Wright*, 8 Ad. & E. 118, 3 N. & P. 243, where, in debt, it was held to be a good plea that the landlord agreed to excuse payment of rent, in consideration of the defendant giving up possession, and that possession was actually given up and accepted accordingly. The plea there did not set up a surrender as a defence, but merely an executed contract. There is no evidence of [511] an executed contract here. This gives rise to the question whether the rent was not at all events suspended by the eviction. With some hesitation, I have come to the conclusion that it was. As to this, the facts appear to be these: —In the early part of April, complaint was made by the undertenants that the floor of the warehouse had broken through, which led to a notice from the commissioners of sewers to take down or repair it. About the middle or latter end of May, in consequence of an order of the commissioners, the landlord took down and "removed the ground floor storey, and the joists and other timbers connected therewith, consisting of the warehouse floor and the joists of the same, and the partition of the staircase." The defendant's undertenants were in consequence obliged to remove, and his business was interrupted. And after the 24th of June, the plaintiff pulled the house down for the purpose of re-building it. It seems to me that as early as May the plaintiff did acts which may be regarded as acts amounting in law to an eviction, because the effect of them was

to interfere with the defendant's enjoyment of part of the premises. It seems to me, though I have come to that conclusion not without considerable hesitation, that these acts were sufficient to constitute a partial eviction, and therefore operated a suspension of the rent. What took place after the 24th of June cannot I think be prayed in aid to constitute the delivery and receipt of the key on the 23rd a surrender by operation of law.

WILLES, J. I also am of opinion that there should be judgment for the defendant. It appears from the statement of the case that the parties intended to put an end to the tenancy from year to year which was created by the defendant's entering under the agreement of the 4th of November, 1858, and paying rent. [512] The key was given up to the landlord on the 23rd of June, 1859, and the tenant left, for the purpose (afterwards carried into effect) of the landlord's taking possession and pulling down and re-building the premises. No doubt, from *Grimman v. Legg*, there has been a series of cases in which it has been held, that, where the landlord has, with the consent of the tenant, entered and pulled down the house,—the intention on both sides evidently being that the tenancy should no longer subsist,—that enures as a surrender by operation of law. But here the surrender did not take place till after the rent was due. The case of *Dodd v. Acklom*, when closely looked at, will be found not at all to have departed from the principles laid down in *Mollett v. Bragme*, 2 Campb. 103, *Johnston v. Huddleston*, 4 B. & C. 922, 7 D. & R. 411, and *Dodd v. Huddleston v. Johnston*, McClell. & Y. 141. But, upon the facts here stated, there clearly was an agreement between the parties that the tenant, giving up possession on the 23rd of June, should not be liable for the rent accruing on the following day. The circumstances which lead my mind to this conclusion are these:—The landlord by the terms of the agreement was liable to repair the warehouse floor. He failed to do so: and in consequence it became dangerous, and it is hardly an exaggeration to say useless. Under pressure from the proper authorities under the Metropolitan Buildings Act, the landlord formed an intention to pull down and re-build the whole structure, and that the tenant should leave for that purpose: and he intimated that intention to the tenant, and offered to assist him in the removal of his plant. It is clear that the landlord wished to get the tenant out: but the latter did not assent to it at that time. Then came the order of the commissioners of sewers, under which the defective floor was to be taken down or repaired. The next [513] step is, that the landlord goes in and removes the ground-floor storey, in consequence of which it becomes necessary for the defendant and his undertenants to remove from the premises. The whole of May and a great part of June passed, and yet the landlord took no steps to repair the floor. The fair inference from that is, that he intended to take down the whole house. In this state of things, comes the defendant's letter of the 22nd of June, which was sent to the landlord on the 23rd accompanied by the key. In that letter the defendant says,—“I forward you the key of the premises in Harp Lane, which you have forced me out of by your wilful and unnecessary destruction of the warehouse floor, &c., and then abandoning the place, evidently with the object of ejecting the whole of the tenants.” The landlord receives the key, reads the letter, and says nothing: and within a few days enters and pulls down the whole of the premises. This brings home a conviction to my mind that the tenant intended to propose and the landlord to assent to the determination of the tenancy, and that no rent should be subsequently accruing.

BYLES, J. I also am of opinion that our judgment should be for the defendant upon two grounds. In the first place, I think the condition contained in the agreement of the 4th of November, 1868, and what was done under it, enables the tenant to support his defence. The condition is as follows:—“The condition of this agreement being binding on the said W. B. Grove is, that the said F. Furnivall shall make good and support the floor of the warehouse of the said premises, &c., within twenty-eight days of the date of this agreement: if not done, this agreement to be void.” It is to be observed that the words are not, “If not then done, this agreement to be void.” The landlord, if he [514] does it within the twenty-eight days, is safe: if he does not, the tenant may within a reasonable time avoid the agreement. It appears that some shew of doing the repairs was made within the time mentioned: but it ultimately turned out that the condition was not performed, and the tenant returned the key and relinquished his possession of the premises. I am clearly of opinion that the landlord's acceptance of the key, with full knowledge of all the circumstances, amounted to an admission that the option of the tenant to avoid the agreement had

been properly exercised. Furthermore, upon the ground put by my Brother Willes, I think the conduct of the parties was strong to shew a mutual intention and assent to the determination of the tenancy. It is unnecessary to give any opinion as to whether the facts stated shew an eviction or a surrender by operation of law.

Judgment for the defendant.

[515] THE LLANDAFF AND CANTON DISTRICT MARKET COMPANY, *App.*; THOMAS HENRY LYNDON, *Resp.* June 8th, 1860.

[8 C. B. 30 L. J. M. C. 105; 2 L. T. 771; 6 Jur. N. S. 1344; 8 W. R. 693.]

The 25th section of the Llandaff and Canton District Markets Act, 21 & 22 Vict. c. cv., enacts that every person who "shall sell or expose for sale, at any place within the limits of the act (other than in his own dwelling-house, or in any shop attached to and being part of any dwelling house), any article in respect of which tolls are by this act authorized to be taken," shall forfeit and pay any sum not exceeding 40s. By a schedule to the act a toll was imposed on horses:—Held, that a horse was an "article" within the above section:—Held also, that a sale by auction of horses by A., a licensed auctioneer, in a yard attached to the dwelling-house of B., within the district, was an offence against the act.

The following case was stated, pursuant to 20 & 21 Vict. c. 43, for the opinion of this court, by two of Her Majesty's justices of the peace in and for the borough of Cardiff, in the county of Glamorgan:—

"At a petty sessions for the said borough, held on the 13th of February, 1860, the respondent appeared before us, in pursuance of a summons charging him with having on the 4th of February then instant, unlawfully exposed horses for sale at the town of Cardiff, within the limits of the Llandaff and Canton District Markets Act, 1858, 21 & 22 Vict. c. cv.

"By the 4th section of the act, the parishes of St. John the Baptist, and St. Mary, comprising the borough and town of Cardiff, are included within the limits thereof.

"Section 25 enacts that 'every person who shall sell or expose for sale at any place within the limits of this act (other than in any existing market-place or the market house and market-places to be established under this act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by this act authorized to be taken, other than eggs, butter, and fruit, shall forfeit and pay to the company any sum not exceeding 40s.' (a).

[516] "By section 26, the company are required, within eighteen calendar months from the passing of the act, to construct and open for public use the cattle-market, by the act authorized to be made: and, from and after the opening of such market, no other market or fair for the sale of live cattle shall be held.

"The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), incorporated with the said Llandaff and Canton District Markets Acts, by s. 13 enacts, that 'after the market-place is opened for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling house or shop, any articles in respect of which tolls are by the special act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s.'

"At the hearing, the opening of the markets constructed under the act was admitted.

(a) "Provided always, that nothing herein contained shall restrain or prohibit any person from carrying or exposing for sale, or from selling from door to door, within the limits of this act any such articles as aforesaid, provided such person or persons shall have first paid for such articles the regular market tolls or duties authorized to be taken by the schedule A. to this act, or in the said recited act; and provided such articles shall first have been brought into the market by this act authorized, or the market established or to be established under the said recited act (5 & 6 W. 4, c. li.), for inspection there: Provided always, that the vendors of all articles liable to market-tolls under this act shall have, if they require it, sufficient accommodation or space to expose them for sale in the said market."

"A local newspaper was put in by complainant (the appellant), which contained the following advertisement:—

"'Mr. Lyndon's announcements. Horses for sale.

"'Mr. Lyndon begs to announce that he will sell by auction on Saturday, the 4th of February, at Holland's horse-repository, Working Street, a number of excellent horses, comprising several powerful draught-horses, useful and handsome hacks, and others. Five or six hauliers' carts, dog-carts, and gigs. Several sets of cart and other harness, saddles, bridles, &c.

[517] "'The auctioneer begs to call the attention of intending purchasers to this sale, as a large proportion of the horses and other things can be highly recommended. Sale to commence at 2 o'clock.

"'Auctioneer's office, Institute Chambers, Cardiff.

"'January 27th, 1860.'

"A witness was called by the appellant, who deposed that he went on the 4th of February instant to Holland's repository in Working Street, Cardiff, and saw some horses put up for sale by public auction by the defendant Lyndon: and, on cross-examination, he stated that the place where the horses were sold is a private place entered by an archway which leads to a yard at the side of Mr. Holland's house.

"A witness was called on behalf of Lyndon, who deposed that he knew Holland's repository, that it is private property, and leads no where, and is all in Holland's hands, and within his gates.

"The defendant's licence as an auctioneer (a copy of which was annexed to the case) was put in.

"On this state of facts, it was urged by the appellant, that the place where the horses were sold was not within the exception of s. 25: and that, at all events, a sale of horses by auction, publicly advertized in newspapers, and held in a yard to which the public were admitted without restriction, was not exempt from the operation of the act.

"For the defendant it was urged that he, being an auctioneer, was protected, and the licence and the 8 & 9 Vict. c. 15 were relied on in support of this view: and that the place of sale was a private place, and within the exceptions of the company's act, s. 25.

"We were of opinion that the place where the auction took place being a private yard, forming part of the dwelling-house and premises of Holland, came within the exception of the 13th section of the Markets and [518] Fairs Clauses Act, 1847, and the 25th section of the Llandaff and Canton District Markets Act; and we thereupon dismissed the information.

"The appellant, being dissatisfied with our determination as being erroneous in point of law, applied to us in writing, within three days after such determination, to state and sign a case for the opinion of the Court of Common Pleas; in compliance with which application we hereby state this case, and pray the opinion of the court thereon."

Giffard, for the appellants (a). The 25th section of the local act, 21 & 22 Vict. c. cv., intended to create a monopoly within the district comprised therein of the sale of live stock: the only exceptions being of persons hawking as therein mentioned, or selling in their own dwelling-houses or in any shop attached thereto. Here, Lyndon was not selling in his own dwelling-house or in any shop attached thereto; and the circumstance of his being a licensed horse-dealer makes no difference: that is a mere matter of revenue. The horses,—some of them at least,—were not even the property of Holland, on whose premises the sale took place. In a case of *Mosley v. Chadwick*, cited in *Mosley v. Walker*, 7 B. & C. 47, 9 D. & R. 863, a case from the Year Book 11 H. 6, pl. 13, is cited from Bro. [519] Abr. Prescription, pl. 98. That was an

(a) The points marked for argument on the part of the appellants, were as follows:—

"That the facts stated disclose a selling and exposing for sale contrary to the provisions of the 25th section of the Llandaff and Canton District Markets Act, 1858, 21 & 22 Vict. c. cv.:

"That the sale by the respondent under the circumstances stated was a market for the sale of live cattle, within the meaning of the 26th section of the above-mentioned statute:

"And that the facts stated shew an offence against the 13th section of the 10 & 11 Vict. c. 14."

action of trespass by the Prior of Dunstable, alleging that whereas he and his predecessors time out of mind held the market in Dunstable such a day, and had the correction of the market, and the butchers who sell victuals should sell in the High Street upon the stalls in the market by him assigned for them, for which the plaintiff had 1d. a day for every stall, and that the defendant sold in his house, by which the plaintiff lost the advantage of his stallage and the correction and so forth of the market: and this was admitted to be a good prescription. The defendant prescribed that he and all householders used to sell in their houses: and the court was of opinion that the allegation by the defendant was a bad prescription. [Erle, C. J. The court meant to say that the defendant should have denied the prescription set up by the prior,—averring it to have been, not a general right, as claimed, but a right subject to that set up by the defendant.] It is not so treated in the judgment in *Mosley v. Walker*. But for the saving in s 25, even private traders would be precluded from carrying on their trade on market-days, in any articles liable to market-tolls, other than in the market-place.

Coleridge, *contra*. It is submitted that the justices were right in refusing to convict the respondent, on the following grounds,—first, that the respondent was a duly licensed auctioneer under the 8 & 9 Vict. c. 15,—secondly, that what was done by him was within the exception in the 25th section of the Llandaff and Canton District Markets Act,—thirdly, that horses are not within the meaning of that section at all,—fourthly, that the case was not within the 26th section. 1. The 22d section of the 8 & 9 Vict. c. 15, enacts that an annual excise duty of 10l. shall be paid “for and upon [520] every licence to be taken out by every person exercising or carrying on the trade or business of an auctioneer in any part of the United Kingdom.” [Williams, J. That licenses the party to carry on the business in a lawful place, not where in so doing he would be a trespasser. Byles, J. Or a wrong-doer.] The special act does not take away any rights possessed by parties under the general act, 10 & 11 Vict. c. 14. In *Williams v. Pritchard*, 4 T. R. 2, Lord Kenyon says: “It cannot be contended that a subsequent act of parliament will not control the provisions of a prior statute, if it were intended to have that operation: but there are several cases in the books to shew that, where the intention of the legislature was apparent that the subsequent act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction. In Bro. tit. Parliament, pl. 52, is the passage, ‘where a statute is that the merchant shall import bullion of two marks for every sack of wool exported; and then another statute was made, that the merchant should not be charged unless for the antient custom only, this does not repeal the first statute. Vi Causam, ib. 4 E. 4, fo. 12.’ And the reason is, that it clearly was not the intention of the legislature that it should have that effect.” 3. The 25th section of the local act enacts that “every person who shall sell or expose for sale at any place within the limits of this act (other than in any existing market-place, or the market-house and market-places to be established under this act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house), any article in respect of which tolls are by this act authorized to be taken, other than eggs, butter, and fruit, shall forfeit and pay to the company [521] any sum not exceeding 40s.” That which Lyndon is charged with having done here was within the exception in that clause. A horse-dealer does not carry on his business in a shop, but in a yard or stable; and there is no prohibition against a party’s selling goods in a shop attached to a dwelling-house not his own. 3. Horses are not within the section at all. It is true that by the schedule tolls are imposed upon horses (a). But, in construing this

(a) The 19th clause, which impowers the company to take tolls, is as follows,—“So soon as the said proposed market-house, market-place, or market-places shall be completed and opened for public use, it shall be lawful for the company from time to time to demand from any person occupying or using any stand, stall, shed, station, building, or place in the said proposed market-house, market place, or market places, or any place provided for fairs, or in any market house, market place, or market places, or buildings to be constructed and established under the provisions of this act, or bringing into such proposed market house, market place, or market places, or building, any horses, cattle, marketable commodity, provisions, articles, or things specified in

section, the ordinary rules applied to the construction of acts of parliament must be observed; and, applying the provision to things ejusdem generis with those enumerated, viz. eggs, butter, and fruit, it is plain that "horses" were not within the contemplation of the legislature. [Byles, J. What generic term could be applied to eggs, butter, and fruit? Is not "article" synonymous with "commodity," and large enough to comprehend a "horse"?] The proviso shews that horses were not contemplated,—“Provided always that nothing herein contained shall restrain or prohibit any person from crying or exposing for sale, or from selling from door to door, within the limits of this act, any such articles as aforesaid,” &c. Who ever heard [522] of horses being cried or exposed for sale “from door to door?” [Byles, J. What do you say to the word “articles” in the concluding part of the same clause?] Horses are clearly not within the first two provisions: and the next proviso, —“and provided such articles shall first have been brought into the market by this act authorized, or the market established or to be established under the said recited act, for inspection there,”—shews that they are not within the part just referred to. In order to see what articles are liable to inspection, reference must be had to the general act, 10 & 11 Vict. c. 14, which is incorporated with the special act (see s. 1): and these we find, by ss. 15 and 20, to be confined to meat and provisions. The inspectors have nothing whatever to do with horses. 4. The 26th section of the local act enacts that, “within eighteen calendar months from the passing of this act, the company shall and they are hereby required to construct, establish, and open for public use the cattle-market and slaughter-houses by this act authorized, with all necessary works, buildings and conveniences: and, from and after the opening of the said market, no other market or fair for the sale of live cattle shall be held within the limits of this act, anything in the said recited act of 5 & 6 W. 4, c. li., or any usage, custom, or privilege to the contrary notwithstanding: Provided always that this restriction shall not extend to prevent the holding of any market or fair for the sale of pigs, sheep, and lambs, within the limits of the pig-market of the mayor, &c. of Cardiff, as it existed on the 1st of January, 1858.” No conviction could be supported upon that section. The respondent was not holding a market or fair for the sale of live stock: and no penalty is provided by that section.

Giffard was heard in reply.

ERLE, C. J. I am of opinion that a horse is an “ar-[523]-ticle” within the 25th section of the Llandaff and Canton District Markets Act, 1858. The statute incorporates the Llandaff and Canton District Market Company, for the purpose of erecting a market-house and other necessary buildings and conveniences for the sale of horses, cattle, sheep, pigs, meat, poultry, fish, vegetables, and other commodities; for the doing of which the undertakers are to be compensated by tolls, a schedule of which is annexed to the act. The 25th section enacts that “every person who shall sell or expose for sale at any place within the limits of this act (other than in the existing market-place or market-house and market-places to be established under this act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by this act authorized to be taken, other than eggs, butter, and fruit, shall forfeit and pay to the company any sum not exceeding 40s.: Provided always that nothing herein contained shall restrain or prohibit any person from crying or exposing for sale, or from selling from door to door, within the limits of this act, any such articles as aforesaid, provided such person or persons shall have first paid for such articles the regular market tolls or duties authorized to be taken by the schedule A. to this act, or in the said recited act (5 & 6 W. 4, c. li.); and provided such articles shall first have been brought into the market by this act authorized, or the market established or to be established under the said recited act, for inspection there.” I am of opinion that the word “articles” in that section was intended to comprise everything in respect of which a toll is payable; and horses I find specifically mentioned in the schedule. The 26th section seems to me to make the matter plain. It can hardly be supposed that so marketable a commodity in a Welsh town should be intended to be excluded from the operation [524] of the act. Then, was the respondent, who was selling by public auction (being

the schedule A. to this act annexed, such tolls, rents, and stallages as the company shall from time to time appoint, not exceeding the several tolls, rents, and stallages specified in the said schedule.”

a duly licensed auctioneer) in a yard adjoining and belonging to the premises of a third party, within the exception in s. 25, applicable to a person selling "in his own dwelling-house, or in any shop attached thereto and being part of any dwelling-house?" The place of sale is not his own; nor is it to my mind a "dwelling-house" within the statute. Though for some purpose all within the curtilage may be deemed part of the dwelling-house, I incline to think this means "dwelling-house" in the popular sense. The intention was, that the established traders of the district who carry on their business in their own dwelling-houses or shops should not be interfered with. I am the more convinced that that was the intention here, because the Llandaff and Canton District Markets Act, s. 1, adopts the provisions of the general act, the Markets and Fairs Clauses Act, 1847, "except so far as the same shall be expressly varied thereby;" and I observe that the expression in the 13th section of the last-mentioned act is "except in his own dwelling *place* or shop," which might include a yard attached to a dwelling-house. I am therefore of opinion that Holland's yard was not a dwelling-house within the local act, and consequently that Lyndon was not within the exception, and was liable for selling as he did.

WILLIAMS, J. I am quite of the same opinion. I will merely add that the fact of the respondent being a licensed auctioneer only legalized a sale by him when made in a lawful place, not when it is done in a place where a sale is prohibited by law.

WILLES, J. I am of the same opinion. The proper course for the magistrates to pursue would be to fine the respondent a shilling.

Appeal allowed.

[525] MARFELL v. THE SOUTH WALES RAILWAY COMPANY. June 5th, 1860.

[S. C. 29 L. J. C. P. 315; 2 L. T. 629; 7 Jur. N. S. 240; 8 W. R. 765.]

The 68th section of the Railways Clauses Consolidation Act, 1845, s. 8 & 9 Vict. c. 20, which imposes upon the company the duty of erecting and maintaining "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway," does not oblige them to fence off their railway from an adjoining tramway which they permit the public to use on payment of tolls, —the enactment applying only to the separation of the railway from the adjoining lands belonging to others.—The defendants were the owners of a railway and also of a tramway which for some distance ran by the side of the railway, and was separated from it by a hedge or fence, also belonging to the defendants, down to a point where the tramway crossed the railway. At this point the company had placed swing-gates to separate the tramway from the railway; but these were seldom, if ever, closed. The tramway was used by the public for drawing coals and other goods in trucks along it by means of horses, a toll being paid to the defendants for its use. The plaintiff's servant was proceeding along the tramway with certain horses and trucks, when one of the horses, alarmed by the noise of an approaching train, swerved on to the railway, and was knocked down and killed.—In an action against the company, charging them with negligence in omitting to use reasonable or proper means to prevent their engines and carriages doing damage or injury to persons lawfully being upon and using the tramway,—the jury having found that the company were guilty of negligence,—Held, by Williams, J., and Byles, J. (Erle, C. J., dissenting), that the plaintiff was entitled to recover.

This was an action against the South Wales Railway Company for alleged negligence in not properly fencing off their railway from an adjoining tramroad, also their property.

The first count of the declaration stated that the defendants, before and at the time of the doing of that which was thereafter complained of, were the owners and proprietors and possessed of a certain railway, and of certain engines and carriages used by them for the carriage and conveyance thereby of passengers, cattle, goods, and chattels upon and along the said railway from and to divers

places, for hire and reward to them in that behalf, and which said railway was and is a railway undertaken and authorized to be constructed by an act of parliament which authorized the purchase and taking of lands for the said undertaking, which was made and passed after the making and passing and coming into force of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, and to which said railway and undertaking the provisions and enactments of the said last-mentioned act always applied and [526] apply : and that, although the defendants purchased and took lands for the said railway and undertaking under and by virtue of the said last-mentioned statute ; and although all things occurred, happened, and existed, and all times elapsed and passed, necessary to impose upon the defendants the liability of maintaining sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land so taken for the use of the said railway from the adjoining lands not taken, and protecting such last-mentioned lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the said railway : yet the defendants, disregarding their duty in that behalf, did not maintain sufficient posts, rails, hedges, ditches, and other fences as aforesaid, but wholly omitted and neglected so to do ; and, on the contrary thereof, they the defendants carelessly, negligently, and improperly suffered and permitted the said land so taken for the use of the said railway to be and continue, and the same was, for a long time, and until the injuries thereafter mentioned, without any sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the same from the said adjoining lands as aforesaid, within the meaning of the said statute ; and while the lands so taken for the use of the said railway remained and continued without any such sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the same from the said adjoining lands not taken as aforesaid, within the meaning of the said statute, and solely for the want of the same, a certain horse of the plaintiff, which was then being used by the plaintiff upon the said adjoining land so not taken as aforesaid within the meaning of the statute, strayed off the said last-mentioned land, by reason of the said railway, into and upon the said railway, and became and was run down by a certain locomotive [527] engine and train of conveyance of the defendants then being and travelling in, upon, and along the said railway, and killed and destroyed ; and the harness then being upon the said horse was greatly torn, damaged, and lessened in value and spoiled ; and the plaintiff had lost and been deprived of great gains and profits which would otherwise have accrued to the plaintiff from and by the use and employment of the said horse.

The second count stated, that, before and at the time of the doing what was thereafter complained of, the defendants were the owners and proprietors and possessed of a certain railway, upon which they were used and accustomed to run locomotive engines and carriages, and which said railway ran and passed side by side with and parallel and close to a certain tramway upon a level with the side ; and the said locomotive engines and carriages were used and accustomed to be run and passed over and across the said tramway at the point where the said railway passed side by side with and parallel and close to the same as aforesaid ; and the defendants, by reason of the possession of the said railway, at the time of the doing what was therein-after complained of, of right ought to have taken and used, and all things had occurred and happened and then existed necessary to impose upon them the obligation of taking and using, reasonable and proper means and precautions to prevent such locomotive engines and carriages so passing over and running across the said tramway at the said point where the said railway so ran and passed side by side with and parallel and close by the said tramway as aforesaid, doing damage or injury to persons there lawfully being upon or using the said tramway with their horses and carriages,—of all which premises the defendants always had notice : Averment, that the [528] defendants then carelessly, negligently, and improperly caused and procured one of their said engines, with a train of carriages attached thereto, to run and pass side by side with and parallel and close to the said tramway, at the said last-mentioned point, without taking due, reasonable, or proper means or precautions to prevent the said last-mentioned engine and carriages doing damage or injury to persons lawfully being upon and using the said tramway with their horses and carriages ; and then so carelessly, negligently, and improperly behaved and conducted themselves in the premises, that, by and through the mere carelessness, negligence, and improper conduct of the defendants in that behalf, and solely for want of such due, reasonable,

and proper means and precautions being taken as aforesaid, the last-mentioned engine and carriages at the last-mentioned point ran down and killed a certain horse of the plaintiff with which the plaintiff was then lawfully upon the said tramway, and which was being lawfully driven and used by the plaintiff upon the same, and broke, damaged, and injured, and lessened in value, and spoiled the harness of the plaintiff which was then upon the said horse, and wherewith the same was harnessed.

The defendants pleaded, —first, not guilty, —secondly, to the first count, that the plaintiff was not the occupier of the said adjoining lands within the meaning of the statute, —thirdly, to the second count, that the said horse was not lawfully upon the said tramway, or being lawfully driven and used upon the same, as alleged. Issue thereon.

The cause was tried before Bramwell, B., at the last Spring Assizes at Gloucester. The facts which appeared in evidence were as follows: —The defendants were the owners of a railway and also of a tramway which for some distance ran by the side of the railway, [529] and was separated from it by a hedge or fence, also belonging to the defendants, down to a point where the tramway crossed the railway. At this point the company had placed swing-gates to separate the tramway from the railway, but which, according to their own evidence, were seldom (if ever) closed. The tramway was used by the public, and amongst others by the plaintiff, for drawing coals and other goods in trucks along it by means of horses, a toll being paid to the defendants for its use. On the 12th of November, 1859, while certain trucks of the plaintiff were proceeding along the tramway, the foremost horse of the team, being alarmed by the noise of a train approaching on the line, swerved from the tramway on to the railway, the gates being open, and was knocked down and killed.

For the plaintiff it was insisted that the company were bound as well at common law as by the 68th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), to make and maintain a sufficient fence between their railway and the tramway to render the latter safe to persons using it by licence of the defendants.

On the other hand, it was submitted, on behalf of the defendants, that the statute only applied to fences necessary to protect the lands of strangers from the railway, and not to fences between the railway and other lands belonging to the company; that there was no common law duty; nor any evidence to establish actionable negligence: but that there was culpable negligence on the part of the driver of the plaintiff's team, in not being at the head of it in a situation of so much danger.

In reply to questions put to them by the learned judge, —who intimated an opinion that the first count could not be supported, —the jury negatived negligence [530] on the part of the plaintiff, but found that the company had been guilty of negligence in leaving the gate open; and they assessed the damages at 35*l*. The learned judge thereupon directed a verdict to be entered for the plaintiff for that sum, reserving to the defendants leave to move to enter a verdict for them if the court should be of opinion that the action was not maintainable. He also reserved leave to the plaintiff to amend the declaration in any form which upon the evidence would sustain the action.

Huddleston, Q. C., on the part of the defendants, in Easter Term last, obtained a rule nisi pursuant to the leave reserved to them. He referred to *Corby v. Hill*, ante, vol. iv., p. 556, and *Hardcastle v. The South Yorkshire Railway Company*, 4 Hurlst. & N. 67.

Powell and H. James shewed cause. The 68th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), imposes upon the company the duty of erecting and maintaining "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." Here, it is true, the plaintiff was not the owner of the land adjoining the railway. That, as well as the tramway, was the property of the company. But it is submitted, that, inasmuch as he was using the tramway with the consent of the company, he had a sufficient temporary occupation to entitle him to the protection of the statute: *Sir Francis Lake's case*, 3 Dyer, 365 a.; *Ricketts v. The East and West India Docks and Birmingham Junction Railway Company*, 12 C. B. 160; *The Manchester, Sheffield and Lincolnshire Railway Company, App., Wallis*, [531] *Resp.*, 14 C. B. 213; *The Midland Railway Company, App., Daykin, Resp.*, 17 C. B. 126. [Erle, C. J. I do not think

the count founded upon the statute can be sustained.] Then, the defendants have clearly been guilty of negligence for which they are liable at common law. The railway, the tramway, and the fence between them, are all the property of the company,—the fence being obviously there only for the protection of persons using the tramway. The plaintiff was using the tramway by the licence of the company; and, through their negligence (as the jury have found), in leaving open a gate which ought to have been closed, the plaintiff's horse was killed. The circumstances clearly imposed upon the company the duty of taking care that those whom they license to use their tramway shall exercise that right in safety: *Barnes v. Ward*, 9 C. B. 392; *Parnaby v. The Lancaster Canal Company*, 11 Ad. & E. 223, 3 N. & P. 523, 1 Railway Cas. 696; *Manley v. St. Helens Canal Company*, 2 Hurlst. & N. 840; *Gibbs v. The Trustees of the Liverpool Docks*, 3 Hurlst. & N. 164; *Corby v. Hill*, ante, vol. iv. p. 556; *Hardcastle v. The South Yorkshire Railway and River Don Company*, 4 Hurlst. & N. 67. Further, it is submitted that persons who, like this company, are carrying on a dangerous trade, are bound to use more than ordinary caution to preserve the public from injury. *Piggot v. The Eastern Counties Railway Company*, 3 C. B. 229; *Roberts v. The Great Western Railway Company*, ante, vol. iv. p. 506; *Vaughan v. The Taff Vale Railway Company*, 3 Hurlst. & N. 743, 5 Hurlst. & N. 679.

Huddleston, Q. C., and Phipson, in support of the rule. The 68th section of the 8 & 9 Vict. c. 20 clearly imposes no other duty upon the company than that of fencing off their railway from the adjoining lands of third persons, or possibly from an adjoining highway: *Roberts* [532] v. *The Great Western Railway Company*, ante, vol. iv., p. 506. The circumstance of the plaintiff using the company's tramway under a licence from them imposes upon the latter no duty to exercise any extraordinary vigilance. The licence was, to use the tramway such as they found it,—with all its attendant perils: *Hounsell v. Smyth*, ante, vol. vii. p. 731. The only possible duty in the defendants which could arise here must be founded on some contract; and of this there is no evidence. It may be that it was not convenient to the defendants to keep the gate closed. [Williams, J., referred to the 47th section of the 8 & 9 Vict. c. 20, which enacts, that, “if the railway cross any turn-pike road or public carriage-road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates: and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway; and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same, under a penalty of 40s. for every default therein.”] The fact of a special enactment being required in the case of a turnpike-road, affords cogent evidence that there is no such duty imposed upon a railway company under circumstances like those of the present case. The company being under no obligation to fence at all between their railway and their tramway, the persons [533] using the latter can have no right to complain of the absence or insufficiency of the fence such as the company have chosen to make it. [Williams, J., referred to *Boorman v. Brown*, 3 Q. B. 511, 2 Gale & D. 793.] That was an action of tort for a breach of duty arising from contract. There is no such duty charged here: and the leave reserved to the plaintiff to amend his declaration would not extend to that; neither would the facts warrant it.

Cur. adv. vult.

BYLES, J., in the absence of the Lord Chief Justice, who was engaged at Guildhall, and of Mr. Justice Williams, who was attending the House of Lords, now proceeded to deliver their several judgments and his own.

ERLE, C. J. In this case the plaintiff's horse had turned from a tramroad to a railway, and been killed by an engine; and the question was whether there was evidence of a breach of duty on the part of the defendants which caused the loss.

The railway and the tramroad ran in parallel lines very near to each other on the land of the defendants. The plaintiff was using the tramway with horses and trucks, by the permission of the defendants, for certain tolls, that is, money to be paid to them by him for such use. A fence had been placed between the railway and tram-

road, and in the line of fence was a gate which had been opened and left open by the defendants' servants; and through this opening the horse swerved from fear on to the railroad. The jury found that there was negligence in leaving the gate open: but, although they have so found, it does not follow that there was a cause of action, unless there was a breach of some duty owing by law from the defendants to the plaintiff, in so leaving it open.

[534] The undefined latitude of meaning in which the word "negligence" has been used, appears to me to have introduced the evil of uncertain law to a pernicious extent; and I think it essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence. Then, do the facts shew any legal obligation on the defendants to keep the gate closed when the plaintiff should be passing? My answer is in the negative. It is clear that the defendants are under no obligation to put any fence on their own land: the statute which obliges them to fence against the land of the adjoining owner, has no application in respect of their own.

The common law contains no provisions in respect of the use of horses either on or close to railroads, on account of danger from fright or otherwise: they are constantly so used. If the tramway was without any fence, it is clear that the defendants might lawfully so use it; and, if any one chose to have the use of it, he would be entitled to it as it was, and would have no right to complain if he found it dangerous, and sustained damage for want of a fence. If any duty existed, it must have been a duty arising out of some contract: and upon these facts, I do not feel justified in imagining some possible contract which might create the required duty. If the fence was known to the plaintiff to be out of repair and broken down, and he chose to hire the use of the tramroad in that state, there would be no contract creating a duty to keep the fence in repair. So of the gate,—if it was always open, there would be no ground for inferring a contract for keeping it shut: and, upon the notes, the plaintiff states that he never saw the gate shut. That may be meant as an aggravated negligence: but it also may mean that the defendants wanted it open, [535] and therefore let the use of the tramroad, subject to the gate being always open.

I have considered the declaration as it stood, and the amendments proposed by Mr. Powell, and do not find any cause of action supported by the evidence. Therefore, according to the agreement made between the counsel at the trial, I cannot affirm that the plaintiff is entitled to succeed. The result is, that my judgment is for the defendants.

WILLIAMS, J. In this case I am of opinion that the rule ought to be discharged. The question is, whether the facts proved at the trial shewed any liability on the part of the defendants to make compensation for the loss of the plaintiff's horse. If so, the declaration (which the court are unanimous in thinking cannot be supported in its present form) is to be taken to have been amended accordingly.

I think the facts do shew the liability of the defendants. It appears to have been part of the constitution of the tramroad of the defendants, which the plaintiff together with the rest of the public were invited by the defendants to use on payment of toll, that some swing-gates should be placed across it at the point where it traversed the railway, in order to seclude the tramroad from the railway, and prevent the perilous position in which horses would be placed who were drawing tram-waggons on the tramroad, when they approached that point, if there was an open communication between the tramroad and the railway. In order to make the gates available for this purpose, they ought to be kept shut, except when the transit of tram-waggons along the tramroad requires that they should be temporarily opened.

The tramroad being thus constituted, I think every one who uses it on payment of toll, has a right to [536] expect, and a duty thereupon arises on the part of the defendants, that, as owners of the tramroad, and recipients of the toll, they shall employ ordinary care and diligence in the management of the gates, in order that they may afford that security which they are ostensibly intended and calculated to afford to those who are using the tramroad. The jury have, in effect, found that the defendants neglected that duty, by negligently leaving the gates open at a time when they ought to have been shut, and that the loss of the plaintiff's horse was occasioned by that neglect of duty.

It has been argued that, as the plaintiff himself admitted in his evidence, that, whenever he saw the gates, they were open, it ought not to be inferred that he used

the railroad on an implied contract that they should be kept shut. But, if it was the duty of the defendants, as owners of the tramroad, towards their customers thereon, to use ordinary care and diligence in keeping the gates duly shut, as part of the constituent safeguards of the tramroad held out as such to those who should use it, they are not, I apprehend, the less liable for the consequence of a breach of that duty, because to the knowledge of the plaintiff they had been previously guilty of breaches of it.

BYLES, J. I am of opinion that the plaintiff is entitled to keep his verdict. The railway, the parallel tramway, and the fence between them, are all the property of the defendants. The fence appears to have had no other purpose than the protection of persons using the tramway. There is in the fence a gate, which is opened for the use of the defendants. The defendants, or other persons claiming under them, but not the plaintiff, have a right to open it. The defendants for reward license the plaintiff to use the tram-[537]-way, being so fenced. The defendants negligently leave the gate open. The foremost of the plaintiff's team of horses, alarmed by the noise of an approaching train, is driven by fright through the open gate on to the railway, and killed.

Conceding that the negligence found against the defendants amounts to no cause of action unless they were under a legal obligation to exercise some degree of care in respect of the gate, the question is this,—were the defendants bound to exercise any degree of care? It is not material to inquire what degree: for, whatever the degrees, the jury have found that the defendants neglected to exercise it.

The facts may be illustrated by a simpler but parallel case. Suppose the defendants to be owners of a meadow in which there is a deep chalk-pit fenced round by them to prevent cattle falling in, but with a gate in the fence, to be used only by the defendants when they should desire to remove chalk from the pit: suppose the defendants for reward to take in cattle to agist in that meadow: the same question arises,—are the defendants under an obligation to exercise any degree of care in the use of the gate? It is clear, on the authorities, that they are, in the supposed case, bound to exercise care in the use of the gate, and are responsible if they leave the gate open: *Jones on Bailments*, 92; *Story on Bailments*, § 289.

In the case now before the court, the person using the tramway is equally without control over the gate: for, he cannot without danger leave his horses in the immediate proximity of the railway, by running on before, to see if the gate is open, or to shut it if it be open. He requires for his safety a continuous fence. The continuity of that fence is broken by the defendants opening the gate placed there for the use of the defendants. The gate is under their control: they [538] provide the fastenings: and it cannot be touched by the plaintiff without a trespass, except to shut it (if possible) when by standing open it is a nuisance to his way. I think, therefore, that the defendants are bound to some degree of care in the use of the gate. That being so, and the jury having found negligence, the damage which the plaintiff has sustained is the proximate and natural result.

It was proved that the gate had very often, perhaps generally, been left open. But I apprehend that evidence shews no more than the habitual negligence of the defendants.

The rule ought, therefore, I think, to be discharged.

The majority of the court being therefore of opinion that the plaintiff was entitled to retain his verdict, the rule was

Discharged.

SUSE AND OTHERS v. POMPE AND ANOTHER. June 5th, 1860.

[S. C. 30 L. J. C. P. 75; 7 Jur. N. S. 166; 9 W. R. 15. See *Willans v. Ayers*, 1877, 3 App. Cas. 144; *In re Commercial Bank of South Australia*, 1887, 36 Ch. D. 527; *Manners v. Pearson*, [1898] 1 Ch. 592.]

Where a bill, drawn and indorsed in England, and payable abroad, is dishonoured by the acceptor's non-payment, the holder is entitled, as against the drawer, to the amount of the re-exchange, that is, the value at the rate of exchange on the day of

the dishonour, of the sum expressed on the face of the bill in the currency of the place where it is payable, with interest and expenses.—And, held, that, in an action against the drawer on a bill so drawn, accepted, and dishonoured, evidence is not admissible to prove a usage among merchants here to entitle the holder, at his option, to demand from the drawer the amount of the re-exchange, or the sum which he gave him for the purchase of the bill,—this being a usage which in terms contradicts the written instrument.

This was an action by the purchasers and indorsees against the drawer of two foreign bills.

The first count of the declaration stated that certain persons by the name of E. Busch & Co., by their bill of exchange dated at Liverpool the 21st of February, [539] 1859, directed to one Carl Von Thornton, at Vienna, in parts beyond the seas, required the said Carl Von Thornton to pay that their first of exchange (second and third not paid) to the order of them the said E. Busch & Co., the sum of 750*l.* sterling, at the exchange as per indorsement, four months after date, which had elapsed before action; and the said E. Busch & Co. also made their second of exchange of the same date and tenor, and indorsed the said second of exchange to the defendants by the name of Messrs. Wilh. Bunge & Co., or order, and also delivered to them the said first of exchange; and the defendants by that name indorsed and delivered the said second of exchange to the plaintiffs at the exchange of 11 guilders, 5 cents, new Austrian currency, per pound sterling, value of the same, as per indorsement thereon, and also delivered to the plaintiffs the said first of exchange; and the said first of exchange was accepted by the said Carl Von Thornton, and the same, together with the said second of exchange so indorsed as aforesaid, was afterwards duly presented to the said Carl Von Thornton at Vienna aforesaid for payment, and was dishonoured; nor did the said Carl Von Thornton pay the said second or third of exchange: whereupon the said bill was then duly protested for non-payment thereof, — of all which the defendants had due notice: Averment, that the amount of the said bill, at the said exchange of 11 guilders, 5 cents, was the sum of 750*l.*, and that the plaintiffs had incurred expenses in and about the noting and protesting of the said bill, and for brokerage and postages incidental thereto: Breach, that the defendants had not paid the said sum of money and expenses respectively.

The second count was upon a second bill similarly drawn, accepted, and indorsed, for 490*l.* 11*s.*, also payable at Vienna, and dishonoured, &c.

[540] There was also a count for money lent, money received, and money found due upon accounts stated.

The defendants pleaded that they were always ready and willing to pay the plaintiffs the sum of 952*l.* 12*s.* 9*d.*, being the whole of the amount ever due and payable by the defendants to the plaintiffs for and in respect of the several matters and causes of action in the declaration mentioned, and that before action they tendered and offered to pay the same to them, but the plaintiffs refused to accept the same; and the defendants brought the said sum of 952*l.* 12*s.* 9*d.* into court ready to be paid to the plaintiffs.

The plaintiffs took issue on the alleged tender: and, for a second replication said that the defendants tendered and offered to pay to them the plaintiffs the said sum of 952*l.* 12*s.* 9*d.* as one single and entire sum in respect of all the causes of action in the declaration mentioned: and that, at the time of such tender and offer, there was and had always since been, and then was, due and owing to the plaintiffs from the defendants a larger sum than the said sum of 952*l.* 12*s.* 9*d.*, in respect of the said causes of action. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term.

The plaintiffs are merchants and foreign bankers, carrying on business in Lime Street, London, under the firm of Suse & Sibeth. The defendants are the London partners in the firm of Wilhelm Bunge & Co., of Rotterdam and London, merchants. The action was brought to recover from the defendants, the drawers, the price paid by the plaintiffs for the purchase of two bills of exchange on Vienna, which had been dishonoured by the acceptor, — one for 750*l.*, the other for 490*l.* 11*s.* The bills (which were drawn in sets) were in the following form:

[541] "No. 5314. Liverpool, 21st Feb. 1859. For £750 Sts.

"Four months after
of exchange (second and
order of ourselves, the
fifty pounds sterling, at
dorsement, value in our-
as per advice from

Accepted
p. p. Carl V. Thornton,
Job. Donhauser.

date pay this our first
third not paid) to the
sum of seven hundred and
the exchange as per in-
selves, and place to account

"E. BUSCH & Co.

"To Mr. Carl Von Thornton,
"Vienna.

"(Second and third of the same date and tenor.)"

The following is a copy of the memoranda and indorsements on the second of the set, —

"In need, with Messrs. F. H. Hametz & Co.

"First for acceptance with Mr. G. Mollo, 580 Jagezeille.

"Pay Messrs. Wilh. Bunge & Co. or order, value in account.

"E. BUSCH & Co.

"Pay Messrs. Suse & Sibeth, or order, at the exchange of eleven guilders, five cents, new Austrian currency, per £ sterling, value of the same. London, 22nd March, 1859.

"WILH. BUNGE & Co.

"Pay to the order of Messrs. Kendler & Co., value in account,

"SUSE & SIBETH."

The date, acceptance, and indorsements on the other bill were similar to the above. The particulars of the plaintiffs' claim under the money counts, were as follows:—

"Under the money counts the plaintiffs seek to recover the sum of 1258l. 18s. 1d. upon the bills of exchange mentioned in the first and second counts of the declaration, and for interest and expenses thereon upon the following account,—

[542] "Messrs. Wilhelm Bunge & Co.

£750 0 0 }
490 11 0 } bought 22nd March.

	£	s.	d.
Paid 25th March, 1859	1,240	11	0
Interest to June, at 5 per cent.		16	5
Brokerage, 1 per cent.		0	14 10
Protest charges fl. 3 82			
and 3 82			
fl. 7 64 at fl. 14.5		0	10 6
Postages		0	5 4
	£1,258	18	1"

The course of business as to the sale and purchase of foreign bills, is as follows:—When a London merchant has to receive money from a correspondent abroad, he instructs his bill-broker to sell an amount of florins (or whatever the current coin of the country on which the bills are to be drawn may be) sufficient at the current rate of exchange to raise the amount in sterling money which he has to receive. The rate of exchange is constantly varying; but, usually, the fluctuations do not amount to much. As soon as the seller knows at what rate of exchange the bills have been sold, he draws them in florins or other foreign money; and thus the bills simply entitle the buyer of them to receive so many florins (or as the case may be), and they contain no allusion whatever to the amount of sterling money paid for them. Inasmuch, however, as there is no rate of exchange for foreign bills at Liverpool or other places in the interior,

and as, by reason of the daily fluctuations in the rate of exchange, merchants at those places do not know at what rate their bills will be sold in London, they are unable to draw them in foreign coin, it is usual to draw [543] such bills in sterling money, but "payable at the exchange as per indorsement." The London correspondent, when he has sold the bills, and knows the amount of foreign money which the buyer is to have, indorses them (as in this case) payable at the agreed rate of exchange : and thus the bills are practically turned into bills payable in foreign money. The rate of exchange at which foreign bills are sold varies somewhat in proportion to the commercial position and standing of the sellers ; and, in calculating the rate of exchange, interest for the time the bills have to run is always taken into account.

On the 21st of February, 1859, Messrs. E. Busch & Co., merchants at Liverpool, having a demand upon one Carl Von Thornton, a merchant at Vienna, drew at Liverpool the two bills in question, for 750l. and 490l. 11s., respectively, payable to the order of themselves "at the exchange as per indorsement," and indorsed them specially to the defendants, for sale in London. The defendants having received the bills on the 22nd of March, immediately instructed their bill broker, Mr. Wade, to sell them on change, which he did on the same day to the plaintiffs, and the defendants indorsed them to the plaintiffs as before stated. The bills were on the same day delivered to the plaintiffs, and, in accordance with the usual course of business, the plaintiffs on the 25th of March paid to the defendants 1240l. 11s.

The bills became due on the 21st of June (no days of grace being allowed by the Prussian law), and were dishonoured, and were returned protested to the plaintiffs by their correspondents at Vienna. Immediate notice of the dishonour was given to the defendants, and the amount, with interest and expenses (125l. 18s. 1d.), demanded of them.

The defendants insisted that they were only liable for the value in sterling money of florins 13,708, 7c. on [544] the day the bills became due, with interest and expenses, —which, at the then rate of exchange, would be 952l. 12s. 9d. ; and, this latter sum having been paid into court, the amount in dispute between the parties was 306l. 5s. 4d.

The contest at the trial was, whether (as the defendants contended) the plaintiffs were entitled to the value at Vienna on the day the bills became due of the number of florins which they represented, and the interest and expenses incurred in consequence of their dishonor ; or (as the plaintiffs contended) whether the holders had the option of demanding back the sum they had paid for the purchase of the bills, or of having recourse to the recambio account, whichever they should find most to their advantage.

It was conceded that the holder would have been entitled to demand back the sum he gave for the bills, if they had been returned for non-acceptance.

On the part of the plaintiffs, several witnesses were called to prove the usage of merchants in London on the subject to be as they contended. The evidence was objected to, but received by the Chief Justice, subject to a motion. These witnesses were, Mr. Rawlings, of the house of Hambro & Sons, German merchants and bankers, —Mr. Cohen, who managed the foreign bill department at Messrs. Rothschild's, —M. Bordier, a French merchant and banker, —Mr. Raphael, a merchant having extensive dealings in American bills, —M. Mieville, a foreign banker, —Mr. Sharp, a merchant and broker, —Mr. Newton, a broker and notary, —and Messrs. Woollaston, Jourdain, Ripley, Meyer, and Knowles, exchange and bill-brokers, —all of whom had had extensive dealings in foreign bills : and they all stated that they invariably, in settling foreign dishonoured bills, if they found it to their advantage, claimed and exercised the option for which the plaintiffs contended.

[545] On the other hand, Mr. Wade, the broker who had negotiated the sale of the bills in question for the defendants, Mr. Page, a clerk in Barings' house, of great experience, and Messrs. Schroder, Siordet, Im Thurn, Benecke, Godefroi, Lenné, Cox, Bischoffsheim, Rohrweger, and Weber, —merchants and brokers, all more or less extensively engaged in foreign bill transactions, —deposed that they had never heard of the alleged custom of resorting to the price paid for the purchase, in the case of a dishonored foreign bill, but always settled upon the recambio account.

In his instruction to the jury, the Lord Chief Justice said, —Ordinarily speaking, the contract of the drawer of a bill of exchange is a conditional contract to become liable in case the acceptor should refuse payment at maturity, —a conditional liability in that case to indemnify the holder against the non performance by the acceptor of his contract : and, where the money is payable in our currency, no question can arise.

If the acceptor of a bill for 100l. does not pay the bill at maturity, the drawer is bound to pay that sum, with interest and expenses, to indemnify the holder. But here, the bill is drawn in pounds sterling, and is drawn upon a merchant at Vienna, who is to pay in florins at the exchange indorsed thereon; and the effect of that, according to the evidence, is, exactly as if it had been a bill for so many florins as the sum mentioned in the bill would amount to at the exchange specified by the indorsement. The contract, therefore, of the acceptor, was, to pay so many florins at the maturity of the bills: and the drawer here says that he performs his duty by paying as many florins as the acceptor was bound to pay, and the expenses occasioned by the acceptor's default. The plaintiffs, the holders, on the other hand, insist that they are entitled to be paid according to the value of the florin at the time they purchased the bills.

[546] After observing upon the evidence given in support of and against the alleged custom, his Lordship proceeded:—But there are many general considerations which, as mercantile men, it is highly important that you should have in your minds before you dispose of this question, which seeks to place the law of England with respect to the liability of the drawers of foreign bills in a position different, as far as I can see, from any other known mercantile law. In all my experience, I must say I never met with any allusion to the custom or usage here sought to be set up. The ordinary right of the holder of a dishonored bill being such as I have before stated, it seems to me that the claim of the plaintiffs in this case introduces an anomaly: and, seeing the importance of the subject, it behoves you, before you establish such a usage by your verdict, to be thoroughly satisfied that it is borne out by the evidence. You will take into account, that, as far as the German Law is concerned, it is clear,—indeed, it is conceded on all hands,—that, when the bills were presented to Thornton for payment, and payment was refused, the German holder was only entitled to draw upon what is called the *recambio* account, that is, for such an amount in pounds sterling as would on the 21st of June, the day of dishonor, have recouped him the number of florins which Thornton the acceptor ought to have paid, with interest and charges. It seems, therefore, strange, that, when the bill gets back to London, the purchaser of the bill should be entitled to claim from the drawer a different amount from that which would have satisfied the contract in Vienna. With regard to bills drawn in London, there would be nothing on their face to shew how much the indorsees had given for them: so that, if, instead of being drawn in Liverpool, the bills in question had been drawn in London, the holders would only [547] have been entitled to demand the sum in pounds sterling which would at the time of the dishonor have been represented by florins at the exchange of 11*fl.* 5*s.* If the holders were allowed to claim the sum they paid for the purchase of the bills, they would be claiming something which did not appear to be the contract upon the face of the instrument. The amount, too, might vary in the case of different indorsers: and so, instead of the measure of damages being regulated by some standard common to all the parties through whose hands the bills pass, each might claim a different amount, according to the price he paid for the bills.

His Lordship then proceeded to comment on the evidence given by the plaintiffs to establish the custom they relied on; and he observed, that, although one of the witnesses, Mr. Rawlings, had spoken to the option to claim from the drawers the sum given for the purchase of the bill having been exercised to the extent of about 25 per cent. of the cases which had occurred in his experience, yet all the others agreed that it was only occasionally that it was to the holder's interest to settle upon any other than the *recambio* principle: and there never has been an instance of the option being enforced in a court of law. Nor does the claim now put forward by the plaintiffs appear to be recognized by any writer upon the law of bills of exchange, or by any book of authority, with the exception of a passage to which my attention has been drawn in Pardessus, *Cours de Droit Commercial*, vol. 1, § 437, which, however, to my mind, does not go quite far enough.

If the damages are to be measured by what the acceptor ought to have paid at the maturity of the bills, the defendants are entitled to your verdict, they having paid into court a sum sufficient to cover that, with interest, costs, and expenses. If, on the other hand, the measure of damages ought to be the amount which the [548] plaintiffs paid for the purchase of the bills, then the plaintiffs will be entitled to your verdict for the amount agreed on.

The jury returned a verdict for the plaintiffs for 315*l.*, and leave was reserved to the defendants to move.

James Wilde, Q. C., accordingly in Hilary Term last obtained a rule nisi to enter a verdict for the defendants, on the ground that the evidence of custom was inadmissible; or for a new trial, on the ground that the verdict was against the evidence as to the existence of the custom. He referred to *De Tastet v. Baring*, 11 East, 265, and *Story on Bills*, §§ 399 et seq.

Bovill, Q. C., and Cleasby, in Easter Term, shewed cause. The damages which the plaintiffs claim to be entitled to in this case are precisely those which a purchaser of goods would claim on the seller's failure to perform his contract. In that case, if the market-price remained the same, the purchaser would recover back the money he had paid: but, if the goods in the mean time had gone up in price, he would be entitled to recover in addition, as damages for the non-delivery, the difference between the contract and the market-price. [Byles, J. Who broke the contract here?] The drawers of the bills. [Byles, J. What contract?] To indemnify the indorsees,—to repay them (on the acceptor's default) the sum they paid them for the bill, or to pay on the recambio principle, viz. the value of the bill at the time of its maturity at Vienna, whichever was the most advantageous to them. The liability of the drawer, on the default of the acceptor, depends upon the law-merchant. The holder is entitled to damages in some instances beyond interest. In *Auriol v. Thomas*, 2 T. R. 52, it was held that, where a bill indorsed over was not duly paid, the indorsee might charge the indorser with interest, ex-[549]change, and other incidental expenses, beyond the amount of 5*l.* per cent., if such charges be reasonable, warranted by usage, and not made a colour for usury; and that the charge of 10*s.* per pagoda on a bill returned protested from India was not excessive, though it was taken in payment here at the rate of 6*s.* 6*d.* per pagoda. Buller, J., there says: "It is now clearly settled that the party is entitled to take not only 5*l.* per cent. for legal interest, but also a reasonable sum for remitting and other necessary incidental expenses. The demand in the present case arises upon a bill of exchange payable in India, which, if not paid there when due, would carry the interest allowed in that country; and it is admitted that the constant course with respect to bills returned protested from India has been to allow at the rate of 10*s.* per pagoda, which includes interest, exchange, and all other charges. In *Francis v. Rucker*, Ambler, 672, there being a law in Pennsylvania, that bills drawn or indorsed there on persons in England, and protested, should be paid to the holder with 20 per cent. for damage, bills drawn on a merchant in England were accepted by him: he then becoming bankrupt before they were due, they were protested for non-payment: and the drawer, having paid the money due on the bills and the 20 per cent. to the holder, was permitted to prove both under the commission. Lord Chancellor Camden said: "The nature of the engagement is, to pay the bills, or the 20 per cent., the consequential damages, according to the law of Pennsylvania, the same as if it had been by express stipulation. Every body must take cognizance of the laws of that country where he corresponds and has dealing; otherwise there would be an end of trade." That case was cited and acted upon in a recent case of *Walker v. Hamilton*, before the Lords Justices. In *Laing v. Barclay*, 3 [550] Stark. N. P. C. 38, upon the dishonour of a bill drawn in Demerara upon England sent back protested, damages at the rate of 25 per cent. were admitted to be the customary allowance. The question, as Lord Ellenborough said in *De Tastet v. Baring*, 2 Campb. 65, must depend upon the usage of merchants, and that as to this matter varies in different countries. The usage in France is thus stated in the Brussels edition (1833) of the *Cours de Droits Commercial*, by Pardessus, vol. i., p. 232, § 437:—"Les condamnations que le porteur a droit d'obtenir contre chacun de ceux qu'il poursuit peuvent consister, ou dans le montant exprime par la lettre de change avec intérêts du jour du protêt faute de paiement, et les frais; ou, s'il le préfère, dans la restitution de la somme qu'il a donnée pour acquérir la lettre de change comme a droit de l'obtenir un acheteur évincé. On a vu en effet par les principes expliqués no. 26, que les variations du change pouvaient être telles que la somme donnée pour acquérir une lettre se trouvât plus considérable que celle qu'on obtiendrait si le paiement de la somme énoncée dans cette lettre était effectué à l'échéance. Le porteur a, s'il le préfère, la faculté de tirer du lieu dans lequel la lettre était payable, sur le tireur ou sur l'un des endosseurs, une autre lettre de change qui se compose,—1, du principal de celle qui a été protestée et des intérêts à compter du jour du

protêt,—2, des frais de protêt,—3, des autres frais légitimes, tels que ceux de commission de banque ou courtage, et de voyage, à la charge par lui d'affirmer, s'il en est requis, qu'il est venu exprès,—4, des déboursés du timbre et du port des lettres que le défaut de paiement a pu forcer d'écrire. Cette nouvelle lettre de change s'appelle retraite : elle ne doit pas excéder ce qu'a véritablement droit de demander celui que la tire : il est donc nécessaire que la preuve justificative l'accompagne. Cette [551] preuve s'établit par un compte de retour, qui doit être joint à la retraite, ainsi que le protêt, ou une expédition de cet acte. Ce compte doit énoncer le nom de celui sur qui la retraite est faite, parceque, sans cela, il ne serait pas possible de reconnaître si le compte est relatif à la lettre qu'il accompagne, et d'éviter les fraudes qui pourraient résulter de cette incertitude. Il doit également énoncer le prix du change auquel la retraite est négociée, qu'on nomme rechange." "Ce rechange (§ 438) est l'indemnité que le tireur de la retraite paie à celui qui lui en compte le montant en monnaie effective, indemnité qui dépend, comme le change lui-même, de diverses circonstances qui le modifient suivant les règles que nous avons données nos. 26 et suiv. Pour laisser le moins possible à l'arbitraire, on a posé des bases, en indiquant le cours d'après lequel le rechange devait être déterminé. Ce cours peut varier selon que la retraite est faite sur le tireur ou sur l'un des endosseurs ; et les règles générales des contrats servent de guide dans ce cas. L'endosseur est, comme nous avons eu occasion de le dire, un véritable tireur à l'égard de celui à qui il a cédé la lettre de change. Mais sous ce rapport, et quand on veut agir contre lui, ce n'est pas le lieu d'où cette lettre a été tiré originairement qui peut être considéré comme celui d'où il l'a tirée, c'est le lieu où il a fait sa négociation par l'endossement. Ainsi, le rechangé se règle, à l'égard du tireur, par le cours du change du lieu où la lettre était payable, sur celui d'où elle a été tirée ; et, à l'égard des endosseurs, il se règle sur le cours du change du lieu où la lettre a été remise ou négociée par eux, sur celui où le remboursement s'effectue." [Erle, C. J. You contend that the usage varies with the different countries upon which the bill is drawn.] In Hambro, the usage is in favor of the defendants' contention : see the Hambro' Ex-[552]change Law, 1811. But, according to the Prussian Code of 1849, articles 49-52, it is the other way. Pothier du Contrat de Change, part 1, ch. iv., art. 58 (a), lays down the law thus,—“L'obligation principale et primitive que le tireur contracte par ce contrat de change envers l'autre contractant, est de lui payer, par le moyen d'une lettre de change, au temps et au lieu convenus, l'argent qu'il lui a donné à recevoir en échange de l'argent ou autre valeur de la lettre qu'il a reçu ou qu'il doit recevoir ici de lui. Le tireur, par ce contrat, s'oblige envers l'autre partie de lui faire donner au temps et au lieu convenus, non pas précisément et déterminément tels sacs d'argent qu'il a faits remettre pour cet effet à celui sur qui la lettre est tirée, mais une certaine somme d'argent : il se rend débiteur, non certorum corporum, sed quantitatis. C'est pourquoi, s'il arrivait que celui sur qui la lettre est tirée vint à perdre par une force majeure les fonds qui lui ont été remis par le tireur pour l'acquiescement de la lettre de change, putà, par le pillage de sa maison dans une sédition : le tireur ne serait pas pour cela libéré de son obligation : car, le principe que la perte de la chose due, qui survient par une force majeure, tombe sur le créancier, et libère le débiteur, n'a d'application qu'à l'égard des obligations de corps certains : mais il n'en peut avoir à l'égard des obligations d'une somme d'argent, à l'égard desquelles au contraire la loi 11, Cod. si cert. pet., dit : Incendium ære alieno non exuit debitorem. Voyez notre Traité des Obligations, n. 658.” The learned author goes on, art. 59,—“De l'obligation principale que le tireur contracte envers l'autre partie, de lui faire payer au temps et au lieu convenus une certaine somme d'argent par le moyen d'une lettre de change, dérivent,—1, l'obligation de lui fournir la [553] lettre de change,—2, celle des dommages et intérêts, au cas qu'elle ne soit pas acquittée à l'échéance, ou de la restitution de la valeur qui a été donnée, au choix du donneur de valeur.” He there treats it as a matter derived from the principal obligation : which is entirely in accordance with the principles of our law. If I pay a man 1000l. for a cargo of wheat, and he fails to fulfil his contract, I have the option of suing him for the recovery back of the money, or, if the market has in the meantime risen so as to make it more to my interest to do so, I may adhere to the contract, and sue him for damages for the breach of it. So, here, the defendants, having failed to perform their contract by delivering to the plaintiffs the stipulated number of florins

at Vienna on the 21st of June, 1859, are bound to restore the plaintiffs to their original position, by returning them the amount they paid for the bargain. In Byles on Bills, 7th edit. 365, it is said: "Re-exchange is the expense incurred by the bill being dishonored in a foreign country, in which it was payable, and returned to the country in which it was made or indorsed, and there taken up: the amount of it depends on the course of exchange between the two countries. The nature of the transaction is this,—a merchant in London draws on his debtor in Lisbon a bill in favor of A., for so much in the currency of Portugal, for which he receives of A. its corresponding value at the time in English currency. Sometimes a bill for that amount in Portuguese currency can be purchased in London for less, sometimes it will fetch more English money, according to the course of exchange. Suppose the rate of exchange to fall when the bill becomes due; that is, suppose it requires in London more English money to purchase a bill on Lisbon for the same sum, and that in Lisbon, to replace it, a larger bill must be drawn on [554] London, A., the holder, has a right to the payment of that sum in Portuguese currency at Lisbon. The bill is dishonored; he, the holder, is therefore entitled to recover of the drawer, not only the value which he formerly gave for the bill, but as much as he must draw a bill for in Lisbon on London, in order to replace, at the time and on the spot when and where the bill should have been paid, the sum which he was entitled to receive:" citing *De Tastet v. Baring*, 11 East, 265, 2 Campb. 65. In Story on Bills, § 399, the rule is thus stated,—“In respect to the drawers and indorsers of bills of exchange which have been dishonored either by non-acceptance or non-payment, they are ordinarily liable to the holder for the principal sum, and interest, and the damages and expenses incurred by the dishonor. These damages may, according to the law of different countries, vary in their amount and in the mode of ascertaining them. But the same general principles of the law-merchant pervade the systems of most, if not of all, commercial nations in modern times, founded upon a large and comprehensive equity. The principal sum is, of course, ascertained by its true or par value at the place of acceptance or payment. The damages, in the absence of any positive or customary rule, are ascertained by the rate of re-exchange between the country where the bill is accepted and the country where the bill is drawn, in the case of the drawer; and between the former and the country where the bill is indorsed, in the case of the indorser. The interest is allowed according to the law of the place where the money is due and ought to be paid; and the expenses are the ordinary charges of protesting the bill, and other incidental expenditures.” In the note reference is made to 3 Kent’s Commentaries, 115, where it is said: “The engagement of the drawer and indorser of every bill is, that it shall be paid at the proper time and place; [555] and, if it be not, the holder is entitled to indemnity for the loss arising from this breach of contract. The general law-merchant of Europe authorizes the holder of a protested bill immediately to re-draw from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays. His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and broker’s commission, and the current rate of exchange at the place where the bill was to be demanded or payable, on the place where the bill was drawn or negotiated (a). The law does not insist upon an actual re-drawing, but it enables the holder to recover what would be the price of another new bill at the place where the bill was dishonored, or the loss on the re-exchange; and this it does by giving him the face of the protested bill, with interest, and the necessary expenses, including the amount or price of the re-exchange.” Story, in § 495, speaking of the French law says: “The holder, upon the dishonour by non-payment, has an election either to receive from the antecedent parties to the bill the amount expressed therein, with interest from the protest for non-payment, and the expenses thereof: or, if he prefers it, the restitution of the sum to obtain the bill of exchange: or, if he prefers it, he has a right to re-draw from the place where the bill is payable, upon the drawer or the indorsers another bill of exchange (or re-exchange, or, as it is usually called in the French law, *retraite*,) for the amount of the principal sum of the protested bill, and

(a) See *Gibbs v. Freemont*, 9 Exch. 25, where 25 per cent. was allowed for interest on bills drawn and negotiated in California.

interest from the date of the protest, the expenses of the [556] protest, and the other lawful expenses, such as commissions or brokerage, or journeys when requisite to obtain payment, and the necessary stamp-duties, and postage : provided these expenses do not exceed what of right are demandable."

In order to shew what was the usage in London in respect of foreign bills returned dishonoured, it was necessary to call witnesses. The rule is well stated by Parke, B., in delivering the judgment of the court in *Hutton v. Warren*, 1 M. & W. 466, 475,— "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with reference to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed : and this has been done upon the principle of presumption, that, in such transactions, the parties do not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." So, in 2 Taylor on Evidence, § 1067, it is said : "Parol evidence of usage or custom is not confined to cases where the written instrument is expressed in ambiguous technical language ; for, it is certainly sometimes admissible to annex incidents, as it is termed,—that is, to shew what things are customarily treated as incidental or accessorial to the principal thing which is the subject of the contract, or to which the instrument relates. For instance, though a bill of exchange or promissory note is silent as to any days of grace, parol evidence of the known and established usage of the country or place where the bill or note is payable, is admissible to shew on what day the grace expired." This rule which is expressed by the maxim, *In contractis tacite insunt quæ sunt moris et consuetudinis*, is adopted in the notes [557] to *Wigglesworth v. Dullison*, in 1 Smith's Leading Cases, 300. In *Mellish v. Simon*, 2 H. Bl. 378, as well as in *De Tastet v. Baring*, 2 Campb. 65, and *Gantt v. Mackenzie*, 3 Campb. 51, this was treated as a question for the jury. Eyre, C. J., in *Mellish v. Simon*, says : "The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be a part of the damages arising from the contract not being performed."

Lush, Q. C., and Honyman, in support of the rule. The law of bills of exchange has now become part of the settled law of England. Though formerly a foreign bill might have been accepted by parol, the amount which it represented was always required to be in writing. The contract of the drawer is, a contract to indemnify the holder against the default of the acceptor. The usage sought to be set up by the plaintiffs would make the contract one varying in amount, as the claim happened to be made against the drawer or a subsequent indorser. Where the bill is returned for non-acceptance, the holder cannot have recourse to the recambio account : all he can do is, to reclaim the sum he paid for the bill, by reason of the failure of consideration. The law is correctly stated in the argument of Sir Vicary Gibbs in the case of *De Tastet v. Baring*, 11 East, 269,— "The nature of the transaction which gives rise to the question of exchange and re-exchange, is this :—A merchant draws on his debtor in Lisbon a bill in favor of another for so much money in the currency of Portugal, for which he receives its corresponding value at the time in English currency ; and that corresponding value fluctuates from time to time, according to the greater or lesser demand there may be in the London market for bills on Lisbon, and the facility of obtaining them : the difference of that va-[558]-lue constitutes the rate of exchange on Lisbon. The like circumstances and considerations take place at Lisbon, and constitute in like manner the rate of exchange on London. When the holder, therefore, of a London bill drawn on Lisbon is refused payment of it in Lisbon, the actual loss which he sustains is not the identical sum which he gave for the bill in London, but the amount of its contents if paid at Lisbon, where it was due, and the sum which it will cost him to replace that amount upon the spot by a bill upon London, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge for a re-exchange" (a). Story, in § 400, says : "By re-exchange, in the commercial sense here alluded to (in the section cited on the other side, 399), is meant, the amount for which a bill can be purchased in the country where the acceptance is made, drawn upon the drawer or indorser in the country where he resides, which will give the

(a) Adopted in Story on Bills, § 401, as a correct illustration of the subject.

holder of the original bill a sum exactly equal to the amount of that bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with his necessary expenses, and interest; for, that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its non-payment." For confirmation of this the learned author refers to 3 Kent. Com. 115. He also refers to Heineccius de Camb. cap. 4, § 45, who says: "*Per cambium intelligitur ipsa summa que solvenda erat, nec tamen soluta est. Recambium (recambio), quod vocant den Wieder-Rück-Geger-Wechsel, in eo consistit quod presentans, non acceptatis litteris cambialibus, à tertio mutuum sumit pecuniam, et pro eâ litteras cambiales trassat ad trassantem. Quum vero id sine impendiis fieri nequeat, damnum [559] illud omne repetitur sub nomine recambii.*" He also refers to Pardessus, and to Pothier du Contrât de Change, Part 1, c. iv. s. 64, which is as follows,—"*Celui qui a fourni la lettre de change doit quelquefois rembourser le rechange à celui à qui il l'a fournie. Pour savoir ce que c'est que ce rechange, il faut observer que celui à qui la lettre a été fournie peut, en cas de refus de paiement de la lettre, après avoir fait son protêt, prendre d'un banquier du lieu où la lettre était payable, une somme d'argent pareille à celle portée par la lettre qui n'a pas été acquittée, et donner à ce banquier, en échange de l'argent qu'il reçoit de lui, une lettre de change de cette somme tirée à vue sur celui qui lui avoit fourni la sienne, ou sur quelque autre personne. Si, pour avoir cet argent en échange de cette lettre, il a payé à ce banquier un droit de change, parceque l'argent alors gagnait sur les lettres, ce droit de change qu'il a payé à ce banquier pour avoir l'argent donc il avait besoin, est ce qu'on appelle le rechange, dont il doit être remboursé par celui qui lui a fourni la lettre dont on lui a refusé le paiement. Celui à qui la lettre a été fournie, pour pouvoir se faire rembourser de ce rechange, est tenu de justifier par des pièces valables qu'il a pris de l'argent dans le lieu auquel la lettre qui lui a été fournie était tirée. (Ordonnance de 1673, tit. 6, art. 7.) L'intérêt de ce rechange ne lui est dû que du jour de la demande.*" The passage cited from the Brussels edition of Pardessus of 1833, was corrected in the Paris edition of 1841, upon the authority of two decisions in the Court of Cassation. It there stands as follows:—"Les condamnations que le porteur a droit d'obtenir contre chacun de ceux qu'il poursuit, consistent dans le montant exprimé par la lettre de change, avec intérêts du jour du protêt faute de paiement (Rej. 5 Mars, 1807, D. 7, 1, 191. Cassation, 26 Janvier, 1818, D. 18, 1, 264), et les frais. [560] Il pourrait se faire néanmoins, que lors de la négociation de la traite, le preneur eut donné au tireur, pour l'obtenir, une somme plus forte que celle que la lettre exprime. Ce cas peut être le résultat des variations de change dont nous avons parlé n. 26. Supposons, en effet, que le 15 Janvier, Pierre, négociant à Lyon, ait tiré au profit de Paul une lettre de dix mille fr. payable à Paris le 15 Mai. Au moment où le négociation a été faite, le change de Lyon gagnait à Paris de telle sorte que Paul a donné dix mille quatre cents fr., ou même plus, pour obtenir la lettre de dix mille fr. Le porteur non payé, qui l'adresse au tireur, ou le preneur qui, par l'effet des recours successifs, s'adresse à ce même tireur, peut-il lui demander les dix mille quatre cents fr. moyennant lesquels il prouve qu'il avait acheté la lettre de dix mille fr.? Pour l'affirmative on peut dire qu'il est dans la même situation qu'un acheteur evincé qui a le droit de demander la restitution du prix payé par lui, outre ses dommages-intérêts. Mais un examen plus attentif conduit à abandonner cet opinion. Quelque soit le prix que, dans sa convenance, et pour éviter un transport d'argent, Paul ait jugé convenable de donner afin d'avoir une lettre de change de dix mille fr. sur Paris, il n'a droit qu'à cet somme: c'est la seule chose qui lui ait été promise, et qui lui soit due: c'est donc la seule chose qu'il ait droit d'exiger: Cassation, 17 Frimaire, an 5, B. No. 8, page 282; Cassation, 11 Prarial, an 5, B. No. 10, p. 237. Mais une autre ressource est ouverte au porteur, et il peut en user suivant qu'il y trouve plus d'intérêt. Il a, s'il le préfère, la faculté de tirer du lieu dans lequel la lettre était payable, sur le ou sur l'un des endosseurs, une autre lettre de change, qui se compose, —1. du principal de celle qui a été protestée et des intérêts à compter du jour du protêt, —2. des frais de protêt, —3. des autres frais légitimes, tel que ceux de commission de banque ou [561] courtage, et de voyage, à la charge par le porteur d'affirmer, s'il est requis, qu'il en est venu exprès, —4. des déboursés de timbre et port de lettres que le défaut de paiement a pu forcer d'écrire. Cette nouvelle lettre de change s'appelle rechange; elle ne doit pas excéder ce qu'a véritablement droit de demander celui qui la tire; il est donc nécessaire que la preuve justificative l'accompagne. Elle s'établit par un compte de retour, qui

doit être joint à la retraite, ainsi que le protêt, ou une expédition de l'acte de protêt. Ce compte doit énoncer le nom de celui sur qui la retraite est faite, parceque, sans cela, il ne serait pas possible de reconnaître s'il est relatif à la lettre qu'il accompagne, et d'éviter les fraudes qui pourraient résulter d'une telle incertitude. Il doit également énoncer le prix du change auquel la retraite est négociée qu'on nomme rechange."

The following cases were also referred to—*Siggers v. Lewis*, 1 C. M. & R. 370, *Castrique v. Barnato*, 6 Q. B. 498, *Seward v. Palmer*, 8 Taunt. 277, 2 J. B. Moore, 274, *Rothschild v. Currie*, 1 Q. B. 43, *Parsons v. Serbon*, 4 C. B. 899, *Fitt v. Casanett*, 4 M. & G. 898, 5 Scott, N. R. 902, and *Gompertz v. Barthett*, 2 Ellis & B. 849.

The parol evidence, the effect of which was, not to explain, but to contradict the written contract, clearly was inadmissible. The case is therefore plainly distinguishable from *Smith v. Wilson*, 3 P. & Ald. 728, *Hutton v. Warren*, 1 M. & W. 475, *Grant v. Maddox*, 15 M. & W. 737, and cases of that class. See Taylor on Evidence, §§ 1068 et seq. The observations of Mr. Justice Story on this subject, in giving judgment in the case of *The Sumner Reside*, 2 Sumner, 567, are well worthy of attention. "I own myself," he says, "no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, [562] or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well settled principles of law. And I rejoice to find, that, of late years, the courts of law both in England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful and equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it never can be proper to resort to any usage or custom, to control or vary the positive stipulations in a written contract, and, à fortiori, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom: for, the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom: for, that would not only be to admit parol evidence to control, vary, or contradict written contracts: but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, [563] or contradict the most formal and deliberate written declarations of the parties." And see the judgment of Lord Denman, in *Trenman v. Loder*, 11 Ad. & E. 597, 598. The fact of there being no instance on record of any such claim as this ever having been urged in a court of law, is strong to shew that the alleged usage has no existence: and the conflicting evidence given at the trial at all events shews that it was not one which was universally known among merchants, without which it cannot be binding.

Cur. adv. vult.

BYLES, J., now delivered the judgment of the court:—

We are of opinion that the rule to enter the verdict for the defendant must be made absolute.

The main question in this case is this,—When a bill drawn and indorsed in England, and payable abroad, is dishonoured by the acceptor's non-payment, what is the extent of the indorser's liability to the holder? The defendants contend that the holder is entitled to the amount of the re-exchange, and to neither more nor less. This amount they have paid into court. The plaintiffs, on the other hand, contend, that he (the holder) is entitled, at his option, either to the amount that he gave for the bill in England or to the re-exchange.

The solution of this question depends on the contract of the indorser. That contract is an engagement by the indorser, that, if the drawee shall not at maturity pay the bill, he, the indorser, will, on due notice, pay the holder the sum which the

drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Such also is the indorser's contract as understood in America: *Story on Bills*, 107.

Apply this contract to the present case. The holders are entitled to receive a certain number of Austrian [564] florins in Vienna on the day when the bill is at maturity. They have in effect bought from the indorsers so many Austrian florins, to be received in Vienna on that day. It should seem to follow, that, on non-payment by the drawee, the holders are entitled, as against the indorsers, to so much English money as would have enabled them in Vienna on that day to purchase as many Austrian florins as they ought to have received from the drawee, and, further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is, to draw in Vienna on the indorsers in England a bill at sight for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonor, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin "*recambium*," in Italian "*recambio*," in French "*rechange*," and in English "*re-exchange*." The bill itself is called in French "*retraite*." This bill for re-exchange being negotiated at Vienna puts into the pocket of the holders at the proper time and place the exact sum which they ought to have received from the drawee.

On this bill for the re-exchange the holders, of course, have not at Vienna the acceptance of the indorsers on whom it is drawn, but hold as their security the original bill with the indorsers' indorsement thereon. If the indorsers pay the re-exchange bill they have fulfilled their engagement of indemnity: if not, the holders sue them on the original bill, and will be entitled to recover in that action what the indorsers ought to have paid, that is to say, the amount of the re-exchange bill.

Although in English practice the re-exchange bill is seldom drawn, yet the theory of the transaction is as we have described it, and settles the principle on [565] which the damages are to be computed, although no re-exchange bill be in fact drawn.

If the indorser were held liable for the amount which the indorsee gave for the bill, when that amount is more than the drawee ought to have paid, the contract of the indorser would be extended; he would be held liable, not merely for the damages sustained by the breach of the contract, but for the damages sustained by the making of the contract. For, a portion of those damages the holder must have sustained, though the contract had been performed by the drawee paying the bill.

In effect, the holders here attempt to treat the contract as rescinded. But the consideration has not failed. They have what they bought, that is to say, a genuine bill, and now seek to treat it as if a forged bill had been imposed upon them.

If the value of the Austrian florin as compared with the pound sterling had risen instead of falling, the holders would have gained by the re-exchange. It would be inequitable if they were entitled to the gain where there is gain, and not liable for the loss where there is loss.

Suppose the transaction had been a domestic one, and that the question had arisen on an inland bill. A bill, for example, is drawn for 500*l.* in London on Liverpool, and a purchaser, for many reasons which may be imagined, gives 510*l.* for that bill, and the bill is dishonoured at maturity, —is not the indorser liable to the holder for 500*l.* and interest, and no more? And, how, on the plaintiffs' principle, could the damages be estimated if there were several indorsers' names on the back of this foreign bill? Is each indorser to refund the money which he received for the bill, though it should happen to be more than the holder gave? Or, is the holder to recover against any [566] one indorser the money he the holder gave, though it be more than the indorser received?

The practice of drawing the *recambio* bill has been established for many years, not only in case of dishonor by non-payment, but in the case of dishonor by non-acceptance. Heineccius, writing in the early part of the last century, says: "*Presentans non acceptatis litteris cambialibus à tertio mutuum sumit pecuniam, et pro eâ litteras cambiales trassat ad trassantem. Quam vero id sine impendiis fieri nequeat, damnum illud omne repetitur subnomine recambii.*" Heineccius de Camb., cited in *Story on Bills*, § 400, n. Pothier, *Contrat de Changes*, § 64, describes the same process in the case of dishonor by non-payment. See also Kent's Commentaries, vol. 3, pp. 115, 116: *Story on Bills*, § 400.

The amount for which the indorser is liable in the case of dishonor by non-payment would seem, therefore, to admit of no doubt, were it not for a passage cited by the plaintiffs' counsel from Pothier, and another from the Brussels edition of Pardessus. The passage, however, from Pothier, *Contrat de Change*, § 58, merely applies to the contract of exchange generally, and imports that the drawer contracts with the payee, that, in the event of the bill not being paid, the payee shall, at his option, have damages (*dommages intérêts*) or the restitution of the sum given by him for the bill. This passage on the general law certainly does not accord with our law on the subject, and possibly may be founded on some technical rule of the civil law. But, in § 64, coming to the precise question now before the court, Pothier says expressly that the sum for which the recambio bill may be drawn is the sum borrowed by the holder, equivalent to that which he ought to have received from the drawee; and that, if, in addition to the amount of this bill, the holder [567] pays the lender what he calls "un droit de change," the holder is to be re-imbursed this charge by his indorser.

The passage cited from the Brussels edition of Pardessus, and which is also to be found in the Paris edition of the same date, is corrected in the subsequent Paris edition.

For these reasons, we think the law is clear, that the holder of the bill on which this action is brought is entitled to recover no more than the re-exchange, that is to say, the value of the Austrian florins payable in Vienna expressed in English money, at the rate of exchange on the day of dishonour, with interest and expenses.

The next question is this,—Was evidence admissible to prove a different custom among merchants in London, that is to say, a custom that the holder is entitled at his election to recover either the amount of the re-exchange, or the sum which he gave for the bill?

We think evidence of such a custom inadmissible.

Customs of trade consistent with the terms of a written mercantile instrument may be admissible,—*Tacite in esse videntur quæ sunt moris et consuetudinis*. But, if we are right on the question as to the re-exchange, the alleged custom is a custom which contradicts the instrument. If, as we conceive, the law-merchant on this subject is settled, then the obligation of the indorser, in the event of non-payment by the drawee, to pay the re-exchange and expenses, is as clearly implied as if it had been expressed. It is, for example, as much implied as the right of the indorser to notice of dishonour, or the right of an English acceptor to days of grace on a bill accepted payable after date or after sight. But evidence of a custom not to give notice of dishonour, or not to allow days of grace, would certainly be inadmissible.

[568] It is unnecessary to add any observations on the want of certainty in the alleged custom, when it comes to be applied to successive indorsers.

The rule, therefore, to set aside the verdict for the plaintiffs, and enter the verdict for the defendants, must be made absolute.

Rule absolute.

COTTON v. WOOD. June 9th, 1860.

[S. C. 29 L. J. C. P. 333; 7 Jur. N. S. 168. Approved, *Smith v. Great Eastern Railway*, 1866, L. R. 2 C. P. 10. Adopted, *Allen v. New Gas Company*, 1876, 1 Ex. D. 255. Upheld, *Manzoni v. Douglas*, 1880, 6 Q. B. D. 153.]

In an action for negligent driving, the judge will not be justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

This was an action under Lord Campbell's Act, 9 & 10 Vict. c. 93, brought by the plaintiff, as administrator of his deceased wife, for an injury which resulted in her death.

The declaration stated that, in the life-time of Mary Matilda Cotton, the defendant was possessed of a certain carriage, to wit, an omnibus, and certain horses then drawing the same in and along a certain public and common highway, which said omnibus and horses were then under the care, government, and direction of a certain servant of the defendant in and along the said highway: nevertheless the defendant, by his said servant, then so carelessly, negligently, unskilfully, and improperly governed and directed his said omnibus and horses, that by and through the careless-

ness, negligence, unskilfulness, and improper conduct of the defendant, by his said servant, the said omnibus and horses ran and struck with great force and violence against the said Mary Matilda Cotton, deceased, whereby she was violently thrown to and upon the ground there, and the wheel of the said omnibus, then so under the care, government, and direction of a cer-[569]tain servant of the defendant as aforesaid, passed over the body of the said Mary Matilda Cotton, deceased, and thereby mortally hurt and wounded the said Mary Matilda Cotton, deceased, and of which hurt and wounds the said Mary Matilda Cotton afterwards died, within twelve calendar months next before the commencement of this suit; and the plaintiff, as administrator as aforesaid, pursuant to the statute in that case made and provided, brings this action, as well for the benefit of himself as the husband of the said Mary Matilda Cotton, deceased, as for the benefit of Matilda Cotton, Lydia Cotton, and Elizabeth Cotton, infant children of the said plaintiff, born of the body of the said Mary Matilda Cotton.

The defendant pleaded not guilty, and not possessed; whereupon issue was joined.

The cause was tried before Willes, J., at the sittings in London after last Hilary Term. The circumstances out of which the action arose were as follows:—The defendant was the proprietor of an omnibus running between Camberwell Gate and Hackney. On the 30th of November last, the omnibus was proceeding at a moderate pace on a journey from the latter place, the evening being dark, and snow falling fast, when, upon its reaching the Eastern Counties Railway Station, the wife of the plaintiff, accompanied by another woman, was attempting to cross the road (not at any ordinary crossing-place) in front of the omnibus, but, alarmed by the approach of another vehicle from the opposite direction, turned back, and was knocked down and run over by the omnibus before she could regain the pathway, and so injured that she died. The plaintiff's omnibus was on its right side, and within seven or eight feet of the kerb. The only circumstance which was at all suggestive of negligence on the part of the defendant's servant was, that, though he saw [570] the woman cross in front of his omnibus, he had at the moment they turned back looked round to speak to the conductor, and was not aware of their danger until warned by the cry of a bystander, but too late to avert the mischief.

It was proved on the part of the plaintiff, that the deceased had by her industry contributed to the extent of about 10s. weekly towards the maintenance of the family.

On the part of the defendant it was submitted that there was no evidence to go to the jury of actionable negligence on the part of the defendant's servant. Of this opinion was the learned judge: but, to avoid the necessity of going down again if the court should think otherwise, he left the case to the jury, who returned a verdict for 25l.,—10l. for the plaintiff himself, and 15l. for the three children.

Montagu Chambers, Q. C., in Easter Term, pursuant to the leave reserved to him, accordingly moved to enter a non-suit. He also moved for a new trial on the ground that the verdict was against the weight of evidence, and upon affidavits. A rule nisi having been granted,

Thomas, Serjt., and Griffiths, now shewed cause. They submitted that the fact of the driver permitting his attention to be called from his horses for a moment in a crowded thoroughfare was amply sufficient to justify the jury in finding negligence; and, they having by their verdict affirmed negligence, the court would not interfere. As to the affidavits, the case set up on the motion was answered.

Montagu Chambers was not called upon to support the rule.

ERLE, C. J. I am of opinion that this rule must be [571] made absolute to enter a nonsuit. The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant or his servant; and there can be no such proof, unless it be shewn that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty. Now, I am utterly at a loss to find any evidence of any breach of duty here. It is as much the duty of foot-passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers. Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case. According to the evidence here, the plaintiff's wife, on a dark night, and in a snow-storm,

proceeded slowly, accompanied by another female, to cross a crowded thoroughfare, whilst the defendant's omnibus was coming up on the right side of the road, and at a moderate pace, and with abundant time as far as I can judge for the women to get safe across if nothing else had intervened; but, in turning back to avoid another vehicle, they returned and unfortunately met the danger. What, then, is the ground for imputing negligence and breach of duty to the defendant's servant? One of the plaintiff's witnesses stated that the driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. The man was driving on his proper side, and I do not find it imputed to him that he was driving at an improper pace. As far as the evidence goes, there appears to me to be just as much reason for saying that the plaintiff's wife came negligently into collision with the defendant's horses and [572] omnibus as for saying that the collision was the result of negligence on the part of the defendant's servant. I find it laid down by Pollock, C. B., in a case of *Williams v. Richards*, 3 Car. & K. 81, that "it is the duty of persons who are driving over a crossing for foot-passengers, which is at the entrance of a street, to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing at the entrance of a street, so as not to get among the carriages, and thus receive injury." And I think I have known that to have been since followed by more judges than one. In *Tomney v. The London, Brighton, and South Coast Railway Company*, ante, vol. iii., p. 146, which was an action against a railway company for negligence, the facts were these:—On the platform of the station there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words "For gentlemen," the other had over it the words "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and, having received a direction, by mistake opened the door of the "lamp-room," and fell down some steps and was injured. It was held by this court, that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company. My Brother Williams there said: "It is not enough to say that there was some evidence; for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in [573] leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence." And that was adopted by Bramwell, B., in *Cornman v. The Eastern Counties Railway Company*, 4 Hurlst. & N. 781. The very vague use of the term "negligence" has led to many cases being left to the jury in which I have been utterly unable to find the existence of any legal duty, or any evidence of a breach of it. I am clearly of opinion that the plaintiff has failed to make out any cause of action here, and consequently the rule for entering a nonsuit must be made absolute.

I think, however, that the affidavits upon which the other alternative of the rule was founded are of such a nature, and have been so completely answered, that the costs which the plaintiff has incurred on that part of the rule should be allowed to him.

WILLIAMS, J. I entirely agree with my Lord in thinking that this rule should be made absolute, upon the terms he has stated. I wish merely to add, that there is another rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz. that, where the evidence is equally consistent with either view,—with the existence or non-existence of negligence,—it is not competent to the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of.

The rest of the court concurring,
Rule absolute.

[574] GORSUCH v. CREE AND ANOTHER. May 30th, 1860.

[S. C. 29 L. J. C. P. 308 ; 6 Jur. N. S. 1342 ; 8 W. R. 543.]

The declaration stated that the plaintiff and one B. were possessed of 2000l. stock upon certain trusts ; that the plaintiff had incurred expense in the execution of the trusts, and had not been reimbursed ; that one T. M. caused to be represented to the plaintiff by the defendants that the trusts had been fully executed, and that he, T. M., was legally entitled to have the stock transferred to him, and the defendants then assured the plaintiff that such representation was correct, and requested the plaintiff to execute a power of attorney for the purpose of enabling him to have the stock so transferred to him ; that the plaintiff was ignorant whether or not T. M. was so entitled as aforesaid ; and that, in consideration of the premises, and that the plaintiff would at the defendants' request execute the power of attorney, without requiring further proof of T. M.'s right to the stock than their assurance, the defendants promised the plaintiff to pay him 32l. 15s. 6d. within fourteen days : General averment of performance of all conditions precedent : Breach, non-payment. —Plea, "on equitable grounds," that, at the time of making the promise, the plaintiff represented to the defendants that certain dividends which had become payable in respect of the stock had not been received by him ; that, in reliance on that representation, and believing it to be true, the defendants made the promise ; but that the representation was untrue, the plaintiff having previously received one of the dividends amounting to 30l. ; and that the defendants would not have made the promise if they had known that the plaintiff had so received the said dividend, of which the plaintiff had notice ; and that the plaintiff ought to have known and remembered that he had so received the same :—Held, that the declaration was good, and the plea no answer.

The first count of the declaration stated, that, before the time of the making of the promise thereafter mentioned, the plaintiff and one John Bayes were possessed of and interested in a certain sum of stock of great value, to wit, 2000l., upon certain trusts theretofore declared of and concerning the same, to wit, by an indenture bearing date on or about the 20th of February, 1834 ; that, before the time of the making of the said promise, the plaintiff had, in the due execution of the said trusts, incurred expense, and had bestowed much time and labour, in respect whereof he had not received any reimbursement or recompense ; that, before the time aforesaid, one Thomas Maberly caused to be represented to the plaintiff by the defendants that the aforesaid trusts had been fully executed, and that he the said Thomas Maberly was then legally entitled to have the said stock transferred to him, and the defendants then assured the plaintiff that such representation was correct, and then requested the plaintiff to execute a certain power of attorney for the purpose of enabling him to have the said stock so transferred to him as aforesaid ; that the plaintiff was then and at and until and after the time of the said promise, and had thence hitherto remained and been ignorant whether or not the said Thomas [575] Maberly was or was not so entitled as aforesaid ; and that, theretofore, to wit, on the 18th of May, 1859, in consideration of the premises, and that the plaintiff would at the defendants' request execute the said power of attorney without requiring further proof of the right of the said Thomas Maberly to the said stock than the aforesaid assurance of the defendants, the defendants promised the plaintiff to pay him a certain sum of money, to wit, 32l. 15s. 6d. within fourteen days from the day of the making of the said promise : Averment, that the plaintiff had done and performed all things, and all things happened and existed, before suit, necessary to entitle him to the payment of the said sum of money : Yet that no part thereof had been paid.

Third plea,—for defence on equitable grounds as to the said first count, that, before and at the time of the making of the said promise in the said first count mentioned, the plaintiff represented to the defendants that certain dividends which had become payable upon and in respect of the said stock in the said first count mentioned had not been received by the plaintiff,—any such due and unreceived dividends being intended and authorized by virtue of the said power of attorney to be received for the use and benefit of the said Thomas Maberly,—whereof the plaintiff had notice ; and that the defendants, in consequence of and in reliance upon such

representation, and believing the same to be true, made the said promise; but that the said representation was not true, inasmuch as the plaintiff had then previously received and retained one of the said dividends, amounting, to wit, to 30l.; and that they the defendants would not have made the said promise if they had known that the plaintiff had so received the said dividend, whereof the plaintiff, at the time of the making of the said promise, had notice; and that the [576] plaintiff ought to have then known and remembered that he had so received the same.

To this plea, the plaintiff demurred, the ground of demurrer stated in the margin being, "that the plea is bad, because it shews no right in the defendants or the said Thomas Maberley to the dividends therein mentioned, and because it does not shew that the defendants or the said Thomas Maberly have never derived any benefit from the agreement, or for the performance of the said contract in the first count mentioned, by the plaintiff on his part." Joinder.

Brett, in support of the demurrer (a)¹. Assuming the declaration to be good, the plea affords no answer to it. It does not allege that there was fraud in any part of the transaction. And, though possibly the court of Chancery might afford some remedy, it clearly would not grant an unqualified and perpetual injunction, which is required to make a good equitable plea. [Willes, J. It would be a case for an account, not for a perpetual injunction.] It may be that the court of [577] Chancery would decline to enforce the bargain. [Willes, J. In *Rawlin v. Wickham*, 28 Law J., Ch. 188, the Lords Justices held, that a representation made by a party, not knowing that it is false, is binding upon him; and that, if the other party enters into a contract on the faith of its truth, the court will set aside the same altogether, and will not merely rectify it.] The declaration is good. It is not open to the defendants to say that there was no consideration or an illegal one. [Willes, J., referred to *Warwick v. Richardson*, 10 M. & W. 284, and *Lord Newborough v. Schroder*, 7 C. B. 342.]

H. Lloyd, contra (a)². A court of equity would not permit a contract to be enforced which had been obtained under circumstances such as are disclosed in this

(a)¹ The points marked for argument on the part of the defendant, in addition to those stated in the margin of the demurrer, were as follows:—

"That the plea shews nothing like fraud or deceit on the plaintiff's part; that the plea does not shew that the defendants have sustained any damage by the alleged misrepresentation, or that the consideration given by the plaintiff for the defendants' promise was thereby rendered of less value to the defendants; that the plea does not shew an entire failure of the consideration for the defendants' promise; that it shews no right in the defendants to a perpetual injunction to restrain the plaintiff from proceeding with the action; that, if true, it at most shews a case for the assistance of a court of equity; and that the defendants must re-instate the plaintiff in his former position before they can repudiate the performance of their promise."

(a)² The points marked for argument on the part of the defendants were as follows:—

"1. That the contract declared on is illegal, the consideration for it being a breach of trust by the plaintiff:

"2. That it appears upon the declaration that the money was promised and is claimed in consideration of the plaintiff's executing a power of attorney for having the stock transferred to Maberly, without knowing or ascertaining that Maberly was entitled to have the said stock transferred to him or not:

"3. That there is no consideration for the promise; for, if Maberly was entitled to have the said stock transferred to him, the plaintiff ought to have done what was necessary for that purpose without requiring any money to be promised or given to him for so doing:

"That the third plea affords a good defence to the action, in equity, on the ground that the defendants were induced to enter into the said contract in consequence of the statement and representation by the plaintiff of what he ought to have known to be false; and that, as the defendants would not have entered into such contract but for such statement and representation, they ought not to be bound by such contract, or liable upon it:

"5. That the plea is good as a plea of fraud, which equally at law and in equity invalidates a contract."

[578] plea. The general principle which guides the court in such cases is thus stated by Sir John Romilly, M. R., in *Pulsford v. Richards*, 22 Law J., Ch. 559, 562: "The ground on which relief is asked is, that principle of equity which declares that the wilful misrepresentation of one contracting party which draws another into a contract, shall, at the option of the person deceived, enable him to avoid or enforce that contract. It will be convenient in the present case to state my view of this principle before applying it to the facts as they appear to be established on the evidence. The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth in all the dealings of mankind. This principle is universal in its application to cases of contract. It affects not merely the parties to the agreement, but also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements false in fact were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatived the representation made; a strong illustration of which is to be found in *Burr v. Lock*, 10 Ves. 470. And I held the same in *Money v. Jorden*, 21 Law J., Ch. 531, 893. This principle applies to all representations made, on the faith of which other persons enter into agreements; so that, whether the representation were true or false at the time when it was made, he who made it shall not only be restrained from falsifying it hereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted." Apply that principle here. The plea states, that, before and at the time of the making of the promise, the plaintiff represented to [579] the defendants that certain dividends which had become payable upon and in respect of the said stock had not been received by him, and that the defendants, in consequence of and in reliance upon such representation, and believing the same to be true, made the promise; but that the representation was not true, inasmuch as the plaintiff had previously received and retained one of the dividends; and that the defendants would not have made the promise if they had known that the plaintiff had so received the said dividend. [Williams, J. Lord Justice Turner, in *Rawlins v. Wickham*, says: "The court must look to what are the true principles by which it is governed, where a contract has been entered into, and where misrepresentation has induced the contract. These principles were clearly laid down by Sir Thomas Plumer in *Lord Clermont v. Tasburgh*, 1 Jac. & W. 112, the marginal note of which is, that the effect of partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely, and to operate as a personal bar to the party who has practised it. That again was a suit for specific performance; but it was not so in *Edwards v. M'Leay*, Coop. 308, 2 Swanst. 287. That case is conclusive to shew the course of the court in cases of misrepresentation. Nor could it be otherwise. The plaintiff here would perhaps never have entered into this contract, but for the statement; and I am of opinion that he ought to have been put in a position to decide whether he would enter into the contract or not. There can be no doubt that the principle of the court is that, where a contract is founded on misrepresentation, the court cannot rectify it, but must thoroughly set aside the whole transaction.] In *Thom v. Bigland*, 8 Exch. 725, the declaration stated that the defendants falsely and fraudulently deceived the plaintiff in this, that the defendants, as brokers of the plaintiff employed [580] by him to purchase certain oil, falsely represented to him that they had purchased for him twenty-five tons of palm oil, to arrive by the "Celma," at the price of 30l. per ton; by reason of which false representation, the plaintiff, believing that the said twenty-five tons of palm-oil had been so bought, and would be delivered to him in accordance with the terms aforesaid, entered into certain contracts, &c., whereas the defendants had not purchased the said quantity of palm oil, or any palm-oil, by the "Celma," on the terms aforesaid, but on different terms, viz. that the said twenty-five tons were sold and would be delivered to the plaintiffs after and subject to the prior delivery of 800 tons of palm oil from the said vessel. The declaration then proceeded to state, that, by reason of the vessel not having more than 800 tons of the said palm-oil on board, no part of the said twenty-five tons could be delivered to the plaintiff, whereby he was obliged to purchase a like quantity of palm oil at other places at a higher price. And it was held that, as the declaration was founded upon deceit, in the absence of fraud, the action could not be sustained.

Brett was not called upon to reply.

Per Curiam. The declaration is good, and the plea clearly affords no answer to it.

Judgment for the plaintiff.

[581] YATES v. NASH. May 30th, 1860.

[S. C. 29 L. J. C. P. 306 ; 2 L. T. 430 ; 6 Jur. N. S. 1343 ; 8 W. R. 764.]

To constitute a valid bill of exchange, the payee must be a person who is capable of being ascertained at the time the instrument is drawn.—Therefore, a bill drawn payable “to the order of the treasurer for the time being” of a benevolent institution, is void.

This was an action by the payee against the acceptor of two bills of exchange. The declaration was as follows :—

“Matthias William Yates, who before and at the time when the bills of exchange hereinafter mentioned became due was the treasurer of the Commercial Travellers’ Benevolent Institution, by F. H., his attorney, sues Charles Nash, for that the plaintiff on the 3rd of November, 1858, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the treasurer for the time being of the said Commercial Travellers’ Benevolent Institution the sum of 20l. six months after date ; and the defendant accepted the said bill, but did not pay the same : And for that also the plaintiff, on the 3rd of November, 1858, by his other bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the treasurer for the time being of the said Commercial Travellers’ Benevolent Institution the sum of 18l. 7s., nine months after date ; and the defendant accepted the said bill, but did not pay the same : And the plaintiff also sues the defendant for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them.”

Second plea, to the first and second counts,—that the said bill in the first count mentioned was and is in the words and figures following, and not otherwise, that is to say,—

[582] “£20 0 0.

“Six months after date
treasurer for the time
Travellers’ Benevolent In
twenty pounds, for value

Accepted, payable at
Messrs. Messerman & Co.,
Bankers, London,
Charles Nash.

“London, Nov. 3rd, 1858.

pay to the order of the
being of the Commercial
stitution the sum of
received.

“To Mr. Nash,

“6 Dartmouth Terrace, Blackheath.”

“M. W. YATES.

And the defendant further said that the said bill in the second count mentioned was and is in the words and figures following, and not otherwise, that is to say [setting it out] : And the defendant further said, that except as in and by the said bills respectively appearing, there was not at any time any contract whatever between him and the plaintiff ; and that the plaintiff was not otherwise than in the plea aforesaid the payee of the said bills or either of them.

The plaintiff demurred to the second plea, the ground of demurrer stated in the margin being, that “it contains no legal answer to any of the three first counts.” Joinder.

Dixon (with whom was Lush, Q. C.), in support of the demurrer (*a*). If the instrument in question had been a promissory note, it seems that it would have been invalid for not disclosing a certain payee at the time of the making of it : *Storn v. Stirling*,

(*a*) The points marked for argument on the part of the plaintiff were as follows :—

“That the bills of exchange mentioned in the first three counts are valid and unobjectionable ; that it appears upon the pleadings that the plaintiff, who was the drawer of the bills, was also the payee ; and that the words ‘treasurer for the time being’ are merely descriptive of the plaintiff himself.”

3 Ellis & B. 832, affirmed on error, per nom. *Cowie v. Stirling*, 6 Ellis & B. 333. But the question is, whether the [583] same rule applies to the case of a bill of exchange. The bill is an order by A. to B. to pay the amount to some third person. The contract between A. and B. is complete by the acceptance. Here, the action is brought by the drawer: the question might have been different as between the payee and the acceptor. [Erle, C. J. The right of the drawer accrues through the payee resorting to him on the acceptor's default.] In *Soares v. Glyn*, 8 Q. B. 24, the declaration stated that E. drew a bill of exchange on the defendants, payable to the order of O.; that the defendants accepted the bill; that O. indorsed it to "the treasurer-general of the Royal treasury of Portugal; and that C., then being the treasurer-general aforesaid, indorsed to the plaintiff. The defendants pleaded,—secondly, that the said treasurer-general of the Royal treasury of Portugal did not indorse to the plaintiff; on which issue was joined,—thirdly, that the said treasurer-general, by whom the indorsements were alleged to have been made, at the time when he indorsed was not such treasurer-general as was designated and intended by the indorsement of O., but minister of a hostile government, and had no title or authority to indorse; to which the plaintiff replied that the treasurer-general who indorsed was the treasurer-general designated and intended by the indorsement of O., not adding, "at the time when he indorsed:" issue thereon. It was proved that the bills were indorsed for the use of M., then King of Portugal, and received by C., being then, and at the time of the first indorsement, his treasurer; but that, after M.'s government had been subverted by a hostile one, and C. removed from office, C. indorsed. It was held that C., by the indorsement and delivery to himself, acquired an absolute title to the bills, and a power to indorse, which could not be qualified by any intention of O. not expressed in the [584] instrument, even if such qualification could be annexed to an indorsement at all; and that it was immaterial whether C. was treasurer-general at the time of his indorsing over or not, and not the words "at the time when he indorsed" were therefore properly omitted from the issue taken. [Byles, J. To make it a good bill, it must be payable certainly and in all events. This instrument is payable to the person who shall be treasurer six or nine months hence, if there be one. Would a bill payable "to the eldest son of A.," an unmarried man at the time, be good?] A bill with a blank for the payee's name is good when the blank is filled up: Byles on Bills, 7th edit. 69. [Willes, J. Is it not essential to the validity of a bill or note that it should be negotiable ab initio? *Coleham v. Cooke*, Willes, 393.] In *Minet v. Gibson*, 3 T. R. 481,—affirmed in error 1 H. Bl. 569,—it was held, that, if a bill of exchange be drawn in favour of a fictitious payee and that circumstance be known as well to the acceptor as to the drawer, and the name of such payee be indorsed on the bill, an innocent indorsee for a valuable consideration may recover on it against the acceptor as on a bill payable to bearer. [Byles, J. I think the bill is bad unless it can be taken to mean "treasurer at the time of acceptance."] Suppose the then treasurer had indorsed the bill the next day, what difficulty would there have been? [Williams, J. This declaration is not in the proper form.]

Raymond, *contra* (a). The question is whether this [585] is a good bill of exchange. It clearly was not intended that Yates was to be the payee. The object was, to meet the case of a change of officers. *Storm v. Stirling* and *Cowie v. Stirling* are conclusive to shew that "the time being" means the time at which the bill would become due, and that an instrument so drawn is void. Bills of exchange and promissory notes are completely assimilated in this respect. In *Storm v. Stirling*, Lord Campbell, in delivering the judgment of the court, says,—3 Ellis & B. 842,—"The nature and

(a) The points marked for argument on the part of the defendants were as follows:—

"That the second plea is good in substance:

"That by the demurrer it is admitted that each of the bills is in the form disclosed by that plea:

"That such plea shews that each of the bills is bad on the face of it, for uncertainty, in this, that the supposed payee is not sufficiently designated:

"That the declaration is therefore bad in substance, and that the plea shews it:

"That the declaration is further bad for not shewing that there was any payee in existence at the time of the making of either bill:

"That the declaration does not shew when the plaintiff first became treasurer."

every definition which we find in the books of a promissory note, shew that it must contain an express promise to pay to a person therein named or designated, or to his order, or to bearer: see Byles on Bills, 6th edit. p. 4; *Coleham v. Cooke*, Willes, 395; 2 Bl. Com. 467. If the person to whom, or to whose order, it is to be paid is uncertain, and it depends on a contingency to whom, or to whose order, payment is to be made, it is not a promissory note unless it can be treated as payable to bearer." And Jervis, C. J., in the court of error, says,—6 Ellis & B. 337,—“Whatever desire we may feel to aid in enforcing a contract, we must hold, that, to make a promissory note, there must be a payee ascertained by name or designation. Now, as was said in the court below, this money is made payable, not to the then secretary, but to the person who should be secretary nine months thence, when the payment was to be made. That was the clear intent.” What was there to prevent Nash from becoming the treasurer [586] for the time being? [Byles, J. My difficulty is as to how far the acceptor has precluded himself by his acceptance from taking this objection. It may be a very good contract, but not a bill of exchange. Nothing that the acceptor can do can vary the nature and effect of the written contract.] There is a manifest distinction between *Soures v. Glyn*, and the present case. There, it was in the indorsement that the party to whom the payment was to be made was described as the “treasurer-general for the time being.”

Dixon was heard in reply.

ERLE, C. J. I am of opinion that our judgment on this demurrer must be for the defendant. The bill is drawn in this form,—“Six months after date pay to the order of the treasurer for the time being of the Commercial Travellers’ Benevolent Institution, the sum of twenty pounds, for value received.” I think the true construction of the instrument is, that the acceptor undertakes to pay the amount to the order of the person whoever he may be who at the time of the maturity of the bill shall be the treasurer of the institution. I take it, that, in order to constitute a valid bill of exchange, it is essential that there should be a drawer, a drawee, and a payee: and, although the payee need not be expressly designated by name, still it is essential to the validity of the bill that he shall be a person who is capable of being ascertained at the time the bill is accepted. He cannot be a person who is not ascertainable at that time. That was laid down in very distinct terms, as to promissory notes, in *Storn v. Stirling*, 3 Ellis & B. 832, affirmed by *Cowie v. Stirling*, 6 Ellis & B. 333, where the note was held void on this very ground. And I think bills of exchange stand upon precisely the same footing in this respect. [587] Consequently, the payee not being an ascertained person at the time of the acceptance, the instrument here sued on is not a valid bill of exchange.

The rest of the court concurring,
Judgment for the defendant.

WILLIAM HILDRETH, THE YOUNGER, *Appellant*; THOMAS ADAMSON, *Respondent*.
May 28th, 1860.

[S. C. 30 L. J. M. C. 204; 8 W. R. 470.]

A local board of health act impowered the board to supply the town with water at certain rates for domestic purposes, and for other than domestic purposes for such remuneration and upon such terms and conditions as should be agreed upon between them and the persons desirous of having such supply.—An inhabitant of the town having presented to the town an ornamental fountain with a trough or basin, which was set up on one of the public streets, the board supplied it with water on market-days, for the use of cattle in the market, and for horses, if yoked, when passing to and fro.—The respondent, who kept horses, with a view to evade payment of the rate for the supply of water to his stable, took his horses to the fountain to drink. Upon an information against him under the 59th clause of the Waterworks Clauses Act, 1847,—which enacts that “every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any reservoir, water-course, or conduit belonging to the undertakers, &c., or from any cistern or other like place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, shall forfeit to the undertakers for every such offence a sum not exceeding 10l.”—the magistrates, being of

opinion that the board had no right to erect a fountain on the public highway otherwise than for the gratuitous use of the public under the provisions in s. 78 of the Public Health Act, 1848, declined to convict:—Held, that the decision of the magistrates was wrong; for, that, notwithstanding the fountain might be a public nuisance, it was competent to the board to limit the supply of water thereto in the manner they had done.

On the 2nd of December, 1859, an information was laid by William Hildreth, the younger, of Darlington, in the county of Durham, secretary to the Darlington Local Board of Health, against Thomas Adamson, of Darlington, carter, for that he did, on the 23rd of November in the year aforesaid, at the township of Darlington, unlawfully take water from a certain cistern, to wit, the basin of a fountain belonging to the local board of health of the district of the township of Darlington aforesaid, he the said Thomas Adamson not having agreed to be supplied with water by the said board, contrary to the Darlington Local Board Act, [588] 1845, and contrary to the form of the statute in such case made and provided.

Upon the hearing of the said complaint before the justices at a petty sessions held at Darlington on the 5th of December, 1859, the justices dismissed the same, and the complainant being dissatisfied with the decision of the justices, the following case was stated for the opinion of this court, pursuant to the statute 20 & 21 Vict. c. 43, s. 2:—

The information was laid under the 59th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); incorporated with the Darlington Local Board Act, 1854 (17 & 18 Vict. c. clxxxi.).

At the hearing of the information and complaint, it was proved on the part of the respondent that an ornamental fountain (consisting of a large open trough or basin, with a spiral column in the centre, through which the water is forced and plays into the basin on market-days,) had been presented to the town of Darlington by one of the inhabitants, and erected on the surface of one of the public streets in that town; and that the local board of health, as the owners of the waterworks (in trust for and as the representatives of the rate-payers of the townships of Darlington aforesaid), supplied the same with water for the use of cattle in the cattle-market on market days, and for horses, if yoked, when passing to and fro; that, in consequence of persons taking the water from the fountain other than for the uses aforesaid, the local board of health issued a notice, of which the following is a copy:—

“Darlington Local Board of Health.

“Notice is hereby given that all persons damaging the fountain, fouling the water, or taking water therefrom, will be prosecuted. The penalty for the latter offence is 10l.

“By order.

“Darlington, June 25th, 1859.

“H. DUNN, clerk to the board.”

[589] It was also proved that the said Thomas Adamson had this notice pointed out to him by Richard Mowbray, a servant of the local board of health, in June last, when the latter was affixing the notice near the fountain in question; and that he at the same time told Adamson that he was not to take his horses from his stable to the fountain to drink, and that Adamson replied that the board could not stop him. It was further proved, that, on the 23rd of November last (the day stated in the information), Adamson took some horses from his stable to the fountain, and allowed them to drink of the water then in the basin. It was also proved that the local board of health by their scale of charges, have a regular fixed charge per horse for water supplied to parties keeping horses, if they choose to have water laid into their stables.

The said Thomas Adamson on the hearing of the aforesaid information, made no defence, beyond merely saying that he did not know he was doing wrong: neither did he take any objections to the information, or otherwise.

The justices being of opinion that the local board of health had no right to erect or allow to be erected in the public highway any fountain otherwise than for the gratuitous use of the public at large, either under the provisions of s. 78 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), or otherwise, they considered that it must be assumed that the fountain in question had been erected under the authority of the said section, there being otherwise in their opinion no power to take up and occupy a portion of the public highway for such a purpose, although the soil and surface of the

streets, it was contended, is vested in the board ; and that therefore the water supplied to such fountain came within the meaning of the exception contained in the 59th section of the Waterworks Clauses Act, 1847, and [590] was water "provided for the gratuitous use of the public." And they were further of opinion that the notice above set forth and the verbal notice respectively given to the respondent did not take away the right of the respondent to take water from the fountain in the manner proved : and they gave their determination against the appellant in the manner before stated. The grounds of their determination, therefore, were,—first, that the local board of health had no power to erect such a trough or fountain on the public highway, except for the gratuitous use of the public,—secondly, that the local board, by giving such notice as aforesaid, could not confine the meaning of the words "gratuitous use of the public," and the use of the trough or fountain to cattle in the cattle-market on market-days, and for horses, if yoked, when passing to and fro.

Whereupon the opinion of the court was asked whether they were right in dismissing the information and complaint as aforesaid, and as to what further should be done or ordered by the said court in the premises.

David Keane, for the appellant (*a*). The 78th sec-[591]-tion of the Public Health Act, 1848, 11 & 12 Vict. c. 63, enacts that the local board of health may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants, to be continued, maintained, and plentifully supplied with water, or they may substitute, continue, maintain, and plentifully supply with water other such works equally convenient ; and the said local board may, if they shall think fit, construct any number of new cisterns, pumps, wells, conduits, and works for the gratuitous supply of any public baths or wash-houses established otherwise than for private profit or supported out of any poor or borough-rates." The Darlington Local Board Act, 1854, 17 & 18 Vict. c. clxxxi., had three objects especially in view,—the supply of the town of Darlington with gas, water, and convenient markets. To each of [592] these objects a separate set of clauses is devoted. The 22nd section impowers the local board, by means of the waterworks to be purchased by and vested in them, to collect and store water, and to supply water within the district, and to sell and dispose of the water, as they from time to time think fit. The 23rd section provides "that a supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or

(*a*) The points marked for argument on the part of the appellant were as follows :—

"That the magistrates were not right in dismissing the said information and complaint, and that they ought to have convicted the respondent :

"That, on the facts shewn in the case, the water taken by the respondent was not provided for the gratuitous use of the public, but only for the gratuitous use of such portion of the public as might require the same for the use of their cattle on certain times and occasions :

"That, the case does not find that the local board erected the fountain, but only that the local board supplied the fountain, which the case finds to be merely ornamental ; and that, even if the fountain had been illegally erected, the water supplied to it did not thereby become 'provided for the gratuitous use of the public :'

"That as the case does not find the cistern to have been in existence at the time the local board of health came into existence, or that it was substituted for such a cistern, or that it was constructed for the gratuitous supply of any public baths or wash-houses, the 78th section of the Public Health Act, 1848, which contemplates the benefit of the inhabitants as distinguished from the public, has nothing to do with this case :

"That the local board, as having the management and control of the streets, and power to improve public works, had power to erect the fountain, if they thought fit, the same not being shewn or surmised to be a nuisance or obstruction to the highway :

"That the local board were not under a legal duty to supply any water for the gratuitous use of the public, although they might be bound to supply some for the free use of the inhabitants, and they therefore were entitled to regulate any supply by such conditions and terms as they might think fit :

"And that the proceeding of the respondent complained of was a wilful evasion of the clauses in the Darlington Local Act, 1854, for raising funds to insure a sufficient water supply within the district."

washing carriages, where such horses or carriages are kept for hire or belong to common carriers or dealers in horses, or a supply of water for any trade, manufacture, or business whatsoever, or for watering gardens, or for fountains, or for any ornamental purposes whatsoever." The 24th section gives the maximum rates at which water is to be supplied for domestic purposes. The 27th section provides that water for other than domestic purposes may be supplied upon such terms and conditions as shall be agreed upon between the local board and the persons desirous of having such supply of water. And s. 29 imposes a penalty not exceeding 5*l.* for using for other than domestic purposes any water supplied by the local board, the party not having previously agreed with the local board for a supply for such other purposes. The information against Adamson was laid under the 59th section of the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, which act is incorporated with the local act "with respect to waste or misuse of the water supplied by the undertakers," among other things. That section enacts that "every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any reservoir, watercourse, or conduit belonging to the undertakers, or any pipe leading to any such reservoir, watercourse, or conduit, or from any cistern or other like place containing water belonging to the undertakers, other than such as [593] may have been provided for the gratuitous use of the public, shall forfeit to the undertakers for every such offence a sum not exceeding 10*l.* [Erle, C. J. Does the 78th section of the Public Health Act, 1848, justify the erection in question?] Assuming it does not, possibly the respondent might have a right to knock it down: but the illegality of the structure would not warrant him in wrongfully abstracting water from the fountain. [Bytes, J. This water is not provided "for the gratuitous use of the public;" it is dedicated to a particular portion of the public only.] It was provided for the especial use of cattle in the cattle-market on market-days, and for horses, if yoked, when passing to and fro. The respondent, by taking the water as he did, was guilty of a clear evasion of the statute-rate. [Bytes, J. An evasion is no offence, provided the law is not infringed.] The object of the act was that every private consumer of the water should in some way contribute to the rates.

The respondent did not appear.

ERLE, C. J. I am of opinion that the appellant in this case is entitled to succeed, that the information was improperly dismissed, and that the grounds taken by the magistrates cannot be sustained. The facts I take to be these:—An ornamental fountain having been presented to the town of Darlington by one of the inhabitants, and erected in one of the public streets of the town, the local board took upon themselves to supply it with water for a limited purpose,—a purpose of humanity. They determined to supply the fountain with water for the use of cattle in the cattle-market on market-days, and for horses, if yoked, when passing to and fro, that is, travelling along the road. As far, therefore, as the law will allow, they have limited the [594] right to use the water so supplied. The respondent, being a person who kept horses, and having a stable, and liable under the local act to pay a rate for the supply of water for their use, determined to avail himself of the water so dedicated to the cattle in the market and to horses travelling along the road, and brought his horses from the stable to drink at the fountain; thus avoiding a rate which he ought to pay. The local board thereupon laid an information against him for taking water in this manner after notice. The information was laid under the 59th section of the Waterworks Clauses Act, 1847, which enacts that "every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any reservoir, watercourse, or conduit belonging to the undertakers, or any pipe leading to any such reservoir, watercourse, or conduit, or from any cistern or other like place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, shall forfeit to the undertakers for every such offence a sum not exceeding 10*l.*" The magistrates before whom that information came on to be heard were of opinion that the water in this fountain was dedicated to the gratuitous use of the public,—for this reason, viz. that the fountain was placed on the public highway, and that the placing it there was an indictable obstruction of the highway, unless justified under the 78th section of the 11 & 12 Vict. c. 63; and they accordingly dismissed the complaint. The magistrates concede that the section just referred to would justify the placing of the fountain upon the public highway. It is unnecessary to stop to consider whether that is so or not. But

it may well be that the fountain may be an indictable obstruction of the highway, and yet the water therein may be private property of the local board. I therefore think the respondent had no right to claim the water against the will of the board, and that the assumption of the magistrates was unfounded in point of law. The 37th section of the Waterworks Clauses Act, 1847, appears to me to contemplate a power in the board to dedicate the water and limit its use in any way they may choose: and I take it they might by law dispose of it in any way they thought fit for the benefit of the town. That section enacts that, "in all the pipes to which any fire-plug shall be fixed, the undertakers shall provide and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident, or during necessary repairs, a sufficient supply of water for the following purposes, that is to say, for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public pumps, baths, or wash-houses that may be established for the free use of the inhabitants, or paid for out of any poor-rates or borough-rates levied within the limits of the special act." There is no obligation imposed upon the board or company to afford this supply absolutely, but the section goes on to say that "such supply shall be provided at such rates, in such quantities, and upon such terms and conditions as may be agreed upon by the town commissioners and the undertakers, or, in case of disagreement, as shall be settled in England or Ireland by two justices, and in Scotland by the sheriff, until in either case an inspector shall have been appointed, and after the appointment of such inspector, by the inspector so appointed,"—clearly contemplating that the supply may be for the gratuitous use of the public as between the town commissioners and the public, and at the same time dealing with the water as private property in respect of which the undertakers might lawfully contract. But that has nothing to do with the assumption here contended for by the magistrates, that, because the fountain was placed on the public highway, therefore the water must be taken to have been dedicated to the gratuitous use of the public.

WILLIAMS, J. I am of the same opinion. The reason assigned by the magistrates for declining to convict the respondent are not supported by the facts of the case. Even if it were, I am not prepared to say that the water must be taken to have been dedicated to the gratuitous use of the public because the fountain was so constructed as to be a public nuisance. It is clear that there was no intention to dedicate the water of this fountain to the gratuitous use of the public at large: and there is nothing in the act to lead to such a consequence. In *Poole v. Huskinson*, 11 M. & W. 827,—following *The Marquis of Stafford v. Cooney*, 7 B. & C. 257, it was held that there may be a dedication of a way to the public for a limited purpose, as for a footway, &c., but there cannot be a dedication to a limited part of the public, as to a parish. Such a partial dedication is simply void, and will not operate in law as a dedication to the whole public. Upon the whole, I see no reason why the local board should not limit the supply of water to the fountain in the manner they have done, and that the magistrates were wrong in not convicting the respondent for the offence of which he clearly had been guilty.

BYLES, J.(a). I am of the same opinion. It seems to me that the reason given by the magistrates for not convicting the respondent cannot be sustained. I am not sure that the use to which this water was supplied was not a public use. The tank was open for anybody's [597] cattle to drink on market-days from 10 o'clock till 5, or for anybody's yoked horses travelling along the road. It seems to me to have been too hastily assumed that this was not a public use. But, at all events, the decision of the magistrates was wrong, and the case must be sent back to them to be re-heard.

Rule accordingly.

AMANN v. DAMM. May 22nd, 1860.

[S. C. 29 L. J. C. P. 313; 2 L. T. 322; 7 Jur. N. S. 47; 8 W. R. 470.]

Referred to, *Stuart v. Bell*, [1891] 2 Q. B. 347.]

The defendant, *bonâ fide* believing that the plaintiff, who was a clerk to one M., a customer of the defendant's, and who had been sent to the defendant's shop by M.,

(a) Willes, J., was in the Divorce Court.

had while there stolen a box from an inner room, went to M., and, after telling him of his loss, intimated his suspicion of the plaintiff, saying, "There was no one else in the room, and he must have taken it :"—Held, that the communication was privileged by the occasion.—Where slanderous words are uttered in a foreign language, the declaration should aver that the persons in whose presence they were spoken understood the language.

This was an action for slanderous words spoken by the defendant of the plaintiff. The declaration alleged that the slanderous words were, "There was no one else in the room ; and he (meaning the plaintiff) muss ess genommen haben," thereby meaning and intending that the plaintiff had stolen a certain mathematical box from the defendant. The defendant pleaded not guilty.

The cause was tried before the Common Serjeant in the Mayor's court, London, when the following facts appeared in evidence :—The plaintiff was a clerk in the service of Messrs. Herschfield & Mensel, who were importers of foreign goods. The defendant was a fancy-box manufacturer, who had frequent dealings with Herschfield & Mensel. In the month of January last, the plaintiff called at the defendant's shop to inquire for some boxes which had been sent from Herschfield & Co.'s to be repaired. In the course of conversation, he asked the defendant's brother, who [598] was alone in the workshop, for two boxes of which he told him the defendant had promised to make him a present. The defendant's brother thereupon desired the plaintiff to go into an inner room and take two boxes from a certain shelf. The defendant accordingly went to the inner room, and returned with two boxes, and departed. Shortly after he was gone, a mathematical box of some value was missed from the inner room : and the defendant, assuming that it had been taken by the plaintiff, went to his employers' warehouse and there saw Mr. Mensel, who, upon being informed by him that he had something to communicate to him, took the defendant into a back room. The defendant then, no one else being present, told Mr. Mensel of the circumstance of the plaintiff's going to the inner room, and of the mathematical box being shortly afterwards missed ; adding, that, as no one else had been in the room, the plaintiff must have taken it. The plaintiff, on being told by Mr. Mensel of what the defendant had said, went to the defendant's house, when the defendant repeated what he had said to Mr. Mensel. The conversation was in the German language, and took place in the presence of a young female who was English, and who was not shewn to understand German.

The plaintiff at the trial swore that he had never seen the article he was supposed to have stolen.

On the part of the defendant it was submitted, that, there was no publication on the second occasion, it not appearing that the girl who was present understood the German language ; and that the communication to Mr. Mensel was privileged. It was also proposed to call witnesses to shew the circumstances under which the words were spoken, so as to rebut the inference of malice.

The learned Common Serjeant overruled the objec-[599]-tion, and rejected the proposed evidence ; and the jury returned a verdict for the plaintiff, damages 5*l*.

Laxton, in Easter Term last, moved to enter a nonsuit, or for a new trial, on the ground that the evidence tendered had been improperly rejected, and that the communication was privileged. [Erle, C. J. What is the privilege ?] The defendant considered himself to have been wronged by the plaintiff. [Erle, C. J. That will not do.] In *Harrison v. Bush*, 25 Law J., Q. B. 25, 29, Lord Campbell says : "A communication made bonâ fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without this privilege, would be slanderous and actionable." [Erle, C. J. What legal or moral duty was there in the defendant to go to the plaintiff's employer and tell him that his clerk had been guilty of a felony ?] He had an interest and a right to prevent a person he conceived to be dishonest being sent to his shop. In *Taylor v. Hawkins*, 16 Q. B. 308, it is laid down that, in an action of slander, if the facts proved are such that the communication is by the rules of law privileged, the judge ought not to leave any question to the jury as to malice unless the plaintiff gives further evidence shewing a probability that the communication was made maliciously rather than that it was made bonâ fide. So, in *Cook v. Wills*, 24 Law J., Q. B. 367, it was held that it is a question of law, to be determined by the judge, whether the occasion of publishing

defamatory matter is such as to repel the inference of malice, so as to constitute a privileged communication; and if, at the close of the plaintiff's case, he is of opinion that the communication is privileged, and there is no evidence, [600] intrinsic or extrinsic, of malice in fact, the judge ought to nonsuit: but, wherever there is evidence, either intrinsic or extrinsic, of malice to answer the immunity derived from the occasion of the publication, that question must be determined by the jury.

A rule nisi having been granted,

Grant now shewed cause. The words spoken were clearly slanderous, and the occasion unprivileged. [Williams, J. Is there any averment in the declaration, that the person in whose hearing the words were spoken understood the German language?] There is not. [Williams, J. In *Fleetwood v. Curley*, Hob. 267, 268, Lord Hobart says, —“The slander and damage consist in the apprehension of the hearers, and therefore slanderous words in Welsh bear no action, except you affirm that they were spoken in the hearing of them that understood the Welsh tongue.” And see 1 Wms. Saund. 242, n. (1), 242 a., n. (c); *Price v. Jenkins*, Cro. Eliz. 865: *Ilex v. Manasseh Goldstein*, 3 Brod. & B. 201, 7 J. B. Moore, 1, 10 Price, 88, R. & R. C. C. 473.] The jury having found for the plaintiff, it must be assumed that they were satisfied that the hearers knew the meaning of the slanderous words. And there was nothing in the occasion to constitute the communication a privileged one. There was neither interest nor duty to warrant the defendant in making a direct imputation of felony. [Erle, C. J. The defendant bonâ fide entertaining the suspicion he did, can it be said that he had no interest in intimating to the employer of the plaintiff that his visits to his shop might as well be discontinued?] The grounds of suspicion were so very slight that the jury might well be warranted in inferring malice from the harsh proceeding of the defendant. [Willes, J. It matters not how harsh or how hasty the defendant may have been, or how untrue the charge, if he bonâ fide made it.]

[601] Laxton was not called upon to support the rule.

ERLE, C. J. I am clearly of opinion that this rule should be made absolute on the ground that the circumstances under which the words were spoken did presumably negative malice in the speaker; in other words, that the communication was what the law calls privileged, unless there be express malice. The short facts are these:—The plaintiff, a clerk in the employ of Messrs. Herschfield & Mensel, was sent on his employers' business to the defendant's shop, and, with the permission of the defendant's brother, he went into an inner room to get some articles which the defendant had promised to give him. After he had gone away, the defendant missed from that room a mathematical box which the plaintiff had no right to take, if he did take it. Upon this, the defendant went to the warehouse of the plaintiff's employers, and, requesting of one of the firm, Mr. Mensel, a private interview, he communicated his suspicions to that gentleman, saying in substance that there was no one but the plaintiff in the room where the box in question was, and that he must have taken it. It seems to me that it was but acting with a reasonable regard to his own interest for the defendant, if he believed that the plaintiff had been guilty of the abstraction of the box, to go to the employers and state what had taken place. If he really believed the plaintiff to have acted so dishonestly, he would naturally object to his being sent to his premises again. It also seems to me that it was a reasonable thing for the defendant to go in the direction in which the box if taken by the plaintiff was likely to be found. I think either of these grounds was amply sufficient to justify the speaking of the words, the defendant bonâ fide believing that he was saying what was true. These being the simple [602] circumstances of the case, I think that, unless it could be shewn that the defendant was actuated by malice, the plaintiff ought not to have succeeded.

WILLIAMS, J. I also am of opinion that the words in question were spoken on a privileged occasion. The class of cases in which the occasion rebuts the primâ facie inference of malice from the utterance of slanderous words, includes the case of a communication made with a fair and reasonable purpose of protecting the interest of the person uttering them. It is unnecessary to say whether or not this case falls within that class where the communication is privileged by reason of a duty towards the employer of the person of whom the words are spoken.

WILLES, J. I am entirely of the same opinion. If it had been necessary, I should have been fully prepared to go the whole length of the doctrine laid down by Tindal, C. J., and Erle, J., in the case of *Coxhead v. Richards*, 2 C. B. 569.

BYLES, J. I also am of opinion that this rule should be made absolute, for the reasons given by my Lord and my Brother Williams.

Rule absolute, the costs to be costs in the cause.

[603] LOCKWOOD v. LEVICK. May 22nd, 1860.

[S. C. 29 L. J. C. P. 340; 2 L. T. 357.]

A commission-agent was employed by a manufacturer to procure orders for him upon the terms contained in a written proposal as follows,—“We sell at your terms, and have no further interference with the account beyond forwarding the order and references. We give you all the information we possess, and you treat the order as coming direct from the buyer. We expect to receive our commission on all goods bought by houses whose accounts are opened through us:”—Held, that the agent was entitled to his commission where an order had been given and accepted by the manufacturer, though, in consequence of his inability to supply the goods, they were not ultimately delivered to the buyer.

This was an action for commission claimed by the plaintiff in respect of goods sold by him for the defendant.

The defendant paid 11. 9s. 1d. into court, and pleaded never indebted beyond that sum. The plaintiff claimed 89l. 5s. 11d. in addition.

The cause was tried before Byles, J., at the sittings in London in last Hilary Term. The plaintiff was a commission-agent carrying on business at Manchester. The defendant was an elastic-web manufacturer at Bradford, in Yorkshire. The plaintiff had been engaged to sell goods for the defendant upon the terms contained in a letter addressed by the former to the latter on the 30th of November, 1857, which were as follows:—

“We act as agents to the manufacturers only, sell at your terms, and have no further interference with the account beyond forwarding the order and references. In all cases you will exercise your own judgment. We give you all the information we possess, and you treat the order as coming direct from the buyer. We expect to receive our commission on all goods bought by houses whose accounts are opened through us. The commission, 2l. 10s., is small for goods which I suppose are sold in moderate quantities; and we receive more for carpets and other heavy goods. However, this can stand over until I see you, as things of this kind are always better and more satisfactorily arranged when the matters are properly explained.”

After the parties had been acting for some time upon the understanding conveyed by this letter, the plaintiff introduced to the defendant a Manchester dealer named Hodges, who, in March, 1859, gave the [604] defendant an order for several thousand yards of web, which order the defendant accepted and undertook to execute, but which, for want of adequate machinery, he was unable to accomplish, though the time for completing had been extended by the buyer beyond the period originally stipulated; and the order was ultimately withdrawn. The sum claimed by the plaintiff in this action was the amount which his commission would have produced if the order had been executed by the defendant.

On the part of the defendant witnesses were called who stated that by the custom of the trade commission was not payable unless the goods bought were actually delivered. This evidence was objected to, but received, subject to leave to the plaintiff to move if the court should hold it to be inadmissible and the verdict should turn upon it.

Witnesses for the plaintiff also stated that, in their experience, the custom was to pay commission where an order was accepted, whether the goods were actually delivered or not.

The learned judge intimated an opinion that the word “bought” in the letter of the 30th of November, 1857, embraced all goods the orders for which had been accepted by the defendant, whether such orders were or were not executed by the actual delivery of the goods to the customer: but he left it to the jury to say whether the custom was as contended for by the plaintiff or as insisted upon by the defendant.

The jury found that the commission was payable when the order was accepted,

and did not depend upon whether it was executed or not. A verdict was thereupon taken for the plaintiff for 89l. 5s. 11d., and leave was reserved to the defendant to move to enter the verdict the other way,—the de-[605]-fendant consenting to be bound by the decision of this court.

Parry, Serjt., accordingly, in the course of the term, obtained a rule to enter a verdict for the defendant if the court should be ultimately of opinion that the learned judge had misconstrued the contract, or for a new trial on the ground that the verdict was not warranted by the evidence.

Manisty, Q. C., and C. Pollock, now shewed cause. Whether it be for the court or for the jury to say in what sense the word “bought” was used in the letter of this Manchester commission-agent, the verdict must stand. The rule upon this subject is well explained by Tindal, C. J., in delivering the judgment of the court in *Lewis v. Marshall*, 8 Scott, N. R. 477, 493, 7 M. & G. 744, who says: “The question was, whether there was a recognized practice and usage with reference to the voyage and business out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used these words in such sense. The character and description of evidence admissible for that purpose is, the fact of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses; for, the contract may be safely and correctly interpreted by reference to the fact of usage; as it may be presumed such fact is known to the contracting parties, and that they contract in conformity thereto: but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge.” [Willes, J., referred to *Prickett v. Badger*, ante, vol. i., p. 396.] Whether the case is to [606] depend upon the custom alone, or upon the letter of the 30th of November, 1857, coupled with the parol evidence, or upon the letter alone, the result must be the same. As to the custom, the finding of the jury is clear and satisfactory. [Erle, C. J. My Brother Byles intimates to us that he is not dissatisfied with the verdict.] Then, if the case is to rest upon the construction of the letter, there is no pretence for saying that the learned judge put an erroneous construction upon it, or that the word “bought” was used in any other sense than that in which it was understood by the jury. In delivering the judgment of the court of Queen’s Bench in *Brown v. Byrne*, 3 Ellis & B. 715, Coleridge, J., says: “Mercantile contracts are very commonly framed in a language peculiar to merchants: the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large: evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning.” [Willes, J. I cannot conceive that the word “bought” as used in the letter in question was intended to have any peculiar meaning.] It is submitted that it has not. There clearly was no misdirection. The learned judge said that, if the construction of the document was for him, he should hold that “bought” meant contracted for by a bargain under which the buyer agreed to accept and the seller to deliver the goods, and that it was not necessary that there should be an actual execution of the contract by delivery and acceptance of the goods. That was the fair and reasonable construction of the letter. The terms “order,” and “bought” and “sold,” are used throughout indiscriminately. The case was not withdrawn from the jury.

[607] Parry, Serjt., in support of the rule. The fair meaning of the letter is that the contract of sale should be completed by the actual delivery and acceptance of the goods before the plaintiff should be entitled to commission. It is not reasonable to suppose that the defendant should be called upon to pay a commission upon orders from which he has received no benefit. The learned judge misdirected the jury in telling them what was the meaning of the letter. [Byles, J. I told the jury that in my opinion the word “bought” included goods which had not been delivered, and the property in which did not pass, but which the defendant had agreed to deliver.] In ordinary parlance, “bought” means the acquisition of the property in the thing. The definition of the verb “to buy,” as given in Webster’s Dictionary, is, “to acquire the property, right, or title to any thing by paying a consideration or an equivalent in money.” Has that been done here? Clearly not. The parties never could have intended by the word “bought” to include goods ordered but never brought into existence. It was obviously intended that the manufacturer should be put in a

position to derive profit from the transaction before the commission should be considered as earned. It may well be that the plaintiff may have got this order executed elsewhere, and received his commission from another manufacturer. In *Reed v. Rann*, 10 B. & C. 438, it was held that a ship-broker who has procured a bargain for the hire of a vessel is, by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is performed, but not otherwise; and therefore, where a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain [608] an action against the ship-owner to recover the commission.

ERLE, C. J. I am of opinion that this rule should be discharged. I have already said that my Brother Byles who tried the cause is not dissatisfied with the conclusion the jury came to upon the evidence; and, having heard the evidence read, I entirely concur with him. The other ground upon which it was sought to support the rule, was, that the learned judge misdirected the jury in the construction of the plaintiff's letter of the 30th of November, 1857. He was of opinion that the words "goods bought" might extend to goods in respect of which an order had been given and accepted, and that the commission was payable although no goods had been actually delivered. I think my Brother Byles was quite right in the construction which he put upon the letter. Though, containing only a proposal, that letter was a written document governing the contract between the parties: and in that sense it was the judge's duty to tell the jury what was his opinion of it, and to leave it to them with the rest of the facts. It seems to me that the relation in which the parties stood to each other shews that the construction put upon the letter was the true one. The plaintiff is a commission-agent, and the defendant a manufacturer. The former writes to the latter,—“We act as agents to the manufacturers only, sell at your terms, and have no further interference with the account beyond forwarding the order and references. In all cases you will exercise your own judgment. We give you all the information we possess, and you treat the order as coming direct from the buyer. We expect to receive our commission on all goods bought by houses whose accounts are opened through us.” It seems to me that the letter itself shews clearly that a [609] person giving an order in the capacity of a buyer was to be considered as a buyer; and that, when an order was given, and accepted by the manufacturer, the commission became due, even though for some reason the goods should never be actually delivered. It is urged on the part of the defendant that it would be unreasonable that he should be held liable to the payment of a commission upon an order which yielded him no profit. But here he had an opportunity of making profit. The plaintiff performed all the service for which he was employed; and the defendant had the option of delivering the goods and so making profit. But I do not agree that the profit to the manufacturer is to be the criterion of the agent's right to commission. The buyer might be an insolvent person; or, the manufacturer might sell his commodity for less than cost price: still that would not affect the agent's rights. Although there might be a loss upon the transaction, it might yet be very desirable for the manufacturer to execute the order. I am clearly of opinion that the intention of the parties was that every order obtained by the plaintiff and accepted by the defendant should constitute a purchase of goods so as to entitle the plaintiff to his commission.

WILLIAMS, J. I am of the same opinion. The goods in respect of which the commission is claimed in this action were clearly “goods bought,” within the meaning of the contract. When there was, through the plaintiff's offices, a bargain binding the one party to deliver and the other to take the goods, the case was brought precisely within the terms of the plaintiff's letter of the 30th of November, 1857. Suppose the order in such a case were for a defined portion of a larger bulk of goods, could it be said that the goods were not bought because they were not separated from [610] the rest? The common form of declaring in such a case is, that the one agreed to buy and the other to sell, &c. Can it make any difference that the goods are undefined, in the sense of not being in existence? I cannot see that it does. The terms of the order might have been satisfied either by the delivery of goods already in stock or by manufacturing other goods of the like description and quality. It seems to me that it would be running counter to the plain and obvious intention of the parties to hold, that, where there has through the exertions of the plaintiff been a binding bargain for goods, that bargain is not brought within the contract contained in the plaintiff's

letter by reason of the defendant's inability to execute the order after he had accepted it.

WILLES, J. I am entirely of the same opinion on the construction of the document.

BYLES, J., said nothing.

Rule discharged.

[611] MOON v. TOWERS. May 23rd, 1860.

The defendant's son, a youth about 17 or 18, in his employ, caused a servant whom he suspected of obtaining money from him by false pretences, to be apprehended and taken before a magistrate, who remanded him, but ultimately discharged him. After the remand, the son told his father what he had done: the latter did not prohibit his son from proceeding in the matter, but said that, as he (the son) had begun it, he would not interfere:—Held, by Erle, C. J., Willes, J., and Byles, J.,—*dubitante* Williams, J.,—no evidence for a jury of either previous authority or subsequent ratification by the father.—Whether, under the circumstances, a subsequent ratification would have rendered the father liable as a trespasser,—*quære*?

Trespass and false imprisonment. Plea, not guilty.

At the trial before Williams, J., at the sittings at Westminster, after last Hilary Term, it appeared that the plaintiff was "property-man" at the Victoria Theatre, of which the defendant was lessee, one Frank Towers, his son, a youth between 17 and 18 years of age, acting as his treasurer; that, on Saturday, the 10th of December last, the plaintiff in his character of property-man presented to and received from the treasurer an account of disbursements alleged to have been made by him for the use of the theatre, which account contained two items of 2l. 5s. and 1l. 17s. respectively for paint, when in point of fact he had only paid 2l. 13s. in the whole. The defendant, conceiving this to be an intentional fraud on the part of the plaintiff, dismissed him from his employment: and Frank Towers caused the plaintiff to be apprehended by a policeman and taken to the station on a charge of obtaining money by false pretences. The plaintiff was taken before a magistrate and remanded, but was ultimately discharged.

The defendant, who was called as a witness on the part of the plaintiff, stated that he had never authorized his son to cause the plaintiff to be apprehended; that he knew nothing of it until the plaintiff had been before the magistrates, and had been remanded; that he never went to the police-court; and that he did not hinder his son from appearing on the remand, but declined to interfere.

Frank Towers was called as a witness for the defendant. He said that he made inquiries which satisfied [612] him that he was justified in causing the plaintiff to be apprehended; that he did it of his own authority; and that, having communicated to his father what he had done, the latter did not prohibit it, but said that, as he (the son) had begun it, he would not have anything more to do with him in the case.

It was submitted on the part of the defendant that there was no evidence to go to the jury that the act of his son in causing the plaintiff to be apprehended was authorized by him.

For the plaintiff it was insisted, that, assuming there was no original authority, there was abundant evidence of a subsequent ratification,—the act having been done for his benefit and by a person over whom he had control, and he not having prohibited it.

The learned judge was of opinion that there was some evidence to go to the jury, and therefore declined to nonsuit: and the jury found for the plaintiff, damages 20l.

Hawkins, Q. C., in Easter Term last, moved to enter a nonsuit or a verdict for the defendant. He submitted that there was no evidence at all that the act complained of was done with the authority of the defendant, and that he could not be made liable as a trespasser by any subsequent ratification or assent. And he referred to the case of *Grinham v. Willes*, 4 Hurlst. & N. 496. There a felony having been committed, the defendant sent for a policeman, who, on the defendant's information, and on inquiries made by himself, arrested the plaintiff: and the defendant accompanied the policeman to the station and signed the charge-sheet: and it was held that the defendant was not liable in an action of trespass. Pollock, C. B., there says: "The

circumstances of this case are, that the defendant appealed to the authorities who are charged with the preservation [613] of the peace. The arrest and detention were the acts of the police-officer, and the defendant did nothing more than he was bound to do, viz. sign the charge-sheet. He may have been liable if he acted *mala fide*, but not otherwise. I agree with the observations of Lord Cranworth and Alderson, B., as to the case of *Flewster v. Royle*, 1 Campb. 187 (a). We ought to take care that people are not put in peril for making complaint when a crime has been committed. If a charge be made *mala fide*, there are ample means of redress. But, in the absence of *mala fides* we ought not to be too critical in our examination of the facts, to see if something is not done without which the charge against the suspected person could not have been proceeded with. A person ought not to be held responsible in trespass, unless he directly and immediately causes the imprisonment." [Willes, J., referred to *Newman v. Zachary*, Aleyn, 3.] A rule nisi having been granted,

Pearce now shewed cause. He submitted that there [614] was abundant evidence to justify the verdict: for that, the defendant by his conduct ratified and sanctioned all that his son had done, and so became liable as a trespasser.

Hawkins, Q. C., and Lewis, were heard in support of the rule.

ERLE, C. J. I am of opinion that this rule ought to be made absolute. I think there was no evidence to go to the jury that the imprisonment of the plaintiff was authorized by the defendant. It appears that the plaintiff was taken up at the instance of the defendant's son, who was about 17 or 18 years of age, without any authority from his father, and without his knowledge; and that, when the plaintiff was in custody, the son informed his father of what he had done. I do not mean to decide whether or not the father could be rendered liable by his subsequent ratification of the act of the son, because I am of opinion that there was no evidence that he did so ratify it. The defendant and his son both affirmed at the trial the direct reverse of what the plaintiff was bound to prove. The son said that, when he told his father what he had done, the latter, so far from saying "What you have done is for my use and benefit, and I ratify and adopt it," merely replied, that, as he (the son) had begun it, he would have nothing more to do with him in the case. And the father said that he did not hinder his son from appearing on the remand, but simply declined to interfere. I am clearly of opinion that the plaintiff failed to establish the affirmative of the proposition which lay upon him. Suppose the son had knocked the plaintiff down, and the father had said "I think it served him right," would that be such a ratification of the son's act as to make the father liable as a trespasser. Not [615] withstanding the son's youth, and the fact of his being in some degree under the father's control, and that the son was acting in his father's business, I think there was no evidence to go to the jury of an adoption of the trespass by the father, so as to make it his act.

WILLIAMS, J. If the court had been of opinion that there was evidence that the defendant had ratified and adopted the act of his son in causing the plaintiff to be apprehended and taken before a magistrate, a question of very general importance would have been raised. But it becomes unnecessary to consider that, inasmuch as the majority of the court have come to the conclusion that there was no evidence of ratification to go to the jury. With some reluctance, I concur with them. My reluctance proceeds upon this,—I incline to think, that, where an act is done by an agent in the course of his employment for a principal, the agent, as in this case, being an unemancipated member of the family of the principal, and the latter allows his

(a) His Lordship referred to *Gosden v. Elphick*, 4 Exch. 445, 447. In *Flewster v. Royle*, it was held, that, if A. states particularly to the commander of a press gang that B. is liable to the impress service, who in truth is not so, and B. in consequence of this information is impressed, A. is liable to an action of trespass for false imprisonment at the suit of B. This case being cited in argument in *Gosden v. Elphick*, Rolfe, B., said: "I must dissent from that ruling. The case may mean that the facts were evidence from which the jury might infer a wrongful imprisonment." And Alderson, B., said: "It would come to this, that, if a constable in search of a delinquent says, 'Which is the man?' the persons present must not point him out. Or, if I see a man who is perfectly innocent taken into custody, and the guilty man running away, I must not say so, or I shall be liable in trespass. The evidence in *Flewster v. Royle* very likely shewed that the defendant bore some spite to the plaintiff."

agent to go on with it and to take steps which could only be taken at the expense of the principal, the jury may fairly take these matters into their consideration as some evidence of ratification. However, the doubt I entertain is not so strong as to induce me to dissent from the rule being made absolute to enter a nonsuit.

WILLES, J. I am of opinion that there was no evidence to go to the jury of any ratification direct or constructive. I am not aware of any such relation between a father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of any body else. I apprehend, that, when it is established that a father is not liable upon contracts made by his son within age, except they be [616] for necessities, it would be going against the whole tenor of the law to hold him to be liable for his son's trespasses. The tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the courts. No man ought, as a general rule, to be responsible for acts not his own. In the present case, it is clear that the young man had no prior authority from his father to take the steps he did. And it is equally clear to mind that the father, when informed of what his son had done, did not intend to make the acts of the son his own by any ratification. The finding of the jury upon the facts before them was manifestly contrary to truth and justice.

BYLES, J. I entirely agree with the opinions expressed by my Lord and my Brother Willes. One thing is clear, viz. that this action is brought for a thing done before the remand, a trespass; and it is clear that the defendant knew nothing of what his son had done until after the remand. Previous authority, therefore, is out of the question. And, as to subsequent ratification, what is the evidence? When told by his son that he had caused the plaintiff to be apprehended, the father said he would have nothing to do with it. The only way of accounting for the verdict is, that the jury may have suspected that the father and son understood each other. But of that there was no evidence.

WILLIAMS, J. I did not mean to put the non-emancipation of the son as a question of law. I merely intended to mention it as one of the facts from which I inferred, or, rather, I thought the jury would be warranted in inferring, that the father did ratify the acts of his son.

Rule absolute for a nonsuit.

[617] PRICE v. HARRISON. June 9th, 1860.

[S. C. 29 L. J. C. P. 335; 6 Jur. N. S. 1345. Referred to, *Brown v. Liell*, 1885, 16 Q. B. D. 230.]

Held, that the defendant was entitled, under the common-law jurisdiction of the court, to have an inspection of letters which in the course of a negotiation for taking a farm he as agent for his brother had written to the plaintiff, but of which he had kept no copies,—it being sworn that the plaintiff's claim in the action was founded upon such letters, and that the inspection was necessary for his defence thereto.

The declaration contained a count alleging that it was mutually agreed between the plaintiff and the defendant that the plaintiff should demise and lease to the defendant a certain farm, lands, and premises of the plaintiff, to wit, a farm known as Paradise Farm, near to the town of Lechlade, in the county of Gloucester, and that the defendant should accept such lease and become tenant to the plaintiff of the said farm, lands, and premises, and that the defendant should forthwith after the making of the said agreement pay to the plaintiff the amount of certain acts of husbandry upon the said farm, and the tillages, dressings, half-dressings, straw, crops, fixtures, and other things upon the said farm, according to the valuation of the same by two persons, &c.: and, after alleging, amongst other things, that, although the said acts of husbandry, tillages, dressings, half-dressings, straw, crops, fixtures, and other things had been duly valued as aforesaid by two persons at and for a large sum, to wit, &c., assigned for breach that the defendant had not paid the same, or any part thereof.

There was also a count for money which it was alleged the defendant had contracted to pay in respect of the plaintiff's having agreed to relinquish and give up to

and in favour of the defendant and at his request a certain farm, lands, and premises, with the appurtenances, and the benefits and advantages of certain work, tillages, and acts of husbandry before then done, and manure and materials before then expended in and about the cultivation and improvement thereof, together with certain turnips, grass, herbage, underwood, crops, chattels, and effects then growing and [618] being thereon, and for fixtures and chattels then agreed to be bargained, sold, and relinquished and given up by the plaintiff to the defendant at his request, and to be by the defendant then had and taken to his own use.

The defendant obtained a judge's order to inspect certain letters, upon which it was surmised the plaintiff intended to rely for the purpose of establishing the agreement alleged in the declaration. The affidavit upon which the application for the order was founded stated that the defendant, as agent for his brother, was in treaty with the plaintiff for renting a farm and premises; that, during such treaty, the defendant wrote several letters to the plaintiff, copies of which he did not keep and had not in his possession; that he believed that it was upon these letters or others from his brother that the plaintiff relied to establish the agreement declared on; and that the defendant had just ground to defend the action.

There was also an affidavit from the defendant's attorney, who deposed, that, since the commencement of the action, he saw in the possession of the plaintiff's attorneys what appeared to him to be several letters, and asked to be allowed to inspect them; that the plaintiff's attorneys allowed him to see one letter of the defendant to the plaintiff, but declined to allow him to see the others without the consent of the plaintiff; that he called on the plaintiff's attorneys again on a subsequent day, when they informed him that the plaintiff declined to allow the letters to be inspected; and that, in his judgment, it was necessary that the defendant should have inspection, to enable him to plead.

Powell, on a former day in this term, moved to rescind this order, on the ground that it was granted [619] upon insufficient materials. The defendant does not state in his affidavit that the letters he seeks to inspect relate to or are material to his case. [Erle, C. J. He states that they form the foundation of the contract upon which the plaintiff declares.] This is a mere attempt to ascertain by an inspection whether the plaintiff can prove his case by means of these letters. The rule laid down by the court of Exchequer in *Hunt v. Hewitt*, 7 Exch. 236, is as follows: "The right of a plaintiff in equity is limited,—first, to a discovery confined to the questions in the cause,—secondly, of such material documents as relate to his (the plaintiff's) case on the trial; and does not extend to the discovery of the manner in which the defendant's case is to be established (a), or to evidence which relates exclusively to his case. The party applying, therefore, who is in the same situation as a plaintiff in equity, must shew,—first, what is the nature of the suit and of the question to be tried in it; and it seems also that he should depose in his affidavit to his having just ground to maintain or defend it,—secondly, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents, in order that it may appear to the court or judge that the documents are asked for the purpose of enabling the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he [620] may submit to shew parts, covering the remainder, on affidavit that the part concealed does not in any way relate to the applicant's case. The same course would be pursued in equity." So, in *Doc d. Avery v. Langford*, 1 Bail Court Cases, 37, 21 Law J., Q. B. 217, a plaintiff in ejectment sought to inspect and take copies of certain deeds, in order that he might be able to prove his title to the premises. It appeared that the assignee of certain premises for the residue of a term, became seised in fee of adjoining premises, and demised both to R. and S., and that subsequently the interest of the assignee in both was transferred to the defendant, who, after the determination of the term of R. and S., retained possession of the leasehold premises. The application was made by the

(a) See *Smith v. The Duke of Beaufort*, 1 Hare, 507, *Bolton v. The Corporation of Liverpool*, 1 Mylne & K. 88, *The Attorney-General v. The Corporation of London*, 12 Beavan, 8.

plaintiff as reversioner, and he prayed for an order to inspect the conveyance by which the leaseholds were assigned and the freeholds conveyed to the defendant,—alleging that the latter had obliterated the boundaries between the two, and that the premises now sought to be recovered formed part of the leaseholds. It was held by Erle, J., that the plaintiff was entitled to inspect the assignment of the term, but not such part of the deed as related to the conveyance of the freeholds. His lordship proceeded upon the case of *Bolton v. The Corporation of Liverpool*, 1 Mylne & K. 88, which lays down the principle, that “a party has a right to the production of deeds sustaining his own case affirmatively, but not those which are not immediately connected with the support of his own title, and which form part of his adversary’s. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary.” [Williams, J. The nearest case for you is *Shadwell v. Shadwell*, ante, vol. vi., p. 679. There, in an action against executors upon an agreement under which the plaintiff claimed certain arrears of an annuity alleged to be due to him [621] from the testator, the defendants pleaded, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof. The court refused to grant the plaintiff a rule to inspect a supposed letter upon which the plea was founded,—upon an affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made,—the inspection being sought, not in order to support the plaintiff’s own case, but in order to see whether and by what means a defence could be made out against him. It was admitted there that inspection could not be compelled under the 14 & 15 Vict. c. 99, s. 6, or under the 50th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125; but the application was sought to be supported on the ground that the party receiving the letter held it in some sense as a trustee for the writer of it, and also on the ground of the abolition of profert by the 55th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. The ground upon which the judgment proceeded, was, that there was no certain allegation that there was any such document in existence, and that it was a mere fishing application. Byles, J. On the other hand there is the case of *The London Gas-Light Company v. Chelsea Vestry*, in p. 411 of the same volume, where it was held to be no objection to an order under the 14 & 15 Vict. c. 99, s. 6, for the inspection of a document in the possession of a defend- [622]-ant, that its production will disclose his case, provided that it be satisfactorily shewn that it also supports the plaintiff’s case.] The affidavits there alleged specifically that the documents were material and necessary to enable the applicants to prepare for trial. [Byles, J. Does not that apply with greater force to this case?] The affidavit does not so suggest. [Byles, J. If there had been an agreement signed between the parties, even before the statute inspection might have been had, the party holding the document (if but one copy) holding it as trustee for the other who had an equal interest in it. The statute removes one ground, but leaves the other. [Williams, J. The affidavit here is certainly as loose as possible. Byles, J. Surely, if a bill of discovery had been filed here, a court of equity would have granted inspection.] A rule nisi having been granted,

Coleridge now shewed cause. The question is whether the learned judge was warranted in making the order, either under the common-law jurisdiction of the court, or under the statute 14 & 15 Vict. c. 99, s. 6. It is submitted that it was perfectly competent to him to make it under either. That he had power under the statute is clear from a glance at the words of the enactment:—“Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law, &c., such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which pre-[623]-vious to the passing of this act a discovery might have been obtained by filing a bill, or by any other proceeding in a court of

equity at the instance of the party so making application as aforesaid to the said court or judge." In Wigram on Discovery, 2nd edit. p. 46,—second proposition, it is said: "It is the right—as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." In *Combe v. The Corporation of London*, 4 Y. & C. 139, the corporation of London claimed for the fellowship porters of that city a prescriptive right of measuring and carrying, for certain fees, all corn landed on either side of the river Thames, between Yantlet Creek and Staines Bridge, and carried into or out of the city; and they filed their bill against Combe & Co. to establish that right. The defence of Combe & Co. was, that the claim was of modern origin; and they filed their bill of discovery against the corporation, suggesting that the porters were established in the time of H. 3, for carrying (within the city only) corn landed by persons other than citizens at Queenhithe, which they alleged was then the only place where corn was permitted to be landed; and they claimed the inspection of certain entries in the corporation books, which purported to be copies of ancient public orders and proclamations, inquisitions, and findings relating to the landing of corn at Queenhithe, and to the charges for carrying it to certain persons within the city. Upon motion to produce these documents, which by the answer of the corporation were admitted to be in their possession, but were insisted upon as part of their title and that of their grantees, the fellowship porters,—it was held that they were not part of their [624] title, and must be produced. The matter came before Vice-Chancellor Knight Bruce in *Combe v. The Corporation of London*, 1 Y. & C., C. C. 631, and afterwards on appeal before Lord Lyndhurst, C., 10 Jurist, 57, where the production of the documents was enforced, though the defendants in their answer stated that they contained evidence material to the claim of the corporation, and were intended to be used by them at the hearing in support thereof. The subject came before the court of Queen's Bench in *Riccard v. The Inclosure Commissioners for England*, 4 Ellis & B. 329. On a feigned issue directed under the statute 8 & 9 Vict. c. 118, s. 56, to try whether the plaintiffs had such an interest in a manor as entitled them to object to the inclosure of certain lands lying within it, the substance of the defendant's case was, that, though the plaintiffs were lords of the manor, yet a former lord, L., to whom the plaintiffs were privy in estate, agreed, in 1800, not under seal, to take an allotment in severalty of 151 acres of the waste in lieu of his interest in the rest of the waste, that the agreement was acted upon, and that the plaintiffs still enjoyed the allotment. A judge's order was obtained by the defendants to inspect the conveyance by which L. acquired the manor, before 1800, and the conveyance by L. to his son, the probate of the will of the son, under which the plaintiffs were executors, and also all leases and entries relating to the letting of the 151 acres alleged to have been allotted. Upon a rule to rescind this order, it was held that each of the documents was relevant to support the defendant's case, and, being so, the defendants were entitled to inspect them, though they were also title-deeds of the plaintiffs. Wightman, J., there says: "Though a party cannot in general inspect documents forming the title of his adversary, there is an exception where the party has [625] an interest in them as proving, and where they are evidence in support of, his own case." The result might have been different in *Shadwell v. Shadwell*, ante, vol. vi. p. 679, if the statute had not been thrown overboard. The effect of the 56th section of the Common Law Procedure Act, 1852, is, to substitute inspection for oyer, but extending it to documents of every description. [Williams, J. The defendant may have inspection of documents which are necessary to support his case, although they be part of the plaintiff's case, or part of his title-deeds. But, is that so where it is simply sought for the purpose of supporting the plaintiff's denial? Erle, C. J. In *Combe v. The Corporation of London*, the plaintiffs denied the right of the corporation: they sought discovery for the purpose of shewing the infirmity of the case of the corporation. It is very difficult to draw the line. How the court of equity reconciled their decision in that case with the rule they profess to act upon, I do not understand.] In all cases the defendant wants to deny the plaintiff's right. He is permitted to have inspection in order that he may set up his construction of the documents against that relied on by his opponent. In *Hunt v. Hewitt*, 7 Exch. 236, 244, the rule is thus laid down by Pollock, C. B., in delivering the judgment of the court:—"The right of a plaintiff in equity is limited,—first, to a discovery confined to the questions in

the cause,—secondly, of such material documents as relate to the proof of his (the plaintiff's) case on the trial; and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. The party applying, therefore, who is in the same situation as a plaintiff in equity, must shew,—first, what is the nature of the suit, and of the question to be tried in it; and it seems also that he should depose in his affidavit to his having just ground to maintain or defend it,—secondly, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents, in order that it may appear to the court or judge that the documents are asked for the purpose of enabling the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. To this the opponent may answer, by swearing that he has no documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he may submit to shew parts, covering the remainder, on affidavit that the part concealed does not in any way relate to the plaintiff's case. The same course would be pursued in equity.” [Williams, J. To entitle you to inspection, you should shew that the documents which you seek to inspect are material to your defence, not for the mere purpose of a denial of the plaintiff's title. *Erle, C. J. In Combe v. The Corporation of London*, the Lord Chancellor says: “It was further objected that the bill only charged that these books related to the matters in question, and that it was not alleged, that, if produced, they would establish the case of the plaintiffs: and that it was only admitted by the answer that the accounts related to the matters in question in the cause. But this admission alone will *prima facie* entitle the plaintiffs to inspect them. *Smith v. The Duke of Beaufort*, 1 Phillips, 209, *Storey v. Lord Lennor*, 1 Mylne & C. 525, *Tyler v. Drayton*, 2 Sim. & Stu. 309, and other cases, have decided that point. It is not necessary that more should be stated in the bill, or that more should be admitted by the answer.” Williams, J. When the case was before him in the Exchequer, Lord Abinger said,—4 Y. & C. 155,—“The ground on which the plaintiff files his bill is, to make [627] the defendant discover what is material to his (the plaintiff's) case: but he has no right to say to the defendant ‘Tell me what your title is,—tell me what your case is,—tell me how you mean to prove it,—tell me the evidence you have to support it,—disclose the documents you mean to make use of in support of it,—tell me all these things, that I may find a flaw in your title.’ Surely that is not the principle of a bill of discovery.”] That case, in truth, goes no further than *Hunt v. Hewitt*.

The court has long exercised a common-law jurisdiction to compel the production of a document of which one copy only exists, and in which the party seeking to inspect it has such an interest that the person holding it may be said to hold in a fiduciary character: *Blakey v. Porter*, 1 Taunt. 386; *King v. King*, 4 Taunt. 666; *Street v. Brown*, 6 Taunt. 302, 1 Marsh. 610. The case of *Shadwell v. Shadwell* is no authority against this application. The main ground of decision there was, that the affidavit did not shew that the plea was founded upon a written document; on the contrary, the plaintiff's own affidavit expressly denied that he had ever made any such agreement as alleged. [Williams, J. The distinction between that case and this is, that there the plea might have been proved without the production of any written agreement; whereas, here, the declaration could not be supported without shewing an agreement in writing.] The judgment was particularly founded on the insufficiency of the affidavit.

Powell, in support of his rule. It does not appear that this action is founded upon any written document. [Erle, C. J. The 4th section of the Statute of Frauds, 29 Car. 2, c. 3, provides that no action shall be brought “upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them,” unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, &c. The present action is brought upon an agreement for an interest in land. Unless he proved an agreement in writing, the plaintiff must inevitably be nonsuited.] Assuming that there is an agreement in writing, the affidavit does not shew that it is an inspection of that for which the defendant asks. What he asks to be allowed to inspect is, some letter, or a series of letters, which, for anything that appears, may be something very different from the agreement declared on. The cases relied on to sustain this order are but little to the

purpose. In *Combe v. The Corporation of London*, the plaintiffs alleged in their bill that the corporation had in their possession documents which were material for their defence to the suit which the corporation were prosecuting against them. The corporation did not deny that the documents were in their possession, or that they were material to the matter in issue. It was therefore the common case in which the court of Chancery enforces discovery. *Richard v. The Inclusion Commissioners for England* turned in a great measure upon the affidavits: inspection was granted on the specific ground that it was sworn that the documents were material to the defendant's case. *Hunt v. Hewitt* shews that the affidavit should distinctly disclose that the documents are essential to the proof of the applicant's case. In that respect the affidavit here is singularly defective: it does not shew that the defendant has any defence at all. In *Colton v. The Corporation of Liverpool*, 1 Mylne & K. 88, Lord Cottenham, C., says: "I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirm-[629]-atively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. . . . The plaintiff here does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But, how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title: they are the corporation's title and not his, and they are only his negatively, by failing to prove that of the corporation. . . . He cannot call for these documents merely because they may, upon inspection, be found not to prove his liability, and so to help him, and hurt his adversary, whose title they are." In *Wright v. Morrey*, 24 Law J., Exch. 259, the court refused to allow the defendant to inspect an account-book of the plaintiff's, believed to contain an entry of 200l. stated by the plaintiff, immediately after the death of the defendant's wife, to have been lent to her by the plaintiff, such entry forming no part of the defendant's case. In *Goodliff v. Fuller*, 14 M. & W. 4, in an action for breach of promise of marriage, the court refused a rule for the defendant to inspect letters written by the plaintiff to him, which he alleged contained a release of his promise, and which, after the breaking off of the connexion, the defendant had returned to her upon an understanding that all the letters of both should be mutually returned, which she had not complied with on her part. [Williams, J. If such a case occurred now, the inspection would most undoubtedly be granted.] In an action against a direc-[630]tor of a joint-stock company, completely registered, for services rendered to the company, the plaintiff's affidavit in support of an application for an inspection of certain documents, stated that there was, as the plaintiff believed, in the possession of the company and of its directors, a book or books containing minutes of the resolutions, orders, and proceedings of the directors of the company and of the committees thereof, and that he was advised that it might be necessary that the said minutes or some parts thereof should be adduced on the trial of the cause as evidence on his part: and that, without an inspection and copy thereof, he could not safely proceed to trial; and that he had no copy thereof in his possession or control, or any certain information as to the contents: it was held that this affidavit was not sufficient for an inspection of the documents under the 14 & 15 Vict. c. 99, s. 6,—*Pepper v. Chambers*, 7 Exch. 226. So, in *Snider v. Mangino*, 7 Exch. 229, in an action by a share-broker in respect of the purchase of stock, in which the bill of particulars allowed several credits, the defendant applied under the 14 & 15 Vict. c. 99, s. 6, for leave to inspect the books, documents, &c., in the possession of the plaintiff, upon an affidavit of his attorney, which stated that, upon the purchase of the stock, the plaintiff received, as the deponent was informed and verily believed, divers bonds representing the security for the said stock, which securities remained in the hands of the plaintiff, the particulars of which he neglected to furnish to the defendant, &c., and also divers books, papers, writings, entries, accounts, and other documents in relation to the said stock, &c., and that it was material and necessary, in order to enable the defendant to defend the action and to arrive at a just and proper conclusion as to the state of the accounts between him and the plaintiff, that the deponent or the defendant should inspect and take copies [631] of all such bonds, books, &c., which the deponent verily believed were in the

possession of or under the control of the plaintiff; that the plaintiff had delivered to the defendant two accounts relating to the matters in question; and that the deponent verily believed that neither the particulars of demand nor those accounts set forth the true state of the accounts between the parties, &c.; and that the application was made *bonâ fide*, &c.: it was held that no ground was shewn for an order to inspect under the statute. And Alderson, B., said: "The affidavit does not state that the bonds would shew any defence to the action." That was a much stronger case for inspection than this. *Shadwell v. Shadwell*, it is submitted, is a binding authority, notwithstanding the observations which have been made upon it. The affidavit there was in much the same terms as this affidavit. The court there say: "No doubt the courts have long exercised a power, independent of the statute 14 & 15 Vict. c. 99, s. 6, to grant inspection of agreements on which one party to a suit seeks to charge, or defend himself from, the other who has executed the instrument, when there is only one copy of it, on the ground that the party who has possession of it holds it in the character of trustee for the other party: see *Blogg v. Kent*, 6 Bingh. 614, 1 M. & P. 433, per Tindal, C. J.; *Bluck v. Gompert*, 7 Exch. 70, per Parke, B. But we think the plaintiff has not sufficiently shewn these defendants to be trustees for him of an instrument on which they rely, within the meaning of this rule. He has merely surmised that there may be some letter on which they may possibly rely, and which, if they do rely on it, they may perhaps hold under such circumstances as would entitle him to inspection at common law. In effect, we think the application is nothing but an attempt to discover whether the defendants intend to rely on any [632] and what instrument in support of their plea. And this, we think, cannot be allowed to be done indirectly under colour of the old practice, any more than directly under the new act." [Willes, J. One of the judges dissented from that judgment; and the late Lord Chief Justice (Cockburn) must not be understood as having given any opinion. I trust we may yet have the benefit of the judgment of that learned judge, which from some circumstances was not read. If you inspect the viscera of that judgment as published, you will find that Crowder, J., was the only assenting party.] How does it appear from the affidavit here that the plaintiff is in possession of any ascertained document which is material to the case of the defendant? Sir James Wigram, in his introductory observations, p. 2, says: "The exercise of a jurisdiction of this nature cannot be otherwise than pregnant with danger to the interests of those against whom it may be enforced, unless careful provision were made for guarding against its abuse."

ERLE, C. J. I am of opinion that this rule should be discharged. Two powers are vested in the court with reference to the subject-matter of this motion: the one under the statutes which were passed for the purpose of promoting the interest of truth and justice by the discovery of documents in the possession or under the control of the one party which are essential to support the claim or the defence of the other. With this we have to-day nothing to do. Whether the documents in question are or are not within the 14 & 15 Vict. c. 99, s. 6, or the 17 & 18 Vict. c. 125, s. 50, it will be time enough to decide when the necessity for a decision arises. But, at common law, and independently of the statutes, the court has long exercised the power of granting inspection of documents in certain cases. [633] Where, for instance, there is but one copy of an agreement, the party holding it is considered to hold it as trustee for the other, and will be compelled to produce it. That doctrine has for very many years been established. The word "trustee" is not used here in its strict technical sense, but is applied wherever the court sees that the party has in equity and justice an interest in the document. Clearly, as far as agreements are concerned, this is a power which has long been exercised. Now here, the plaintiff's claim is founded upon an agreement; and he cannot succeed at the trial unless he produces an agreement in writing. The defendant says that the agreement, if any, is contained in certain letters written by him to the plaintiff, and in the plaintiff's possession, of which letters he (the defendant) has no copy: and that it is material that he should see them, in order to enable him to plead to the action. If there had been a formal agreement entered into between the parties, it is quite clear that the defendant would be entitled to inspection of it: and I think it is equally clear, that, if the letters are only evidence of an agreement, they fall within the same rule; and on that principle the learned judge was perfectly right in making the order. The form of the affidavit upon which the application for the order was founded has been the subject of much criticism.

But it must be observed that the jurisdiction at Chambers is very much confined to a consideration of the substance of the right, and that the forms of procedure are not gone into with the same nicety and strictness as they are in court. Where a defendant is seeking to inspect documents which are in his own handwriting, and upon which the plaintiff founds his claim in the action, and which he admits to be in his possession, I think the judge may reasonably be satisfied,—as I certainly should be,—with a mere skeleton of an affi-[634]-davit. Most of the cases referred to are cases where the court has been called upon to exercise the statutory jurisdiction. Where it is sought to compel a party to produce title-deeds or trade-books, the judge would always require the affidavit to shew clearly that the applicant has a peremptory and real need of inspection, and the order will in defined terms limit the inspection to be had; the production of documents of that sort only being compelled in cases where the interests of truth and justice absolutely require it. These have no application to a case like the present. It seems to me that the affidavits which were before my Brother Keating were sufficient, and the order rightly made: and, as the objection is unfounded, the rule will be discharged with costs,—that is, the costs of this rule to be defendant's costs in the cause.

WILLIAMS, J. I am entirely of the same opinion. This order was in substance an order for the production and inspection of the document on which the action is founded. It is not dependent on the statute at all. Whether or not the statute would have enabled the learned judge to give inspection in this case, it is not necessary to offer any opinion. But, as to the common-law power and duty of the court to grant inspection, it will be necessary to consider the authorities with some attention. About twenty-five or thirty years ago, the rule laid down was, that inspection would only be granted where there was but one copy of the document, and the party holding it held it as a quasi trustee for the other party. But long before the late act the rule had been extended so as to include every case where the party seeking to inspect has an interest in the document. Wherever the instrument is declared on, the rule is fully estab-[635]-lished, since the passing of the Common Law Procedure Act, 1852, that the defendant is entitled to inspection in the nature of oyer, not only where the instrument declared on is a deed under seal, but also in the case of contracts not under seal. This matter was fully discussed in a case in this court which has not been cited,—*The Penarth Harbour Company v. The Cardiff Waterworks Company*, ante, vol. vii., p. 816, where it was held, that, since the Common Law Procedure Act, 1852, s. 55, abolishing profert, the court will order inspection of a deed relied on by a defendant in his plea, though it be a disclosure of the defendant's title. It would be obviously idle to confine the rule to the inspection of documents under seal (*a*). That being so, it may now be considered as fully established in all the courts that the right to inspect extends to any writing, whether under seal or not, which is relied on by the other side as the foundation of his claim or defence. In the case now before us, inasmuch as by reason of the Statute of Frauds, the plaintiff could not prove his declaration without producing an agreement in writing, such written agreement is virtually declared on, and the defendant is entitled to inspect it. In this view the case materially differs from *Shadwell v. Shadwell*, ante, vol. vi., p. 679. Not only did it not appear there that the agreement was in writing, but the plea might have been supported by proof of an agreement by word of mouth. The inspection was sought upon a mere surmise on the part of the plaintiff that the defendant meant to rely upon a document the existence of which the applicant declined to admit. The existence of the rule on which we now proceed was taken for granted in that case. [636] Upon these grounds I concur with my Lord in thinking that the order of my Brother Keating was properly made, and consequently that this rule should be discharged.

WILLES, J. I entirely agree with every word that has fallen from my Lord and my Brother Williams. The reason why I did not concur in the judgment of my Brothers Williams and Crowder in *Shadwell v. Shadwell* was, because I thought it made no difference in the right to ask for inspection that the written instrument was not mentioned in the pleading, or that it needed not an instrument in writing to sustain it; and I thought that the affidavits in that case shewed, that, if there was any agreement at all, it was in writing. I did not agree that the plaintiff was not entitled to call for the inspection, because, upon the construction of the affidavits, I thought

(*a*) See the judgment of Lord Campbell in *Doe d. Child v. Roe*, 1 Ellis & B. 279.

it was affirmatively alleged, and not denied, that, if there was any waiver, it was a waiver in writing, and it did not appear to me to be material that the plea might have been supported by proof of a waiver by word of mouth. I founded that opinion upon the case of *Charnock v. Lumley*, 5 Scott, 438. There, it did not appear from the record that the action was brought upon a written agreement, the action being for money had and received; but the moment it was made to appear that a written agreement was the foundation of the plaintiff's claim, the court granted inspection. Tindal, C. J., there said: "This case clearly comes within the spirit, though not within the strict letter of the rule. Had the action been founded upon the special agreement, the defendant's right to inspect the agreement could not have been questioned. Although in form this is an action for money had and received, inasmuch as the rights of the parties will be controlled [637] by the agreement, it is in effect the same as if it were brought upon the agreement itself. I therefore think the defendant is entitled to have the inspection." And Vaughan, J., added: "I am also of opinion that this comes within the range of the numerous cases by which I conceived the rule as to the production of documents for inspection was long since settled." These were the grounds upon which I was not satisfied to concur in the judgment in the case of *Shadwell v. Shadwell*. I do not presume to reason further upon the case: I am bound to take it for granted that I was wrong.

BYLES, J. The profound respect I entertain for the learned judges who decided the case of *Shadwell v. Shadwell* would induce me to abstain from offering any opinion if the determination of this case depended upon the rule there laid down. But I entertain a strong opinion that the learned judge who made this order was well warranted in doing so by virtue of the common-law jurisdiction of the court. It was decided long ago,—long before any one here present ever practised in Westminster Hall,—that, where an agreement was entered into by two persons, of which agreement there was but one copy, the party who retained it held it as trustee for the other, and was bound to permit the other to inspect and take a copy of it. The present is not the case of an agreement in writing entered into by the plaintiff and the defendant. But it seems to me, that, where the agreement consists of a series of letters, or of a written proposal on the one side and an oral acceptance on the other, and the writer of the letters, who is sought to be charged with a contract arising out of them, has no copies, it is as strong a case of trusteeship in the sense in which the word is used as can well be conceived. The same observations would apply to the case of an offer by word of mouth, and an acceptance [638] of it in writing. The writer surely has a right to say, let me see my letter, in order that I may know what contract I have entered into. It would be, I think, in the highest degree discreditable to the administration of justice not to allow inspection in such a case. Another reason may be given why the case of letters may be an *à fortiori* case. Though the paper upon which the letters are written belongs to the recipient, many cases may be suggested in which the writer retains an interest in them,—especially if he be a literary man (*a*). For these reasons I concur with the rest of the court in thinking that the order for inspection was properly made, and that the rule to set it aside must be discharged.

Rule discharged, with costs.

BIGGS v. GORDON. May 25th, 1860.

The defendant being possessed of a leasehold house, and also of certain building-land likewise held on lease, the former of which was subject to an annual rent of 75 guineas, and the latter to a rent of 50l. and also to a covenant to lay out a certain sum in building, employed the plaintiff, an estate-agent, to dispose of the whole for him, upon the terms of commission mentioned in a printed paper, as follows:—"For the sale of property by private contract,—On the first 100l., 5l. per cent. (and in no case less than 5l.); from 100l. to 5000l., $2\frac{1}{2}$ per cent.; from 5000l. to 10,000l., $1\frac{1}{2}$ per cent.; on the sum exceeding 10,000l., 1 per cent.—For letting, or disposal of the leases of, estates or houses,—Unfurnished, 5l. per cent. on one year's rent, and 5l. per cent. on the premium or sum obtained for fixtures, furniture, &c.: on lease, 5l. per cent. on the first year's rent, and $2\frac{1}{2}$ per cent. on the second year's rent, and 5l. per cent. on premium or sum obtained for fixtures, &c.,—Furnished, 5l. per cent. on the entire rental (not exceeding 12 months), but in no case (whether

(a) See *Gee v. Pritchard*, 2 Swanst. 402.

furnished or unfurnished) less than one guinea.—“On letting building-land,—one year’s standing ground-rent. For large estates, one half-year’s ground-rent.”—The plaintiff having disposed of the premises to one M. for 1300l., the two leases were assigned to M. subject to the covenants for payment of the rents, &c.:—Held, by Erie, C. J., Williams, J., and Willes, J., that the plaintiff was only entitled to a commission on the 1300l. under the first branch of the printed scale, viz. 5 per cent. on the first 100l., and $2\frac{1}{2}$ per cent. upon the remainder.—Held, by Byles, J., that he was also entitled to a commission on the amount of the yearly rent, under the second branch of the scale.

This was an action brought by an auctioneer and house and estate-agent, to recover a sum of 182l. 14s. 3d., for commission, &c. on the letting and disposal of certain leasehold property.

[639] The particulars of the plaintiff’s demand were as follows:—

“1857. August.	£	s.	d.
To registration of house (Woodville)	0	5	0
To letting house for a term of 80 years, at 75 guineas (78l. 15s.) per annum, to Walter Morton, Esq., commission 5 per cent. first year, and $2\frac{1}{2}$ per cent. second	5	18	6
To sale of fixtures, fittings, planned and other furniture, improvements, and additions, clearing and laying out garden ground, &c., greenhouse fixtures, stable, &c.: amount 1300l.; commission 5 per cent.	65	0	0
To letting five plots of building land, commission one year’s ground-rent	50	0	0
To money advanced for building purposes by Walter Morton, Esq., 1450l.: my fee, $2\frac{1}{2}$ per cent.	36	5	0
[Several other items, which were not in dispute, in the whole amounting to]	25	5	9
	<u>£182 14 3</u> ”		

The defendant pleaded,—first, except as to 71l. 9s. 3d., parcel of the plaintiff’s claim, never indebted, —secondly, as to the sum of 48l., parcel of the said 71l. 9s. 3d., that, after the commencement of this action, he satisfied and discharged the said 48l. parcel, &c., by payment to the plaintiff of the said sum of 48l., in full satisfaction and discharge of the same, and the plaintiff accepted and received that sum in such satisfaction and discharge, thirdly, as to the sum of 23l. 9s. 3d., residue of the said 71l. 9s. 3d., parcel, &c., payment into court.

[640] The plaintiff took issue upon the first and second pleas; and, as to the third, accepted the 23l. 9s. 3d. in full satisfaction and discharge of his claim in respect of the matters to which that plea was pleaded.

The cause was tried before Williams, J., at the sittings at Westminster after last Easter Term. The defendant was the lessee of a house at Norwood, in Surrey, called Woodville House, and also lessee under Dulwich College of certain building land in the neighbourhood, upon which he was under covenant to lay out a sum of 2000l. Being desirous of letting the house (which was unfurnished) and disposing of the lease of the building land, he employed the plaintiff to procure him a tenant,—the terms of the plaintiff’s employment being contained in a printed paper which was handed to the defendant at the time. This paper had the following

“SCALE OF COMMISSION

“For the sale of property by private contract,

“On the first 100l.	5l. per cent. (and in no case less than 5l.)
From 100l. to 5000l.	$2\frac{1}{2}$ per cent.
From 5000l. to 10,000l.	$1\frac{1}{2}$ per cent.
On the sum exceeding 10,000	1 per cent.

“For letting or disposal of the leases of estates or houses.

“Unfurnished, —5l. per cent. on one year’s rent, and 5l. per cent. on the premium or sum obtained for fixtures, furniture, &c.

"Unfurnished,—on lease, 5l. per cent. on the first year's rent, and 2½ per cent. on the second year's rent, and 5l. per cent. on premium or sum obtained for fixtures, &c.

"Furnished,—5l. per cent. on the entire rental (not exceeding twelve months); but in no case (whether furnished or unfurnished) less than one guinea.

"On letting building-land,—one year's standing ground-rent.

"For large estates, one half a year's ground-rent."

[641] Woodville House was held by the defendant under a lease from one Saxton, dated March 16th, 1855, for a term of 85 years from the 25th of March, 1854, at a rack-rent of 78l. 15s. per annum, the lease being expressed to be granted "in consideration of the costs and expense which the defendant had been at in erecting certain improvements, and in consideration of the rent and covenants thereafter mentioned.

The building-land, which, though described in the particulars as consisting of five plots, in truth consisted of three only, was held by the defendant of one Fuller, the lessee of Dulwich College, under a building lease dated the 25th of June, 1856, for 84 years from the 25th of March, 1854, at a ground-rent of 50l. per annum.

The plaintiff was instructed to let the house and premises, and advertized them as "to let," and procured one Morton to take them, he paying a premium of 1300l., for the fixtures and improvements: but afterwards an arrangement was made between the defendant and Morton that the latter should have an assignment of the leases, subject to the rents thereby reserved; and they were accordingly assigned to him by indenture of the 25th of March, 1858.

The whole of the plaintiff's claim, with the exception of the second, third, fourth and fifth items, was admitted. Upon the four disputed items two questions arose,—first, whether the plaintiff was entitled to charge a commission for letting the house and land, and selling the fixtures and improvements, pursuant to the second branch of his printed scale or only to a commission under the first branch,—secondly, whether the plaintiff was entitled to charge any commission for procuring the advance of 1450l. mentioned in the fifth item of the particulars.

The jury at once disposed of the second question, by saying that the plaintiff was not entitled to anything for his services in obtaining that advance.

[642] On the first question, it was contended on the part of the plaintiff that he was entitled by his printed terms, which formed the basis of the contract, to a commission on the letting of the house and land, and also to a commission on the amount obtained for fixtures and improvements, under the second branch of the said terms; and on the part of the defendant it was insisted that the whole transaction was a sale of his interest in the leases, and consequently that the plaintiff was only entitled to the commission mentioned in the first branch of the printed scale.

Several witnesses,—auctioneers and estate-agents,—who were called on the part of the plaintiff, proved, that, in calculating the commission to be charged for the letting of houses and land, an "assignment of a lease" was always treated as equivalent to a "lease," and invariably so charged.

The learned judge was of opinion that the transaction referred to in the second, third, and fourth items of the particulars was a "sale," and consequently came within the first branch of the printed terms. The effect of this was to disallow the second and fourth items of the particulars (5l. 18s. 6d. and 50l.), and to reduce the third item by 30l., which sums, added to the 36l. 5s., the fifth item, which was struck off by the jury,—making together 122l. 3s. 6d.,—reduced the plaintiff's claim to 60l. 10s. 9d., which being overtopped by the plea of payment and the payment into court, the plaintiff was nonsuited; leave being reserved to him to move to enter a verdict if the court should think the ruling of the learned judge wrong.

Parry, Serjt., in Easter Term last, accordingly obtained a rule calling upon the defendant to shew cause why the nonsuit should not be set aside, and instead [643] thereof a verdict entered for the plaintiff for such sum as the court should direct, on the ground that the plaintiff was entitled to charge the defendant the commission charged by him in his particulars of demand.

Hayes, Serjt., shewed cause. The transaction was nothing more nor less than a sale of the defendant's interest in the house and land. Morton became the purchaser for the sum of 1300l. for the whole; and Gordon, the defendant, assigned to him all his interest in the leases. The 1300l. was the purchase-money for the whole: the rents reserved by the two leases, viz. 75 guineas per annum for Woodville House,

and 50l. per annum for the land, being payable to the ground-landlords by the purchaser. All the defendant obtained through the plaintiff's services was 1300l., and for this the plaintiff was by the terms of his own scale entitled to receive only 5 per cent. on the first 100l., and $2\frac{1}{2}$ per cent. on the remainder,—35l. This being covered by the payment into court, it is submitted that the plaintiff was properly nonsuited.

Parry, Serjt., and Laxton, in support of the rule. An assignment of a lease clearly comes within the meaning of the expressions used in the printed scale of commission,—“the disposal of the lease.” According to Webster's definition, “To dispose of,” means, “To part with, to alienate.” This transaction clearly did not amount to a “sale of property.” Leasehold is not “property” in the sense in which the word is used here. Property means that which by the act of sale becomes absolutely and indefeasibly vested in the purchaser; whereas, this property is subject to liabilities in the shape of rent and other covenants. The 1300l. paid by Morton was not purchase-money; it was a premium to reimburse the defendant for the sums laid [644] out by him upon the house and premises in the shape of fixtures and improvements.

Cur. adv. vult.

ERLE, C. J. The question in this case turns entirely upon the construction of the terms on which the parties contracted by the printed scale of commission in respect of property sold or let or disposed of. According to the construction contended for on the one side, if leaseholds be the subject-matter of disposition, they fall within the second branch of the scale, relating to the “letting or disposal of the leases of estates or houses,”—sale properly applying only to freehold property. According to the construction insisted upon on the other side, the first branch of the scale applies equally to a sale of leasehold property as to a sale of freehold. I am of opinion that, under the first branch, viz. the scale of commission for the sale of property, the plaintiff has provided for the case of a sale of leaseholds. It is quite clear that leasehold property may be the subject of sale. The argument that a conveyance of it does not pass an absolute and indefeasible right, free from liabilities, does not prevent a lease from being as much the subject of sale as any other description of property. Here, the purchaser pays 1300l. on the one hand, and on the other he gets an assignment of the leases. The transaction clearly amounted to a sale. That being so, all that the plaintiff was entitled to demand for his services in negotiating that sale was, 5 per cent. on the first 100l. of the purchase-money, and $2\frac{1}{2}$ per cent. upon the remaining 1200l.; and that the defendant has paid. The second branch of the scale applies to the “letting, or disposal of the leases of, estates or houses.” No doubt a lease “sold” is in one sense a lease “disposed of.” But this part of the paper evidently contemplates the case [645] of the disposal of premises by a letting from year to year, or on lease, otherwise than by sale. I think the meaning is this:—Where premises are let on lease, the agent arranges for the amount of rent and the various other stipulations which the lease is to contain; and for that he may well be entitled to a commission. In that sense, the disposal of a lease applies to the case where an interest is created by a new lease. It has, however, no application to the case of a sale of a term, where the vendee pays a given sum for the purchase, and the vendor assigns all his interest in the term to him. That is the case of a sale of property which was already provided for by the first branch of the printed scale. For these reasons, I am of opinion that the plaintiff was properly nonsuited.

WILLIAMS, J. I entirely concur with my Lord in thinking that there is no ground for disturbing the nonsuit, and for the reasons which he has given.

WILLES, J. I also entirely concur.

BYLES, J. I regret that I have the misfortune to differ from the opinion which has been expressed by my Lord, and which has received the concurrence of my two learned Brothers. No doubt the opinion I have formed is an erroneous one; but I entertain it so strongly that I feel bound to express it. In the first place, I do not agree that the second branch of the printed scale on the terms of which these parties contracted, “for letting or disposal of the leases of estates or houses,” is confined to improved rents. It seems to me that the agent intended, and the employer must have understood, that, if the latter, being assignee of a lease subject to a heavy rent of which he is desirous of disposing, employs the agent for that purpose, [646] and the agent finds a sub-assignee who is willing to take the burthen off his hands, his remuneration would be, under the second branch of the scale, 5 per cent. on the first

year's rent, and $2\frac{1}{2}$ per cent. on the second year's rent, and 5 per cent. on any sum which might be obtained for fixtures, &c. If it were not so, the agent would get no remuneration, inasmuch as there was no premium upon which it could be computed. I agree that the first branch of the scale applies to all property,—to freehold and copyhold, and to leasehold, whether at rack-rent, or at a pepper-corn rent, or at no rent. In any case where property is sold, according to the first branch of the scale the agent would be entitled to receive in respect of the purchase-money or premium paid a commission of 5l. on the first 100l., and $2\frac{1}{2}$ per cent. on the remainder. I therefore think that the first branch of the scale does apply to the lease which was sold upon this occasion. But it seems to me that the second branch of the scale also applies. If the lease were sold for 10l., I think the agent would be entitled to a percentage on the 10l., and also a percentage on the amount of rent. The use of the words "premium or sum" gives rise to some ambiguity. It may be that those words indicate the same thing. If so, the agent is entitled to charge commission on the premium under the first branch of the scale, and commission on the rent under the second branch. It seems to me that the first item in the second branch of the scale, viz. "Unfurnished,—5l. per cent. on one year's rent, and 5l. per cent. on the premium or sum obtained for fixtures, furniture, &c." rather applies to cases where there is no lease in existence, where the letting is from year to year; and that the second applies where the letting is for a term. I think there was good reason for making the second branch as well as the first; for, under the first, if a [647] lease subject to a large rent were sold for a small sum, the agent's remuneration would be altogether inadequate; whereas, by charging under the first branch a commission upon the amount of premium or purchase-money, and under the second branch a commission on the amount of rent, he would be fairly and properly remunerated. For these reasons, it seems to me that the construction put upon this document by my Brother Parry is the proper construction; and it is moreover one which makes the arrangement just. As to the last disputed item,—it seems to me to be quite clear that there was no letting of building-land here. I therefore think the sum charged for that was properly disallowed.

Rule discharged.

PHILBY v. HAZLE. June 13th, 1860.

[S. C. 29 L. J. C. P. 370; 2 L. T. 433; 7 Jur. N. S. 125; 8 W. R. 611. Applied, *Wilkinson v. Smart*, 1875, 33 L. T. 575.]

Where an attorney agrees with his client to receive a gross sum and costs out of pocket in lieu of costs to be incurred, the bill is nevertheless taxable; and therefore the delivery of a bill containing a charge of 50l. for business done, the particular items being left in blank, and only those carried out in figures which consisted of actual disbursements, is not such a "delivery of a signed bill" as is contemplated by the 6 & 7 Viet. c. 73, s. 37.

This was an action brought by an attorney to recover a sum of 50l. for work done by him for the defendant.

The defendant, amongst other things, pleaded that no signed bill had been delivered pursuant to the statute.

The plaintiff had delivered a signed bill, in which was charged in one item 50l. for business done as per agreement. The remaining items were left blank, with the exception of those relating to expenses out of pocket,—for instance,

[648]		£	s.	d.
"Instructions for petition	.	0	0	0
Ingrossing petition	.	0	6	0
Two copies notice of intended application	.	0	5	3
Drawing brief	.	0	0	0
Fair copy	.	1	3	4
Paid fee to Mr. M.	.	3	5	6
Attending him	.	0	0	0"

The cause was tried before Keating, J., at the sittings in Middlesex in Trinity Term last. The defendant, it appeared, had built a public-house called the Walmer

Castle, in the neighbourhood of the Victoria Docks, for which he was desirous of obtaining a licence. The plaintiff was employed by him to give the necessary notices and take all the requisite steps to effect that object. There was some contention at the trial as to the terms of the employment: but the plaintiff's statement, which was affirmed by the jury, was that, in the event of the licence being obtained, the plaintiff was to receive 50*l.* besides his expenses out of pocket; but that, in case of failure, he should have his expenses out of pocket only.

The business was done, and the licence procured through the plaintiff's exertions; but the defendant declined to pay him the 50*l.*: hence this action.

For the defendant it was contended that the bill delivered was not such a signed bill as was contemplated by the statute 6 & 7 Vict. c. 73, s. 37. The learned judge, however, declined to nonsuit the plaintiff: and the jury found a verdict for him.

Mellor, Q. C., in Hilary Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a nonsuit, on the ground that the bill delivered was not a signed bill within the meaning of the statute.

[649] Ballantine, Serjt., and Tindal Atkinson, now shewed cause. The subject-matter of this agreement was not necessarily one for which the assistance of an attorney was required. [Erle, C. J. A bill for business done at petty-sessions is taxable.] Here, a signed bill has been delivered: and the question is whether there is anything to prevent an attorney from *bonâ fide* agreeing with a client to do work of this sort for a stipulated sum. In a case of *In re Whitcombe*, 8 Beavan, 140, it was held that an agreement by a solicitor to take a gross sum from his client in lieu of costs was not void, though the court would regard it with jealousy. [Willes, J. That was an agreement after the costs had been incurred.] A cause being referred to arbitration, an attorney was retained by the defendant's attorney to conduct the defence before the arbitrator. He afterwards delivered a signed bill to the defendant's attorney, in which he charged for "journey and tavern bill, attending and advocating four days, as per terms, 12*l.* 12*s.*: posting and travelling, as per agreement, 3*l.* 4*s.*: and it was held that this was not a taxable bill: *In re Simons*, 2 Dowl. & L. 500. Patteson, J., there said: "I have mentioned this case to several of the judges, and they all agree with me in opinion that such a bill as this cannot be taxed, as it is for business done by Mr. Simons rather as an advocate than as an attorney." Such an agreement as this does not prevent the master from proceeding with the taxation of the bill: *In re Eyre*, 2 Phillips, 367. [Erle, C. J. Unless there be a suggestion of fraud, I am not aware that such an agreement is invalid. Byles, J. If such an agreement be valid, the principle of protection of the client is gone.] The object of taxation is not to interfere with arrangements between parties who have equal knowledge on the subject. [Williams, J. I must confess I do not see more danger in an arrangement of [650] this sort, than where a client chooses to pay a bill without taxation.] In *Draai v. Scroope*, 2 B. & Ad. 581, 1 Dowl. P. C. 69, where the subject was very fully discussed, it was held that an agreement entered into by a client with his attorney to pay him at a certain specified rate for business to be done, is not binding; but the charges made according to such agreement may be allowed on taxation, if the master, on inquiring into them, considers them proper. Lord Tenterden there says: "No agreement of this kind, even with reference to journeys, can be absolutely binding: the master must still exercise his judgment as to the propriety of allowing the charges, according to the circumstances laid before him." Littledale, J., said: "As a general rule, I think effect ought not to be given to these agreements between attorney and client. But there may be cases in which, from the particular nature of the business to be done, such contracts may be allowable, subject, however, to be looked into by the master." And Parke, J., said: "Agreements of this kind should be looked at with great jealousy." There is clearly, therefore, nothing illegal in such an arrangement. [Byles, J. *Draai v. Scroope* establishes that at all events the items are taxable. A bargain for less than full fees is not against the policy of the law. The item here for "Attending Mr. M. with brief, 0 0 0," is covered by the 50*l.*: and that is acting as an attorney.]

Mellor, Q. C., and H. Lloyd, in support of the rule. The attorney is bound to deliver a signed bill which is taxable. This was not a bill of that description. The business done here was clearly taxable business. Charges of solicitors employed as electioneering agents have been held to be taxable: *In re Osborne*, 25 Beavan, 353. Every item in this bill shews that the business in respect of which the charges are

made is [651] an attorney's business. Then, is this a valid agreement? *Drax v. Scroope* is a strong authority to shew that it is not. And the observations of Lord Langdale, M. R., in *Re Whitcombe*, 8 Beavan, 144, are also material. "I must remark," he says, "on the great danger which solicitors incur when they enter into such arrangements with their clients. An agreement like this between a solicitor and a client for taking a fixed sum in satisfaction of all demands for costs, is an agreement which may be perfectly good; but this court, for the protection of parties, looks at every transaction of this kind with great suspicion. The matter may turn out to be perfectly fair and right; still it exposes the conduct of the solicitor to suspicion, and naturally awakens the vigilance and jealousy of this court, seeing that one party has all the knowledge, and the other is in ignorance." [Erle, C. J. Why is not this a sufficient bill?] Because there is nothing which the master can tax. The items comprised in the gross charge of 50l. are not priced. [Byles, J. The attorney does not even state how many attendances there were.] There is nothing upon which the master could exercise any discretion at all.

ERLE, C. J. Looking at the 37th section of the statute 6 & 7 Vict. c. 73, which enacts that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor shall have delivered unto the party to be charged therewith, "a bill of such fees, charges, and disbursements, subscribed with the proper hand of such attorney or solicitor, &c., it appears to me that an attorney, before he can sue for business done by him as such, must deliver a bill which is so [652] framed and drawn as to enable the client to have it taxed. Regard being had to the words of the enactment, and the policy of the law, which had in view the protection of the client against the attorney's greater knowledge of professional charges, it seems to me to prohibit attorneys from making agreements like this with their clients, to this extent, that the attorney cannot be allowed to take advantage of the agreement where it would give him more than the law would otherwise have given him, that is, more than would have been allowed him by the master on taxation. The inclination of the cases is, that an agreement whereby the attorney was to get a larger sum than the ordinary allowance cannot be enforced. In *Drax v. Scroope*, 2 B. & Ad. 581, 1 Dowl. P. C. 69, I observe that Lord Tenterden and Littledale, J., do not carry out the principle to the extent of saying that the attorney must give his services for one inflexible taxable rate of remuneration: on the contrary, they rather seem to sanction the notion that he may under particular circumstances stipulate for higher remuneration for journeys; but still the bill must be so presented as to enable the master to exercise his discretion as to whether or not the client should be charged at the increased rate. Here, the attorney agrees with his client, that, if the business on which he is employed is successfully performed, he shall receive 50l. in addition to his actual disbursements; but that, if it fails, he shall receive costs out of pocket only: and he has delivered a bill charging his disbursements, and a lump sum of 50l. for his services and attendances. I think that does not give the client the protection the statute intended he should have, by enabling the master to exercise his discretion on the propriety of the charges. I therefore think the rule should be made absolute to enter a nonsuit.

[653] WILLIAMS, J. I am entirely of the same opinion. The conclusion at which we have arrived substantially decides that such an agreement as this is void. The statute requires the attorney, before he can sue for business done for a client, to deliver a signed bill in such a shape as will enable the master to judge of the propriety of the several charges. The result is, that he cannot recover upon a bill framed as this is. I do not regret that we are compelled to come to this conclusion, because on the reason and principle of the thing I think such an agreement ought not to be allowed to stand. Notwithstanding the high respect I entertain for the learned judge who decided the case of *In re Whitcombe*, 8 Beavan, 140, I think such agreements are manifestly contrary to the general policy of the law.

WILLES, J. I think the client is entitled to have the judgment of the master upon the propriety of allowing the attorney's charges: and that he can only have by the delivery of a bill shewing the several items of charge. Upon that narrow ground, I am of opinion that the plaintiff in this case is not entitled to recover.

BYLES, J. I also am of opinion that the rule for entering a nonsuit should be made absolute. The statute 6 & 7 Vict. c. 73, provides for a case of which there are

many, in which persons strong in knowledge are dealing with those whose knowledge is more weak and limited. The legislature is in the habit of stepping in and affording protection in such cases. The statute requires the attorney, as a preliminary to the right of suing therefor, to deliver to the client a bill of his fees, charges, and disbursements, in such a form that the taxing officer of the court may judge [654] of their reasonableness. The statute has been held to embrace all sorts of business which the party transacts as attorney. For services rendered by him dehors that character,—as steward of a manor, for instance,—no signed bill need be delivered. It seems to me to be enough to inquire here whether this person affected to charge for business done by him as an attorney. The bill contains items for attending to instruct counsel, and various others which clearly shew that he was retained as attorney. That of itself is sufficient to dispose of the case. But, further, I agree with my Lord and my Brother Williams that the fair result of all the authorities is, that such agreements as the present between an attorney and his client are void. If it were otherwise, an attorney might hang up a tariff in his office, and then insist upon a special bargain between himself and his clients as to the terms on which he transacted business for them. If we were to hold such an agreement as this to be good, it would be necessary to remodel the act of parliament altogether. For these reasons I think the plaintiff was properly nonsuited.

Rule absolute.

[655] RICHARDSON v. DUNN. May 31st, 1860.

[S. C. 30 L. J. C. P. 44; 2 L. T. 430.]

The plaintiff being desirous of purchasing a public-house, A. introduced him to one C. who had one to dispose of, and who referred the plaintiff to her agent B. A. volunteered to see B. on the subject, and accordingly went to him, and afterwards told the plaintiff that B. represented the receipts of the house to average a certain sum daily; upon the faith of which statement the plaintiff bought the house for 400l. It turned out that the value of the business had been grossly exaggerated; and the plaintiff, without any notice to A., and without making any inquiry, brought an action against C., charging her with a deceitful representation on the sale. B. swore at the trial that he never made any such representation as A. had stated: and the jury, being satisfied that A.'s statement was false, returned a verdict for the defendant.—The plaintiff then sued A. for the damages he had sustained from his false representation, when the jury gave him 300l. (being the difference between the price he paid for the business and the sum for which he afterwards sold it), 100l. for loss of time, and 18l. 8s. 6d., the costs of the abortive action against C.:—Held, that the action was maintainable so far as related to the 300l. and 100l.; but that the costs of the first action were not, under the circumstances, the natural and proximate consequence of A.'s misrepresentation, and therefore were not recoverable.

This was an action for a fraudulent and deceitful representation by the defendant in reference to a contract for the sale of a public-house.

The declaration stated that the plaintiff having in consideration whether he would buy the goodwill of a certain public-house then occupied by one Mary Clifton, and being desirous of obtaining information with reference to the value of the said goodwill, and having requested the defendant to call upon one William Baylis, a friend and referee of the said Mary Clifton, and to obtain from him, for the information of the plaintiff, the particulars of the returns in the sale of beer and other things in the said public-house, the defendant, by falsely and fraudulently representing to the plaintiff that he (the defendant) had obtained from the said William Baylis certain information, to wit, that the said William Baylis had taken the said returns for the then last three years, and that they would average for the then last year 8l. per day, and for the two previous years about 10l. per day, induced the plaintiff to buy from the said Mary Clifton the goodwill of the said public-house for a much larger sum than the same was worth, the takings of the same having been greatly less than the amount so said to have been mentioned by the said William Baylis, and also to become the tenant thereof instead of the said [656] Mary Clifton: whereas, in fact, the said presentation by the defendant was untrue, as the defendant well knew: whereby the plaintiff had not

only lost a large sum of money which he paid for the said goodwill beyond its real value, but he had been obliged to resell the same at a great loss, and to give up the occupation of the said house at great loss and inconvenience; and he had also incurred and become liable to pay a large sum of money for the costs, charges, and expenses, as well of himself as of the said Mary Clifton, in an action afterwards brought by him, in reliance on the said representation of the defendant against the said Mary Clifton, in Her Majesty's Court of Common Pleas at Westminster, charging her with having falsely made and authorized the representation that the takings of the said house were during the period above mentioned of the amount above particularly mentioned, and with having so induced the plaintiff to purchase the said goodwill and become the tenant of the said house, in which action the verdict was for the said Mary Clifton; and the plaintiff had been otherwise, by reason of the said false representation of the defendant, greatly damaged, inconvenienced, and injured, and had for a long time been thrown out of trade and business, and had incurred other expenses with reference to the purchase of the said goodwill and occupation of the said house, which he would not have incurred had he known the said representation of the defendant to be untrue.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:—The plaintiff, being desirous of investing some money in the purchase of a public-house, applied to Dunn to look out for a [657] house. Dunn informed him that there was a house at Windsor to be disposed of; and accordingly the plaintiff and Dunn went to Windsor and saw Mrs. Clifton, the landlady, who referred them to one Baylis. Dunn went to Baylis, and afterwards informed the plaintiff that Baylis represented to him that the receipts of the house were 8l. a day, and that the sum demanded for it was 500l. Ultimately the plaintiff purchased it for 400l. Dunn received 38l. for his commission.

The plaintiff, having taken possession of the house, discovered that the receipts had been grossly exaggerated, and ultimately he sold the goodwill for 100l., and brought an action against Mrs. Clifton for the alleged misrepresentation. Dunn, who was called as a witness upon that occasion, swore that Baylis had represented to him that the takings of the house were from 8l. to 10l. per day. Mrs. Clifton swore that she had never authorized Baylis to make any such representation; and Baylis, who was called for the defendant, also denied that he had made the representation alleged, but said that, on the contrary, Mrs. Clifton would willingly have received 200l. for the house. The jury thereupon found a verdict for the defendant; and this action was brought against Dunn for the damages sustained by the plaintiff from his false representation,—the plaintiff claiming 300l., the loss upon the re-sale of the house, besides damages for the inconvenience he had been put to, and 181l. 8s. 6d., the costs of the action against Mrs. Clifton.

For the defendant, it was submitted that the action would not lie; and that, at all events, the plaintiff was not entitled to the costs, these constituting a damage too remote.

The jury, however, returned a verdict for the plaintiff, damages 581l. 8s. 6d.,—being 300l., the loss on the re-sale of the house, 100l. for his loss of time, and 181l. 8s. 6d. for the costs of the former action.

[658] O'Malley, Q. C., in Easter Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to reduce the damages by the last-mentioned amount. The cases of *Randell v. Trimen*, 18 C. B. 786, and *Collen v. Wright*, 7 Ellis & B. 301, 8 Ellis B. 647, were referred to by the court.

Huddleston, Q. C., and Maude, now shewed cause. The damages in question, viz. the costs which the plaintiff was put to in the abortive action against Mrs. Clifton, naturally resulted from the false representation made by the plaintiff. The defendant knew that that action was pending, and that the plaintiff relied upon his testimony for its maintenance; and, knowing that the plaintiff had no cause of action, he permitted him to go on and to incur these costs. [Erle, C. J. Dunn told Richardson a falsehood. Richardson, on the faith of Dunn's statement, made a contract with Mrs. Clifton. He was damaged, and sought indemnity on the ground that the representation by which he was induced to enter into the contract was false; and he failed because Dunn's representation was false. It does not appear that there was any previous communication with Mrs. Clifton as to whether or not Dunn's representation was authorized

by her.] Nor was it necessary : for, Richardson would not have been bound to give credence to her denial rather than to Dunn's statement. It does not lie in Dunn's mouth to say that the action against Mrs. Clifton was improvidently brought. It is impossible to discover any distinction between the case of *Randell v. Trimen*, 18 C. B. 786, and this case. There, the declaration stated that the defendant, who was employed as architect by A. and others to superintend the building of a church, falsely and fraudulently represented and pretended that he was authorized by A. to order, and did order, stone of [659] the plaintiffs for the building of the said church for and on account of and to be charged to A : and that the plaintiffs, relying on that representation, and believing that the defendant had authority from A. to order the stone on his account, delivered the same, and the same was used in the building of the church : whereas, in truth and in fact, the defendant was not, as he well knew, authorized so to order the said stone. It then went on to aver, that, A. refusing to pay for the stone, the plaintiffs, trusting in the defendant's representation, sued A. for the price, and failed in their action, and had to pay A.'s costs, and also the costs incurred by their own attorney : and it was held that the declaration sufficiently disclosed a cause of action : and,—it appearing that the defendant had no such authority as he represented,—that the plaintiffs were entitled to recover, not only the value of the stone, but also the costs they had incurred and paid in the former action. *Collen v. Wright*, 7 Ellis & B. 381, is also an authority in point. There, W. signed a written agreement, describing himself in the signature as agent to G., whereby he agreed with C. that a lease should be granted to C. of a farm belonging to G. C. and W. both believed that W. had authority from G. to make the agreement : in fact W. had no such authority. G. refusing to grant the lease, C. filed a bill against G. for specific performance : and, after G. had put in his answer, denying W.'s authority, C. gave notice to W. of the suit and ground of defence, and that C. would proceed with the suit at W.'s expense, unless W. gave him notice not further to proceed : and that C. would bring an action against W. for damages in the event either of the bill being dismissed on the ground of defence set up, or of W. requiring C. not further to proceed. W. answered, repudiating his liability to C. The bill was dismissed on the ground of defence set up. On a [660] special case stating the above facts, with liberty to the court to draw inferences as a jury,—it was held,—first, that C. was entitled to maintain an action against W. as for breach of a promise that W. had the authority,—secondly, that C. might recover in such action damages for the expense of the Chancery proceedings, it not appearing that he had instituted them incautiously, and they being therefore damages naturally resulting from the misrepresentation made by W. Lord Campbell, in giving judgment, said he should be clearly of opinion that the action lay, even without the authority of *Randell v. Trimen*. And, as to the question of the plaintiff's right to recover in respect of the expenses of the Chancery suit, he says : "He acted as a reasonable man would who gave faith to the representation that a contract had been made by the alleged principal : he required that that contract should be specifically performed. The case cannot differ from that of a sale of goods by a party alleging himself to be broker. The purchaser says that the alleged broker's contract is broken, because he had no authority to sell. If, before the action was brought, the alleged broker had explained the mistake, the purchaser could not have recovered damages incurred by subsequently prosecuting the action. But, if the assertion was made and never retracted, I could not blame him for bringing the action. If the purchaser could not know that the alleged broker had no authority to make the contract, the loss arising from the action seems to me naturally to result from the allegation." [Byles, J. It is to be observed that in both those cases the representation of the agent was of a matter in his own knowledge : here, the representation is as to the authority of a third person. The plaintiff might have inquired of Baylis whether he had made the representation.] If he had inquired and Baylis's statement had been at variance with that [661] of the defendant, was he bound to conclude that the defendant had cheated him ? The decision of the court of Queen's Bench as to the costs of the Chancery proceedings, in *Collen v. Wright*, was unanimously affirmed by the Exchequer Chamber, —8 Ellis & B. 647. In *Farall v. Barnett*, 2 Ellis & B. 928, the defendant, by a warrant of commitment on a coroner's inquisition held without jurisdiction, caused the plaintiff to be imprisoned : the plaintiff was bailed, and afterwards, while on bail, procured the inquisition to be quashed : and it was held, that, in an action for such false imprisonment, the plaintiff was entitled, under an allegation that

he had incurred expense in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition. And see Sedgwick on Damages, 2nd edit. 292, 331.

Malcolm, in support of the rule. The damages in question are too remote. They are not the natural, immediate, and necessary consequence of the act of the defendant. See the notes to *Vicars v. Wilcocks* (8 East, 1), in 2 Smith's Leading Cases, 4th edit. p. 423. Can it be said that this case falls within the rule enunciated by Pollock, C. B., in *Rigby v. Hewitt*, 5 Exch. 243, viz. "that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct?" [Erle, C. J. Dunn told Richardson that Baylis, the agent of Mrs. Clifton, had represented the receipts to be 8l. a day: on the faith of that representation, Richardson took the house: and, finding that he had been deceived, still acting on the faith of Dunn's statement, he sued Mrs. Clifton for the supposed misrepresentation of her agent, and failed.] Was that the natural consequence of the defendant's act. Had [662] Richardson no duty to perform before embarking in an expensive litigation? Ought he not to have ascertained from Mrs. Clifton and from Baylis whether or not there was any foundation for Dunn's statement? [Williams, J. If your argument is right, our decision in *Randell v. Trimen* was wrong.] Inquiries were made there, and an opportunity given to Trimen to retract his false representation before the expenses of the action against Ireland were incurred: and Trimen induced Randell to sue Ireland. [Byles, J. Trimen and Ireland stood in such a relation towards each other as to make it probable that the former had authority. Williams, J. Does it lie in the defendant's mouth to say to the plaintiff, "You ought not to have believed me?"] No case has ever gone the length of holding such damages as these to be recoverable.

ERLE, C. J. I am of opinion that this rule should be made absolute. The question is whether the costs incurred by the plaintiff in suing Mrs. Clifton are the natural and proximate consequence of the false representation made by the defendant as to the information which he had received from Baylis. I cannot find any authority for the allowance of damages so remote as these: and I think it would be introducing a wider and more uncertain measure of damages than has hitherto been sanctioned by any judicial decision. The facts are these:—Richardson being desirous of purchasing a public-house, Dunn represented to him that Baylis had told him that Mrs. Clifton had represented to him that the receipts of the house averaged a given sum. Upon the faith of that representation, Richardson bought the house, and afterwards found that he had been grossly deceived as to the amount of the receipts. Conceiving that he had a cause of action against Mrs. [663] Clifton for this misrepresentation, and for his disappointed expectations, Richardson sued her. In his action against Mrs. Clifton it was essential for Richardson to establish that Mrs. Clifton had represented the receipts of the house to amount to the sum mentioned, and that she at the time of making it knew that representation to be false. It seems to me that it was not the natural consequence of Dunn's representation that Richardson should without any further inquiry bring an action against Mrs. Clifton. Dunn's statement that Baylis told him that she had made the representation alleged is one thing: but it by no means follows that Mrs. Clifton must have known it to be false. These damages, therefore, are a remote, and not a natural and immediate consequence of Dunn's fraudulent misrepresentation. It turned out that Mrs. Clifton had never made any representation at all, and consequently the action was unsuccessful. It is right that Richardson should hold Dunn responsible to him for the natural and proximate consequences of his misconduct: but not for the costs of an action which he rashly and inconsiderately brought without any inquiry into the facts and grounds upon which it was to be supported. Undoubtedly Richardson had a right to assume that Dunn told him the truth: but he has no right to charge Dunn with the costs of an action brought against Mrs. Clifton, when he had no means of proving that she knowingly made a false representation. It seems to me that there is a marked distinction between this and the case of a false assertion by an agent that he has the authority of his principal to make a contract for him. If in such a case an action is brought against the principal, and it turns out that the principal had given no authority to the agent to contract for him, the agent is responsible for all the consequences naturally flowing from his misrepresenta-[664]-tion,—as was held in *Randell v. Trimen*. I cannot but observe that there were very peculiar circumstances in that case. Ireland

denied his liability, and Randell was repeatedly assured by Trimen that he had authority to make the contract, and that Ireland was liable on it. But, independently of that, an agent who represents that he has authority to deal for a principal warrants that he has such authority: and, if it turns out that he has not the authority which he represents himself to have, and the party to whom the representation is made has incurred expenses in consequence, I think such expenses may fairly be considered as having been naturally and proximately occasioned thereby. If, therefore, Trimen had no authority from Ireland, the party supplying the stone would of course have an action against him; and the costs of the fruitless action against Ireland were the natural and proximate consequence of his misrepresentation. The same observations apply to *Collen v. Wright*. Wright had no authority to make the agreement on behalf of Gardner; and therefore he was responsible for the litigation occasioned by his wilful misrepresentation. Here, however, I cannot see that the action against Mrs. Clifton was the natural and proximate consequence of the misrepresentation made by Dunn.

WILLIAMS, J. I am of the same opinion. Considering what was the representation made by the defendant to the plaintiff, and what the action was which the plaintiff brought against Mrs. Clifton, it seems to me that the course the plaintiff took was not the course which a reasonable man would have taken, and that the costs of the abortive action are not such damages as can be said to have resulted naturally and proximately from the defendant's wrongful act.

[665] BYLES, J.(a). I am of the same opinion. I observe that, in the notes to *Hicks v. Wilcocks*, in 2 Smith's Leading Cases, 430, the learned editors say that, "where a tort is committed, or the action is brought for a violation of right unattended by any of those circumstances of aggravation which give the control of the matter to the jury (such as fraud, malice, or oppression)," "the difficulty of laying down any principle upon which the measure of damages is to be ascertained, beyond a strict adherence to the natural and proximate consequences of the act complained of, is confessed to be insurmountable." The question here is, whether the damages which the jury gave for the costs of the abortive action against Mrs. Clifton were the natural and proximate consequence of the fraudulent representation made by the defendant. It is not enough if it be the natural consequence: it must be both natural and proximate. See how many things must have intervened here. It is clear that the plaintiff bought the public-house solely upon the representation of Dunn. He makes no inquiry. He finds himself deceived. Without any inquiry of Mrs. Clifton, or of Baylis, or of the defendant, he brings his action against the former. He does not consult the defendant,—as was done in *Randell v. Trimen*,—as to whether the action should be brought or not. But, without any notice to Dunn, without any attempt to compromise, he brings a rash action against Mrs. Clifton: and he fails. There was not the slightest evidence of fraud on the part of Mrs. Clifton or her agent Baylis. All these are steps leading to these damages. It seems to me that they are neither the natural nor the proximate consequence of the defendant's misrepresentation: and, applying the rule in *Hadley v. Baxendale*, 9 Exch. 341, they are not such damages as might [666] reasonably be supposed to have been in the contemplation of the parties. Upon looking at the bill, I find that as to a portion of the costs, — amounting to 10l. 7s. 2d., — they were occasioned by the postponement of the trial in consequence of Dunn's illness. These clearly could not have been in the contemplation of any one. If these could not be allowed, where are we to stop?

Rule absolute.

OXLEY v. HOLDEN. May 23rd, 1860.

[S. C. 30 L. J. C. P. 68; 2 L. T. 464; 8 W. R. 626. Applied, *Harris v. Rothwell*, 1887, 35 Ch. D. 428. Discussed, *British Motor Syndicate v. Taylor*, [1901] 1 Ch. 129.]

A patent was taken out for "certain improvements in the doors and sashes of carriages." In the specification, after describing it, the patentee said: "I have shewn my invention as applied to railway carriage doors and window fittings, although they

(a) Willes, J., was in the Divorce Court.

are equally applicable to the doors and windows of any other description of carriage, or in any position where windows and doors are subject to jar and vibration :”—Held, that the claim made in the specification was not larger than the title of the patent.—One part of the invention was described as “a novel arrangement and mode of fitting and working sliding sashes, glass frames, blinds, and shutters for railway and other carriages,” which consisted of a metal plate with a slot and a stud or pin working in a groove on each side of the sash or frame : and the patentee claimed “the metal fittings and the mode of applying the same, described herein as the second part of my invention :”—Held, that this was a claim, not for the metal fittings themselves, but for the mode of applying them : and, consequently, that the patent was sustained by proof that the application was new, though the stud and plate themselves were old.—The circumstance of the patentee having previously filed (but abandoned) a provisional specification describing in part the same invention, does not render a subsequent patent void,—the filing of the previous provisional specification not being a publication within the statute.—The manufacture of a patent article for the purpose of sale, and offering it for sale, although no sale is actually effected, is a user of the invention.—And *semble*, per Byles, J., that it is equally a user though the article is made merely as a sample.—The declaration alleged an agreement for the sale by the plaintiff to the defendant of the exclusive right to the use of an invention of “improvements in elastic cushion fittings for carriage and other window frames,” and also of “improvements in the arrangement of the stud and plate for carriage window-frames and for other purposes :”—Held, that the declaration was sustained by a specification in which the inventions were described as an invention of “improvements in the doors and windows of carriages,” the claim being first, for “the construction of elastic pads or cushions as herein described,” secondly, “the mode of applying vulcanized india-rubber or other elastic material to sliding sashes, glass frames, and doors, as herein described :” and also for “a novel arrangement and mode of fitting and making sliding sashes, &c. for railway and other carriages,” &c.,—the descriptions being confined to carriages.

This was an action for royalties payable on a licence to use a patent invention.

The first count of the declaration stated, that, by a [667] certain agreement made and entered into by and between the defendant and the plaintiff,—after reciting that the plaintiff did, in the month of April, 1858, take out a provisional patent for improvements in hinges suitable for railway and other carriages, and which hinges were also applicable for other purposes, also for improvements in elastic cushion fittings for carriage and other window frames, and also for improvements in the arrangement of the stud and plate for carriage-window frames, and for other purposes ; and that the plaintiff intended to completely patent the said provisional patent so taken out by him as aforesaid : and that the plaintiff had agreed with the defendant that he the defendant should have the sole and exclusive right during the period of the said patent to manufacture the above-named articles (so patented by the plaintiff as aforesaid), upon the following terms,—it was thereby agreed between the said parties that the defendant should pay to the plaintiff, at the times hereinafter mentioned, 4d. each for the said patented hinges so to be manufactured by him or by any other person under his direction or authority ; the like sum of 4d. for each elastic cushion so manufactured by him as aforesaid ; and the like sum of 4d. for each stud and plate so manufactured by him as aforesaid : that the defendant agreed that the royalty so to be paid by him to the plaintiff in respect of the above-mentioned articles should in no one year during the continuance of that agreement amount to less than the sum of 100l. per year : that, whether or not the royalty should amount to the sum of 100l. in each year during the continuance of that agreement, the defendant did thereby agree to pay to the plaintiff the sum of 100l. per year, as if such hinges and other things had been manufactured or sold, such royalty to be paid in equal quarterly payments : and, in case the said [668] royalty should not exceed the sum of 300l. in any one year after the second year during the term of the said patent, the plaintiff should be at liberty to determine that agreement by giving the defendant three calendar months’ notice in writing of such his intention ; and that the defendant should also be at liberty of determining the said agreement in like manner as the plaintiff at the end of the third year from the date thereof : that all the said articles

so to be manufactured by the defendant as aforesaid should be marked or stamped with a suitable mark as "Oxley's Patent," the said mark or stamp to be first approved of by the plaintiff: that, at the expiration of three calendar months from the date of the said agreement, and thenceforth at the expiration of every successive period of three calendar months, an account should be made out by the defendant, and settled between the said parties, of all business done during the said three calendar months; and, upon the settlement of every such account, the defendant should pay to the plaintiff whatever should be due to him on such accounts,—it being the true intent and meaning of the said agreement and of the said parties thereto that the accounts should be settled at the expiration of the period of three months, and whether the defendant should or should not then have received the amount appearing to be due upon such account from the purchaser or purchasers of the articles therein stated to have been supplied by the defendant: that the plaintiff should either by himself or agents be at liberty at all times thereafter during the continuance of that agreement to inspect the books and accounts of the defendant for the purposes of that arrangement, and to make copies or extracts therefrom: and that, in the event of the defendant not paying the amount due to the plaintiff, in accordance with the terms of the said agreement, he [669] should be at liberty by a notice in writing, to be given or sent to the defendant at the place of business in the said agreement mentioned, to declare the said agreement void and at an end, without prejudice, however, to any rights he might have thereunder: that the defendant should, at the request of the plaintiff, at his expense, execute any further instrument he might be advised would be necessary or proper for the purpose of carrying out the objects intended by the said agreement: that, in case of death of either of the said parties thereto, the said agreement should continue in force as between the executors or administrators of the party so dying and the survivor of them, or as between the executors or administrators of such parties, as the case might be: That the plaintiff and defendant then promised each other to do and perform all things in the said agreement on their respective parts to be done and performed: Averment, that, after the making of the said agreement, and during the continuance of the same, two such quarterly payments for and in respect of the said royalty became due and payable according to the terms of the said agreement; and, although the plaintiff had done all things necessary, and all things had occurred and happened necessary, and all conditions had happened and been performed necessary, and all times had elapsed and passed necessary to entitle the plaintiff to have the defendant pay unto him the plaintiff the said two quarterly payments for royalty which so became due and payable according to the terms of the said agreement as aforesaid, yet the defendant had not paid the same or any part thereof when the same became due and payable, or at any other time, but had wholly neglected and omitted so to do, and the same and every part thereof at the commencement of this suit remained wholly unpaid and unsatisfied.

[670] There was a second count, for money payable by the defendant to the plaintiff for money agreed to be paid by the defendant to the plaintiff for and in respect of the plaintiff, at the defendant's request, then giving to the defendant, at his request, licence and permission to make and manufacture goods in a certain mode and manner in which the plaintiff then had the exclusive right to make and manufacture goods, according to the laws then in force concerning inventions and patents in England; and also a count upon an account stated.

The defendant pleaded, first, to the first count, that he did not make or enter into the said agreement as in that behalf alleged,—secondly, to the residue of the declaration, never indebted.

Third plea,—to the whole declaration, except so far as the same related to the accounts in the last count of the declaration alleged to have been stated by and between the plaintiff and the defendant,—that, at the time of the making of the alleged agreement in the first count, and the alleged agreement in the second count therein first-mentioned, and of the alleged giving to the defendant the said alleged licence and permission in the second count mentioned, and at all times afterwards, the said alleged letters patent and exclusive right in the first and second counts mentioned were wholly void and of no effect, and the plaintiff had no such patent or exclusive right as in the first and second counts alleged; and the defendant was already before and at the time of making the alleged agreements, and of the alleged giving of the said alleged licence and permission, and at all times thereafter, entitled as of right

and without any agreement by or licence or permission from the plaintiff, to do everything to which the alleged agreement, licence, and permission in any way related: That the defendant never at any time had in fact, nor could have had, any benefit or advantage [671] whatsoever from the said alleged agreements, licence, or permission, nor did he ever do or obtain anything whatever under the alleged agreements, or in any way use or enjoy the licence or permission in the second count mentioned, nor was there ever at any time any consideration whatever for the making of the said agreement in the first count mentioned, or of the agreement in the second count therein first mentioned: and thereupon, and before the time for the performing of the two several agreements last aforesaid in any respect had arrived, and before any breach thereof, and before the defendant had ever done or obtained anything whatever under, or in any way used or enjoyed the alleged licence or permission, and forthwith upon the discovery of the premises by the defendant, and before the commencement of this suit, the defendant wholly and finally abandoned and rescinded the said agreements and the said licence and permission, and then gave notice to the plaintiff, and the said agreements, licence, and permission then were by means of the premises wholly and finally determined and put an end to.

Fourth plea, to the whole declaration, that the defendant was induced to enter into and make, and did enter into and make, all the several contracts and agreements in the declaration mentioned, by means of the fraud and covin of the plaintiff and others in collusion with him. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Michaelmas Term. It appeared that, on the 17th of March, 1858, the plaintiff petitioned for letters-patent, and left at the office of the commissioners of patents a provisional specification, as follows:—

“I, John Oxley, of Beverley, Yorkshire, and Moorgate Street, carriage-builder, do hereby declare the nature [672] of the said invention for “An elastic cushion or fitting piece for windows, blinds, shutters, and doors, which is also applicable for other purposes,” to be as follows:

“I form a coil, roll, or pad of india-rubber of a suitable size and resisting power, and I place it in or within a brass or other metal frame or a box-like receptacle: the elastic material is large enough to project from the face thereof; and I protect it from friction by means of a semicircular or other form of curved clip or band, which is free to move into and out of the metal frame or box as the elastic material is compressed and expands upon the removal of the pressure. The protective metal band may be a semicircular clip, having a projecting lip or flanch at each end, to prevent its being thrust out by the pressure behind it; or it may form the curved termination of a lever, or any similar contrivance may be adopted for holding the india-rubber or elastic material in its place, and at the same time permit of its elasticity.

“I apply such metal frame, case, or box, so fitted, to the face of the rebate or stile of a door-frame on the shutting side, at the front side or top part thereof; and, where applied to sliding sashes, blinds, or shutters, I let in or fit the apparatus described to the face of the rebate or groove, or, in certain cases, I apply it at the bottom of the rebate frame or groove.

“Thus, for the sashes or windows of railway or other carriages, the noise and damage produced by the rattle, jar, and vibration which occurs will be entirely prevented, as the sliding and other sashes, shutters, or blinds, and doors, and other similar contrivances for closing openings, may be kept or retained firmly against the rebate, groove, stile, or frame in which they slide, hang, move, or work: and the same apparatus may be employed for other similar purposes.”

This invention received provisional protection, but [673] notice to proceed with the application for letters-patent was not given within the time prescribed by the statute.

On the 10th of April, 1858, the plaintiff left at the office of the commissioner of patents another provisional specification, as follows:—

“I, John Oxley, of Beverley, Yorkshire, and Moorgate Street, carriage-builder, do hereby declare the nature of the said invention for “Certain improvements in the doors and sashes of carriages,” to be as follows:—

“This invention relates, first, to the construction of elastic or compressible pads or cushions mounted in metal frames, and protected by a metal band, case, or cover.

The pad frames so constructed may be mounted on or fixed to the face or edge of a sliding sash or glass frame, or on the rebate or frame on which they slide, or upon the face of a hanging door or casement, or to the face of the rebate or pillar frame of a door, upon the shutting side or at the top or bottom thereof. When applied to sliding sashes or glass frames, these elastic pads or cushions will keep them securely pressed against the frames, and prevent the rattle, jar, and other inconveniences and annoyances so much complained of, more particularly in public vehicles and railway carriages. When applied to hanging doors, the shock produced by slamming is avoided: and they also keep the fastenings of railway and other carriage doors more secure, and prevent injury thereto by preventing the wear of hinges and handles which occurs from this cause.

"The second part of my invention relates to a novel arrangement and mode of fitting and working sliding sashes, glass frames, blinds, and shutters for railway and other carriages, and wherever else sliding sashes, glass frames, and such like fittings or furniture may be [674] applied. It consists in constructing the sashes and the doors or frames in which they slide in the following manner:—For carriage doors, sashes, or pillars in which the frames slide, I groove out a rebate in the pillars as usual for the sashes or frames to slide in, but I also cut or work another small groove below this for the purpose of receiving a stud or pin, and permitting of its sliding freely up and down therein. I also let in or fix on one side of this small groove, which is worked on each side of the frame, two or more brass plates, each having a kind of P slot therein, and which slot will receive the projecting stud piece of a plate which is fitted to the edge of the sliding sash or frame, so that, when the sash or frame has been raised or slid up sufficiently high to allow of its passing over the fence piece or sill, the horizontal slot of the P slot plate will allow of the corresponding pin or stud sliding thereinto out of the small vertical groove or rebate in the pillar or frame, whereupon the stud or pin of each of the plates fitted to the sliding sash (and there may be two or more thereof) will be free to slide down the vertical part of the P slot plate, which forms an angular or inclined slot or groove in the metal plate, which, as before described, has been fitted in the bottom of the rebate or groove of the pillar, and thus the sash, glass frame, blind, or shutter, will, as it is pulled or pressed down, be carried forward or against the face of the rebate, and so make a perfectly close fitting joint all round, and thereby exclude the dust, prevent noise and damage by vibration. Care must be taken that sufficient angle and depth of groove be given to the slot in the brass plates, whereby allowance for wear and adjustment will also be provided. The elastic pad before described may also be fitted to the face or to the bottom, or to both the bottom and the face, of the sashes, &c., fitted as last described.

[675] "The third part of my invention relates to the hinges of doors, more particularly the doors of railway and other carriages, and consists in forming a metal socket or cap for the bottom nuckle, between the under side of which socket or cap and the top face of the bottom nuckle I insert a vulcanized india-rubber or other elastic washer, or flat ring. As the upper end of the metal socket or cap is necessarily of larger diameter than the bottom nuckle, I take advantage of this to increase the diameter of the face of the nuckle working above and upon it to the same size. By thus introducing the elastic washer or ring, I prevent or take off the injurious effects of jar or vibration.

"The fourth part of my invention relates to fastenings for doors more particularly for the doors of railway carriages. It consists in substituting for the ordinary turn-buckle, lever, or tongue, acted upon by any kind of handle, a spring latch with a bevil bolt, which is drawn back by a suitable tumbler piece, cam, or eccentric, fitted upon the spindle, by which the lock or the door is opened: the bolt is taper in section, and has the greatest width at the back or bottom: the bolt is kept thrust out by a spring, and the lock may be let in or fitted into the door or into the pillar or frame."

The complete specification, which was filed on the 9th of October, 1858, was as follows:—

"To all to whom these presents shall come, I, John Oxley, of Beverley, Yorkshire, and Moorgate Street, carriage builder, send greeting:

"Whereas Her most excellent Majesty Queen Victoria, by her letters patent, bearing date the 10th day of April, 1858, in the 21st year of Her reign, did for herself, her heirs and successors, give and grant unto me, the said John Oxley, her special

licence that I, the said John Oxley, my executors, administrators, and [676] assigns, or such others as I the said John Oxley, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, an invention for 'Certain improvements in the doors and sashes of carriages,' upon the condition (amongst others) that I the said John Oxley, by an instrument in writing under my or their hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the great seal patent-office within six calendar months next and immediately after the date of the said letters-patent:

"Now, know ye, that I the said John Oxley do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statements and accompanying drawings:—

"This invention relates,—first, to the construction of elastic or compressible pads or cushions mounted in metal frames, and protected by a metal band, case, or cover. The pad frames so constructed may be mounted on or fixed to the face or edge of a sliding sash or glass frame, or on the rebate or frame in which they slide, or upon the face of a hanging door or casement, or to the face of the rebate or pillar frame of a door upon the shutting side, or at the top or bottom thereof. When applied to sliding sashes or glass frames, these elastic pads or cushions will keep them securely pressed against the frames, and prevent the rattle, jar, and other inconveniences and annoyances so much complained of, more particularly in public vehicles [677] and railway carriages. When applied to hanging doors, the shock produced by slamming if avoided; and they also keep the fastenings of railway and other carriage doors more secure, and prevent injury thereto, by preventing the wear of hinges and handles which occurs from this cause.

"The second part of my invention relates to a novel arrangement and mode of fitting and working sliding sashes, glass frames, blinds, and shutters for railway and other carriages, and wherever else sliding sashes, glass frames, and such like fittings or furniture may be applied. It consists in constructing the sashes and the doors or frames in which they slide in the following manner:—For carriage-door sashes or pillars in which the frames slide, I groove out a rebate in the pillar as usual for the sashes or frames to slide in, but I also cut or work another smaller groove below this, for the purpose of receiving a stud or pin and permitting its sliding freely up and down therein: I also let in or fix on one side of this small groove, which is worked on each side of the frame, two or more brass plates, each having a kind of **P** slot therein, and which slot will receive the projecting stud piece of a plate which is fitted to the edge of the sliding sash or frame, so that when the sash or frame has been raised or slid up sufficiently high to allow of its passing over the fence piece or sill, the horizontal part of the slot in each of the **P** slot plates will allow of the corresponding pin or stud sliding therinto out of the small vertical groove or rebate in the pillar or frame, whereupon the stud or pin of each of the plates fitted to the sliding sash (and there may be two or more thereof) will be free to slide down the vertical part of the **P** slot plate, which forms an angular or inclined slot or groove in the metal plate which, as before described, has been fitted in the bottom of the rebate or groove of the [678] pillar, and thus the sash, glass frame, blind, or shutter will as it is pulled or pressed down be carried forward or against the face of the rebate, and so make a perfectly close-fitting joint all round, and thereby exclude the dust, prevent noise and damage from vibration. Care must be taken that sufficient angle and depth of groove be given to the slot in the brass plates, whereby allowance for wear and adjustment will also be provided. The elastic pad before described may also be fitted to the face or to the bottom, or to both the bottom and the face of sashes, &c. fitted as last described.

"The third part of my invention relates to the hinges of doors, more particularly the doors of railway and other carriages, and consists in forming a metal socket or cap for the bottom nuckle, between the under side of which socket or cap and the top face of the bottom nuckle I insert a vulcanized india-rubber or other elastic washer, or flat ring. As the upper end of the metal socket or cap is necessarily of larger

diameter than the bottom nuckle, I may take advantage of this to increase the diameter of the face of the nuckle working above and upon it to the same size. By thus introducing the elastic washer or ring, I prevent or take off the injurious effects of jar and vibration. Another advantage which pertains to this part of my invention is, that, by the introduction of the elastic washer and cap or socket just described, the wear between the metal faces of the nuckle is compensated for and a good fit maintained: thus play or jar is prevented, and the hinges are rendered more lasting.

"In the accompanying sheet of drawings I have illustrated my said improvements. Figures 1 to 7 relate to the first part of my invention, being views of the elastic pad for holding and preventing the rattle and jar which ordinarily occurs in carriage sashes, glass frames, shutters, &c. Figures 8 to 14 relate [679] to the second part of my invention, and exhibit views of a railway carriage door and sliding glass frame. Figures 15 to 18 relate to the third part of my invention, and exhibit views of a hinge suitable for hanging a railway carriage door.

"In each of these illustrations I have shewn my invention applied to railway carriage door and window fittings, in preference to shewing it applied to other descriptions of carriages, although the said several fittings are equally applicable to and may be applied to the doors and windows of any other description of carriage, or in any position where windows and doors are subject to jar or vibration.

"Figure 1 is a side view of one of the elastic fitting pieces, *a* being a vulcanized india-rubber ring or pad; *b*, the metal shield, which receives the friction and works in and out of the metal frame *c* upon the pressure being applied to the surface of the shield; *d*, the plate upon which is screwed the metal frame *c*. Figure 2 is a plan in section of figure 1; and Figure 3 is a transverse section of figure 1. Figure 4 is a modification of figure 1, in which, instead of the metal shield moving in and out vertically, a metal clip or band *b*, as shewn in detached view. Figure 5 is mounted on a pin, and works radially upon the pressure being applied. Figure 5 is the curved metal band or shield as applied in figure 4: it is shewn as a flat band but it may be box-like, for holding the india-rubber pad, as in figures 1, 2, &c. Figure 6 is a detached view of the metal shield *b*, as shewn in figures 1, 2, &c.: and figure 7 is an elastic pad, which may be vulcanized india-rubber or any other suitable material. Figure 8 is a vertical sectional elevation of part of the door pillar or stile of a railway-carriage door: it exhibits the arrangement of grooves or rebates hereinbefore described and as worked according to this invention; [680] figure 9 being a cross section of figure 8, taken on the line A. B.: and figure 10 is a cross section of figure 8 taken on line C. D. Figure 11 is an elevation, partly in section, of figure 8, the section being taken on the line E. F. of figure 8. Figure 12 is an edge view of the sliding sash or glass frame, shewing the metal plate with stud pin screwed on to the edge of the glass frame; figure 13 being a front elevation of sash or glass frame, figure 12: and figure 14 is a section of one side of such a glass frame, taken on the line G. H. of figure 13.

"In the several figures 8, 9, 10, 11, 12, 13, and 14, the same letters refer to similar parts, viz. *d* is the stile or pillar of door, in which the narrow and deeper groove *e* is worked to receive the stud pin or pins fitted on the corresponding edge of the sliding sash or glass frame: *f* is a rebate worked out in manner shewn for the purpose of permitting the sash or glass frame to slide up and down, and which, from being wide at the bottom, narrows at the top to a width only slightly more than sufficient to admit of the thickness of the sash or glass frame passing up it: *g*, a slot plate, fitted flush or let into the face of the rebate *f*: *h* is the metal fence piece or plate screwed to the sill *i*: *k* is the sliding sash or glass frame: *l*, the stud plate screwed to the edge of the sash.

"In figure 8 the position of the sliding sash is shewn dotted in, also the angle given to the vertical slot, which, instead of being perfectly parallel with the outer edge or face of the rebate *f*, forms a slightly taper space, by which the pin or stud of the stud plate is caused to approach nearer to the face of the rebate *f*, and of the outer face of the door sill or pillar *d*, thus keeping the sash tightly up to its place, and also compensates for wear in either the stud or the groove.

"In figures 15, 16, 17, and 18, *n* is the single nuckle [681] flap, and *o* the double nuckle flap of a railway carriage door hinge constructed according to my invention: *p* being the pin, *q* a metal cap or socket made to fit over the lower nuckle of the flap *o*, and *r* is a vulcanized india-rubber or other elastic washer placed within the metal cap or socket *q*, and between the top side of the nuckle and the under side of the cap

or socket. For the hinges of private carriage doors, and for other doors, the form of the hinge may be suitably varied, according to the purpose for which it is intended; and, instead of one elastic washer, two or more of such washers may be employed. The elastic pads or cushions referred to in the first part of my invention may be either used singly, fitted one on each side of a sash, or one on each pillar or stile, or more than two of such pads or washers may be used together; and they may be used alone or in combination with the second part of my invention.

"Having described my invention, and illustrated the same by the several figures in the accompanying drawings, exhibiting certain applications of my said invention, which by preference I have selected for the purpose of illustration, I claim,—first, the construction of elastic pads or cushions as herein described,—second, the mode of applying vulcanized india-rubber or other elastic material to sliding sashes, glass frames, and doors, as herein described,—third, the metal fittings and the mode of applying the same, described herein as the second part of my invention,—fourth, the construction of hinges and the combination therewith of india-rubber or other elastic material, as herein described. In witness," &c.

The particulars of objections delivered by the defendant pursuant to a judge's order were as follows:—

"1. That the invention was not new at the time of taking out the said patent, and particularly that the [682] parts of the invention relating to improvements in hinges suitable for railway and other carriages and applicable for other purposes, and to improvements in elastic cushion fittings for carriage and other window-frames, and to improvements in the arrangement of the stud and plate for carriage window-frames, were not new.

"2. That the invention was not the invention of any manufacture which could be the subject of a patent.

"3. That the invention was and is of no public benefit for the purpose proposed, or otherwise.

"4. That neither the provisional nor the subsequent specification sufficiently describes the invention.

"5. That, before and at the time of taking out the patent, the invention and each part thereof were known to one Mr. Cabrey, Messrs. Brown, Marshall, & Co., and others, and that from them or some or one of them the plaintiff obtained or derived his knowledge of the said invention.

"6. That the part of the invention relating to improvements in elastic cushions for carriage and other window-frames was before the taking out of the patent known to the said Mr. Cabrey and the said Messrs. Brown, Marshall, & Co., and others, and from them or some or one of them the plaintiff obtained or derived his knowledge of that part of the invention.

"7. That the invention as described in the provisional specification varies materially from the invention for which the letters-patent were obtained.

"8. That the letters-patent were granted for an invention to which the provisional specification did not relate.

"9. That the provisional specification related to an invention to which letters-patent did not extend.

"10. That the plaintiff was not the first and true inventor of the said invention.

[683] "11. That the plaintiff was not the first and true inventor of that part of the invention relating to improvements in hinges suitable for railway and other carriages, and applicable for other purposes, or to improvements in elastic cushion fittings for carriage and other window-frames, or to that part which relates to improvements in the arrangement of the stud and plate for carriage window-frames.

"12. That the said invention, before the taking out of the patent, had been used in Dublin, London, Birmingham, and Nottingham, and generally throughout England, Ireland, and Scotland, in the construction of railway and other carriages.

"13. That those parts of the invention relating to the improvements in hinges suitable for railway and other carriages, and applicable to other purposes, and to improvements in elastic cushion fittings for carriage and other window frames, and also for improvements in the arrangement of the stud and plate for carriage window-frames, had before the taking out the said patent been used in Dublin, London, Birmingham, and Nottingham, and generally throughout England, Ireland, and Scotland, in the construction of railway and other carriages.

"14. That the fourth part of the provisional specification described and claimed an invention relating to fastenings for doors, more particularly for the doors of railway carriages, which was not new, but which had been used in Dublin, London, Birmingham, and Nottingham, and generally throughout England, Ireland, and Scotland.

"15. That the provisional specification and the subsequent specification vary materially.

"16. That the provisional specification describes and claims in respect of inventions or of an invention to which the subsequent specification did not relate.

[684] "17. That the subsequent specification describes and claims in respect of inventions or of an invention to which the provisional specification did not relate.

"18. That the invention for which the letters-patent were granted varied materially from that described in the subsequent specification.

"19. That the patent to which the agreement related was abandoned by the plaintiff, and another and different patent, to which the agreement did not relate, was taken out by him.

"20. That, before the patent referred to in the agreement had been taken out, the plaintiff had petitioned for another patent for the same or part of the same invention, and had accompanied the petition with a provisional specification of the same."

The hinges described in the complete specification as the third part of the plaintiff's invention were admitted to be both new and useful.

As to the elastic pads or cushions described as the first part of the specification, the plaintiff's witnesses swore also that they were new and useful. On the other hand, several witnesses called for the defendant stated that they were identical in principle and in their operation and effect with an article of a similar description made by Messrs. Brown & Marshall, railway carriage builders.

As to the metal stud and plate which formed the third part of the invention described in the specification, it was admitted by the plaintiff's witnesses that these were things well known, but they stated that the application of them to the doors and windows of railway and other carriages, as described in the specification, was a novelty and a great improvement. The defendant's witnesses also admitted that they had never known a stud and plate with a groove like the plaintiff's applied to railway or other carriages.

[685] There was an attempt on the part of the defendant, to prove the plea of fraud: but that failed.

On the part of the defendant it was submitted that there was a material variance between the invention described in the agreement declared on and that described in the provisional and complete specification: for that the agreement described it as an invention of "improvements in elastic cushion fittings for carriage and other window-frames," whereas the specification was for "improvements in the doors and sashes of carriages," and the claim was, first, for "the construction of elastic pads or cushions as herein described," secondly, "the mode of applying vulcanized indiarubber or other elastic material to sliding sashes, glass frames, and doors, as herein described:" and, further, that the agreement was for the exclusive use of a patent for "improvements in the arrangement of the stud and plate for carriage window-frames and for other purposes;" whereas the specification was for "a novel arrangement and mode of fitting and making sliding sashes, &c. for railway and other carriages," &c.

It was further objected, that, by his specification, the plaintiff claimed the plate and stud itself, which was confessedly old, and not merely the arrangement and application of it; and that, consequently, upon the authority of the case of *Tolley v. Easton*, 2 Ellis & B. 956, the patent was void.

It was further urged that the specification was larger than the title of the patent, —the title of the patent stating it to be for "certain improvements in the doors and sashes of carriages;" whereas, in the provisional specification, the patentee says: "I have shewn my invention applied to railway carriage door and window fittings, in preference to shewing it applied to other descriptions of carriages, although the said several fittings are equally applicable to and may be applied [686] to the doors and windows of any other description of carriage, or in any position where windows and doors are subject to jar or vibration;" and in the complete specification it is thus described,—"This invention relates, first, to the construction of elastic or compressible pads or cushions mounted in metal frames, and protected by a metal band, case, or cover. The pad frames so constructed may be mounted on or fixed to the face or

edge of a sliding sash or glass frame, or on the rebate or frame in which they slide, or upon the face of a hanging door or casement, or to the rebate or pillar frame of a door, upon the shutting side, or at the top or bottom thereof." Thus, it is a claim for the application of the elastic pads or cushions to every description of door or casement, and is not confined to carriage doors or windows. In support of this objection *Croll v. Edge*, 9 C. B. 479, was referred to.

The learned judge reserved all these points for the court.

On the part of the plaintiff it was further submitted,—on the authority of *Lawes v. Purser*, 6 Ellis & B. 930, and *Smith v. Neale*, ante, vol. ii., p. 67,—that it was not competent to the defendant to object to the validity of the patent after having acted upon the agreement, by manufacturing the patent articles under it. As to this, the evidence was that the defendant had made about half a dozen of the studs and plates, and by his traveller had offered them for sale to about sixty different persons, but had not succeeded in selling any.

In his summing-up the learned judge told the jury that this was in point of law as much a user of the patent as if there had been an actual sale of the articles: and the questions left to them were,—first, was the whole or any part of the invention old,—secondly, did the defendant manufacture and endeavour at [687] various times and at different places to sell the patent articles.

The jury found that the elastic pads were new; that the stud and plate was old, but that its application to railway and other carriages in the way described in the specification was new; and that the defendant did manufacture the patent articles for sale, and offered to sell them.

The verdict was thereupon directed to be entered for the plaintiff, damages 50l.

Shee, Serjt., in Hilary Term last, pursuant to the leave reserved, obtained a rule nisi to enter a verdict for the defendant, on the grounds,—first, that the specification and claim extended as respects the second invention to the metal fittings as well as to the mode of applying them, and that the metal fittings thus specified and claimed were not new,—secondly, that the specification of the first invention was beyond and larger than the title,—thirdly, that the filing by the plaintiff of the previous provisional specification of the 17th of March, 1858, and his allowing it to expire, amounted to a dedication of the invention to the public, and prevented his obtaining a valid patent on any subsequent application: and also for a new trial, on the ground that the learned judge misdirected the jury in telling them that the manufacturing of some of the patented articles as patterns, and the exhibition of them for the purpose of obtaining orders, though no orders were obtained, and none of the patented articles were sold, was a user between which and the manufacture and actual sale of the patented articles there was in point of law, as respected the question between these parties, no difference. Upon the first, *Tetley v. Easton*, 2 Ellis & B. 956, was cited; upon the second, *Croll v. Edge*, 9 C. B. 479, was relied on as in [688] point; and upon the third, *Chanter v. Leese*, 4 M. & W. 295, 5 M. & W. 698, was referred to, and *Smith v. Neale*, ante, vol. ii., p. 67, and *Lawes v. Purser*, 6 Ellis & B. 930, distinguished.

He also moved upon the ground of the alleged variance between the specification and the agreement, as urged at the trial. But upon this point the rule was refused.

Grove, Q. C., Wordsworth, Q. C., and H. James, in Easter Term last, shewed cause. Assuming the patent to be void, for want of novelty, it is not competent to the defendant, after having to a certain extent at least enjoyed the benefit of that for which he stipulated, to repudiate the agreement: *Chanter v. Dewhurst*, 12 M. & W. 823; per Lord Abinger, *Chanter v. Leese*, 4 M. & W. 295, 311; *Hall v. Conder*, ante, vol. ii., p. 22; *Smith v. Neale*, ante, vol. ii., p. 67. In the last-mentioned case, Willes, J., in delivering the judgment of the court, says: "The defendant in this case, as in *Hall v. Conder*, contracted for the use of the plaintiff's right, such as it was, without regard to whether it could be sustained by litigation or not: and there is nothing unreasonable or uncommon in such a bargain." In *Lawes v. Purser*, 6 Ellis & B. 930, the plaintiff declared for a sum agreed to be paid to him by the defendants for each ton of an article manufactured and sold by them by the permission of the plaintiff to them given at their request, the plaintiff having letters-patent for the sole manufacture and sale of that article. The defendants pleaded that the letters-patent were void, and that they had a right to make and sell the article without the plaintiff's permission. The plea was held bad on demurrer; for, the invention having actually

been used by the permission of the plaintiff, and there being no allegation of fraud, or of anything equivalent [689] to eviction, the defendants were not at liberty to set up as a defence that the patent was void. Lord Campbell there said: "This plea would be proved, though the plaintiff had really made a useful invention, and had taken out a patent for it, treated by every one as valid, and supposed by all parties, to be so, if at the time of the trial it were discovered for the first time that there had been some previous user of the invention or some part of it, though utterly unknown both to the plaintiff and defendants. It would be monstrous if the defendants, after such an agreement acted upon, could on this ground refuse payment." And Wightman, J., said: "It may very well be that the discovery that the patent was invalid was only made at the time of the plea pleaded; and it is clear to me that enjoyment by permission of the patentee whilst the patent was supposed to be valid, is consideration."

The first objection raised by the rule is, that the specification and claim extend, as respects the second invention, to the metal fittings as well as to the mode of applying them. Now, it is to be observed that neither this nor the second and third points is within the notice of objections delivered pursuant to the statute 15 & 16 Viet. c. 83, s. 41, the words of which are very stringent (*a*). This is not the case of an objection im-[690]perfectly expressed; but of a total omission to give the plaintiff the notice which the statute requires. [Shee, Serjt. This point was not made at the trial: the notice of objections was not put in. Byles, J. The notice is annexed to the record. The plaintiff has got the verdict. Upon this rule, all answers are open to him which will enable him to retain it.] The claim is not for the stud and plate,—which are admitted to be old: but it is for the metal fittings and the arrangement and application of them as described in the specification; which all the witnesses agreed was new and useful.

The second objection is, that the specification of the first invention is beyond and larger than the title. There is nothing, however, in the specification to indicate that the patentee claims anything as his invention which the title does not cover. After describing the drawings, he says, "In each of these illustrations [691] I have selected and shewn my invention applied to railway carriage door and window fittings, in preference to shewing it applied to other descriptions of carriages, although the said several fittings are equally applicable to and may be applied to the doors and windows of any other description of carriage, or in any position where windows and doors are subject to jar or vibration." There is nothing here to point to anything but doors and windows of carriages. The invention, says the patentee, is substantially for carriages; but it may possibly be applied also to other doors and windows. The case mainly relied on by the other side,—*Croll v. Edge*, 9 C. B. 479,—differs materially

(*a*) Which enacts, that, "in any action in any of Her Majesty's superior courts of record at Westminster or in Dublin for the infringement of letters-patent, the plaintiff shall deliver with his declaration particulars of the breaches complained of in the said action, and the defendant, on pleading thereto, shall deliver with his pleas, and the prosecutor in any proceedings by *scire facias* to repeal letters-patent shall deliver with his declaration, particulars of any objections on which he means to rely at the trial in support of the pleas in the said action or of the suggestions of the said declaration in the proceedings by *scire facias*, respectively; and at the trial of such action or proceeding by *scire facias* no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such letters patent, which shall not be contained in the particulars delivered as aforesaid: Provided always, that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters patent, shall be stated in such particulars: Provided also, that it shall and may be lawful for any judge at chambers to allow such plaintiff or defendant or prosecutor respectively to amend the particulars delivered as aforesaid, upon such terms as to such judge shall seem fit: Provided also, that, at the trial of any proceeding by *scire facias* to repeal letters-patent, the defendant shall be entitled to begin and give evidence in support of such letters patent, and in case evidence shall be adduced on the part of the prosecutor impeaching the validity of such letters-patent, the defendant shall be entitled to the reply."

At a subsequent stage of the argument, Erle, C. J., said, that, if amendable, the court would, if necessary, consider the particulars as amended.

from the present. There, the specification described an invention and a claim as to which the title was altogether silent. [Erle, C. J. Suppose the doubtful passage in this specification had been omitted, and the stud and plate were applied to the window of a house, would an action lie for the infringement?] Clearly not. It constantly happens that the specification goes beyond the title of the patent: but, unless there be anything to mislead the public, the patent is not thereby rendered void. The patentee is bound in his specification to give the public all the benefit of his experience, all the knowledge that he has acquired during the six months which the law gives him for the purpose of maturing his invention.

The third objection is, that the filing by the plaintiff of the previous provisional specification of the 17th of March, 1858, and his allowing it to expire, amounted to a dedication of the invention to the public, and prevented his obtaining a valid patent on any subsequent application. It appears, that, on the 17th of March, 1858, the plaintiff delivered at the patent-office a provisional specification for "An elastic cushion or fitting piece for windows, blinds, shutters, and [692] doors, which is also applicable for other purposes." On the 10th of April, he filed another provisional specification for "Certain improvements in the doors and sashes of carriages," which contained three other important inventions, and also included the former, which is varied, but not substantially. The patent taken out on this latter provisional specification, which was afterwards perfected by the filling of a complete specification, must be taken as if sealed on the 10th of April, 1858, up to which time there clearly had been no publication, no dedication to the public, of the invention mentioned in the provisional specification of the 17th of March. A provisional specification gives no monopoly. It does not import publication; still less a dedication to the public. The material provisions of the Patent Law Amendment Act, 15 & 16 Vict. c. 83, which are applicable to this matter, are the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 23rd, 24th, 29th, and 30th sections. The 6th section enacts that "every petition for the grant of letters-patent for an invention, and the declaration required to accompany such petition, shall be left at the office of the commissioners, and there shall be left therewith a statement in writing, hereinafter called the provisional specification, signed by or on behalf of the applicant for letters-patent, describing the nature of the said invention: and the day of the delivery of every such petition, declaration, and provisional specification shall be recorded at the said office, and indorsed on such petition, declaration, and provisional specification, and a certificate thereof given to such applicant or his agent; and all such petitions, declarations, and provisional specifications shall be preserved in such manner as the commissioners may direct, and a registry thereof and of all proceedings thereon kept at the office of the commissioners." The 7th section enacts that "every [693] application for letters-patent made under this act shall be referred by the commissioners, according to such regulations as they may think fit to make, to one of the law officers." The 8th section enacts that "the provisional specification shall be referred to the law officer, who shall be at liberty to call to his aid such scientific or other person as he may think fit, and to cause to be paid to such person by the applicant such remuneration as the law officer shall appoint: and, if such law officer be satisfied that the provisional specification describes the nature of the invention, he shall allow the same, and give a certificate of his allowance, and such certificate shall be filed in the office of the commissioners, and thereupon the invention therein referred to may, during the term of six months from the date of the application for letters-patent for the said invention, be used and published without prejudice to any letters-patent to be granted for the same, and such protection from the consequences of use and publication is hereinafter referred to as provisional protection: Provided always, that, in case the title of the invention or the provisional specification be too large or insufficient, it shall be lawful for the law officer to whom the same is referred to allow or require the same to be amended." Thus, the provisional specification is never published. The 9th section enables the inventor, in lieu of a provisional specification, to file a complete specification: and this complete specification is open to the public. "The applicant for letters-patent for an invention, instead of leaving with the petition and declaration a provisional specification as aforesaid, may, if he think fit, file with the said petition and declaration an instrument in writing under his hand and seal (hereinafter called a complete specification), particularly describing and ascertaining the nature of his said invention, and in what manner [694] the same is to be performed, which complete specification shall be mentioned in such declaration, and the day of the

delivery of every such petition, declaration, and complete specification shall be recorded at the office of the commissioners, and indorsed on such petition, declaration, and specification, and a certificate thereof given to such applicant or his agent, and thereupon, subject and without prejudice to the provisions hereinafter contained, the invention shall be protected under this act for the term of six months from the date of the application, and the applicant shall have during such term of six months the like powers, rights, and privileges as might have been conferred upon him by letters-patent for such invention issued under this act and duly sealed as of the day of the date of such application: and, during the continuance of such powers, rights, and privileges under this provision, such invention may be used and published without prejudice to any letters-patent to be granted for the same; and, where letters-patent are granted in respect of such invention, then, in lieu of a condition for making void such letters-patent in case such invention be not described and ascertained by a subsequent specification, such letters-patent shall be conditioned to become void if such specification filed as aforesaid does not particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed: and a copy of every such complete specification shall be open to the inspection of the public, as hereinafter provided [s. 29], from the time of depositing the same, subject to such regulations as the commissioners may make." The 10th section enacts that, "in case of any application for letters-patent for any invention, and the obtaining upon such application of provisional protection for such invention, or of protection for the same by reason of the deposit of a [695] complete specification as aforesaid, in fraud of the true and first inventor, any letters-patent granted to the true and first inventor of such invention shall not be invalidated by reason of such application, or of such provisional or other protection as aforesaid, or of any use or publication of the invention subsequent to such application and before the expiration of the term of such provisional or other protection." The 11th section enacts, that, "where any invention is provisionally protected under this act, or protected by reason of the deposit of such complete specification as aforesaid, the commissioners shall cause such provisional protection or, such other protection as aforesaid to be advertized in such manner as they may see fit." The 12th section enacts that "the applicant for letters-patent, so soon as he may think fit after the invention shall have been provisionally protected under this act, or where a complete specification has been deposited with his petition and declaration, then so soon as he may think fit after such deposit, may give notice at the office of the commissioners of his intention of proceeding with his application for letters-patent for the said invention, and thereupon the said commissioners shall cause his said application to be advertized in such manner as they may see fit, and any person having an interest in opposing the grant of letters-patent for the said invention shall be at liberty to leave particulars in writing of their objections to the said application at such place and within such time and subject to such regulations as the commissioners may direct." By s. 23 it is provided that letters patent may be dated as of the day of the application; and by s. 24, that "any letters patent issued under this act sealed and bearing date as of any day prior to the day of the actual sealing thereof, shall be of the same force and validity as if they had been sealed on the day as of which the same [696] are expressed to be sealed and bear date: Provided always, that, save where such letters-patent are granted for any invention in respect whereof a complete specification has been deposited upon the application for the same under this act, no proceeding at law or in equity shall be had upon such letters patent in respect of any infringement committed before the same were actually granted." The 29th section enacts that "the commissioners shall cause true copies of all specifications (other than provisional specifications), disclaimers, and memoranda of alterations filed under or in pursuance of this act, and of all provisional specifications after the term of the provisional protection of the invention has expired, to be open to the inspection of the public at the office of the commissioners," &c. And the 30th section enacts that "the commissioners shall cause to be printed, published, and sold, at such prices and in such manner as they may think fit, all specifications, disclaimers, all memoranda of alterations deposited or filed under this act; and such specifications (not being provisional specifications), disclaimers, and memoranda respectively shall be so printed and published as soon as conveniently may be after the filing thereof respectively, and all such provisional specifications shall be so printed and published as soon as conveniently may be after the expiration of the provisional protection obtained in respect thereof,"

&c. These provisions clearly shew that during the six months in which the invention is provisionally protected, there is no publication or dedication thereof to the public. Here, the patentee has his monopoly only from the 10th of April, 1858. There was no period before that day at which the invention could be said to have been made public.

Then, it is contended on the part of the defendant that the learned judge misdirected the jury, in telling [697] them that the manufacturing of some of the patented articles as patterns, and the exhibition of them for the purpose of obtaining orders, though no orders were obtained, and none of the patented articles were sold, was a user and a violation of the patent. The jury here found that the articles in question were manufactured by the defendant for sale. That clearly was an infringement. In *Jones v. Pearce*, 1 Webster's P. C. 121, the defendant had made a pair of wheels upon the principle of the plaintiff's patent: and in answer to a question from the jury. Patteson, J., said: "If he did actually make these wheels, his making them would be a sufficient infringement of the patent, unless he merely made them for his own amusement, or as a model" (a). There was, therefore, clearly no wrong ruling in point of law. Any manufacture which, if it took place before the grant, would invalidate the patent, will constitute an infringement, if it take place after the date of the grant.

Shee, Serjt., Hindmarch, David Keane, and Griffiths, in support of the rule. Assuming the patent to be void, is the licensee liable upon the facts found by the jury? The contract declared upon is a contract entered into by a man who has filed a provisional specification, and who is, in consideration of his giving to the defendant an exclusive right to manufacture a completely patented article, to receive a minimum royalty of 100*l.* per annum for three years. The patentee is not to be entitled to this royalty unless he does that which he on his part undertakes to do, viz. to give the defendant, as the consideration for his contract, an exclusive right to the use of the invention which he has provi-[698]-sionally specified, and which he is about to perfect by filing a complete specification. If the thing which he professes to grant has no valid existence, the whole consideration for the defendant's promise fails. The cases relied on by the plaintiff are altogether distinguishable. In *Hall v. Coulter*, ante, vol. ii., p. 22, and *Smith v. Neale*, ante, vol. ii., p. 67, the subject-matter of the bargain was an invention the patent for which had gone through the second stage. In each of them, the defendant knew what he bargained for: he deliberately contracted for the thing which he had. Here, however, the defendant contracts to pay the stipulated royalty only in the event of the plaintiff's giving him the exclusive right he engaged to give him. Without this there is no consideration. [Byles, J. At least the defendant gets the exclusive use of the invention as against the inventor.] The same argument might have been urged in *Chanter v. Leese*, 4 M. & W. 311, 5 M. & W. 698. Lord Abinger there says: "The party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated." The consideration for the defendant's promise is whole and entire. [Erle, C. J. Suppose the licensee has had the benefit of the patent for the whole term,—could he then turn round and say that he is not liable for the stipulated royalty because the patent was void?] *Laves v. Purser*, 6 Ellis & B. 930, shews that he could not. But there the declaration was founded upon an executed consideration: here, all is executory. In *Hayne v. Maltby*, 3 T. R. 433, A. asserting that he had a right to a patent machine covenanted with B. that he should use it in a particular manner, in consideration of which B. covenanted that he would not use any other; in an action by A. on the covenant, it was held that B. was not estopped by his covenant from pleading in bar to the action that the invention [699] was not new, or that the patentee was not the inventor; but that he might thus shew the patent to be void. [Byles, J. It is difficult to reconcile that with *Laves v. Purser*, 6 Ellis & B. 930. Grove. *Bowman v. Taylor*, 2 Ad. & E. 279, 4 N. & M. 264, and numerous other cases, lay down a different doctrine.]

The patent was substantially void. The specification claims the metal fittings themselves as well as the mode of applying them: and the stud and plate were confessedly old. The stud and plate are minutely described; and the inventor concludes

(a) Speaking of this case, the same learned judge says, in *Minter v. Williams*, 4 Ad. & E. 254, "No contest arose on that point."

by specifically claiming as his invention "the metal fittings and the mode of applying the same." If any part of the thing claimed is old, or if the specification so mixes up what is new with what is old that it is left in doubt what the thing claimed is, the patent is void altogether. In *Holmes v. The London and North Western Railway Company*, 12 C. B. 831, 1 Macrory's P. C. 4, a specification of an invention of "an improved turning-table for railway purposes" described the alleged invention "to consist in supporting the revolving plate or upper platform of the turning table, as also its stays, braces, arms, and supports, on the top of a fixed post, well braced, and resting on or planted in the ground, the top of which post forms a pivot for the table to turn on, while support-arms radiating from a frame-work (the weight of which is also sustained on the post) moving round the bottom part of the post with friction rollers, and fastened to the outer edges of the plate, stay the plate at all sides, and keep it steady, to receive the superincumbent weight of carriages or whatsoever is to be turned upon it;" and, after describing the drawings, the specification concluded thus,—"Now, whereas I claim as my invention the improved turning-table hereinbefore described, and such my invention being to the best of my knowledge and belief entirely new, and [700] never before used in England, &c., I do declare this to be my specification of the same, and that I do verily believe this my specification doth comply in all respects, fully and without reserve or disguise, with the proviso in the hereinbefore in part recited letters-patent contained: wherefore, I hereby claim to maintain exclusive right and privilege to my said invention:" and it was held that the specification claimed the whole combination as new; and,—a jury having found that the only novelty consisted of the suspending-rods (all the rest having been substantially described in the specification of a patent previously granted to another person),—that the defendant, in an action for an alleged infringement, was entitled to a verdict on a plea taking issue on the sufficiency of the specification. So, in *Tetley v. Easton*, 2 Ellis & B. 956, it was held that a patentee describing his invention in the specification is to be taken to claim as part of his invention all which he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention. That was an action for an alleged infringement of a patent for certain improvements in machinery for raising and impelling water, in which issues were taken on the plaintiff being the first inventor, and on the novelty of the invention. The specification described a machine in which water was raised and impelled by the action of centrifugal force, through the revolution of a hollow wheel revolving in a manner therein described. The specification did not shew clearly that the wheel was itself not claimed as part of the invention. On the trial, it appeared that the raising of water by centrifugal force acting through the revolution of a hollow wheel was previously known; but there was evidence that the manner in which it revolved in the plaintiff's machine was new. The judge directed a verdict for [701] the defendant on the two issues on the novelty: and it was held that, for the reason above stated, the direction was right, as the claim must be taken to include the wheel. [Erle, C. J. There is no dispute about the law: the only difficulty is as to the application of it.]

Then, as to the second point in the rule, viz. that the specification is larger than the title of the patent. The title is, for an invention of "certain improvements in the doors and sashes of carriages," and the specification extends to all hanging doors or casements, as well as to carriage doors. It says, "The pad or frame so constructed may be mounted on or fixed to the face or edge of a sliding sash or glass frame, or on the rebate or frame in which they slide, or upon the face of a hanging door or casement, or to the face of the rebate or pillar frame of a door upon the shutting side, or at the top or bottom thereof. When applied to sliding sashes or glass frames, these elastic pads or cushions will keep them securely pressed against the frames, and prevent the rattle, jar, and other inconveniences and annoyances so much complained of, more particularly in public vehicles and railway carriages. When applied to hanging doors, the shock produced by slamming is avoided, and they also keep the fastenings of railway and other carriage doors more secure, and prevent injury thereto, by preventing the wear of hinges and handles which occurs from this cause." [Byles, J. It is not enough to shew that the specification will include something which is not covered by the title: to sustain this objection, you must shew that the claim extends to every sort of hanging door.] *Croll v. Edge*, 9 C. B. 479, is precisely in point. There, the plaintiff declared against the defendant for an alleged infringement of a

patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." The defendant [702] pleaded,—fourthly, that the plaintiff did not particularly describe his invention, and in what manner the same was to be performed, &c.—sixthly, that the invention described in the specification was a different invention from that for which the letters-patent was granted, by reason whereof the letters-patent were void. At the trial, the plaintiff put in a specification, the title of which described the invention to be of "improvements in the manufacture of gas for illumination, and in the apparatus used therein and when transmitting and measuring gas;" and which stated it to relate,— "first, to a mode of manufacturing gas for the purpose of illumination,—secondly, to improvements in setting and heating clay retorts for making coal-gas,—thirdly, to a mode of manufacturing clay retorts,—fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the consumer:" and it was held that there was a material variance between the invention specified and that described in title of the letters-patent; and, consequently, that the letters-patent were void; and that the objection was available under either the fourth or the sixth plea. Maule, J., in delivering the judgment of the court, there said: "Any person reading the specification for the purpose of ascertaining what the patentees claimed as their exclusive right, would see without doubt that a material branch of their claim, and of the patent the specification of which they were professing to inrol, was, an improvement in apparatus used in the manufacture of gas. Now, no patent at all had been granted to them for that: and it appears to us to be difficult to suppose that the inrolling a specification in the terms here used can have been intended as otherwise than an attempt on the part of the grantees to remedy an oversight, and so to alter and enlarge the patent. It seems to us that they have [703] specified for a more extensive and a different patent from that which was granted to them." [Keating, J. The specification there described something altogether foreign from that which the title of the patent indicated. Is this anything more than a suggestion of a possibly more extensive applicability of the patent than the patentee intends to claim?] It is submitted that it is not such a specification as to be a due compliance with the condition upon which the patent is granted. The true principle is that laid down by Lord Eldon in *Hill v. Thompson* (3 Meriv. 626), 1 Webster's P. C. 235, 237,—"If a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled. On the other hand, there may be a void patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials. If there be a patent both for a machine and for an improvement in the use of it, and it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether, on account of its attempting to cover too much.

4. On the 17th of September, 1858, when the provisional protection acquired by the filing of the provisional specification of the 17th of March expired, the invention became the property of the public, the inventor having failed to proceed within the period prescribed by the statute: 15 & 16 Vict. c. 83, ss. 6, 30. If it were competent to the patentee thus to delay his proceedings, he might by postponing the filing of the [704] second provisional specification until the 16th of October, have secured a prolongation of his patent for an extra period of six months. By such a course, too, the patentee protracts the period for payment of stamp-duties. [Keating, J. These considerations might possibly justify the Lord Chancellor in declining to seal the patent: but can they affect the validity of the patent when sealed?] The second application varies the title of the invention.

Then, as to the direction of the learned judge as to the alleged user. In no case has the mere making of patterns, or the exposing or offering for sale of the patent article been held an infringement of the patentee's right: *Minter v. Williams*, 4 Ad. & E. 251, 5 N. & M. 647. [Erle, C. J. An innocent importer has been held not liable.] The things which were made were merely manufactured for the purpose of being exhibited as samples. [Byles, J. The jury found that they were manufactured for sale, and that the defendant endeavoured to sell them: and I told them that, that being so, there had been a user of the patent.]

All the objections are substantially pointed at in the notice of objections, which it has repeatedly been held, is not to be construed with all the strictness of a special demurrer. It is enough if it gives substantial information to the patentee as to what it is he is called upon to defend. And here it is quite clear that the plaintiff came prepared to meet all the objections which were urged against him. There was no suggestion at the trial that he was taken by surprise.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

Upon this rule for entering the verdict for the [705] defendant on the third plea, he has contended that the patent there mentioned was void.

The patent was for "Improvements in the doors and sashes of carriages:" and it comprised three distinct inventions. The first related to a mode of applying elastic pads, the second to a mode of applying certain metal fittings to sashes, and the third to a construction of hinges.

The principal objection related to the second of these inventions, and depends upon the construction to be put upon these words,—“I claim the metal fittings and the mode of applying the same described herein as the second part of my invention.” If the true construction is, that the metal fittings are claimed separately from the mode of applying the same, the patent is void for want of novelty: the jury having found that the metal fittings by themselves are old but that the mode of applying them is new. Then, are the metal fittings claimed separately? We think not. The context expresses that one part of the invention consists of the metal fittings and the mode of applying them described herein. If the patentee meant to claim the metal fittings as one separate part, and the mode of applying them as another part, his words do not express that meaning.

In respect of the first part of his invention, consisting of elastic pads and the mode of applying them, he has subdivided his invention into a separate claim for the pads, and a separate claim for the mode of applying them. If he had meant the same with respect to his second invention, he would naturally have used the same form. The grammatical construction makes the metal fittings and the mode of applying them one subject, of which the words “herein described” is one predicate.

If the construction be adopted that they are separate [706] claims, it is necessary to read the claim thus, —“The metal fittings herein described, and the mode of applying them herein described,” that is, to add words, in order to support the construction.

The plaintiff's construction gives effect to every word in its ordinary meaning. The defendant's construction seems to us scarcely consistent with the words as they stand.

If the effect of each construction is considered, according to the plaintiff's, the patent is valid: according to the defendant's, it is obviously void: for, if “the metal fittings” are taken to mean all metal fittings consisting of two plates adjusted with stud and slot, such a claim would be futile, as plates so adjusted are notoriously old. If the claim is for “the metal of fittings herein described,” it is equally futile: no metal fittings taken by themselves are specified so that an infringement could be proved. There is no description of size, or weight, or form, or material, separately: but the plates are described in their application so as to produce the desired result: the stud plate is to be fitted on the sash, the slot plate on the sash groove: and they are to be so mutually adjusted as to confine the sash to the side of its groove. The description of the metal fittings is inseparably interwoven with the mode of applying them.

In the claim they may be taken to be combined. The patentee must have intended that the patent should be valid. The construction which has that result is more probable than that which assumes extreme ignorance in respect of metal fittings, or extreme confusion in describing particular metal fittings.

We were pressed with the argument that, in the agreement made by the plaintiff before the complete specification was filed, the metal plates are made a separate subject of royalty,—4d. for each pair: but we [707] consider that, in this stipulation, the payment for each pair of plates included the licence for applying them to the sashes of carriages in the manner described in the patent: and, as we think this is the true construction, it is not necessary to go into the question whether the list of objections gave notice of this objection, nor into the question whether either the first count of the declaration or the second count in indebitatus assumpsit for the use of the patent,

might not be sustained, if the defendant had any benefit, or the plaintiff any detriment amounting to a consideration.

The second ground of objection was, that the specification claimed more than the patent. The title was "for certain improvements in the doors and sashes of carriages." In the specification, it is stated that "I have shewn my invention as applied to railway-carriage doors and window-fittings, although they are equally applicable to the doors and windows of any other description of carriage, or in any position where windows and doors are subject to jar and vibration." We consider that these words indicating that the invention may be applied to other doors and windows than those belonging to carriages, do not indicate that the patentee intended to claim by his specification such possible application to be comprised in his patent.

The invention specified and claimed is truly an improvement in the doors and windows of carriages, not the less because it is also applicable to other doors and windows. It seems to us reasonable that the claim should be construed with reference to the title, and confined accordingly to the doors and windows of carriages. The present case has no analogy to the decision in this court in *Croll v. Edge*, 9 C. B. 479, where the patent was in effect for improvements in the apparatus for the [708] transmission of gas, and the specification was for improvements in the apparatus for the manufacture and also in that for the transmission of gas. The specification, therefore, related to an apparatus additional to and beyond that referred to in the title. Here, the title and the specification relate to one and the same apparatus.

The third objection was, that the provisional specification relating to the elastic pads, delivered in on the 17th of March, rendered inoperative the provisional specification delivered in on the 10th of April, and therefore rendered void the patent granted on the 10th of October founded on the specification of the 10th of April, which was either void ab initio or became void on the 17th of September, when, it is contended, the invention specified on the 17th of March, and afterwards abandoned, became dedicated to the public.

But we are of opinion that a provisional specification abandoned does not become public by abandonment. The statute 15 & 16 Vict. c. 83, s. 29, authorises the publication; but, until that event, it is not public.

Furthermore, although the first provisional specification may afford an objection either to receiving a second for the same invention, or to granting a patent for the invention after the first specification has expired, there is no principle of law, and no enactment, making the patent void if it is so granted; and, on the contrary, s. 24 enacts that the patent dated as of the day the provisional specification was delivered in shall be of the same force and validity as if it had been sealed on that day.

This patent is dated as of the 10th of April. On that day the protection given under the specification of the 17th of March existed: and the patent is valid by the operation of this section.

All the objections to the validity of the patent in our [709] opinion fail. It therefore becomes unnecessary to consider whether the relation between the parties to the licence created any obstacle against the defendant as to disputing the validity of the patent.

On these grounds we think that the rule should be discharged.

Rule discharged.

IN THE MATTER OF THE COMPLAINT OF FREDERICK RANSOME AGAINST THE EASTERN COUNTIES RAILWAY COMPANY. May 29th, 1860.

[S. C. 29 L. J. C. P. 329; 2 L. T. 376; 8 W. R. 527. See previous proceedings, 1 C. B. N. S. 437; 140 E. R. 179; 4 C. B. N. S. 135; 140 E. R. 1034; and the cases cited in the note at 140 E. R. 179.]

By their sale or tariff, a railway company divided the places through which their lines passed into districts, and charged at a reduced rate per ton for coals carried a given distance from Peterborough to Ipswich respectively, when consigned in full train-loads of 200 tons or 35 trucks. The advantage of this reduced rate was given to persons consigning coals from Peterborough to one of these districts in full train-loads, though on their arrival at Cambridge the company for their own convenience thought fit to break up the train, and carry about one third of it forward by the

ordinary goods trains,—the whole consignment, however, ultimately finding its way into the district to which it was addressed by the consignor:—Held, that this was not giving any undue preference to the Peterborough coal-dealers, or imposing any undue prejudice on the Ipswich dealers; although the latter were unable to avail themselves of the lower rate of charge for coals consigned by them to the same district, by reason of the insufficiency of the demand for sea-borne coals at the places comprised therein.

Power, Q. C., in Easter Term last, obtained a rule calling upon the Eastern Counties Railway Company to shew cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), injoining the said Eastern Counties Railway Company to desist from charging the Peterborough coal-dealers for the carriage of coals brought from Peterborough to or towards Needham Market, Stow-market, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss, in quantities of less than 200 tons or 35 trucks, according to the rates specified in the tariff for the carriage of coals in entire trains of 200 tons or 35 trucks, and not according to the rates in the said tariff for the carriage of coals in less quantities than 200 tons or 35 trucks: and to desist from [710] giving an undue preference to the Peterborough coal-dealers in respect of the carriage of coals brought from Peterborough to or towards Ipswich, Needham-Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss; and to desist from subjecting the said Frederick Ransome and the Ipswich dealers in sea-borne coals to undue disadvantage in respect of the carriage of coals from Ipswich to or towards Needham-Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss,—with costs.

The motion was founded upon voluminous affidavits going through all the matters detailed on the former occasions (*a*). The material additional matter was that contained in the affidavits of Frederick Ransome, John Bradley Geard, and Alfred Staff Prior (*b*).

The affidavit of Mr. Ransome, after going through the history of his dealings with the company, stated as follows:—That the said coals carried by the company for the inland coal-dealers start from Peterborough in special trains, but not consisting of 35 trucks or 200 [711] tons: That, when the train reaches Cambridge, which is distant from Peterborough forty-five miles, the said train no longer remains a special or full coal train, and such coals as are not left at Cambridge are taken on from that place to the aforesaid places and districts by different engines, and form part of the ordinary goods trains, and coals, merchandize, and cattle are mixed up together in the same trains, so as to keep up as nearly as may be a convenient load for the engine: That the carrying of coals from Peterborough and from Ipswich to the aforesaid places at which the complainant dealt in coals, and the coal traffic to those places, could not be conducted otherwise than by trains stopping successively at each station, dropping the trucks of coals required there, and passing onwards with a continually diminishing load of coals: That, in the districts in which the places at which the complainant dealt in coals as aforesaid were situate, there was a considerable traffic in corn, malt, lime, and other articles in the direction of and to Ipswich, for exportation, and there was therefore a profitable employment for trucks or waggons in which the complainant's coals were conveyed to such places returning in the direction of or to Ipswich from such places as aforesaid, and such trucks or waggons were constantly profitably

(*a*) Ante, vol. i., p. 437, vol. iv., pp. 135, 159.

(*b*) The rule was originally granted in Hilary Term last upon the affidavits of Ransome, Geard, and Robinson only. But, in Easter Term, in consequence of something which the complainant had learned since that rule was granted, Power applied for leave to file an additional affidavit, viz. that of Prior. But Erle, C. J., said: The rule was obtained on a specific ground, which the defendants are ready to shew cause against. It would be setting a very pernicious precedent to allow this to be done. Possibly you might be entitled when cause is shewn to file affidavits in reply, under the 45th section of the Common Law Procedure Act, 1854; but that would depend upon the statements contained in the affidavits of the company. Perhaps the better course will be, to allow you to abandon the former rule, and to come again upon the new materials for another rule, the costs of the abandoned rule to abide the event.

employed by the said railway company in such return journey to Ipswich; but that the trucks or waggons forming train-loads of coals from Peterborough were and had to be conveyed back to Peterborough empty: That the said railway company could not carry the complainant's coals from Ipswich to places where he dealt in coals as aforesaid in special trains of 35 trucks or 200 tons, as they had not sufficient engine power and rolling stock for that purpose: and that, upon the few occasions when the complainants had been able to send into one district from Ipswich a full train load of 35 trucks or 200 tons [712] of coals, and had tendered such quantity of coals to the company, the said company had not carried such 200 tons of coal in an entire train, but had carried the same by the ordinary goods trains.

Mr. Geard's affidavit stated that, on the 7th of March, 1860, he went from Ipswich to Peterborough by the railways worked by the Eastern Counties Railway Company, and during his journey he observed that almost all the goods trains which he passed between Ipswich and Cambridge had trucks of inland coals attached to them: That, at about half past 11 o'clock in the forenoon of the said 7th of March, he saw at the Thurston station a goods train with trucks of the Norfolk and Eastern Counties Coal Company (which is the same company as was originally carried on under the name or firm of Messrs. E. & A. Prior & Co., laden with coals attached thereto, pass in the direction from Bury St. Edmunds towards Ipswich; and at about a quarter to 12 o'clock in the forenoon of the same day he saw at Thurston a special coal train drawn by a large engine, No. 305, and with twenty-five trucks of coals, pass the same station in the same direction, chiefly from Prentice & Co., of Stowmarket, and one for Morley, of Mellis: That he was at the station at Bury St. Edmunds at about a quarter past 1 o'clock in the afternoon of the said 7th of March, and whilst he was there he saw the goods train from Peterborough come up, and there were in the said train thirteen trucks of inland coals besides other goods, four of which trucks were directed to Prentice & Co., Stowmarket, and one to Morley, Mellis: That, on the 9th of March, 1860, he saw at the Cambridge station, in the siding of the railway from Cambridge to Bury St. Edmunds, nine trucks of inland coals directed for Sudbury, Witham, and Needham, and amongst which were four trucks numbered 891, 892, 893, and [713] 894, and directed to Bull, of Needham: That, on the 10th of March, 1860, he saw at the Six Mile Bottom station, which is distant six miles from Cambridge, on a siding of the said railway from Cambridge to Bury St. Edmunds, eight trucks of inland coals along with the trucks laden with other goods, and amongst which were trucks numbered 758, 362, 297, and 330, and directed to Sudbury: That the ordinary load of an engine on the railway between Cambridge and Bury St. Edmunds is only 25 trucks, whether the ordinary goods train or not: That, at about a quarter past 10 o'clock in the forenoon on the said 10th of March, he saw in the siding at the Bury St. Edmunds station 16 trucks of coals, and amongst the first four of the said trucks were two directed to Packard, Bramford, and numbered 830 and 304: That Bramford is one of the stations on the railway between Bury St. Edmunds and Ipswich and is about three miles distant from Ipswich: That, at about five minutes to 12 in the forenoon of the said 10th of March, he saw an engine leave Bury St. Edmunds station with twelve of the said last-mentioned 16 trucks, and amongst them the said two trucks directed to Bramford as aforesaid: That, at about a quarter past 3 o'clock in the afternoon of the same day, he was at the Thurston station, and there saw the goods train from Peterborough come up and shunt; and he observed in the said goods train nine trucks of coals, and he took the numbers of the engine and trucks, and the former was numbered 225, and the latter 894 and 892, and were the same trucks he had seen at Cambridge in the morning of the same day, as before mentioned: That, on his return to Ipswich in the afternoon of the same day, he saw at the Bramford station the aforesaid two trucks of coals which were directed to Packard, Bramford: That, on the 12th of March, 1860, he saw at the Ipswich station, ready to [714] be forwarded by another train, several trucks of inland coals, directed to Sudbury and other places beyond Ipswich, and amongst the said trucks were some of the trucks which he had seen laden with coal at the Six Mile Bottom station as aforesaid: and that the said trucks numbered 758, 362, and 297, were particularly noticed by him as being amongst such trucks: That he was informed on the said 12th of March, and he believed it to be true, that conveyance of the said two trucks of coals directed to Packard, Bramford, was charged for by the company at the lower rate of 4s. 9d. per ton, as if they had been conveyed in a full train load of 200 tons or 35 trucks, and

that the conveyance of the said two trucks which he had seen as aforesaid directed to Morley, Mellis, was also charged for by the company at the lower rate of 4s. 8d. : That he was up to the 30th of June last a coal-merchant carrying on business at Ipswich and at Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, and Hadleigh, in the county of Suffolk, and at Mellis and Diss, in the county of Norfolk : That he was well acquainted with the working of the inland coal-traffic on the railway from Peterborough to or towards Needham-Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Ipswich, and Hadleigh, and to the places or towns on the said railway south and west of Ipswich, and he had since the 1st of May, 1857, taken especial notice of the mode in which such coal-traffic on the said railways was conducted from Peterborough into, over, and along what is termed "No. 8 district" in the printed regulations of the company for the carriage of coals from Peterborough, and particularly with reference to the carriage of coal by the company from Peterborough into and along No. 8 district in full train loads of 200 tons or 35 trucks or otherwise by the ordinary goods or mixed trains : That, from the observations he had made, and from his experience of the [715] working of such coal traffic, he was able to say that it was the constant usage and general practice of the company to carry and convey such coals and traffic from Peterborough into and along No. 8 district by the ordinary goods or mixed trains, and not in full train loads of 200 tons or 35 trucks, or by special coal trains ; and that he never saw a full train load of 35 trucks, of coal from Peterborough in No. 8 district although he had carefully watched for the same : That, on the 12th of April, 1858, he was at Peterborough, and there saw delivered to the railway company a full train load of coals for carriage from Peterborough to various stations in No. 8 district : that two of the said trucks of coal comprising such train load were to be delivered at Needham-Market, one at Stowmarket, one at Elmswell, two at Thurston, two at Hadleigh, two at Mellis, and six at Ipswich : That such full train load of coals left Peterborough early in the morning of the 13th of April, 1858, and he carefully watched its progress into, over, and along No. 8 district ; and that the said train load of coals did not proceed in a full train load from Peterborough further than Cambridge, a distance of only forty-five miles from Peterborough, and did not enter into No. 8 district in a full train load, or drawn by the same engine that it had left Peterborough with, but that, after the train load had arrived at Cambridge, several of the trucks were detached from the said train load, and that further on the journey other of such trucks were detached, and such trucks of coal were carried into and along No. 8 district by the ordinary goods trains, and not by a full train load of coals or special coal-train, and that the trucks composing such train-load of coals so starting from Peterborough were drawn and conveyed from Peterborough to their destination in No. 8 district by no less than twelve different trains ; and that the [716] company charged for the conveyance of such train-load of coals at the lower rate, that is to say, at the rate specified in the said printed regulations of the company for the conveyance of coals from Peterborough in entire trains of 200 tons or 35 trucks ; and that, from his knowledge and experience of the working of the said coal traffic from Peterborough into and over No. 8 district, he was able to say that the mode adopted for the carriage of the said train load of coals from Peterborough into No. 8 district was that usually adopted by the company in the carriage of coals of 200 tons or 35 trucks from Peterborough aforesaid.

Prior's affidavit stated that, after the granting of the first injunction against the Eastern Counties Railway Company at the suit of Ransome, he had many consultations with Mr. Moseley, the traffic manager of the company, for the purpose of framing a new tariff of rates, and so framing it that the inland coal-dealers might still retain their position in the various markets on the Eastern Counties Railway system which they then possessed by the rates then charged for the carriage of coal, and so that no benefit or advantage or reduction in the rates then existing should be given to the traffic in sea borne coal : That the real object of the railway company was, to divert the coal-traffic carried on by the shipping at the ports, and thereby not only to cause all the coal to be brought inland before carried on by the ships to the ports, and thence by the navigation into the various districts, but also to secure the carriage of the corn as return traffic which then was largely conveyed from the inland places through the navigations to the ports, and thence by the ships to Newcastle, Wakefield, and other places ; and that the said tariff was framed with the object in view : That he

remembered the granting of the second injunction against the company on the application of [717] Ransome, and he was then consulted by Moseley as to the framing of a new tariff of rates, and that the new tariff was framed with the same object as before stated, and resulted in making the rates to the inland coal dealers less than they were before the granting of such injunction and in not giving any corresponding benefit or advantage to the sea-borne coal dealers: That, since the 6th of March, 1858, the company, notwithstanding the said tariff of rates, charged Prior & Co., and agreed to charge them, less than the said published rates for distances beyond 100 miles in the London district; and that, beyond such distances, they gave them a reduction of 10d. in the first instance per ton, that is, they only charged them 4s. per ton to Bishopsgate station, instead of 4s. 10d., and that shortly after that time the company allowed them a further reduction beyond such distance of 2d. per ton conditionally on their carrying 50,000 tons per annum to Bishopsgate and Mile End, and that continued until August, 1859, and that, in August, 1859, their successors, the Norfolk and Eastern Counties Coal Company had had and then had from the company a further reduction in the carriage of coal beyond 100 miles in the said district of 4d. per ton, the rate paid by them for that distance being now 3s. 6d. per ton, including terminals: That, notwithstanding the said tariff of rates and regulations, the company did not carry any coal into No. 8 district in full train loads of 35 trucks or 200 tons, but their coals were usually carried into the said No. 8 district by the ordinary goods trains, and they were always charged for such carriage at the lower rates mentioned in such tariff for the conveyance of full trains of 35 trucks or 200 tons: and that the course pursued by the company was, that the coals were carried from Peterborough to Cambridge by a special train, and then they were left there, and carried [718] forward by the ordinary goods trains, at the convenience of the company.

Bovill, Q. C., and Bushby, now shewed cause, upon an affidavit of Mr. Robert Moseley, which alleged, amongst other things, that the company were not desirous of preventing the complainant from dealing at any or either of the places mentioned in his affidavit, and were not desirous of excluding sea-borne coals from any or either of the said places, nor were the said districts, regulations, or rates framed or adjusted by the company, nor was either of them framed or adjusted for the purpose of giving to the dealers in inland coal at Peterborough any undue preference or advantage over the dealers in sea-borne coal from Ipswich or elsewhere, nor did the company give undue or unreasonable preferences or advantages in the carriage of inland coal to or in favour of dealers therein, or to or in favour of the traffic in inland coal, nor did the company subject the complainant or other dealers in sea-borne coal, or the trade therein, to undue or unreasonable prejudice or disadvantages: but that the company carried coals for the complainant and for other merchants residing at Ipswich, or at any other port on the Eastern Counties Railway, and dealing in sea-borne coal, on equal terms with the said dealers in inland coal, and that the company carry annually thousands of tons of coals from Wisbeach, Lynn, Wells, Yarmouth, Lowestoft, Hythe (Colchester), Maldon, and Blackwall, upon the same terms as those on which the complainant's coals were carried by the company: and that no dealer at any or either of such ports except the complainant had complained of such terms: That the rates complained of were made in obedience to the injunction issued by this court on the 20th of March, 1858, and were confirmed by the decision of [719] this court on the 10th of June in the same year, in the case of the application made for an attachment against the defendants by the complainant and his then partner, Geard: That Mellis is not situate on the main line between Bury St. Edmunds and Ipswich, and that, when coal-trains start from Peterborough and proceed via Bury St. Edmunds with trucks for Mellis, the said trains respectively deposit the trucks for Mellis at Haughley, the point of junction of the main line with the Haughley and Bury branch, and that the trucks so deposited at Haughley are afterwards conveyed to Mellis by the ordinary goods trains of the company from Ipswich, or in special coal-trains from Ipswich proceeding in the direction of Norwich: That the main profit derived by the company from the conveyance of an entire train of 200 tons on 35 trucks from Peterborough to No. 8 district is earned by the time that the train enters that district, because the train has been carried a distance of seventy-eight miles from Peterborough before it enters the said district at Thurston, which is the first station arrived at in the district, and the company have in the mean time, by reason of the long haulage of the whole quantity along the said distance, earned a sum exceeding 40l.: That the

company are bound by the regulations referred to in the complainant's affidavits, to apply the scale of rates therein to every entire train of 200 tons or 35 trucks of coals carried in the owners' trucks and delivered to the company for any one of the districts specified therein, provided that the coals are so delivered to the company for not more than one of the said districts; and that the said scale is applicable during the whole journey, although the said coals may be so delivered for the purpose of being detached or distributed at more than one place in such district, and may consequently be [720] reduced below the said quantity of 200 tons or 35 trucks before the said journey is completed: That, by the said regulations, the company stipulate that they will not be responsible for either mileage or demurrage, and thus reserve to themselves the power of transmitting, according to their own convenience, either simultaneously or by separate trains, and in different portions (using reasonable dispatch), any coals which may be delivered to the said company in an entire train of 200 tons or 35 trucks or otherwise; but that, though it may thus happen occasionally that a dealer at Peterborough delivers to them such an entire train of coals for one of the said specified districts, and the said coals are for the convenience of the company carried from Peterborough by separate trains, and in different portions which are respectively smaller than 200 tons or 35 trucks, yet the said dealer is entitled to the benefit of the said scale so applicable as aforesaid to the entire train delivered by him to the company for transmission to the said district. [The affidavit then set out a return of all the train-loads charged by the company at the reduced rate, together with the quantities of the said train-loads delivered to the company at Peterborough for transmission to No. 8 district, between the 1st of June, 1859, and the 29th of February, 1860, and also of the places within the said district to which the train-loads were consigned respectively:] That, on the 28th of October, 1858, an alteration was made by the company in the arrangement of the working of their coal-traffic to and through Cambridge, and that since that alteration the arrangement had been as follows,—the engines by which the company convey coals from Peterborough to Cambridge return with empty coal-trucks to Peterborough, and each entire train for the No. 8 district, of 200 tons or 35 trucks, is reduced from 35 to 25 trucks at Cam-[721] bridge, in order that the engine which carries them onwards along the single line of railway between the stations of Cambridge and Bury St. Edmunds may ascend the steep gradients which extend from Cambridge in the direction of Bury St. Edmunds with greater facility and with less risk of the said train dividing by reason of the fracture of the coupling-chains thereof; that, in many cases, the same engine goes on to Ipswich, and commences dropping or distributing coals in No. 8 district at Thurston and at the station between Thurston and Ipswich; that, if there are any coals to be dropped or delivered in the last-mentioned district at any station beyond Ipswich, they are worked onwards by the ordinary mixed goods and coal trains which ply from Ipswich in the direction of London; that coals for Hadleigh are detached at Bentley, which is situate at the junction of the main line with the Hadleigh branch, and are sent thence to Hadleigh or the places on the said last-mentioned branch by the local engine which is exclusively appropriated to plying on the said branch; that coals for Harwich leave Ipswich by the same ordinary mixed goods and coal train, and are detached at Manningtree, which is situate at the junction of the main line with the Harwich branch, and are thence sent to Harwich or the places on the last mentioned branch by the local engine, which is exclusively appropriated to plying on the last-mentioned branch; that coals for Sudbury, Chappell, and Bures are sent from Ipswich by the same ordinary mixed goods and coal train to Marks Tey, which is situate at the junction of the main line with the Sudbury branch, and are thence sent to Sudbury or the places on the last-mentioned branch by the local engine which is exclusively appropriated to plying on the last-mentioned branch; that coals from Braintree, Witham, and Maldon, which stations are also in No. 8 district, are for [722] forwarded from Ipswich by the same ordinary mixed goods and coal train to Witham, which is situate at the junction of the main line with the two branches of Braintree and Maldon, and are thence forwarded to Braintree and Maldon, or the places on the last-mentioned branches, by the local engine which is exclusively appropriated to the last-mentioned branches respectively; that coals for Fimingham and Mellis, which are stations on the main line in the direction of Norwich, are detached at Haughley, which is situate at the junction of the main line with the Cambridge and Bury St. Edmunds branch, and are picked up at the said junction by the train which

leaves Ipswich in the direction of Norwich : and that coals for any stations on the East Suffolk line, up to Saxmundham inclusive, are forwarded from Ipswich by the ordinary mixed goods and coal train which leaves Ipswich in the direction of Yarmouth and Lowestoft : That the portion of the said train (say, ten trucks thereof) which is so left at Cambridge as aforesaid, is worked as follows, that is to say, on the same day, generally, that the former portion of the said train leaves Cambridge, coals are forwarded by one of the ordinary mixed goods and coal trains which leave Cambridge for Bury St. Edmunds, or else by the ordinary mixed goods and coal train which plies between Cambridge and Ipswich ; that, when coals are sent by the Bury St. Edmunds train, which goes no further than the last-mentioned place, they are picked up by the train which leaves Cambridge for Ipswich, and are distributed in the same course and order as have already been described in respect to the coals sent by the last-mentioned train : and that, if the company were compelled to transmit each entire train of 200 tons or 35 trucks simultaneously to the No 8 district, without taking advantage of such arrangements as above described, the cost of [723] transmitting such trains would be increased to a degree which would render it impossible for the company to afford to convey coals according to the scale so applicable as aforesaid to entire trains of 200 tons or 35 trucks : That the company never apply the scale referred to in Ransome's affidavit to inland coals in any case except where the company are paid for an entire train of 200 tons or 35 trucks of coals the whole of which are to be transmitted (subject to the company's own convenience in forwarding them simultaneously or otherwise,) to some one of the specified districts, and the company never apply the said scale to inland coals in any case where such train is delivered to them for transmission to or distribution among more than one of the said districts : That the regulations and rates of the company in respect of the conveyance of inland coal apply equally to the conveyance of sea-borne coal from Ipswich to and from the places mentioned in the complainant's affidavit. The affidavit, then, in addition to a general denial of the statements contained in Prior's affidavit, stated that the company are exposed to competition with the Great Northern railway in respect to the carriage of inland coal between Peterborough and London, and that the distance by the Great Northern between Peterborough and London is only 76 miles, whereas by the Eastern Counties line it is 101 miles ; that, from March, 1858, until the 1st of August, 1858, the company charged for carrying train-loads of 35 trucks or 200 tons from Peterborough to London, 4s. 10d. per ton, and on the 1st of August, 1858, they reduced the rate to 4s. ; that this reduction was made solely to obviate the effects of the said competition, and was applied indiscriminately to all dealers transmitting inland coal from Peterborough to London ; and that no advantage was ever afforded by the company to Prior over other dealers in inland [724] coal, the said reduction being confined to London traffic so exposed to such competition as aforesaid, and not applying to coals carried into or along No. 8 district ; and that the effect of compelling the company to raise in any degree their charges for the carriage of inland coal from Peterborough would be to divert to the Great Northern railway such inland coal-traffic as now passes to London along the Eastern Counties Railway Company's line, and to destroy altogether such inland coal-traffic as passes between Peterborough and No. 8 district, and between Peterborough and other districts at a like distance therefrom.

This is substantially an attempt to re-open a matter which has already been disposed of by the court, first, in Hilary Term, 1857,—ante, vol. i., p. 437 : and again in Hilary Vacation, 1858, when the question of districts was discussed and disposed of,—ante, vol. iv., pp. 135, 159. The only new matter of complaint now is that suggested by Prior's affidavit, which is conclusively answered by what is sworn to by Mr. Moseley,

Power, Q. C., and Couch, in support of the rule. It is conceded that, in 1857, the company had so framed their tariff as to favour the Peterborough coal-dealers at the expense of the Ipswich dealers. When these parties were first before the court, Cresswell, J., in delivering the judgment (ante, vol. i., p. 450), says, —“ The applicants, coal-merchants at Ipswich, sent coals which had been brought to that port by sea, to various places on the same lines of railway, and the company charged them a much larger sum per ton in proportion to the distance over which their coals were carried, than was charged to Messrs. Prior : and it was manifest that the sums charged to Messrs. Prior for the carriage of coals to different places were fixed so as to enable

them to compete in the coal-trade with Ransome [725] & Co., who had the advantage of having their coals brought by sea to Ipswich." Professing to act in obedience to the writ, the company framed an amended scale which still gave the inland coal-dealers a preference over the Ipswich dealers so far as the district numbered 8 was concerned; and again a writ of injunction issued against them,—ante, vol. iv., p. 135. Upon the motion for an attachment against the company for disobedience to that writ,—ante, vol. iv., p. 159,—the whole argument on their part was based upon the advantage to the company of carrying the coals in full train-loads of 200 tons or 35 trucks: and now their argument is that it is more advantageous to them to carry less than full train-loads to the several places comprised in No. 8 district. [Erle, C. J. They carry in the manner which they find most convenient to themselves.] This they have no right to do, if thereby they impose an undue burthen on the Ipswich coal-dealers, and afford undue preference to the dealers in coal coming from Peterborough.

ERLE, C. J. This was a rule praying for a writ of injunction against the Eastern Counties Railway Company pursuant to the Railway and Canal Traffic Act, 1854, injoining them to desist from charging the Peterborough coal-dealers for the carriage of coals brought from Peterborough to or towards Needham-Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss, in quantities of less than 200 tons or 35 trucks, according to the rates specified in the tariff for the carriage of coals in entire trains of 200 tons or 35 trucks, and not according to the rates in the said tariff for the carriage of coals of less quantities than 200 tons or 35 trucks, and to desist from giving an undue preference to the Peterborough coal-dealers in respect of the carriage of coals brought from [726] Peterborough to or towards Ipswich, Needham-Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss; and to desist from subjecting the complainant and the Ipswich dealers in sea-borne coals to undue disadvantage in respect of the carriage of coals from Ipswich to or towards Needham-Market, of Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss. The tariff in question has been under the consideration of the court, and its principle has been sanctioned more than once; that principle being that a railway company may reasonably, with a view to their own advantage, give encouragement and facilities to persons bringing large quantities of goods for conveyance for long distances, which they do not afford to persons bringing goods in smaller quantities, and to be carried shorter distances. The tariff in question is framed upon that principle; and the principle specifically applied to the scale was, that when the Peterborough coal-dealers consigned coals to the particular district numbered 8 in full train-loads of 35 trucks or 200 tons, the company, according to the tariff, were at liberty to charge them the lower rate which is now complained of. The ground upon which the injunction is asked is, that the privilege of having their coals carried into No. 8 district at the lower rate was accorded to the Peterborough dealers where the consignment was of less than 200 tons or 35 trucks, and that the same advantage is withheld from the Ipswich dealers in sea-borne coals. Upon examining the affidavits on both sides, the conclusion I have come to is, that the rule should be discharged, the complainant not having made out that the company have carried coals for the Peterborough dealers at a lower rate than that prescribed by the tariff. In every instance in which the lower rate has been charged, the consignor has sent a full train-load of 200 tons or 35 trucks, and [727] therefore had entitled himself to demand that they should be carried at the lower rate. The court having already held that the tariff is a valid tariff, it is expedient, seeing the great interests that are involved and the engagements that have been made upon the faith of it, that its principle should be adhered to. The coals having been consigned from Peterborough in full train-loads, it is said that they are carried into No. 8 district in smaller quantities for distribution there. But it appears that the gradients and other circumstances render it sometimes convenient to the company to break up the train on its arrival at Cambridge, and send some of the waggons on by the ordinary goods trains as occasion may offer. There was, therefore, some semblance of ground for the complaint, inasmuch as the complainant and his witnesses had never seen a full train-load of 200 tons or 35 trucks come into No. 8 district. The explanation, however, shews that no undue preference has in reality been given; and, the tariff having been established, the Ipswich dealers have no right to complain of what the company thus do for their own convenience. It has been much pressed upon us in the course of the argument that the Ipswich coal-

dealers have suffered from the competition with the inland coal, inasmuch as from the number of places in the district to which the Peterborough dealers send their coals they are enabled to send them in full train loads. But that observation will apply to all cases where the construction of a railway has made a given district more accessible. Until the inland coal could by means of the railway be brought into the neighbourhood of Ipswich, the dealers in sea-borne coal had almost a monopoly of the supply. The question of competition is not one that the court can entertain. All we require is, that the company shall hold out equal opportunities and equal facilities [728] to all persons using the railway: and it appears to me that the stipulation for a lower rate of charge for the conveyance of full train loads is a fair and reasonable stipulation. Adhering to the principle of our former decisions, I think this rule must be discharged. But, looking at the circumstances by which Mr. Ransome may have been misled, I cannot say that he had no reason for making this application. I therefore think there should be no costs.

WILLIAMS, J. I am of the same opinion. On the former occasion, one ground of complaint made on the part of the Ipswich coal-dealers was, that the difference of charge made to the Peterborough coal-dealers was grossly disproportioned to the difference of distance which their coals travelled along the railway. The answer then made by the company was, that the expense of starting a train was the same whether for a long or a short distance, and therefore the rate was not proportioned to the actual distance. The contention on the part of the complainant now is, that the subsequent conduct of the company shews that this answer was illusory, because they still charge the lower rate, although the course pursued by them renders a second start necessary, viz. at Cambridge. Another ground of complaint on the former occasion had reference to the introduction of the lower rate of charge only where the coals were consigned in full train-loads of 200 tons or 35 trucks. It was said that that was unjust to the Ipswich dealers, because the lower rate of charge was confined to the case of consignments of full train-loads to a single district, and the demand for sea-borne coal in the district in question was not large enough to enable the complainant to avail himself of the reduced rate of carriage. The answer given to that argument was, that the company could afford to carry full train-loads [729] long distances at a lower rate than they could carry smaller quantities shorter distances. To day it is said that that argument also was illusory, because it appears that the company are content to charge the Peterborough dealers at the reduced rate although their coals are not carried into No. 8 district in full train-loads. I agree that these suggestions afford no inconsiderable ground of suspicion that our former decision may have proceeded on mistaken considerations. But, though I feel this, I also feel that it would be highly inconvenient to treat the present motion as an application for a re-hearing. I think we are bound to abide by our former judgment, and that the tariff must be considered as established. There has been no infringement of that tariff in point of fact. And we have no power to interfere with the mode in which the company choose to carry their customers' goods, unless it is shewn that there is some undue prejudice to the applicant, or some undue preference to a third person. As long as the tariff stands, and its principle is not infringed, it must be quite immaterial to the Ipswich dealers how the company carry coals for others. I certainly would not have assented to the granting of this rule if I had understood the facts as I now understand them. I understood, that, when the trains were broken up at Cambridge, part of the coals were left for consumption there, and the residue carried on at the lower rate of charge into No. 8 district. If that had been so, it clearly would have been an infringement of the tariff. But it turns out not to be the fact. All the coals were originally consigned from Peterborough in full train loads of 200 tons or 35 trucks, and the whole were carried into No. 8 district. That being so, the ground upon which the rule was moved entirely fails. But, looking at all the circumstances of the case, though I think the rule must be [730] discharged, I quite agree with my Lord Chief Justice that it is not a case of costs.

BYLES, J.(a). I am of the same opinion, simply upon the ground that the reasons upon which the rule was founded have entirely failed. I agree with my Lord in thinking that the tariff, which has already received the sanction of this court, must be strictly observed. If I had seen that a smaller number than 200 tons or 35 trucks

(a) Willes, J., was engaged in the Divorce Court.

of coal had been consigned and carried from Peterborough to Cambridge, or that less than the full train load so consigned had found its way into No. 8 district, I should have been of opinion that the injunction should be granted. But it appears from Mr. Moseley's affidavit that the whole consignment is forwarded, though, for their own convenience, the company send part by the ordinary goods trains. This rule, therefore, will be discharged, but without costs.

Rule discharged, without costs.

[731] WOOD v. THE EPSOM AND LEATHERHEAD RAILWAY COMPANY AND THE WIMBLEDON AND DORKING RAILWAY COMPANY. May 30th, 1860.

[S. C. 30 L. J. C. P. 82; 2 L. T. 487.]

The W. Railway Company who were empowered by an act incorporating the Lands Clauses and Railways Clauses Consolidation Acts, 1845, to make a railway, with all proper stations, works, and conveniences connected therewith, to terminate by a junction with the L. Railway at a point marked on the parliamentary plan, gave the plaintiff notice that the line of the railway would pass through a piece of his land which lay beyond the point of junction, but within the line of deviation marked in the plan, and that such land was required for the purposes of the railway, and took the necessary steps under the Lands Clauses Consolidation Act to acquire a right of entry thereon.—Being about to erect a station upon the piece of land in question, the W. Company agreed with the L. Company that the station so to be erected should be used by both companies; and the terms of this agreement were afterwards embodied in and confirmed by an act of parliament. The station was accordingly built at the joint expense of the two companies,—the W. Company prolonging their line with a double set of rails from the point of junction into the station; one line of rails being for the joint use of both companies, and the other for the exclusive use of the W. Company:—Held, that the notice given by the W. Company to the plaintiff was a sufficient notice, although it did not in terms state that the land was required for the purpose of a station; that the prolonging their line beyond the point of junction into the station was no excess of their powers; and that the arrangement with the L. Company (who were not in a position to take the land themselves) for the joint use of the station did not vitiate the title which the W. Company had already acquired to the land,—though *semble* (per Williams, J.), that, if the W. Company took the land for the purposes of the L. Company only, and parted with their right to them, their title might have been defeated thereby.

This was an action of ejectment brought on the 10th of February, 1858, to recover possession of 1a. 2r. 28p. of meadow or pasture land, being the southern portion of a field of 4a. 1r. 18p. called Wood's Field, in the parish of Epsom, in the county of Surrey. The writ was directed to "The Epsom and Leatherhead Railway Company, and all persons entitled to defend the possession of the premises." The Epsom and Leatherhead Railway Company (hereinafter called the Leatherhead Company) appeared on the 27th of February: and, on the 8th of March, the Wimbledon and Dorking Railway Company (hereinafter called the Wimbledon Company) appeared and defended under the following order of Pollock, C. B.:—

"I do order that the Wimbledon and Dorking Railway Company be at liberty to appear and defend this action, that company undertaking to prove that they were in possession at the time of the commencement of this action, or they are to fail."

[732] Both companies limited their defence to 1a. 2r. 23p. that being the whole of the plaintiff's land which had been entered upon.

The cause came on to be tried before Erle, C. J., at the Surrey Spring Assizes, 1858, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:—

Wood's Field is a field of about 4a. 1r. 18p. in extent, situate in the parish of Epsom, and has been the plaintiff's land since the year 1854. In December, 1855, the plaintiff received from the Leatherhead Company, preliminary to their application to parliament for an act of incorporation, the usual landowner's notice. In this notice the plaintiff was described as owner of meadow and garden ground numbered 19

upon the plans deposited by the company with the clerk of the peace for the county of Surrey, and the railway was described as passing through this ground upon an embankment twenty-one feet high. No. 19 on the plans was Wood's Field, and in and upon the plans and sections so deposited this embankment was represented as upon the portion of Wood's Field in question in this cause.

By an act of parliament passed on the 14th of July, 1856 (which it was agreed should form part of this case), the Leatherhead Company were empowered to make and maintain a railway, with all proper works and conveniences connected therewith, commencing by a junction with the Epsom branch of the London, Brighton, and South Coast Railway, in the parish of Epsom, in the county of Surrey, at a point therein near to the Epsom Station on the said branch railway, and terminating at or near to the gas-works in the town and parish of Leatherhead, in the said county, in the line and upon the lands delineated in the said plans, and to enter upon, take, and use such [733] of the said lands as should be necessary for that purpose.

The said Leatherhead Company have never had the consent of the plaintiff to enter his land; nor have they purchased or agreed to purchase it, or given notice to treat for it, or attempted to exercise their powers for compulsory purchase; and such powers expired on the 14th of January, 1858.

In December, 1856, the plaintiff received from the Wimbledon Company, preliminary to their application to parliament for an act of incorporation, the usual landowner's notice. In this notice the plaintiff was described as owner of meadow, garden, and garden ground, numbered 34 upon the plans deposited by the said Wimbledon Company with the clerk of the peace for the county of Surrey; and the said notice stated that such land would be required for the purposes of the undertaking of the Wimbledon and Dorking Railway Company, according to the line thereof as then laid out, or might be required to be taken under the powers of deviation which would be applied for in the act, and would be passed through in the manner mentioned in the schedule to such notice. In the schedule, the property in dispute was described as being within the limits of deviation intended to be applied for, and as not intersected by the centre line of the said railway as laid down on the said plans. According also to the last-mentioned plans, a junction of the said Wimbledon Company's railway with the Leatherhead Company's railway, as shewn on the said plans, was to take place in a field at the back or north side of the High Street of Epsom, numbered 26 on those plans, not belonging to the plaintiff, and distant about sixty yards from the nearest point of the portion of Wood's Field in question in this cause, and about one hundred and seventy yards from the furthest point of that por-[734]-tion, measured in a straight line from the point of junction. There was no section deposited with the said last-mentioned plans, of any line passing through the field in question.

By another act of parliament (which it was also agreed should form part of the case), passed on the 27th of July, 1857, and incorporating (inter alia) the Lands Clauses and Railways Clauses Consolidation Acts, 1845 (8 & 9 Vict. cc. 18, 20), the said Wimbledon Company was empowered to make and maintain the railway therein-after mentioned, with all proper stations, works, and conveniences connected therewith, in the lines and according to the levels shewn upon the plans and sections relating to the said last-mentioned railway deposited as in that act mentioned (being the plans last hereinbefore mentioned), and upon the lands delineated upon the said plans, and described in the books of reference thereto, and to enter upon, take, and use all or any of such lands as might be necessary for those purposes, that is to say, a railway commencing as therein mentioned and terminating in the said parish of Epsom by a junction with the line of the Leatherhead railway, as authorized to be made, in a field at the back or north side of the High Street of Epsom. The whole of Wood's Field was delineated in the last-mentioned plans, and described in the book of reference thereto as No. 34, and was included within the limits of deviation laid down upon those plans.

Upon the 4th of September, 1857, the said Wimbledon Company, in pursuance of the 18th section of the Lands Clauses Consolidation Act, 1845, gave the plaintiff notice to treat for 1a. 2r. 23p. of Wood's Field; and in the said notice they alleged that the line of their said railway would pass through Wood's Field, and that the said portion of 1a. 2r. 23p. was required by them for the purposes of the Wimbledon and Dorking railway.

[735] This portion of 1a. 2r. 23p. includes the portion of Wood's Field on and

through which the centre line of the Leatherhead railway was authorized to pass and be constructed (as hereinbefore mentioned), and also other parts of the said field on either side of the said centre line, and is the land in question in this cause.

The plaintiff on the 24th of September, 1857, claimed, in a letter of that date, from the Wimbledon Company 2500l. for the land in question, and for the remainder of the field, which he required them to take. No agreement having been come to between the plaintiff and the said Wimbledon Company, the said Wimbledon Company, in October, 1857, duly and regularly proceeded under the provisions of the Lands Clauses Consolidation Act to acquire a right of entry on the land in question: and it was agreed, that if the said Wimbledon Company had power to take the land in question under the circumstances set forth in the case, all steps required by the act of parliament had been complied with.

On the 15th of January, 1858, the plaintiff sent to the said Wimbledon Company the following notice:—

“To the Directors of the Wimbledon and Dorking Railway Company, to G. W. Horn, Esq., their secretary, to W. G. Roy, Esq., their solicitor, and to Mr. William Butcher, the local agent employed by the said company.

“Take notice that I have withdrawn, cancelled, rescinded, and made void, and do hereby withdraw, cancel, rescind, and make void all proposals and claims for compensation hitherto made by me or on my behalf for or by reason or in respect of the said company's projected railway passing through the lands and premises belonging to me and in my occupation, situate at Epsom, in the county of Surrey, or anyways in relation thereto. Dated, &c.

“CHARLES WOOD.”

[736] In July, 1856, after the passing of the act incorporating the Leatherhead Company, the line of the said Leatherhead railway was set out for construction by Mr. Crosse, the engineer of the company, over and across Wood's Field, according to the plans referred to in the act.

The Leatherhead railway was always intended to be and has been constructed as a railway with a single line of rails; and it was originally intended to have no station for the said railway at Epsom, but to use the station at that place of the London, Brighton, and South Coast railway.

Shortly after the passing of the act incorporating the Wimbledon Company, Mr. Crosse, the resident engineer of that company, proceeded to set out the Wimbledon line for construction.

The Wimbledon line was always intended to be and has been constructed as a railway with a double line of rails. Having no access to a station upon any other line at Epsom, the Wimbledon Company, previously to the 22nd of August, 1857, had determined to construct there a station and station works for themselves, upon (amongst other lands) a portion of that part of Wood's Field now in question; and, before the Wimbledon line had been completely set out by the engineer, it was arranged between the Wimbledon and Leatherhead companies that the Leatherhead Company should, instead of using the said station of the London, Brighton, and South Coast railway, have the joint use with the Wimbledon Company, upon certain terms agreed upon between them (which terms have been since embodied in the act, 22 & 23 Vict. c. iii.), of the station works so intended to be constructed by the Wimbledon Company.

The last mentioned act accompanied, and was to form part of the case.

[737] After this arrangement for the joint use of the proposed station, that is to say, in August, 1857, in order to facilitate the access of the Wimbledon Company to the said intended station and works, it was determined to alter the point of junction of the two lines; and an alteration was accordingly, within the limits of deviation of both companies, made by the engineers upon the working plans of the respective railways; but the point of junction as so altered is still in the field before mentioned as No. 26, and not in Wood's Field. The line of the Wimbledon railway was then set out for construction by the engineer of that company over and across the land in question, and up to the road called Clay Hill, being No. 28 in the Leatherhead plan, and so as with the station and works hereinafter mentioned to cover with some additional ground the whole of the ground over which the line of the Leatherhead railway had been previously set out for construction.

The line of the Wimbledon railway as thus set out was of a width adequate to a double line of rails, and to the construction of a station and station works. At the same time that the alteration was made in the point of junction, the line of the Leatherhead railway, which had been set out as aforesaid, was (but within the limits of the land in dispute) diverted some yards to the north, so that the rails on the portion so diverted would occupy no part of the ground upon which it was originally intended to lay them.

Some portion of the land upon which it was proposed to erect such station and works is beyond and on the south side of the limits of deviation allowed by the act for incorporating the Leatherhead Company.

Messrs. Brassey & Ogilvie were the contractors employed for the construction of both the said railways

They entered into an agreement with the Leatherhead Company in October, 1856, for the construction [738] of the Leatherhead line according to a plan and section thereof, being a plan and section of the same as set out in July, 1856, in the manner aforesaid, for construction: and they sublet this contract to one John Marsh. Marsh began the construction of this line in July, 1857, at a distance from but working towards Wood's Field. Shortly before the 28th of October, 1857, he had worked close up to the west end of Wood's Field, but had not entered thereon. Meanwhile, a contract had been entered into by the said Messrs. Brassey & Ogilvie on the 15th July, 1856, for the construction of the Wimbledon line in the manner and direction in which the same was set out after the said alteration of the point of junction and arrangement for the joint use of the said intended station and works.

The contract for the construction of the Wimbledon line was sublet by Brassey & Ogilvie to one Clarke.

In order to provide stuff for the construction of the intended station and works, it was at the time of the said alteration of the point of junction also determined to deepen two of the cuttings on the Leatherhead line. By this means an additional quantity of earth was furnished, which it was arranged by the two companies should be used in increasing the width of the proposed embankment across Wood's and the adjoining fields, to admit of the main double line of rails and of the intended station and works, including several lines of sidings; and this extra quantity of earth was afterwards in fact used for those purposes.

For the extra work rendered necessary by the deeper cuttings upon the Leatherhead line, as well as by the increased width of the embankment across Wood's and the adjoining fields, it was agreed that Messrs. Brassey & Ogilvie should be and they were afterwards in fact paid by the Wimbledon Company; but the residue of the expence of the said embankment, that is, of so [739] much of it as was sufficient for a single line of rails, was paid by the Leatherhead Company.

On the 28th of October, 1857, Mr. Roy, the solicitor of the Wimbledon Company, by their authority, sent the following letter to Mr. Ogilvie:—

“28 Great George St., Westminster,
“28th October, 1857.

“Wimbledon and Dorking Railway Company.

“Dear sir,—You may at once take possession of the following lands,—

“Henry Batson, Nos. 16, 18, in the parish of Ewell, containing 1a. 1r. 26p.

“E. R. Northey, Nos. 12, 13, 14, 17, 18, in the parish of Ewell, containing 2a. 2r. 2p.

“Charles Wood's, No. 34, in the parish of Epsom, containing 1a. 2r. 23p.—Yours
truly, “W. G. ROY.”

On the same day, Mr. Roy, by the like authority, sent to Mr. Crosse the following letter:—

“38 Great George Street, Westminster,
“28th Oct. 1857.

“Wimbledon and Dorking Railway Company.

“Dear sir,—Possession may at once be taken of the following lands, viz.

“Henry Batson, Nos. 16, 18, in the parish of Ewell, containing 1a. 1r. 26p.

"E. R. Northey, Nos. 12, 13, 14, 17, and 18, in the parish of Ewell, containing 2a. 2r. 2p.

"Charles Wood's, No. 34, in the parish of Epsom, containing 1a. 2r. 23p.—Yours truly,
"W. G. Roy."

After the receipt of these letters, the portion of Wood's Field in question was, on or about the 20th of [740] November, 1857, fenced off from the remainder thereof by a person named Trigg, who was paid for the same by the Wimbledon Company; after which Marsh entered upon Wood's Field, and commenced the construction of an embankment across the portion of Wood's Field in question.

After the embankment had been commenced, and in the early part of December, 1857, Marsh and his men dug some gravel out of the land in question in this cause; and this gravel was afterwards, in 1858, used upon the Wimbledon line.

The excavation of this gravel was paid for by the Wimbledon Company.

After Marsh had been some time at work upon the said embankment, he received orders from Brassey & Ogilvie to make it of increased width; and he accordingly increased the width, using for that purpose the earth from the extra cuttings hereinbefore mentioned of the Leatherhead line; and the embankment was eventually completed by him across Wood's Field of the width and in the manner in which the same had been set out for construction by the engineer of the Wimbledon Company.

Up to the 10th of February, 1858, Marsh and his men were the only persons who worked at the said embankment on the land in question.

Half only of the land actually taken would have been required for the Leatherhead Company: but, for a station and line for the Wimbledon Company as now constructed, the whole of the land actually taken would have been required.

At the time of the commencement of this action neither of the said lines had been opened for traffic, and no part of the said intended station and works had been constructed.

The said lines, station, and works have since been [741] completed in accordance with said arrangement of August, 1857.

The Leatherhead line was opened for traffic on the 1st of February, 1859, and the Wimbledon line and station on the 4th of April, 1859.

One of the lines of rails across Wood's Field, being the southernmost one, is used by both the said companies. The other is used by the Wimbledon Company only.

Neither company has entered the plaintiff's land for temporary purposes only. It was agreed that copies of the deposited plans, and of the plans referred to in the third section of the said act 22 & 23 Vict. c. iii., should form part of the case.

The court were to be at liberty to draw from the above facts all such inferences a jury might draw. Wood's Field is shewn in the said plans referred to in the third section of the said act of the 22 & 23 Vict. c. iii., the portion thereof in question in this cause being numbered 9 in such plans.

The defendants contended, that, under the circumstances stated in this case, the plaintiff was not entitled to recover possession of the land in question in this cause.

The plaintiff, on the other hand, contended that he was entitled to recover possession, as against both or one of the said companies, of the whole or some of the land in question in this cause.

The question for the opinion of the court was, whether the plaintiff was entitled to recover possession of the whole or part of the land in question in this cause. According to their decision, the verdict was to be entered for the plaintiff for the whole or part of the said land, or for the defendants.

Thrupp (with whom was Lush, Q. C.), for the plain-[742]tiff (a). The question

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the Epsom and Leatherhead Company had no title to the land in question:

"2. That, at the commencement of this action, the Wimbledon and Dorking Railway Company were not in possession of the land in question, within the legal meaning of the judge's order allowing them to come in and defend:

"3. That the land in question was not necessary for the sole use of the Wimbledon Company:

"4. That, if the land in question was necessary for the Wimbledon Company as

is whether the Wimbledon and Dorking Railway Company had power to take this land. The Epsom and Leatherhead Railway Company had lost their right, by reason of the want of notice. [Williams, J. Might the Wimbledon Company have had a separate station?] There is nothing in their act (20 & 21 Vict. c. lxxii.) specifically pointing to a joint station : but by a subsequent act, 22 & 23 Vict. c. iii., provision is made for the erection of a joint station. The question here is, how the junction of the two lines was to be effected. The 21st section of the Wimbledon and Dorking Railway Act enacts, that, subject to the provisions in this act contained, the company may make and maintain the railway hereinafter mentioned, with all proper stations, works, and conveniences connected therewith, in the lines and according to the [743] levels shewn upon the plans and sections relating to the said railway deposited as aforesaid, and upon the lands delineated upon the said plans and described in the book of reference to such plans, and may enter upon, take, and use all or any of the said lands as may be necessary for those purposes, that is to say,—"a railway commencing by a junction with the London and South Western railway in the parishes of Wimbledon and Merton, or one of them, in the county of Surrey, at or near the bridge thereon across a public highway leading from Merton to Kingston, called Combe Lane, and terminating in the said parish of Epsom by a junction with the line of the Epsom and Leatherhead railway, as authorized to be made, in a field at the back or north side of the High Street of Epsom." That section does not authorize the Wimbledon and Dorking Railway Company to take any land beyond what is required for the railway itself. The notice of intention to take lands is provided for by the 18th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the provisions of which are incorporated with the special act, in these terms : "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act, or any act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof : and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for [744] the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." In *The Queen v. The South Wales Railway Company*, 14 Q. B. 902, the South Wales Railway Company, having power to take and purchase lands and to construct a railway according to the plans and books of reference deposited under their act, gave notice to the Llanelly Railway and Dock Company that they (the South Wales Railway Company) required to purchase a small piece of land, on part of which the Llanelly railway was actually constructed, such piece of land being set out in the said plans and books of reference as part of the proposed line of the South Wales railway ; but they afterwards refused to issue their warrant to the sheriff to assess the amount of purchase-money, on the ground that the Llanelly Railway and Dock Company had no power under their act to sell any portion of land on which their railway was constructed. On mandamus, at the suit of the Llanelly Railway and Dock Company, to the South Wales Railway Company to issue their warrant, it was held, that, as there was no express clause in any special or general act of parliament which authorized either the Llanelly Railway and Dock Company to sell any part of their actual line of railway, or the South Wales Railway Company to purchase it, the authority was not to be implied from the general power given to the South Wales Railway Company to make their line and to purchase lands according to their

the line of that company was set out, that company had nevertheless no power to take this land, or at the least no power to take the portion of it upon and over which the Leatherhead railway passed, or the portion of it to the south of the Leatherhead railway :

"5. That the Wimbledon Company had no power to take the land in question, or any part of it, for the joint use of themselves and the Leatherhead Company :

"That the Wimbledon Company had no power to take the land in question, or any part of it, for the use or behoof of the Leatherhead Company."

deposited plans and books of reference. The present case is stronger than that; for, the plans deposited by the Wimbledon Company shewed no intention that their line should cross the field in question. [Byles, J. Under what authority, then, do they assume the right to take this land?] Under s. 22 of the special act, 20 & 21 Viet. c. [745] lxxii., which enacts that "the company shall, if the board of trade shall so require, and either before or at any time after the railway shall be open for public traffic, construct and at all times thereafter maintain the railway as a double line of railway." This is in effect an attempt to revive the expired powers of the Epsom and Leatherhead Railway Company. In *Dodd v. The Salisbury and Yeovil Railway Company*, 5 Jur. st. N. S. 782, the Salisbury and Yeovil Railway Company were authorized by their act of parliament to make deviations in their line of railway: within the limits of deviation the house of M. D. stood near a road, which, according to the terms of the act, the railway company were authorized to make and raise at a certain rate of inclination, and carry over their line of railway. The railway company afterwards proposed to alter the course of the road, according to a plan which would make it necessary to pull down M. D.'s house: a notice was served on the plaintiffs, and an offer to accept a certain sum for the house was made by one of them, which was not accepted. The railway company being about to take possession, under the 85th section of the Railways (Clauses Consolidation Act, 1845, the plaintiffs moved for an injunction, on the ground that the proposed new road was intended for the accommodation of an adjoining landowner and proprietor, who was to pay part of the expenses of the alteration: and the injunction was granted. That decision was affirmed on appeal by the Lords Justices: see 33 Law Times, 311. *The Great Northern Railway Company v. The East and West India Docks and Birmingham Junction Railway Company*, 7 Railway Cases, 356, and *The London, Brighton, and South Coast Railway Company v. The London and South Western Railway Company*, 5 Jurist, N. S. 801, were also referred to.

[746] Bovill, Q. C. (with whom was Honyman), contra (a). The 4th section of the Wimbledon and Dorking Railway Act, 1857, describes the purpose of the incorporation of the company: it enacts that the subscribers "shall be united into a company for the purpose of making and maintaining the railway thereafter described, with all proper works and conveniences belonging thereto, according to the provisions of that act and the acts incorporated therewith, and for other the purposes therein and in the said acts contained;" and that they shall have power "to purchase and hold lands for the purposes of the undertaking within the restrictions therein and in the said acts contained." Now, it is not pretended that the land in question was not required for the purposes of the Wimbledon and Dorking railway: on the contrary, the case expressly states that it is so required. Then, the 16th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 [747] Viet. c. 20), provides that it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, to "make or construct in, upon, across, under,

(a) The points marked for argument on the part of the defendants were as follows:

"1. That, upon the facts stated in the special case, the plaintiff is not entitled to recover:

"2. That the facts stated in the case shew that the land in dispute was bonâ fide required for the Wimbledon and Dorking Company for the purpose of their undertaking:

"3. That the lands being delineated on the plans deposited by the Wimbledon and Dorking Company, and described in their book of reference, that company had power to take such lands under the compulsory clause of their act, in the mode stated in the case:

"4. That the notice to take the land given by the Wimbledon and Dorking Railway Company, and the claim made by the plaintiff thereunder, amounted to a contract by that company and the plaintiff for the land in question at a price to be fixed in the statutory manner:

"5. That the fact of the Wimbledon and Dorking Company allowing the Epsom and Leatherhead Company to use the land in dispute jointly with the former company, will not entitle the plaintiff to claim the land, the same being bonâ fide required for the purposes of the company."

or over any lands, or any streets, &c. within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper ;” and “may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway.” In *Cotter v. The Midland Railway Company*, 2 Phillips, 469, it was held, that, under the words “railway and works,” a railway company had a right, by the compulsory powers of their act, to take a piece of land for the purpose of building a station. And in *Sadd v. The Maldon, Witham, and Braintree Railway Company*, 6 Exch. 143, it was held, that, under the 16th section of the Railways Clauses Consolidation Act, a railway company empowered by a special act incorporating the provisions of the general act to construct “a railway and works” within certain limits as to space and time, may, within such limits, without the consent of the owner, take the land for the purpose of constructing the various works mentioned in the 16th section of the general act, although such works be not necessary, but only convenient for the purposes of the company. In *Crawford v. The Chester and Holyhead Railway Company*, 11 Jurist, 917, by an act of parliament authorizing an extension of a line of railway and the construction of a station (which act incorporated the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, and the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20), it was enacted, that, subject to the powers of deviation in the said Railways Clauses Consolidation Act [748] contained, it should be lawful for the said company to make and maintain the said extension and the said station, and the said station, and the works connected therewith, in the lines, &c., and upon the lands delineated upon the said plans, &c., and to enter upon, take, and use such of the said lands as should be necessary for the purpose. The plaintiff’s lands were delineated upon the plans, and marked 1 and 4, and the line of deviation passed through both lots. The company required the entire of lots 1 and 4 for the purpose of extension and the station : and it was held by Sir L. Shadwell, V. C., that the company were empowered to take all or any part of the lands delineated on the plans, although beyond the line of deviation, and although they were not so entitled under the powers of deviation contained in the Railways Clauses Consolidation Act. By the interpretation clause (s. 3) of the general act, it is provided that the expression “the railway” shall mean the railway and works by the special act authorized to be constructed. The 49th section of the special act authorizes traffic arrangements with the London and South Western and the Epsom and Leatherhead railway companies. [Byles, J. One or other of these two companies must buy the land : they could not have each an undivided moiety.] That clearly is so. The cases cited on the other side have no application whatever.

The cases of *The North British Railway Company v. Tol*, 12 Clark & Fin. 722, *Beardner v. The London and North Western Railway Company*, 1 M’N. & G. 112, and *Pinchin v. The London and Blackwall Railway Company*, 1 K. & J. 34, 5 De Gex, M’N. & G. 851, were also referred to.

Lush, Q. C., in reply. No part of the station is erected on the plaintiff’s land. The principle involved in the case of *Dodd v. The Salisbury and Yeovil Rail* [749] *way Company*, 5 Jurist, N. S. 782, is clearly applicable here. In *Eversfield v. The Mid-Sussex Railway Company*, 28 Law J., Ch. 107, a railway company had compulsory powers to purchase soil for their works, and to purchase such of the lands delineated in the plans, and within the limits of deviation indicated in the plans and books of reference, and to enter upon, take, and use such of the said lands as should be necessary for such purposes. They entered upon a small piece of land belonging to A. B., situate within the limits of deviation, and made a contract with him for the purchase of the soil found thereon for the purpose of making an embankment forming part of the railway works situate at some distance from the other lands of A. B. After this the company determined on the purchase of this small piece of land in fee-simple, and gave the required notices for the assessment of its value. It appeared that the company did not want the small piece of land for any other purpose than that of taking the soil for the embankment. On a bill filed by A. B., one of the Vice-Chancellors granted an injunction to restrain the company from taking the piece of land ; and, on appeal (the motion being turned into a motion for a decree), it was held that the fee-simple of the land was not necessary for the making and maintaining the railway within the meaning of the parliamentary powers of the company, but that, the soil

alone being wanted, which they might purchase elsewhere under their powers, the injunction must be made perpetual.

ERLE, C. J. In this case the plaintiff had brought an ejectment on the ground that the land in question never passed from him: and the point to be determined is, whether the land passed to the Wimbledon Company. It appears that an act of parliament had passed authorizing the Leatherhead Company to carry their line through the land in question: but that company never gave any notice, and so never acquired any right to the land. Another act passed enabling the Wimbledon Company to construct a line from Wimbledon to Dorking, which was to come down to a point of junction with the Epsom and Leatherhead railway at a short distance from the plaintiff's field: but, in the parliamentary plans shewing what lands might be required for the purposes of the Wimbledon Company, the land now in question is included. It is said that the Wimbledon line as a line of transit terminated before it came to the plaintiff's land, at a point marked in the parliamentary plans as the junction between the Wimbledon and the Leatherhead line, and therefore that the rights claimed over the plaintiff's land were rights in respect of stations, works, and conveniences connected with the railway. Take it on that assumption. The Wimbledon Company obtained the usual powers of lateral deviation, and they claimed a right to take the plaintiff's land to a point beyond the suggested termination of their line, but within the limits of deviation. They claimed a right to take the land for the purposes of stations, works, and conveniences connected with the railway. It is stated as a fact in the case that the land in question was required for the purpose of a station for the Wimbledon Company, and that they had taken it for the purpose of a station, and had laid down their rails upon it and so prolonged the line marked upon the parliamentary plans deposited by them into the plaintiff's land so taken for the purpose of a station. But, it is said that, if the Wimbledon Company contemplated the taking of the land for the purpose of prolonging the line beyond the terminus appointed by the special act, it would be a forfeiture, and that their putting their rails into the station was [751] a prolongation of the line in excess of their powers, and so a forfeiture. It seems to me to be idle to suppose that it could have been the intention of parliament that the company should stop their trains short of the station. Having authorized the company to take the land for the purposes of their stations, works, and conveniences, it appears to me that they authorized them to continue their line into the land so taken for the purposes of a station, and to lay down such rails as might be required for the more convenient use of the station. That being so, it seems to me that the whole of the case on the part of the plaintiff is disposed of, because it is found that the Wimbledon Company complied with all the conditions necessary under the parliamentary provisions to vest in themselves the power of compulsorily taking the plaintiff's land.

One ground of objection urged against the Wimbledon Company, is that, in the notice which they gave the plaintiff, they intimate that the line of railway will run through his land, and that the land is required by the company for the purposes of their railway: and it is contended that all their rights are defeated because they have not stated that the line will run as marked in the parliamentary plan, and will be continued into the station upon the land required for the purposes of a station. That, as it seems to me, is a very narrow and perverted construction of the notice. The real substance of the question, is this,—Have the Wimbledon Company need of this land, and have they given the notice required to clothe themselves with the right of taking it under the compulsory clauses of the statute? I am of opinion that the notice gives full information to the owner of the land that it is to be taken for the purposes of the railway, and that there is nothing therein to defeat or abridge its effect.

Another main ground of objection is this. The [752] Epsom and Leatherhead Railway Company first obtained an act of parliament authorizing them to make a railway from Epsom to Leatherhead, prior to which they gave the plaintiff notice of their intention to apply for powers which would enable them to take his land, but they never gave him notice that they meant to take his land. The Wimbledon and Dorking Railway Company, having subsequently obtained an act authorizing them to make a railway from Wimbledon to Epsom, which was to terminate by a junction with the line of the Epsom and Leatherhead railway, gave the plaintiff notice that their line would pass through the land in question, and that the same would be required by them for the purposes of their railway. The Wimbledon Company then agreed with the

Leatherhead Company, with the sanction of parliament (22 & 24 Vict. c. iii.), to construct a station at Epsom for their joint use: and the result of that agreement was that the Wimbledon Company entered upon the land and laid down a double line of rails, and agreed with the Leatherhead Company, that, as to one of those lines, the Leatherhead Company should use it as a junction, and, having gone into the station at one end and used the station, should go out at the other end towards Leatherhead on a line of their own: the other line being exclusively used by the Wimbledon Company. Upon these facts, it is urged on the part of the plaintiff, that, if the Wimbledon Company gave a notice for the purpose of giving to the Leatherhead Company an unauthorized advantage, they thereby forfeited their right to take the land. The first answer, however, to that argument is that, if a railway company authorized to take land for the purpose of the undertaking complies with all the requirements of the act of parliament, it acquires a legal title to the land. If the purpose of the company were to use the land in a manner which would be [753] *ultra vires*, as well as for the purpose of their railway and works, I am not aware that that would operate a forfeiture and give the owner a right to maintain ejectment for the land. I cannot assent to that proposition. Possibly it might be ground for an application to a court of equity for an injunction: and cases were referred to with that aspect. But it is unnecessary to go into that here, because I am of opinion that, under the 49th section of the Wimbledon and Dorking Railway Act, the two companies might legitimately arrange for the joint use of the station. That section enacts that "it shall be lawful for the (Wimbledon) company on the one hand, and the London and South Western Railway Company and the Epsom and Leatherhead Railway Company on the other hand, to enter into and carry into effect such agreements and arrangements as they may think fit in respect of the regulation and management by the company and such two companies of the traffic upon or over their respective railways, or any part thereof, and with respect to the division and apportionment between the respective companies parties to any such agreement or arrangement in respect of the expenses incurred, and of the tolls, rates, and charges received in respect of such traffic." It seems to me that parliament contemplated that these two companies might act in conjunction. It is manifestly in furtherance of the intention of the Legislature that the Wimbledon Company, having taken the land in question for the purpose of their railway, should have power to make an arrangement with the Leatherhead Company for the joint use by them of the line lawfully laid down by the Wimbledon Company, and for the use of the station which was contemplated as part of the line. Then, the Leatherhead Company having come into and used the station, there was nothing to prohibit them from [754] using the line to go on towards Leatherhead. I think the legal title to the land in question was taken out of the plaintiff by the steps taken by the Wimbledon Company, and that none of the points relied on by him affect the validity of that company's title.

The argument of this case has occupied a very considerable time; and I have had some difficulty in ascertaining what it was that the plaintiff relied upon. The plaintiff has had all that he could be entitled to when he obtained the value of the land from the Wimbledon Company. When the fee-simple was once parted with to that company, I am utterly unable to comprehend how the plaintiff could be interested as to whether the land was exclusively used for the purposes of the Wimbledon Company, or whether they allowed the Leatherhead Company to participate in the enjoyment of it. We can only deal with the legal rights of parties. It seems to me that the plaintiff has shewn no legal right to maintain this action, and consequently that our judgment should be for the defendant.

WILLIAMS, J. I am of the same opinion. Two points in substance have been contended for on the part of the plaintiff. The first is, that the Wimbledon Company had no authority under their act to take the plaintiff's land for the purpose for which they have taken it, that purpose being, though a purpose of their own, not such a purpose as was contemplated by the act of parliament. The second point I understand to be this, that, assuming that the Wimbledon Company had power to take the land for their own purposes, in reality they did not take it for their own purposes, but, as to a portion of it at least, for the purposes of the Epsom and Leatherhead Railway Company. Upon that part of the case, I must confess I do not entertain quite so clear an opinion as my Lord Chief Justice has [755] intimated: and I think that, if the plaintiff's view of the facts were correct, the point might be open to much argument and be deserving of consideration.

As to the first question, it appears to me, upon looking at the act of parliament, and at the documents referred to in the special case, to be quite clear that the Wimbledon Company had power to take the land in question, if it were really required by them for the purpose of constructing thereon a portion of their line, or for the purpose of a station, works, and conveniences connected with their railway.

As to the second point, the case stands thus:—The plaintiff insists that, as to a portion of the land in question, viz. that portion over which the line used by the Leatherhead Company runs, the Wimbledon Company did not in reality purpose to take that as a portion of their own property, or for the direct convenience of a junction of their line with the Epsom and Leatherhead line, but to take it for the purpose of forming a portion of the Epsom and Leatherhead line. If that had manifestly been so upon the facts, if the object of the Wimbledon Company in taking the land had been merely to enable the Leatherhead Company to complete their line, and the former company were only to have running powers or some such enjoyment over it, I think the case would be open to some difficulty. But, upon the facts stated in the special case, I do not think we are justified in coming to the conclusion that that was the purpose for which the Wimbledon Company required the land. It appears that the Wimbledon Company gave the plaintiff notice that they required this land for themselves as a portion of their line and the works and conveniences connected therewith: and the effect of that notice, and of the statute, was to vest in them the land comprised in [756] that notice. I see nothing upon the face of the case which leads to the conclusion that there was any bargain between the Wimbledon Company and the Leatherhead Company that there should be any transfer of the property by the Wimbledon Company, when acquired by them, to the Leatherhead Company. In support of the plaintiff's contention, two circumstances are relied on: the first is that, in the construction of the line, a portion of the expence was borne by the Leatherhead Company, and that that portion of the embankment over which the line used by that company ran was constructed by their agent, who was to be paid by them: and the other is, that the Leatherhead line was opened for traffic first as an independent line of railway. But I do not think that these circumstances are sufficient to vary the ordinary result of the steps taken by the Wimbledon Company to acquire the land, viz. to vest the legal property in them. It is clear that, unless the arrangement between the Wimbledon Company and the Leatherhead Company goes so far as absolutely to vest the soil itself in the latter, it is of no importance in the case, because there is no legal impediment or objection in the Wimbledon Company under their act of parliament getting and retaining possession of land which they wanted and which they had a right to acquire for the purpose of their railway, works, and conveniences, that, when they have acquired it, they permit the Leatherhead Company to have a joint use with themselves of the land so acquired. The soil remains vested in the Wimbledon Company, notwithstanding the arrangement under which the enjoyment of it is shared by them with the Leatherhead Company. For these reasons, I am of opinion that the defendants are entitled to judgment.

[757] BYLES, J.(a). Notwithstanding we have had the advantage of listening to both the learned counsel for the plaintiff, I think the defendants are entitled to our judgment. It was for some time in controversy, but it is now conceded that the land in question was within the limits of the line of deviation of the Wimbledon Company, and that that company had an undoubted right to take it under their notice, if they required it for the purpose of a station for their own use. It is also clear from the act of parliament, that, at the time they took the land, it was contemplated that there was to be a junction of the two lines of the Wimbledon and the Leatherhead companies: and, wherever there is a junction, there necessarily must be some portion of the line, longer or shorter according to circumstances, of which both companies will require the use. The 21st section of the Wimbledon and Dorking Railway Act alludes to this junction; for, it describes the railway authorized by that act to be made, as being "a railway commencing by a junction with the London and South Western railway, in the parishes of Wimbledon and Merton, or one of them, in the county of Surrey, at or near the bridge thereon across a public highway leading from Merton to Kingston, called Combe Lane, and terminating in the said parish of Epsom by a junction with the line of the Epsom and Leatherhead railway as autho-

(a) Willes, J., was engaged in the Divorce Court.

rized to be made in a field at the back or north side of the High Street of Epsom : ” and the 49th section enables the Wimbledon Company on the one hand, and South Western Railway Company and the Epsom and Leatherhead Railway Company on the other hand, to enter into and carry into effect such agreements and arrangements as they may think fit in respect of the regulation and management by them and such two companies of the traffic upon or [758] over their respective railways, or any part thereof. Some land, therefore, it is clear, would be needed for the joint purpose of the two railways ; and the statute must have intended that it should be acquired somehow. How, then, was it to be acquired ? Each company might have given notice to the owner that they required an undivided portion of it. That would not do. The owner could not be compelled to sell an undivided portion ; neither company, therefore, could give such a notice ; there is no authority and no provision in the act of parliament for such a proceeding. A joint notice cannot be given by the two companies. What, then, is to be done ? One of them must necessarily give a notice for the land which is to be used by the two jointly. Accordingly, the Wimbledon Company gave the plaintiff notice that they required this land, which they clearly had a right under their act of parliament to take, for the purpose of their own line only. If in their notice they had said that the land was required for the purpose of a station, the notice would have been unobjectionable. If they had afterwards run a line or a double line of rails into the station, it would have been perfectly competent to them to do so. But it is said that the notice is bad because it states that the line of railway will pass through the land, whereas, it is contended, it ought to have stated that the station or the works and conveniences connected therewith would be constructed upon the land. But it seems to me that the line of railway does in one sense pass through the land in question, because, although the trains would pass the actual line of junction before arriving at the station, yet it was a line used by the Wimbledon Company, and which might have been used by them even if the line had extended no further ; for they might surely have laid down a line of rails into their station. In fact it is a [759] line which is used by the Wimbledon Company in the progress of completing the junction. It is said that the owner of the land should have precise notice where it is proposed the line of railway should run. It seems to me that this notice gives him all the information he could reasonably require : the line does pass through his land in the sense in which it is necessary that he should understand that statement. I think there is nothing objectionable in the form of the notice. But then it is said that it was not competent to the Wimbledon Company to take land for the purposes of the Leatherhead Company, who had lost their power to take it for themselves. But this land was not so taken : it was not taken for the purposes of the Leatherhead Company, but it was taken by the Wimbledon Company for the purposes of their own railway and works. And, even if it had appeared that the land was taken for the joint purposes of the two companies, inasmuch as it was necessary for the purposes of effecting the junction, and as only one of them could take it, and the Wimbledon Company alone was in a position to do so, I should have thought that the notice given by them was within the powers of their act. The land, then, being vested in the Wimbledon Company, it is quite immaterial what was afterwards done with it. The statutory conveyance has clearly vested the soil of this portion of the land in the Wimbledon Company : and that constitutes a sufficient defence to this action.

Judgment for the defendants.

[760] THE GUARDIANS OF THE POOR OF THE CITY OF LONDON UNION, *Appellants* ; DAVID GEORGE ACOCKS, one of the Overseers of the Poor of the Parish of St. Mary Mounthaw, *Respondent*. June 8th, 1860.

[S. C. 8 W. R. 608. Principle approved, *Saul v. Wighton Sanitary Authority*, 1886, 56 L. T. 440. Applied, *Caistor Union v. North Kelsey Overseers*, 1890, 59 L. J. M. C. 103.]

The 6th section of the statute 22 & 23 Vict. c. 49, is retrospective in its operation.—The guardians of the London Union made an order upon one of the parishes comprised therein for the payment of a sum which included a balance due from the parish at the preceding half-year, which balance was made up of the accumulated balances of several successive years :—Held, that the order was rendered invalid by

the 6th section of the 22 & 23 Vict. c. 49.—A refusal of justices to order payment of money under such an order is no bar to a future proceeding to enforce it. And such refusal is ground of appeal to one of the superior courts, under the 20 & 21 Vict. c. 43.

This was a special case stated by justices of the city of London, under the 20 & 21 Vict. c. 43.

On the 7th of January, 1860, at a special sessions of the peace of the city of London summoned for the purpose, the respondent appeared before the justices in answer to a summons issued against him upon the application of the appellants, under the 2 & 3 Vict. c. 84, to shew cause why a sum of 412l. required by the appellants by a contribution-order dated the 13th of September, 1859, to be paid to their treasurer by the respondent and other officers of the respondent's parish on the 10th of October, 1859, had not been paid; and the said complaint was then heard before the justices at the said sessions, and certain questions of law arose for their consideration; and they determined the said matters in favor of the respondent. The appellants, being dissatisfied with their decision, as being founded upon an erroneous determination of the said questions of law, duly applied to the justices to state and sign a case setting forth the facts and the grounds of their determination for the opinion of this court. The justices thereupon stated the following case, setting forth the facts and grounds of their determination:—

The appellants, the guardians of the poor of the City of London Union, were incorporated more than twenty years ago; and the union consists of ninety-eight parishes, of which the respondent's parish is one.

The appellants, under the authority of the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, and of the orders of [761] the poor law commissioners made by virtue thereof, have had the management of the relief and maintenance of the poor of the said ninety-eight parishes of the said union from the time of their said incorporation down to the present time; and have levied contributions upon the said several parishes for the purpose of defraying the expenses of so doing.

The 81st and 82nd articles of the consolidated order of the poor law commissioners, dated the 24th of July, 1847, are as follows:—

Article 81. "The clerk shall four weeks at least before the 25th day of March and the 29th day of September, respectively, in each year, refer to and ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half of the last year corresponding to the half year next coming, and shall estimate, and as near as may be divide amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year; and he shall also estimate the probable balance due to or from the parish at the end of the current half-year; and shall then prepare the orders on the several parishes for the sums which upon such computation it shall appear necessary for them to contribute to the expenses of the union for the coming half-year; and the orders so prepared shall be laid before the guardians for their consideration three weeks at least before the expiration of the current half-year."

Article 82. "The guardians shall make orders on the overseers or other proper authorities of every parish of the union, from time to time, for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the [762] union, and for any other expenses chargeable by the guardians on the parish; and in such order the contributions shall be directed to be paid in one sum, or by instalments, on days specified, as to the guardians may seem fit."

The course pursued by the appellants in levying these contributions upon the said several parishes, is by such orders directed to be as follows:—

Four weeks at least before the 25th of March and the 29th of September, respectively, in each year, the clerk of the appellants shall refer to and ascertain the cost to each parish in the union for the maintenance of the poor and other separate charges, as well as for the common charges incurred in the half of the last year corresponding to the half-year next coming, and estimate, and as near as can be divide amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year, and also estimate the probable balance due to or from the parish at the end of the current half year, and then prepare orders on the several parishes for the sums

which upon such computation it appears necessary for them to contribute to the expenses of the union for the coming half-year: and the orders so prepared are to be laid before the appellants for their consideration three weeks at least before the expiration of the current half-year.

The appellants are directed then to make orders on the overseers or other proper authorities of every parish of the union, from time to time, for payment to the appellants of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the appellants on the parish; and in such orders the contributions are directed to be paid in one sum, or by instalments, [763] on days specified, as to the appellants it seems fit. The said balance so taken into calculation in favour of or against the parish in estimating the amount of the contribution-orders for the following half-year, is directed to be and is estimated by placing the sums of money received from the parish by the treasurer of the union in the course of the half-year then drawing to a close on one side of the account, and the actual expenditure and sums chargeable to the parish for the same half-year on the other, and the difference (if any) constitutes the balance. A copy of this account was made up to Michaelmas, 1859, and was delivered to the respondent.

The clerk of the appellants, in estimating whether any and what balance as aforesaid is to be taken into account in favour of or against any parish, is not guided by the amount which may have been called for by the appellants in the contribution-orders for the half-year. These calls, it appears, generally turn out either to exceed or fall short of the actual amount of charges and expenditure for which the parish is liable in the course of the half-year: it being the exception for the contribution-orders made prospectively as aforesaid to be calculated so exactly as to be of the precise amount which turns out eventually to have been necessary.

On the 20th of August, 1859, the clerk to the appellant, following the provisions of the 81st article of the consolidated order of the poor law commissioners, prepared the following estimate:—

“Estimate made by the clerk to the board of guardians of the City of London Union this 20th day of August, 1859, for determining the amount of the order for contribution to be paid by the churchwardens and overseers of St. Mary Mounthaw, for the half-year ending Lady-day, 1860.

[764] “Cost to St. Mary Mounthaw for maintenance of the poor, viz.

	£	s.	d.	£	s.	d.
“First. In maintenance	27	2	11½			
Out relief	64	2	11			
Maintenance of lunatics in asylum	16	18	0			
Children at school	10	0	0			
	<hr/>			118	3	10½
Secondly. Other separate charges, viz.						
Vaccination fees	0	8	9			
Registration fees	0	10	6			
Collector's poundage	3	19	8			
	<hr/>			4	18	11
Thirdly. Common charges, viz.						
School common charges	12	0	0			
Union common charges, loans, and interest	99	0	0			
	<hr/>			111	0	0
Fourthly. Estimate of the probable balance due from the parish at the end of the current half-year, September 29th, 1859				590	0	0
	<hr/>			£824	2	9½

The clerk to the appellants then prepared an order upon the respondent's parish for the payment of the sum of £824., which, upon the above computation, appeared to the appellants necessary for the said parish to contribute to the expenses of the union

for the coming half-year: and the order so prepared was placed before the appellants for their consideration three weeks at least before the expiration of the then current half-year: and afterwards, on the 13th of September following, the appellants made an order upon the churchwardens and overseers of the respondent's parish, of which the following is a copy:—

“City of London Union.

“To Henry Rogers and Walker Wilson Brown, churchwardens, and to David George Acocks and [765] Samuel Rosser Kelly, overseers, of the parish of St. Mary Mounthaw.

“You are hereby ordered and directed to pay to Samuel George Smith, Esq., of No. 1 Lombard Street, on behalf of the guardians of the poor of the City of London Union, in the following manner, that is to say, at No. 1 Lombard Street aforesaid, on the 10th day of October next the sum of 412l., and on the 9th day of January next the sum of 412l., towards the relief of the poor thereof, and to the contribution of the parish to the common fund of the union, and such other expenses as are chargeable by the said guardians on the said parish, and to take the receipts of the said Samuel George Smith indorsed upon this paper for the said sums of 412l. and 412l.

“Given under our hands at a meeting of the guardians of the poor of the said City of London Union held on the 13th day of September, 1859.”

(Signed) “JAS. ABBISS, presiding chairman.

“HENRY SHARP, } guardians.

“GEO. T. CHRETIEN, }

“JOHN BOURING, clerk to the guardians.

“Note. The churchwardens and overseers are requested to be punctual in making the above payments.”

This order was served upon the respondent on the 22nd of September, 1859; but the said sum of 412l. was not paid on the said 10th of October, nor any part thereof, but payment of the same was refused on the part of the said parish authorities.

It was for the non-payment of this arrear of 412l. that the said summons so heard before the justices on the 7th of January, 1860, was issued.

On cause being shewn on behalf of the respondent why the said sum had not been paid, it was alleged as the cause of refusal to pay the same, that the said sum of 824l. required by the said contribution-order to be [766] paid by the respondent's parish in the course of the said half-year ending Lady-Day, 1860, included the said balance alleged to have been due from the said parish to the appellants at the end of the half-year ending Michaelmas, 1859; and for this cause it was contended, upon the grounds following, that the said contribution-order, to the extent of the said balance at least, was invalid,—First, — that the said balance being claimed for charges and expenditure incurred before the commencement of the half-year ending Lady Day, 1860 (and which included the balances ascertained at several previous half years in respect of which the said contribution-order was made), was a retrospective charge, and therefore, according to the law established by the decision of the court of Exchequer Chamber in the case of *Waddington v. The City of London Union*, 1 Ellis, B. & E. 370, illegal; and that the enactment of the 6th section of the statute 22 & 23 Vict. c. 49, did not authorize the making of a retrospective call, but merely provided that the whole call or order shall not be deemed to be illegal on the ground that the said call or order for contribution includes a balance due from any parish or parishes at the time when the half yearly accounts are made up and balanced as aforesaid.

Secondly, — it was stated as a fact, on behalf of the respondent, and admitted by the appellants, that the said balance against the said parish was not wholly or even principally incurred for the first time in the half year ending Michaelmas, 1859, but that there had in fact been a greater or less balance against the parish at the end of every half-year for many years back, such successive balances having been carried into the accounts of each succeeding half year in the manner already described, being sometimes enlarged and sometimes reduced, according as the money actually paid by the parish to the treasurer of the union in any given [767] half year fell short of or exceeded the actual amount of expenditure by the appellants on behalf of the parish during that half-year.

The following tabular statement, shewing the half-yearly calls upon the respondent's

parish and the expenditure by the appellants on behalf of the parish for every half-year, together with the actual payments made by the parish to the treasurer of the union for and during every half-year from Lady-Day, 1847, to Michaelmas, 1859, was admitted by the appellants to be correct:—

[768] *City of London Union and the Parish of St. Mary Mounthaw.*

Table of half-yearly calls upon, expenditure for, and receipts from, this Parish, commencing with the half-year ending Michaelmas, 1847, and ending with the half-year ending Lady-Day, 1859, shewing the balances due to or from this parish at the end of every half-year:—

Half year ending	Amount of call.	Expenditure of guardians for parish.	Receipt by treasurer from parish.	Balance due	
				to parish.	from parish.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1847. Lady-Day .					56 4 5
„ Michaelmas .	146 0 0	90 16 4	130 17 6	40 1 2	
1848. Lady-Day .	110 0 0	95 6 8	108 19 0	13 12 4	
„ Michaelmas .	100 0 0	96 10 0	94 7 3		2 2 9
1849. Lady-Day .	109 0 0	92 11 6	84 9 0		8 2 6
„ Michaelmas .	130 0 0	139 0 6	72 16 6		66 4 0
1850. Lady-Day .	116 0 0	154 17 3 ³ ₄	100 17 9		53 19 6 ³ ₄
„ Michaelmas .	149 0 0	138 11 4	107 7 11		31 3 5
1851. Lady-Day .	134 0 0	149 7 2 ³ ₄	113 19 6 ³ ₄		35 7 8
„ Michaelmas .	125 0 0	136 17 0	125 4 1		11 12 11
1852. Lady-Day .	134 0 0	146 0 1 ¹ ₂	119 19 0		26 1 1 ³ ₄
„ Michaelmas .	382 0 0	126 0 5	137 6 6	11 6 1	
1853. Lady-Day .	410 0 0	156 15 0	141 14 6		15 0 6
„ Michaelmas .	137 0 0	174 18 6 ¹ ₂	137 12 6		37 6 0 ¹ ₂
1854. Lady-Day .	174 0 0	183 1 5	163 16 0		19 5 5
„ Michaelmas .	199 0 0	184 9 2	217 17 6	33 8 4	
1855. Lady-Day .	183 0 0	178 19 0 ¹ ₄	104 13 0		74 6 0 ¹ ₄
„ Michaelmas .	205 0 0	165 9 7 ¹ ₂	137 8 6		28 1 1 ¹ ₄
1856. Lady-Day .	179 0 0	227 14 11 ¹ ₂	145 18 6		81 16 5 ¹ ₂
„ Michaelmas .	190 0 0				27 16 9 ¹ ₂
1857. Lady-Day .	230 0 0	349 18 3 ¹ ₂	322 1 6		
„ Michaelmas .	230 0 0	160 0 2	138 3 6		21 16 8
1858. Lady-Day .	208 0 0	219 14 11	123 10 9		96 4 2
„ Michaelmas .	683 0 0	146 9 0	145 12 6		
1859. Lady-Day .	818 0 0	186 2 7 ¹ ₂	17 18 7 ¹ ₂	3 18 10	
			165 0 0		
			8 5 4		
				£102 6 9	£692 11 6 ³ ₄
					102 6 9
					£590 4 9 ³ ₄

And it was further contended upon this point, that it was illegal on the part of the appellants to postpone the enforcing payment of these charges, and to introduce them in the form of balances in successive half-years, so as in fact to cast upon the present and future rate-payers the burden of charges incurred several years previously, as would appear from the above account, by which it might be seen that at times when the half-yearly payments made by the parish were sufficient to cover the current expenditure, there was still a continued half-yearly balance against the parish not paid off, carried over from half-year to half-year.

Thirdly,—it was stated on behalf of the respondent, and admitted by the appellants, that the call or contribution-order made by the appellants for the half-year ending Michaelmas, 1859, and dated the 8th of March, 1859 (in the computation of which the balance appearing by the above table against the parish at the end of the half-year ending Lady-Day, 1859, was taken into account in the manner already explained), being in arrear, the respondent was summoned under the said statute of the 2 & 3 Vict. c. 84, to shew cause at a special sessions as aforesaid why the amount had not been paid; and that the complaint was heard at such special sessions, when the

respondent shewed cause, [769] and objected that the said call or contribution-order could not be enforced by reason of the said balance having been included therein : and that the justices at such special sessions dismissed the said summons, and that the appellants, being dissatisfied with the said determination, then duly made application to the said justices to state a case for the opinion of one of the superior courts of law at Westminster, pursuant to the said statute of the 20 & 21 Vict. c. 43, and that the appellants had afterwards abandoned the same : upon which ground it was contended before the justices that such determination by the justices, and such abandonment of the special case by the appellants, finally disposed of the balance so standing in the said account against the parish at the end of the half-year ending Lady-Day, 1859 ; and that therefore the introduction of that balance into the account for the half-year ending Michaelmas, 1859, and the consequent estimate of a balance against the parish at Michaelmas, 1859, was erroneous in point of law ; and that the contribution-order for the half-year ending Lady-Day, 1860, made upon such a computation was wrongly made.

Since the foregoing table of half-yearly calls was completed, two other calls in addition to the call of 824l. now in dispute have been made, as appears by the following statement, viz.

Half year ending	Amount of call.	Expenditure by guardians for parish.	Receipt by treasurer from parish.	Balances due	
				to parish.	from parish.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Michaelmas, 1859. (Call dated 8th March, 1859.)	147 0 0	165 5 1½	99 5 3		65 15 9½
Lady-Day, 1860. (Call dated 27th December, 1859.)	66 0 0	Not ascertained.	Nil.	Not ascertained.	Not ascertained.

[770] The said justices, by a majority of those then sitting at such special sessions, determined the said complaint in favour of the respondent, upon the said grounds advanced on his behalf, as above mentioned. And the question for the opinion of the court is, Whether the said contribution-order of the 13th of September, 1859, is valid or otherwise.

Watkin Williams (with whom was Lefevre), for the appellants (*a*). The question is whether the respondent's parish has paid to the treasurer of the union enough to cover the arrears due therefrom. [Byles, J. Does not this question depend upon the construction of the 6th section of the 22 & 23 Vict. c. 49 ?] The parish rely upon the language of the 81st article of the consolidated order of the poor law commissioners, which provides that "the clerk shall, four weeks at least before the 25th of March and the 29th of September respectively in each year, refer to and ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well [771] as for the common charges incurred in the half of the last year

(*a*) The points marked for argument on the part of the appellants, were as follows :

"1. That the contribution order dated the 13th of September, 1859, is valid, and that the respondent's parish was liable to pay the said arrear of 412l. :

"2. That the legal effect of the respondent's parish having for many years neglected to pay up its calls to a sufficient amount to discharge the current expenses of any half-year and the balance due from the parish to the appellants at the commencement of that half-year is, that the parish was getting deeper and deeper into debt to the appellants every half-year, and was in debt to the appellants at Lady Day, 1859, to the amount of 590l. :

"3. Upon the same ground as in the second point, that the parish was in debt to the appellants in the amount of 590l.

"4. That, under the 22 & 23 Vict. c. 49, s. 6, the said contribution order is valid, notwithstanding it includes the said balance of 590l. due from the parish to the guardians."

corresponding to the half-year next coming, and shall estimate, and, as near as may be, divide amongst the parishes any extraordinary charges to which the union may be liable in the coming half-year, and he shall also estimate the probable balance due to or from the parish at the end of the current half-year, and shall then prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the union for the coming half-year; and the orders so prepared shall be laid before the guardians for their consideration three weeks at least before the expiration of the current half-year." The balance to which the order related was made up of balances of several years, the proximate balance being the balance appearing due at the end of the last half-year. [Byles, J. Is not that just the case which the 6th section of the 22 & 23 Vict. c. 49, was intended to meet?] That section was introduced in consequence of the decision of this court in the case of *Hale, App., The Guardians of the Poor of the London Union, Resp.*, ante, vol. vi., p. 863. There, the guardians of the London Union made a contribution-order pursuant to the 82nd article of the consolidated order; but the clerk, in preparing it, disregarded the terms of the 81st article, inasmuch as, in computing the sum for which the parish of St. M. B. was to be ordered to contribute to the expenses of the union, he omitted to estimate "the probable balance due to that parish;" for, if he had taken the balance into account, it was so largely in its favour that no sum whatever would have been needed to meet the cost of the maintenance of its poor, and the other charges for which the order was made. The reason for this omission was, that the balances in favour of that and several other parishes [772] in the hands of the treasurer of the union had been fraudulently appropriated by an officer of the union who was employed to collect the rates for certain of the parishes forming the union, of which the parish of St. M. B. was not one. And this court held that, as the guardians might, by taking the proper steps,—either by orders apportioning the amount of the loss amongst the various parishes of the union, or by orders apportioning it exclusively amongst those parishes for which the defaulting officer was collector,—realize the balance due to the parish of St. M. B., they had no right to treat it as non-existing, and, consequently, that the order was illegally made, and could not be enforced. The 22 & 23 Vict. c. 49, begins by reciting that "it is expedient to define and limit the period during which any debt hereafter incurred by guardians of unions or parishes or by district boards of management in the administration of the laws for the relief of the poor may be paid, and to make provision, in respect of debts heretofore lawfully incurred by them, for payment of the same;" and the 6th section enacts that "no call or order for contribution made by any guardians, nor any poor-rate made to meet such call or order, shall be deemed to be illegal on the ground that the same is made to provide for any debt, claim, or demand the payment whereof is authorised by this act, or on the ground that the said call or order for contribution includes a balance due from any parish or parishes at the time when the half-yearly accounts are made up and balanced as aforesaid: Provided always that, when the fund out of which any such debt, claim, or demand should have been discharged shall have been already paid by any parish to the board of guardians of any union, and shall not have been applied for that purpose, any funds which may be required to be again contributed to dis[773]-charge such debt, claim, or demand, shall be levied on each parish in the union in proportion to the rateable value of each such parish." [Byles, J. This is a highly remedial statute: and if ever there was a statute which ought to be construed so as to suppress the mischief, and to advance the remedy, this is one.] Under this section the guardians were bound to make the order as they have done. [Byles, J. How do you deal with the 2nd section (a)?] This is not an order made for payment of an old debt, and therefore that section has no application. There is nothing in the 6th section to render the contribution-order invalid by reason of its including the old balance.

One of the objections urged before the justices was, that the respondent had already been summoned for non-payment of the balance alleged to be due from the parish to the appellants at the close of the half-year ending at Lady-Day, 1859, on which occasion the justices dismissed the summons, and the appellants demanded a case under the 20 & 21 Vict. c. 43, but afterwards abandoned it; and it was contended that that balance was thereby finally disposed of, and could not properly form part

of the balance due at Michaelmas, 1859. The decision of the justices, however, is not binding, like the judgment of this court, upon a point of law: it is discretionary with the justices to grant or to withhold a warrant. [Erle, C. J. The 20 & 21 Vict. c. 49, is a very salutary statute: it was intended to enable all these summary jurisdictions to obtain an authoritative decision upon any point of law which may arise before them.] This court is not asked upon the present occasion to reverse the decision of the justices, but to remit the matter back to them with its opinion upon it.

[774] G. Pollock, for the respondent (a). The order in question was not a legal order, inasmuch as it comprised the accumulated balances of by-gone years. The whole tenor of the provisions for the regulation of the poor shew that all rates are to be prospectively charged. The case of *Waddington v. The Guardians of the London Union*, 1 Ellis, B. & E. 370, disposes of this part of the case, assuming that the 6th section of the 22 & 23 Vict. c. 49, does not apply. There, the City of London Union, formed under the statute 4 & 5 W. 4, c. 76, consisted of ninety-eight parishes, and had a board of guardians annually elected. In February, 1857, large sums of money were owing to tradesmen for goods, &c. supplied to the poor of the union, and which had been incurred principally in 1856, and partly in preceding years. The arrears were owing to embezzlements by M. & P. M. had been appointed by [775] the guardians collector for nine of the parishes, which appointment had been confirmed by the poor-law commissioners. P. was assistant clerk of the guardians. The guardians had ordered M. to pay the rates collected for the nine parishes to the treasurer of the union. M. appropriated the greater part to his own use, and, in concert with P., made false entries in the union ledger, representing the sums as having been all paid to the treasurer. The accounts made out from these entries were produced to the auditor and certified by him to be correct. P. had appropriated certain cheques drawn in favour of tradesmen, which were entered as payments in the accounts which were audited and passed as correct. The guardians had also overdrawn the treasurer's account to a large amount accruing during several years before February, 1857. The embezzlements by M. & P., and the consequent arrears to the tradesmen, were first discovered in December, 1856. No call was after that made on the parishes until February, 1857, when the then clerk of the union, under article 81 of the consolidated order made the 24th of July, 1847, by the poor-law commissioners, ascertained the costs to each parish for the maintenance of the poor, estimating as "extraordinary charges" for the ensuing half-year the amount of the arrears to the tradesmen and the debt to the treasurer, and divided the whole among the different parishes: and the guardians, under article 82, made orders on the 17th of February, 1857, on the overseers of the several parishes for payment. A parish, not being one of the nine for which M. collected, disputed the validity of the order. All previous calls had been paid. It was held by the Exchequer Chamber, —reversing the judgment of the court of Queen's Bench, —that the order was wholly bad, as being partly in the nature of a retrospective rate, though in fact there were items, besides those [776] mentioned, free from objection. Watson, B., in delivering the judgment of the court of error, says: "The original legal authority to make a rate for the relief of the poor is the

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That the appellants did not follow the directions contained in the 81st and 82nd articles of the consolidated order of the poor-law commissioners dated the 24th of July, 1847, as to the preparation of the estimate for and the making of the contribution-order for 824l., of the 13th of September, 1859:

"2. That the sum of 590l. mentioned in such estimate was not the probable balance due from the parish at the end of the current year, September 29th, 1859, and that such estimate was in all respects illegal.

"3. That the said contribution order was for the reasons stated, and facts admitted, retrospective and illegal, and was not authorized by the act of the 22 & 23 Vict. c. 49, s. 6:

"4. That it was illegal to postpone enforcing the payment of old balances, and throw the burthen thereof on present and future rate-payers:

"5. That the question as to the said balances had been previously determined in favor of the respondent, and finally disposed of; and that its introduction into the said estimate and order was therefore wrong, and erroneous in point of law."

statute 43 Eliz. c. 2, which enacts that the churchwardens and overseers of a parish shall, with the consent of two justices, raise weekly or otherwise, by taxation, a competent sum for the relief of the lame and other poor, and for putting out the poor children apprentices. Upon the construction of this statute, it has been uniformly held that the power of taxation under it can be exercised to meet prospective expenses only, and that it is not lawful to make a poor-rate for the payment of a past debt. Judges of the greatest eminence have not only approved of this construction as correct in itself, but have stated that in their opinion this construction is founded upon principles of policy and justice: of policy, because it enables the poor-law officers to deal for ready money and avoid contracting debts, thereby avoiding a great temptation to extravagance and waste: and of justice, because, so far as is possible, it casts upon the existing rate-payers the burthen of the poor for the time being, and protects them from one which ought to have been borne by their predecessors: *Town's case*, 2 Salk. 531: *The King v. Harrell*, 1 Dougl. 116: *The King v. The Churchwardens of Dursley*, 5 Ad. & E. 10, 6 N. & M. 333." Here, the 590l. is an old balance, made up of balances due in several successive years from the parish to the guardians of the union. To make the contribution-order valid, it must be shewn that the sum ordered to be paid is applicable for the expenses of the current half-year, and not the payment of a pre-existing debt.

Then, the statute 22 & 23 Vict. c. 49, is inapplicable to this case. It was never intended to purge the neglect of the guardians. It is an act for imposing a burthen upon the subject,—to make the existing rate-[777]-payers responsible for the defaults of those who have in by-gone years preceded them: and it is not to have a retroactive effect unless such an intention is clearly indicated: *Nova constitutio, futuris formam imponere debet, non præteritis*. The statute recites that "it is expedient to define and limit the period during which any debt hereafter incurred by guardians of unions or parishes or by district boards of management in the administration of the laws for the relief of the poor may be paid, and to make provision, in respect of debts heretofore lawfully incurred by them, for payment of the same." The 1st section enacts that, "with respect to any debt, claim, or demand which may after the passing of this act be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year but not afterwards, the commencement of such half year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the poor law commissioners or poor law board: Provided that the poor law board, by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand." The 2nd section, which is the really effective provision, enacts that, "with respect to any debt, claim, or demand which may have been lawfully incurred by any such guardians or board of management or on their account before the passing of this act, they may, if they think proper, pay within twelve months after the passing of this act, out of the funds in their possession, any such debt, claim, or demand which may have been so in-[778]-curred or have become due within two years before the date of this act, and may, within the said period of twelve months, make provision for the payment of any debt, claim, or demand lawfully incurred as aforesaid which shall have become due from them at some period beyond two years but not beyond six years from such date in full at once, or by equal annual instalments, not exceeding five, if the poor law board, after open and public investigation, during which counsel or solicitors may appear and witnesses may be examined on both sides, when the same shall be required by any rate-payer of the union, parish, or district, shall be satisfied that no fraud, collusion, or neglect of the general rules of the poor-law board respecting the contraction or discharge of such debt, claim, or demand have been committed by the party to whom such claim or demand is alleged to be due, and that such party has not been accessory to any fraud on such guardians or board of management, and shall give their consent in manner aforesaid to such payment: and such guardians or board respectively shall charge every such payment to the account to which the same should have been charged if the payment had been made in due time; and the president or secretary of the poor-law board shall, within one calendar month after the expiration of such period of twelve months as aforesaid, if parliament be then sitting,

or, if not, then within one calendar month after the next meeting thereof, lay or cause to be laid before both houses of parliament a return of all such payments as shall have been made or authorized under the power lastly hereinbefore contained." So far the act is clearly prospective. The 6th section enacts that "no call or order for contribution made by any guardians, nor any poor-rate made to meet such call or order, shall be deemed to be illegal on the ground that the same is made to provide [779] for any debt, claim, or demand the payment whereof is authorized by this act, or on the ground that the said call or order for contribution includes a balance due from any parish or parishes at the time when the half-yearly accounts are made up and balanced as aforesaid: Provided always, that, when the fund out of which any such debt, claim, or demand should have been discharged shall have been already paid by any parish to the board of guardians of any union, and shall not have been applied for that purpose, any funds which may be required to be again contributed to discharge such debt, claim, or demand, shall be levied on each parish in the union in proportion to the rateable value of each such parish" [Byles, J. What meaning do you give to the word "balance"? Willes, J. Suppose too little is called for at Lady-Day, may not the deficiency be made up by the call made at Michaelmas? and, if that is insufficient, may not that deficiency be made up at the ensuing Lady-Day call?] Clearly not. Before the statute, the guardians could not have corrected their first blunder in that way: that would be precisely within *Waddington v. The Guardians of the London Union*, 1 Ellis, B. & E. 370.

Then, it is submitted that this is *res judicata*. Unless the decision of the justices under the 2 & 3 Vict. c. 84, is an administrative or judicial act, it could not properly be made the subject of an appeal under the 20 & 21 Vict. c. 43. The 2nd section of that act provides, that, "after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to [780] the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law, to be named by the party applying," &c. By s. 4, the justices may refuse to state a case if they think the application frivolous; by s. 5, the improper refusal of a case is made ground for a mandamus; and by s. 6 the decision of a superior court upon the case transmitted to them is declared to be final and conclusive on all parties. By the 2 & 3 Vict. c. 84, s. 1, the justices are to hear and determine, and to enforce the order. That section enacts, "that, in every case in which any contribution by overseers or other officers of any parish of moneys required by the board of guardians or persons acting as guardians of such parish, or for any union which shall include such parish for the performance of their duties, shall be in arrear, it shall be lawful for any two justices acting within the district wherein such parish shall be situate, on application under the hand of the chairman or acting chairman of such board, to summon the said overseer or any other officers to shew cause, at a special sessions to be summoned for the purpose, why such contribution has not been paid, and, after hearing the complaint preferred under the authority of such chairman or acting chairman, and on behalf of such board, if the justices at such sessions shall think fit, by warrant under their hands and seals, cause the amount of the contribution so in arrear, together with the costs occasioned by such arrear, to be levied and recovered from the said overseers or other officers, or any of them, in like manner as moneys assessed for the relief of the poor may be levied and recovered, and the amount of such arrear, together with the costs as aforesaid, when levied and recovered, to be paid to the said board," &c. The justices, therefore, are not acting ministerially: [781] they are to act "upon hearing the complaint." [Willes, J. And to adjudicate "if they shall think fit."] The whole language of the section shows that they are acting in the matter judicially. In *Rentleaves, App., Husb., &c.*, Weekly Rep. for 1860, p. 363, a servant in husbandry sued her master in the county court, claiming damages on the ground that she, having been hired for a year, had been dismissed within the year without reasonable cause, in which suit the judgment was in favour of the master. The servant then applied to the justices of the peace under the 20 G. 2, c. 19, for an order upon her master to pay her her wages, claiming wages for the whole year, on the ground that she had been dismissed without just cause;

and it was held that the justices had no power to inquire into the merits of the case and adjudicate thereon, as the same question substantially had been already adjudicated on by a court of competent jurisdiction. The justices, therefore, having already heard and decided this matter as to the 590l. balance, and granted a case, which the guardians declined to proceed with, it is not competent to them to agitate the question again. And see, as to the effect of a former judgment upon the same subject matter, the authorities collected in *Buckland v. Johnson*, 15 C. B. 145.

Williams, in reply. The question is reduced to this,—what is the meaning of “balance” in the act? If it had not been intended to limit it to a balance accruing within the preceding half-year, it would have been easy so to express it. If improper sums are included in the estimates, the proper time for objecting to them is before the auditor. The parish having allowed that opportunity to escape, must be assumed to have acquiesced. The fact of the parish having been in debt to the guardians for several half-years does not prevent [782] the accumulated balance being within the words of the statute a balance due at the last half-year.

ERLE, C. J. As to the point urged on the part of the respondent that the claim for the balance of 590l. due at Lady-Day, 1859, had been adjudicated upon and disposed of by the petty sessions, it seems to me that there is nothing in it. The court of petty sessions, when applied to for a warrant to enforce payment of a rate, or to compel the overseers to pay the amount mentioned in a contribution-order, is not a court of appeal to adjudicate on the validity of the rate or the order; but they are to determine whether or not they will compel payment. Perhaps it might be said, on an application for a mandamus, that they have a discretion: but it must be a discretion which is to be exercised according to law; they are to be satisfied that the rate or call for which they issue their warrant is one which ought to be enforced. To that extent, perhaps, they have a discretion in the matter: “if they think fit,” must mean if they are satisfied that it is a fit thing for them to do according to the powers which the law has reposed in them.

As to another question which has been argued before us, the statute under which this case is stated was intended to give justices where they entertained doubts upon matters of law arising before them, to have those doubts solved by the decision of one of the superior courts on appeal. In my opinion, it would be within the intent of the statute that a case should be stated if the justices find themselves unable to come to the determination that they ought to enforce payment of a rate or call upon some objection in point of law arising before them. I have some recollection of this matter having been discussed in the Queen’s Bench whilst I was a member of that court. How-[783]-ever, be that as it may, the case being now before us, and having been very fully argued, it only remains for us to say what we think the justices might legally do in the matter.

The main question which presents itself is this. A call has been made upon the parish of St. Mary Mounthaw, one of the parishes comprised within the City of London Union, of 824l., upon an estimate made for the half-year ending at Lady Day, 1860, for what would be needed to provide for the proportion due from that parish to meet the current expenses of the union for that half-year, together with a balance of 590l. remaining due from that parish to the guardians of the union at the preceding half-year. It may be that that balance takes up and includes balances remaining due from former half-years: but, upon the facts presented to us, the call is a call for 824l. to be paid by the parish in respect of the half-year ending at Lady-Day, 1860: and the great question here is, whether the estimate and call for the half-year ending at Lady-Day, 1860, is illegal because it includes the balance of 590l. which stood over from the preceding half-year. Now, I will consider how the matter stood at the time when the statute upon which the question turns was passed. By law each parish was bound to provide for the necessities of its poor. In earlier times this provision was made by the overseers. Since the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, when parishes were for the most part formed into unions, that duty devolved upon the guardians: but all along the overseers or the guardians, as representing the inhabitants of each parish, had the duty cast upon them of providing for the wants of their respective poor. Down to the time of the decision of the court of Queen’s Bench in the case of *Waddington v. The City of London Union*, 1 Ellis, B. & E. 370, it had always been held to be the [784] duty of the parish officers as far as possible to defray the expenses of maintaining the poor, and the other incidental charges, by rates levied upon the

inhabitants and rate-payers for the time being. The law had always been administered as far as possible to carry out that principle. The notion, however, of paying for each loaf or other article as required by the parish became altogether impracticable in the case of large unions: there must of necessity be large contracts for supplies, and in the ordinary course of things debts to a greater or less extent must be incurred. All these things are subjects for question and scrutiny before the auditor. It must perpetually occur that the means of the parish or union to meet these demands are for the moment inadequate. Suppose a rate made upon the inhabitants for the collection of 1000*l.*, there must always from one cause or another be a deficiency in the amount realized: many become defaulters from inability to pay; many go away, from whom it is impossible to obtain the rate; or the deficiency may arise from many causes unforeseen at the time of making the rate. *Waddington v. The City of London Union* only affirmed a principle which was well ascertained and agreed on before, viz., that a rate or call upon the inhabitants ought not to be retrospective. It appeared that several of the parishes of the union were considerably in arrear, some of which arrears occurred from the neglect of the guardians, some from the dishonesty of certain servants of the union; and the guardians had made a call upon the several parishes to provide for the deficiency thus arising. This call was held to be illegal and void. It was this state of things which the legislature, as it seems to me, intended to provide for by the recent statute. I do not think it is to be imputed to the guardians here that they were guilty of any culpable negli-^[785]gence in not enforcing payment of the balances year by year. The result, no doubt, is, that the burthen is or may be shifted from those who ought at the time to have borne it. Several of the parishes have within the last year or two, this parish amongst others,—become considerably in arrear. In the year 1854, as appears by the tabular statement in the case, the parish of St. Mary Mounthaw had a balance in its favour; but subsequently it got into arrear; and, when the call in question was made, there was a balance against the parish from the preceding half-year of 590*l.* The statute which we are now called upon to construe was passed on the 18th of August, 1859; and on the 20th of that month the guardians made the contribution-order which gives rise to the contest, for the purpose of getting in the arrears. It appears to me that the intention of the legislature in passing that act, was, to enable the guardians to collect from each parish its unpaid balance. The 6th section enacts that “no call or order for contribution made by any guardians, nor any poor-rate made to meet such call or order, shall be deemed to be illegal on the ground that the same is made to provide for any debt, claim, or demand the payment whereof is authorized by this act, or on the ground that the said call or order for contribution includes a balance due from any parish or parishes at the time when the half-yearly accounts are made up and balanced as aforesaid: Provided also, that, when the fund out of which any such debt, claim, or demand should have been discharged shall have been already paid by any parish to the board of guardians of any union, and shall not have been applied for that purpose, any funds which may be required to be again contributed to discharge such debt, claim, or demand, shall be levied on each parish in the union in proportion to the rateable value of each such parish.” The ^[786]half-yearly accounts are made up a month before Lady-Day and Michaelmas, to estimate what may be necessary to provide for the wants of the union for the coming half-year, as well as the probable balance due to or from the parish at the end of the current half-year. In the estimate for this parish, it was found that 824*l.* would be required to meet the charges upon the union for the maintenance of the poor of the parish, and for the other incidental expenses, and also to pay off the balance of 590*l.* which would appear to be against that parish at the end of the current half-year, — partly arising, no doubt, from arrears accruing in some former years. The justices, conceiving that that balance was improperly included in the estimate, have refused to enforce payment of the call by distress. It seems to me that they have made a mistake, because I am of opinion that the statute intended to authorize the guardians to do as they have done; and therefore I am of opinion that the question referred to us upon this case should be answered in favour of the guardians. I have dealt with this matter as if the 590*l.* was a balance which had become due from the parish of St. Mary Mounthaw at Lady-Day, 1859; but, if the whole account is looked at, I think it is a fallacy to say that the balance so appearing was a continuing and accumulating debt half-year by half-year for a long series of years; for, if there was a balance of 200*l.* due at the expiration of one half-year, and the sum collected for

the succeeding half-year were 400l., and a balance was then left to be carried on to the next half-year, it could not be said that the original debt of 200l. remained unliquidated: practically, that debt would be paid off and discharged by the money first collected, according to the rule in *Clayton's case*, 1 Meriv. 572. However, I do not found my judgment on that; because I think the statute expressly says [787] that the guardians acting under this 6th section do not render their contribution-order void by including therein a balance which appears to be due in the preceding half-year.

WILLIAMS, J. I am of the same opinion. I cannot say that I feel at all sure that I understand what the legislature really meant by the enactment contained in the 6th section of the 22 & 23 Vict. c. 49: but I think they have employed such words as afford an answer to the objections which have been urged against the validity of this order. The reason why I do not feel sure that I correctly apprehend the intention of the legislature is, that the enactment in question simply consists of this, that the call or contribution-order shall not be deemed to be illegal on the ground that it is made to provide for a debt, claim, or demand the payment whereof is authorized by the act, or on the ground that the call or contribution-order includes a balance due from any parish at the time when the half-yearly accounts are made up and balanced as before provided. Now, that seems to assume, that, but for the special provision contained in this section, it would be a good objection to the contribution order that it included a balance due from any parish at the time when the half-yearly accounts are made up and balanced: yet the law is fully established by the 81st article of the consolidated order made by the poor-law commissioners in conformity with the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, that not only it may but it must include any balance due to or from the parish at the end of the current half-year. I cannot understand why the legislature should have framed the 6th section as they have done. If it is said that that section means that, whereas under the 81st article of the consolidated order, the balance contemplated was [788] only the balance of the current half-year, the new provision was meant to extend it indefinitely, — one would have thought that that intention might have been more aptly and clearly expressed, instead of using the very general language we find resorted to. However, be that as it may, the objection to this order is simply this, that it includes a balance which appeared to have been due from this parish in the preceding half-year: and that is answered by the fact that all which it includes is within the provision of the 6th section. The balance which is included is a balance due from the parish at the time when the half-yearly accounts were made up and balanced. There is nothing to limit it to a debt accruing due from the parish within any particular period. The order was made after the passing of the 22 & 23 Vict. c. 49: and the balance in question is a balance due from the parish of St. Mary Mounthaw at the time when the half-yearly accounts were made up and balanced; and therefore it seems to me that the case is within the 6th section, and consequently that the refusal of the magistrates to enforce the order was wrong.

WILLES, J. I am entirely of the same opinion, and have nothing to add to what has fallen from my Lord and my Brother Williams.

BYLES, J. I am of the same opinion. I am quite at a loss to see what doubt there can be in this case, when the facts are once ascertained. It is clear that this call or order is made for a balance existing against the parish at the beginning of the half-year, which balance is composed inter alia of an aggregate of balances resulting from several preceding half-years, but not, as Mr. Pollock puts it, of all the half-yearly balances up to 1857, because it is clear these balances [789] have appeared in the general accounts: and, if we had the general accounts before us, it would probably turn out that the balance of 590l. is a balance of two, three, four, or five, or it may be several half-years. That, however, does not affect the case. The question is, whether the 6th section of the 22 & 23 Vict. c. 49, means a balance accruing in the preceding half-year, or a balance existing in the half-year. The object of the statute was to enable the guardians of the City of London Union to do that which the court of Queen's Bench had endeavoured, but ineffectually, to enable them to do, viz. to raise funds for the payment of debts due from them, by enabling them to collect arrears due to them from the several parishes. So far as it authorizes them to pay existing debts, the statute is clearly retrospective. Then the statute comes to deal with balances due to the guardians. It would have met but a small portion of the mischief it was designed to remedy unless it included past balances. The 6th section seems to me to include all balances due from any parish in the union to the guardians.

That is the plain sense of the word used, and it is the sense which gives the best construction to the whole of the act, and which tends to advance the remedy and to suppress the mischief at which it was aimed. To read the section in any other sense, you must interpolate the word "future": whereas, if the legislature had so intended, it would have used apt and proper words so to provide. For these reasons, it seems to me that this balance of 590l. was a debt recoverable from the parish, and that the refusal of the justices to enforce it was an erroneous interpretation of the law. Hardship, it is true, there may be in holding the parishioners of the present day liable for that which peradventure ought to have been a burthen borne by their predecessors: but there would be equal hardship in a contrary decision: and, after [790] all, the legislature has distributed the charge among a very large number of persons.

Williams asked for costs.

Per Curiam. We do not think that this is a case for costs.

Appeal allowed, without costs.

End of Trinity Term.

[791] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN TRINITY VACATION, IN THE TWENTY-THIRD AND TWENTY-FOURTH YEARS OF THE REIGN OF VICTORIA.

The Judges who usually sat in banco at these sittings, were,—Williams, J., Willes, J., and Keating, J.

GEORGE MORTON, *Appellant*; WILLIAM BRAMMER, *Respondent*. June 21st, 1860.

[S. C. 29 L. J. M. C. 218; 2 L. T. 600; 7 Jur. N. S. 211.]

Where the amount of a poor-rate at so much in the pound on the assessable value of premises involves the fraction of a farthing, a demand by the overseer of the whole farthing is an excessive and illegal demand.

The following case was stated for the opinion of this court, pursuant to the statute 20 & 21 Vict. c. 43.

On the 20th of March, 1860, William Brammer, the respondent, by his attorney, Mr. C. H. Cooper, appeared at March, in the Isle of Ely, before two justices of the peace for the said Isle, pursuant to a summons previously served on the respondent, granted upon the information of George Morton, the appellant, one of [792] the overseers of the poor of the hamlet of Wimblington, in the said Isle of Ely, requiring the respondent to shew cause why he, being a person duly rated and assessed to the relief of the poor of the said hamlet in and by several rates made on the 8th of November, 1859 (hereafter called the first rate), and on the 31st of January, 1860 (hereinafter called the second rate), in the several sums of 1s. 5d. and 1s. 9½d., had not paid the same, or any part thereof, but had refused so to do." The making, allowance, and publication of each rate were duly proved.

The respondent was assessed in each rate upon a rateable value of 4l. 4s. 4d. The first rate was at 4d. in the pound, and the second was at 5d. in the pound. Demands, of which the following are copies, were proved to have been served personally on the respondent for each rate:—

"No. 11. Wimblington poor-rate demand note.

"To William Brammer, of Wimblington.

"The overseer of the parish of Wimblington demands payment of the poor-rate made on the 8th day of November, 1859, due from you, with the arrears of the former rate previously due, as below:—

				£	s.	d.
"Assessable value, 4l. 4s. 4d.						
Amount of rate, at 4d. in the pound	.	.	.	0	1	5
Previous arrear	.	.	.	0	0	0
Total				£0	1	5"

(Signed) "JOHN THOMPSON, collector."

The demand of the second rate was as follows :—

“No. 11. Wimblington poor-rate demand note.

“The overseer of the parish of Wimblington demands payment of the poor-rate made the 31st day of [793] January, 1860, due from you, with the arrear of the former rate previously due, as below :—

“Assessable value, 4l. 4s. 4d.	£	s.	d.
Amount of rate at 5d. in the pound	0	1	9½
Previous arrears	0	1	5
Total	£0	3	2½”
(Signed) “JOHN THOMPSON, collector.”			

On the part of the respondent it was contended that both rates were altogether void, inasmuch as they were monied out wrong, that is to say, the first rate, being at 4d. in the pound on 4l. 4s. 4d., amounted to 1s. 4¾d. and a fraction of another farthing only, instead of 1s. 5d., and the second, being at 5d. in the pound, amounted to 1s. 9d. and a fraction of a farthing only, instead of 1s. 9½d.; and, further, that the demand in each case was insufficient, as the precise sum due and no more should have been demanded,—citing as an authority the decision of Gibbs, C. J., in the case of *Hurrell v. Wink*, 2 J. B. Moore, 417, 8 Taunt. 369: and he submitted that it was patent from the rate that the precise sum properly due was in each case less than the amount actually demanded.

No tender of any sum whatever had been made by the respondent.

There were at the same petty sessions thirty-five other cases, in which the same attorney appeared; and he stated that he should raise the same question in each case.

The magistrates in a previous case at the same petty sessions decided against the objection, on the ground that the defence properly constituted a cause of appeal; and that an error in the rate-book could not be set up as a defence to a distress, the validity of the rate not having been tested by appeal. Mr. Cooper refused to [794] demand a case, and stated that Mr. Naylor, barrister-at-law, advised that the objections were valid, and that he would have attended to support them, but that he was engaged at the Cambridge assizes.

A similar case had been heard at previous petty sessions, when a similar question was raised by the same counsel, and over-ruled by the magistrates, who granted a warrant of distress, which was put in force; and Mr. Cooper thereupon issued writs for his clients against the overseers of Wimblington and their assistants acting under the said warrant of distress. The magistrates therefore deemed it expedient to decide the respondent's case in his favour, so as to allow an opportunity to the appellant of demanding this case and obtaining the opinion of a superior court on the questions of law thus raised and insisted upon, in an economical and summary manner.

The appellant (the overseer) by his attorney did accordingly demand a case, and entered into the usual recognizances. The hearing of the other summonses was then adjourned, on the understanding that they were to abide the decision in this case.

The questions for the opinion of the court were,—first, whether the respondent shewed sufficient excuse for not paying the two rates in question, or either of them,—secondly, whether the magistrates ought or would have been justified in issuing a distress-warrant against the respondent for the recovery of one or both of the rates.

David Keane, for the appellant (a). The overseer is [795] bound to get in the rate: he incurs a serious responsibility if he omits to do so,—see 43 Eliz. c. 2, 17 G. 2,

(a) The points marked for argument on the part of the appellant were as follows :—

“That an arithmetical error on the face of the rate does not avoid it, but, if a good ground of objection at all, is, like any other matter not going to the jurisdiction, to be remedied by appeal only:

“That no error of amount is substantially shewn by the case; the want of appropriate coin for fractions of farthings being a matter for which the makers of the rate are not responsible; and it being the duty of the appellant to obtain, and of the

c. 38, 7 & 8 Vict. c. 101. Who is to be responsible for the insufficiency of the coinage? If here he had demanded less than he has done, he would have demanded something short of what the respondent was liable to pay. Under the pawnbroker's act, 39 & 40 G. 3, c. 99, it was held in *The Queen v. Goodburn*, 8 Ad. & E. 508, 3 N. & P. 468, that, where the pledge is redeemed after several months, and the interest, according to the terms of the act, is a sum which is not an exact number of farthings, the pawn-broker is not entitled to calculate the interest on each month separately, taking upon each month the benefit of the fraction of the farthing. But that proceeded upon the words of the 3rd section of the act, which authorizes the pawn-broker to demand interest at a given rate "and no more." Here, the proper assessment is mentioned in the notice: if the arithmetical computation was wrong, the rate-payer might have tendered the proper sum. If there be a mistake, that might have been corrected by appeal: 17 G. 2, c. 38, s. 4. This is a matter to which the maxim *De minimis non curat lex* might well be applied.

[796] Naylor, for the respondent (a). The maxim referred to can hardly apply to a case where thirty-six persons are twice subjected to an unwarrantable and illegal charge. The question is, whether in collecting a poor-rate the overseer is justified in demanding a farthing in every case for the fraction of a farthing. The difficulty is brought upon the overseer by the absurd assessment of 4l. 4s. 4d. There can be no reason why the one party should demand and the other pay an excessive sum, however trifling the excess. *The Queen v. Goodburn*, 8 Ad. & E. 508, 3 N. & P. 468, is a distinct authority in favour of the respondent. Lord Denman there says: "An ingenious argument was raised on the defendant's behalf, that the act considers the sum lent as advanced by the month; that, if the 4s. had been repaid at the end of the first month, the 20 per cent. would be three farthings and one fifth, which sum the defendant could not have received, as there are no fifths of a farthing, so that he must either have received a penny or lost a portion of his 20 per cent.; that the act requires a similar mode of paying for every succeeding month: that therefore a penny for each month must have been paid and, adding all [797] these for the eleven months and upwards, the amount actually received by the defendant is warranted by the act. But, supposing this argument to be valid if the loan were repaid while the interest is less than a farthing, from the necessity of the case, inasmuch as it must otherwise be less than 20 per cent. (which we are by no means prepared to admit, the words being, so much 'and no more'), still, as soon as that period arrived when the interest so calculated amounted to a current coin, the necessity is at an end." In the case of the income-tax, it required an express enactment to authorize the demand of an even sum where a fraction occurred,—the 2nd section of the 5 & 6 Vict. c. 35, providing that, "upon every fractional part of 20s. of the annual profits or gains aforesaid, the like proportion of duty, at the rate before denoted, shall be charged; provided no rate or duty shall be charged of a lower denomination than one penny." It is clear, therefore, that the demand here was unjustifiable. That being so, the magistrates were quite right in refusing to issue a distress-warrant. In *Harrell v. Bink*, 2 J. B. Moore, 417, 8 Taunt. 369, in an action of replevin for taking

respondent so to pay that the appellant shall obtain, from the respondent the full amount of the respondent's contribution:

"And that the rates and demand were good, either because the appropriate form for demanding fractions of farthings so as to obtain payment of them was used; or because, if the respondent was entitled to take advantage of the difficulty arising from the system of coinage, the form of the rate and of the demand enabled him to do so, and the magistrates to issue their warrants accordingly."

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That, in a demand for a poor-rate, the sum due must be precisely stated when demanded:

"2. That a demand made for a sum of money for a poor-rate greater than is due according to the rate made and allowed, is in law no demand at all:

"3. That the demand-notes recited in the case are bad upon the face of them:

"4. That no warrant of distress can be issued by justices for the recovery of a poor-rate for a sum greater than that which appears upon the rate to be due:

"5. That the respondent shewed sufficient cause to warrant the justices in their determination to refuse to issue a warrant of distress."

the plaintiff's goods, the defendant avowed as overseer of the poor, under the 43 Eliz. c. 2, by virtue of a warrant of distress for 104l. 17s. due for several rates, one of which was quashed on the ground that the plaintiff was not an occupier within the parish where he was rated: and it was held that, as one of the rates was quashed, the warrant was void, and that the precise sum due for poor-rates should have been demanded from the plaintiff previously to the issuing of such warrant. [Willes, J. It is enough for you to say that a demand which is made for a sum that is intentionally larger than the sum which the overseer is justified in demanding, is not a demand within the statute.]

[798] Keane, in reply. There has been here a precise demand in words; and that demand is not vitiated by the error in the figures.

WILLIAMS, J. We consider that this case is laid before us in order that we may determine the point, whether, where the amount of a poor-rate at so much in the pound on the assessable value of the premises involves the fraction of a farthing, the rate-payer is bound to pay the whole farthing. I am of opinion that he is not so bound. It seems to me that he has a right to say to the overseer,—“I am not bound to pay more than my rateable proportion of the rate. If I pay a farthing where a fraction of a farthing only is due, I shall not only be paying more than my fellow parishioners, but you the overseer will be raising more money than you are authorized to raise. And I cannot pay the fraction, because I cannot pay that which the coinage of the realm does not enable me to pay.” The consequence is that, in this case, the appellant has demanded too much, and the respondent was not bound to pay it.

WILLES, J. I am of the same opinion. The case of *Barter v. Faulam*, 1 Wilson, 129, as far as it goes, shews that the maxim *De minimis non curat lex* applies in favour of Mr. Naylor's argument (a).

[799] KEATING, J. I am entirely of the same opinion. The rate-payer ought not to be called upon to pay beyond the exact sum due in respect of the assessment. If that involves the fraction of a farthing, he cannot be called upon to pay the farthing. The difficulty is one which has been created by those whose duty it is to make the rate. The rate-payers are not to be prejudiced by that. Our judgment must be in favour of the respondent.

Naylor asked for costs.

Per Curiam. This is not a case for costs.

Judgment for the respondent, without costs.

[800] GROUX'S IMPROVED SOAP COMPANY, LIMITED, v. COOPER, Administratrix, &c.
June 23rd, 1860.

The 12th section of the Limited Liability Act, 18 & 19 Vict. c. 133, enacts that no alteration made by virtue of this act in the name of any company shall prejudice or affect any right which previously to such alteration has accrued to such company, &c., but every such company shall be entitled to all such remedies as they would have been entitled to if no such alteration had been made:—Held, that the rights of a company which had obtained a certificate of complete registration with limited liability under the above act, against a surety on a bond entered into with them for the faithful service of a clerk or agent, in respect of defalcations since the date of such certificate, remained unaffected by their change of name.

The declaration stated that the defendant and one Henry Hayward and other persons, to wit, John Flower Jackson, John Day, and John Williams Watson, to wit,

(a) The question there was whether an indenture of apprenticeship where 6d. was mentioned to be the sum given with the apprentice was or was not void for want of being stamped according to the statute 8 Ann. c. 9, s. 32. And it was resolved by the whole court “that the statute intended that, where above 50l. was paid with an apprentice, a twentieth part thereof should be paid for the duty, and one fortieth part where less than 50l. was paid: and this is a case wherein it is well known there is no coin small enough can be paid: and it seems by the two stamps of 1s. and 6d. in the pound, that no sum less than 20s. paid with an apprentice should pay any duty; and this case falls under the saying of *De minimis non curat lex*, and there was no occasion to have the indenture stamped according to the statute.

on the 31st of March, 1856, by their bond, sealed with their seals respectively, severally acknowledged themselves to be held and firmly bound to the plaintiffs, then being a joint-stock company completely registered according to the 7 & 8 Vict. c. 110, for the registration, incorporation, and regulation of joint-stock companies, and which said company became and was afterwards, whilst so registered, and after the making of the said bond, completely registered under and according to the Limited Liability Act, 1855 (18 & 19 Vict. c. 133), and then became and was and is named Groux's Improved Soap Company, Limited, and became and was afterwards completely registered and incorporated under and according to the Joint Stock Company's Act, 1856 (19 & 20 Vict. c. 47), in the sum of 1000l. to be paid to the said company; and the said bond was and is subject to a certain condition thereunder written, which was and is to the tenor following, that is to say, "Whereas, the above-bounden Henry Hayward has been appointed the sole agent for the said company for the sale of the soaps manufactured by the said company, and for the collection of the company's credits, and the said company having agreed to pay the said Henry Hayward certain commissions on the amount of his sales which shall be accepted by the company, and on the collection of the said credits, as by an agreement made between him and the said company bearing or intended to bear even date here-[801]-with will appear, by which agreement it is provided that the said Henry Hayward should give security to the said company for the due and regular payment of all moneys, bills, cheques, notes, and securities for money received by the said Henry Hayward for the said company, and the said Thomas Cooper, John Flower Jackson, John Day, and John Williams Watson, have, as his sureties, therefore entered into the above-written bond, subject to the condition hereunder written: Now the condition of the above-written obligation is, that, if the above-named Henry Hayward shall at all times hereafter honestly and faithfully pay over and apply all moneys, bill, cheques, notes, and other securities which he shall receive, or which shall come into his hands, possession, or power, for and on behalf of the said company, by virtue or reason of his said appointment, then the above written obligation to be void, otherwise to be and remain in full force and virtue: Provided, nevertheless, and it is hereby declared and agreed, that no greater sum than 250l. shall be recoverable under the above-written obligation from any one of them the said Thomas Cooper, John Flower Jackson, John Day, and John Williams Watson, or their respective heirs, executors, or administrators; and, further, that all, any, or either of them the said Thomas Cooper, John Flower Jackson, John Day, and John Williams Watson, their or any or either of their heirs, executors, or administrators, may at any time determine their or any or either of their or his suretyship, and continuing liability under the above-written obligation, by previously giving to the said company six calendar months' notice in writing of his or their, or any or either of their, intention so to do: Provided further, that the withdrawal of any one or more of them the said Thomas Cooper, John Flower Jackson, John Day, and John Williams Watson, shall not in [802] any way affect the responsibility of, or be construed to affect, relieve, or release the continuing surety or sureties (if any), nor shall the giving of such notice as aforesaid discharge the party or parties giving the same from their responsibility, unless or until the said Henry Hayward shall have honestly and faithfully paid over and applied all moneys, bills, cheques, notes, and other securities which he shall have received, or which shall have come into his hands, possession, or power, for and on the behalf of the said company, by virtue or by reason of his said appointment, down to the expiration of the said notice:" Averment, that the said Henry Hayward did not nor would, after the making of the said bond, honestly and faithfully pay over and apply divers moneys amounting, to wit, to 1614l. 12s. 5d., and divers bills, cheques, notes, and other securities, which he received, and which came into his hands, possession, and power, for and on behalf of the said company, by virtue and reason of his said appointment in the said condition mentioned after the making of the said bond, but wholly neglected and refused so to do, whereby the said bond became forfeited, and the sum of 250l. became due and payable by the defendant to the plaintiffs under and by virtue thereof; and the defendant had not paid the same, or any part of the said 1000l., and the same remained wholly due and unpaid.

Fourth plea,—that the supposed bond was not made and executed by the defendant until after the 31st of March, 1856, or before the 5th of June, 1856, on which last-mentioned day (and not before) the said bond was made and executed by the defendant: that the company in the said bond mentioned, and to whom the defendant

the said Henry Hayward, and the said other persons acknowledged themselves to be held and firmly bound, was, at the time of the making [803] and executing the said bond by the defendant, a certain joint-stock company completely registered according to and under and by virtue of the provisions of a statute made and passed in the eighth year of the reign of our Lady the Queen Victoria, for the registration, incorporation, and regulation of joint-stock companies, by and under the name of Groux's Improved Soap Company : and the defendant made and executed the supposed bond as a surety only for the said Henry Hayward as the appointed sole agent for the said last-mentioned company, for the sale of the soaps manufactured by the said last-mentioned company, and for the collection of the said last mentioned company's credits, to the intent and purpose and in order to secure to the said last-mentioned company that he the said Henry Hayward should at all times after the making and executing the said bond by the defendant honestly and faithfully pay over and apply all moneys, bills, cheques, notes, and other securities which he should receive, or which should come into his hands, possession, or power, for and on the behalf of the said last-mentioned company by virtue or reason of the said appointment, and not otherwise : that the condition of the said last-mentioned bond was and is in the words following, that is to say [setting it out] : that, after the making and executing of the said bond by the defendant, and until the said Groux's Improved Soap Company became and was completely registered and had obtained a certificate of complete registration with limited liability by and under the name of Groux's Improved Soap Company, Limited, according to and under and by virtue of the provisions of the Limited Liability Act, 1855, the said Henry Hayward did honestly and faithfully pay over and apply all the moneys, bills, cheques, notes, and other securities which he received, or which came into his hands, possession, or power, for [804] and on the behalf of the said company, by virtue or reason of his said appointment.

Fifth plea,—that the supposed bond was not made and executed by the defendant until after the 31st of March, 1856, or before the 5th of June, 1856, on which last-mentioned day (and not before) the said bond was made and executed by the defendant : that the company in the said bond mentioned, and to whom the defendant, the said Henry Hayward, and the said other persons, acknowledged themselves to be held and firmly bound, was at the time of the making and executing the same a joint-company completely registered according to and under and by virtue of the provisions of the statute made and passed in the eighth year of the reign of our Lady the Queen Victoria for the registration, incorporation, and regulation of joint-stock companies, by and under the name of Groux's Improved Soap Company ; and the defendant made and executed the said bond as a surety only for the said Henry Hayward, as the appointed sole agent for the said last-mentioned company for the sale of the soaps manufactured by the said last-mentioned company and for the collection of the said last-mentioned company's credits, to the intent and purpose and in order to secure to the said last-mentioned company that the said Henry Hayward should at all times after the making and executing the said bond by the defendant honestly and faithfully pay over and apply all moneys, bills, cheques, notes, and other securities which he should receive or which should come into his hands, possession, or power for and on the behalf of the said last-mentioned company by virtue or reason of the said appointment, and not otherwise : that the said bond was and is subject to the condition mentioned and set forth in the next preceding plea : and that the said Henry Hayward, after the committing of such of the [805] alleged breaches in the declaration mentioned as occurred or happened in respect of any moneys, bills, cheques, notes, and other securities which the said Henry Hayward received, or which came into his hands, possession, or power for and on the behalf of the said Groux's Improved Soap Company by virtue or reason of his the said Henry Hayward's appointment, and whilst the damages (if any) in respect thereof remained and were wholly unliquidated, and before the commencement of this suit, the said Henry Hayward paid and delivered to the said Groux's Improved Soap Company, and to the said Groux's Improved Soap Company, Limited, and to the plaintiffs, at the request and for and on the behalf of the said Groux's Improved Soap Company, who respectively accepted and received of him, divers large sums of money and divers securities for money in full satisfaction and discharge of the said last-mentioned damages, and all claims and demands in respect thereof : and the defendant became and was and is wholly and absolutely discharged and exonerated from such damages, and all claims in respect thereof.

Sixth plea,—that the defendant made and executed the supposed bond at the time, and acknowledged himself to be held and firmly bound to Groux's Improved Soap Company as in the said fourth plea is mentioned, such surety as is in that plea mentioned, and under the circumstances and for the purposes therein also mentioned, and the said bond was and is subject to the said condition mentioned and set forth in the said fourth plea: that, shortly after the making and executing of the said bond by the defendant, the said Groux's Improved Soap Company became and was completely registered, and obtained a certificate of complete registration, with limited liability, by and under the name of "Groux's Improved [806] Soap Company, Limited," according to and under the provisions of the Limited Liability Act, 1855, and thereupon the said Henry Hayward ceased to be the appointed agent for the said Groux's Improved Soap Company, and the said appointment was then wholly ended and determined: and that the said Henry Hayward, during the said appointment, and the continuance thereof, until the time when the same was so ended and determined, did honestly and faithfully pay over and apply all the moneys, bills, notes, and other securities which he received, or which came into his hands, possession, or power, for and on the behalf of the said Groux's Improved Soap Company by virtue or reason of his said appointment.

The plaintiffs demurred to the fourth, fifth, and sixth pleas; the grounds of demurrer stated in the margin being,—as to the fourth and sixth pleas, "that the matters alleged therein are no defence to the action,"—and, as to the fifth plea, "that the matters alleged therein are no defence to the whole action." Joinder in demurrer.

Hannen, in support of the demurrers. The question is, whether, by reason of the change in its name from unlimited to limited, this company has ceased to be the same company. The mode of obtaining limited liability is defined by the 2nd section of the 18 & 19 Vict. c. 133, which enacts that "any joint-stock company, except as aforesaid (a), now or hereafter completely registered under the 7 & 8 Vict. c. 110, may obtain a certificate of complete registration with limited liability, in manner and subject to the condition following, that is to say, the directors of such company may, with the consent of three fourths in number and value of its shareholders who may be present person-[807] ally or by proxy at any general meeting summoned for that purpose, make such alteration in the name, nominal value of shares, and deed of settlement of the company, as may be necessary for enabling it to comply with the conditions hereinbefore mentioned (s. 1) with respect to joint-stock companies seeking to obtain certificates of complete registration with limited liability: and, upon compliance with such conditions, the registrar, after the affairs of the company shall at the expense of the company have been audited by some person appointed by the board of trade, and on certificate from the said board that the complete solvency thereof has been established on such audit to its satisfaction, shall grant to such company, by its new name, a certificate of complete registration with limited liability; and thereupon all privileges and obligations hereby attached to companies with limited liability, their shareholders, directors, and officers, shall attach to the company named in such certificate, its shareholders, directors, and officers." [Willes, J. Does the company by registering under that act lose all its property? Clearly not. Byles, J. The individual members are relieved from some of their liabilities.] It is not alleged here that there has been any change in the directors. The 12th section provides that "no alteration made by virtue of this act in the name of any company shall prejudice or affect any right previous to such alteration has accrued to such company as against any other company or person, or which has accrued to any other company or person as against such company, but every such company as against any other company or person, and every other company or person as against such company and the members thereof, shall be entitled to all such remedies as he or they would have been entitled to if no such alteration had been made; and no such alteration [808] shall abate or render defective any legal proceeding pending at the time when such alteration is made." By the 107th section of the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, the 7 & 8 Vict. c. 110, 10 & 11 Vict. c. 78, and 18 & 19 Vict. c. 133, are repealed: but such repeal shall not take effect with respect to any company completely registered under the 7 & 8 Vict. c. 110, until such

(a) "Other than an assurance company:" s. 1.

company has obtained registration under this act, as hereinafter mentioned." The 114th section enacts that "any existing company may, for the purpose of obtaining registration with limited liability, change its name by adding thereto the word, 'limited,' or do any other act that may be necessary." And s. 16 enacts that "the registration of any existing company under this act shall not, nor shall any act of the company subsequent to such registration, prejudice any right which previously to such registration has, or which would, if no such registration had taken place, have accrued to any creditor or other person against the company in its corporate capacity, or against any person then being or having been a member of such company; but every such creditor or other person shall be entitled to all such remedies against the company in its corporate capacity, and against every person then being or having been a member of such company, as he would have been entitled to in case such registration had not taken place." Thus, all contracts are to remain in force, notwithstanding the change in the name of the company. The contract might be put an end to by anything which would make the employment of the servant cease to be an employment in the same duties or under the same parties. But here there has been no change either in Hayward's duties or in the persons by whom he is employed, unless the company has ceased to be the same company. A mere change in [809] the name of a corporation does not affect in any degree its rights. This matter underwent much discussion in a recent case of *In re the Plumstead, Woolwich, and Charlton Consumers Pure Water Company*, 6 Jurist, N. S. 791, before the Lords Justices, the result of the judgment in which is that the change in the name of a company from unlimited to limited has no effect whatever upon existing rights and liabilities of the original company. The earlier authorities are collected in the notes to *Lord Arlington v. Merricke*, 2 Wms. Saund. 414 a., where it is said, that, "Where the security is given to the house, as a banking-house, for instance, for the fidelity of a clerk in the shop and counting-house, and not to the particular persons, a change of partners is held to make no difference, but the surety still continues liable. As, where the condition of a bond, reciting that the plaintiffs had agreed to take one P. J. into their service and employ as a clerk in their shop and counting-house, and the obligors had agreed to become security for his fidelity as far as 500l. each, declared that if the said P. J. should faithfully account for and pay to the plaintiffs all sums of money he should at any time receive in the service of the plaintiffs, then the bond to be void: in an action upon this bond, a verdict was found for the plaintiffs upon a case which stated, that, after the bond was given, one R. S. was taken into partnership with the plaintiffs, and that afterwards the said P. J. received a sum of money on account of the new partnership, and had not paid it over to the plaintiffs: the court thought that this case was materially distinguishable from *Wright v. Russel*, 3 Wils. 530, 2 W. Bla. 934: for, in this case, the security was to the house of the plaintiffs, but in that it was only to Wright personally, and the breach assigned was for embezzling the whole partnership money; *Barclay v. Lucas*, 1 T. R. 29, n. (a)." And in [810] note (c) the learned editor adds: "So, it was held that a bond given to trustees, to secure the faithful services of a clerk to the Globe Insurance Company (who were no corporation) might be put in suit by the trustees for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by the company themselves as a natural body: *Metcalf v. Bruin*, 12 East, 400." Again, in *The Eastern Union Railway Company v. Cochrane*, 9 Exch. 197, the defendant, as surety, executed a bond conditioned for the faithful service of a clerk to a railway company. Whilst the service continued, that company and another railway company were dissolved, and united into one company by a statute which provided that all bonds, &c. made or entered into with, in favour of, or by the dissolved companies should "be and remain as good, valid, and effectual in favour of and against and with reference to the new company, and might be proceeded on and enforced in the same manner to all intents and purposes, as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein instead of the persons, company, or party actually named

therein respectively ;” and it was held that the defendant was liable for breaches of the bond committed by the clerk after the union of the two companies.

[811] Lush, Q. C., contra (*a*). The principle applicable to all these cases is that laid down by Lord Ellenborough in *Strange v. Lee*, 3 East, 484, where *Barclay v. Lucas*, [812] is commented upon, and certainly not upheld. There, a bond by A., reciting that B. intended to open a banking account with C., D., and E., as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the banking-house of C., D., and E.; and it was held that, on C.’s death, such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.’s death, having afterwards paid off the balance, which was applied at the time to the old debt incurred in C.’s life-time, A. was wholly discharged from his obligation. Lord Ellenborough said: “I consider this question concluded by the cases of *Lord Arlington v. Meerieke*, 1 Saund. 412, *Wright v. Russel*, 2 W. Bl. 934, 3 Wils. 532, and *Barker v. Parker*, 1 T. R. 287. It may be observed, however, that, in *Barclay v. Lucas*, the words were different from the present case; the clerk was to be taken into the service of the obligees as a clerk in their shop and counting-house, which might be supposed to mean the same house, however the individual partners might change. But, without considering whether that were the true construction of those words, it is enough to say that there are no such words here. But we are now desired to construe an obligation to be answerable for money due to them (certain partners having been before named) to mean money due to any part of them,—a construction which would be contrary to the words of the instrument. What is contended for is, to make this a bond to the persons then constituting the banking-house, and their successors, which cannot be admitted.” The case of *The Eastern Union Railway Company v. Cochrane*, 9 Exch. 197, does not touch this. The decision there is rested by the court on the express reservation of the rights of the respective companies by the statute. Here, however, there [813] are no enactments to keep this obligation in force; for, the 12th section of the 18 & 19 Vict. c. 133, does not apply to a case of this kind. This company was a joint-stock company established under the 7 & 8 Vict. c. 110, being at the time this bond was given

(*a*) The points marked for argument on the part of the defendant were as follows:—

“As to the demurrer to the fourth plea,—1. That the said fourth plea is good in substance:

“2. That the bond of the said Thomas Cooper was given by him as a surety only for Henry Hayward as the appointed agent for Groux’s Improved Soap Company, being a company of unlimited liability as to the members thereof, according to the statutes in that behalf, for the purposes, &c. in the condition to the said bond and in the fourth plea mentioned; and that, so long as the said company remained and was such a company, the condition was kept and observed and satisfied, and the suretyship was limited to such a company:

“3. That the said Henry Hayward’s appointment (in respect of which the said Thomas Cooper was surety) ceased on Groux’s Improved Soap Company being registered as Groux’s Improved Soap Company Limited:

“4. That the said Thomas Cooper did not become or remain, nor was he surety or liable under the bond and conditioned, or either of them, after Groux’s Improved Soap Company in the said bond and condition mentioned became and was registered as Groux’s Improved Soap Company Limited:

“5. That the said Thomas Cooper ceased to be surety under the said bond and condition for or in respect of any matters or things in the said bond and condition mentioned, except so far as related to matters or things in respect of the said Henry Hayward’s appointment as agent to Groux’s Improved Soap Company:

“6. That Groux’s Improved Soap Company was and is a different and distinct company from Groux’s Improved Soap Company, Limited:

“7. That the security for the payment of Henry Hayward’s salary and commission became imperilled by the company becoming registered under the Limited Liability Act of 1855, and the Joint-Stock Companies Act, 1856; and the risk of the said Thomas Cooper under the suretyship was altered and increased, to his prejudice.”

The like points as to the demurrers to the fifth and sixth pleas respectively.

a partnership incorporated with transferrable shares, but all its members being liable for the whole debts of the firm. Every word of the bond has reference to the company thus constituted; and there is nothing in it which contemplates a change in the constitution of the concern. Under the 18 & 19 Vict. c. 133, the company became a body of a totally different description. It became re-constituted, and changed into a body corporate the liability of the members whereof was limited to the amount of the shares of each individual. Certain provisions are introduced to prevent that change from having the effect of nullifying existing contracts. The 11th section provides that the grant of a certificate of complete registration with limited liability shall not prejudice or affect the rights of creditors against the company; and s. 12, that the alteration in the name of the company shall not prejudice or affect any right which previous to such alteration had accrued to the company against any third person, or to any third person against the company. These words are inapplicable here; for, at the time of obtaining the certificate, no right had accrued to the company. If there had been any defalcation on the part of Hayward before the company obtained a certificate of registration with limited liability, the 11th section would have prevented the company's right to have recourse against the surety from being affected. But the question is, does the 12th section keep alive a bond or security which but for that section would be gone? [Williams, J. The right exists when the bond is given. Byles, J. Do you contend that "right" and "right of action" are [814] synonymous?] It is submitted that they are. Had any "right" accrued to the company before a breach committed by Hayward? The defendant is at all events entitled to judgment on the sixth plea.

Hannen, in reply, was stopped by the court.

WILLIAMS, J. I think this is a very plain case. The fact of the company to whom this bond was given having under the statute 18 & 19 Vict. c. 133, obtained a certificate of complete registration with limited liability, produced no change in the company with reference to the liability of the surety on this bond. The effects of a change in the name of the company by the addition of the word "limited" are obviated by the provision contained in s. 12 of the statute.

WILLES, J. I am of the same opinion. The change in the name of the company in no degree varies the rights of the company or the obligations of the surety on this bond. The word "thereupon" in the sixth plea is used as synonymous with "in consequence thereof." But it was not a consequence of the company's obtaining a certificate of complete registration with limited liability under the 18 & 19 Vict. c. 133, that the agency of Hayward ceased.

BYLES, J. I am of the same opinion. Independently of any enactment, I should have thought that the company remained the same, notwithstanding its having obtained a certificate of complete registration under the act. The only alteration in its name is the superaddition of the word "limited." But the 12th section makes the matter clear. As to the sixth plea, if "thereupon" had been the preface to a new allegation, the plea would have been bad. But, in truth, the same question arises upon the sixth as upon the other pleas. I think the plaintiffs are entitled to judgment upon all the demurrers.

Judgment for the plaintiffs.

COBHAM, Clerk to the Local Board of Health for the District of Ware, in the county of Hertford, v. HOLCOMBE. June 22nd, 1860.

A contract was entered into with the defendants by five persons named, who were members of a local board of health, for works to be done by the defendants. The five covenanted "for themselves, their heirs, executors, and administrators," but the contract professed to be entered into by them "for and on behalf of the local board:"—Held, that the clerk to the local board was the proper person to sue for a breach of this contract, by virtue of the 138th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63.

The declaration stated that Nathaniel Cobham, as and being the clerk to the local board of health for the district of Ware, in the county of Hertford, formed and constituted under and by virtue of the Public Health Act, 1848, sued Charles Thomas Holcombe,—For that, by articles of agreement, sealed with the seal of the said local

board, signed by five members thereof, made the 27th day of October, 1857, after the passing of a certain other act therein recited, that is to say, the Public Health Supplemental Act, 1849, between William Parker, Ambrose Frederick Proctor, Martin Hadsley Gosselin, Thomas Cobham, and Joseph Clenck the younger, being five members of the said local board, of the one part, and the defendant of the other part, reciting that the said local board had been duly formed and constituted under and by virtue of the said Public Health Act, 1848, and that by the said Public Health Supplemental Act, 1849, it was, among other things, enacted that the local boards under the said [816] Public Health Act might contract, for any period not exceeding three years at any one time, with any company or person, for the supply of gas or oil, or other means of lighting the streets, roads, and other open places, markets, and public buildings within their respective districts, and might provide such lamps, lamp-posts, and other materials and appurtenances as such local boards respectively might think necessary for lighting the same, and the expenses incurred by such local board in so doing should be defrayed out of the general or special district-rates (as the nature of the case might require) levied under the said Public Health Act; and reciting that the said local board, in exercise of the powers vested in them by the said acts, had contracted with the defendant for lighting the streets, roads, and other public places within their said district, with gas, for the time being, upon the terms, and subject to the conditions, covenants, provisoes, and agreements thereafter expressed and contained,—it was witnessed that, in pursuance of the said agreement, and for carrying the same into effect, and in consideration of the covenants and agreements thereafter entered into by the defendant, they the said William Parker, Ambrose Frederick Proctor, Martin Hadsley Gosselin, Thomas Cobham, and Joseph Clenck, the younger, did thereby, for themselves, their heirs, executors, and administrators, on behalf of the said local board, covenant with the defendant, his executors, administrators, and assigns, that it should be lawful for the defendant, and that the said local board should and would from time to time authorize, permit, and suffer the defendant, at his own proper costs and charges (subject as hereinafter mentioned), to dig and break up the streets, roads, and other open places within the said district, for the purpose of laying down the main-pipes, branch pipes, service-pipes, and other [817] pipes necessary or requisite for lighting the said streets, roads, and other public places within the said district, with gas, he the defendant doing as little damage or injury, and occasioning as little inconvenience as possible, and at his own costs and charges replacing, reinstating, levelling, and making good again the said streets, roads, and other open places with all convenient speed after the said pipes should be so laid down, to the satisfaction of the said local board, or their successors or surveyors for the time being; and that it should be lawful for the defendant, from time to time, at his own proper costs and charges (subject as hereinafter mentioned), to have free access to the several main-pipes, branch-pipes, service-pipes, and other pipes then laid down (being pipes belonging to him) or thereafter to be laid down by him within the said district, and to dig and break up such parts of the said streets, roads, and other open places within the said district as should or might be necessary to give to him the said defendant free access to all and every the main pipes, branch-pipes, service-pipes, and other pipes already or thereafter to be laid down by him, for the purpose of repairing, relaying, altering, or replacing, or examining into the state of repair and condition of the said pipes and mains, or any or either of them: That the defendant did thereby covenant and contract with the said William Parker, Ambrose Frederick Proctor, Martin Hadsley Gosselin, Thomas Cobham, and Joseph Clenck the younger, their executors and administrators, in manner following, that is to say, that he the defendant would from time to time during the continuance of the said agreement, at his own proper costs and charges, well and sufficiently repair and keep and continue in good and sufficient repair, to the satisfaction of the said local board, or their successors or surveyor for the time being, all and singular the main pipes, branch [818] pipes, service pipes, and other pipes, and also all and singular the several street lamps, lamp-posts, lamp burners, and fittings, which were thereby by him agreed to be supplied with gas, and which were the property of him the defendant; and that he the defendant would, for and during the term of three years, to be computed from the 24th of June then last past, well and sufficiently light, or cause to be lighted, with the best made gas one hundred and four full bat's wing lights to be

put and placed on the same situations on the said streets, roads, and other open places within the said district as the same lamps were then put and placed, or might thereafter be put and placed, according to the directions of the said local board, if the number of lamps were increased (subject, however, to the proviso in that behalf hereinafter contained); and that the defendant would light or cause to be lighted with the best made gas each and every of the said one hundred and four lamps for ten months in each and every year during the said term of three years, omitting three nights each full moon during six of the said ten months, and five nights each full moon during the other four of the said ten months, as the said local board should direct, but with full power, nevertheless, for the said local board and their successors in any year during the said term of three years to order and direct the said lamps to be lighted either earlier or later in the season, upon giving one month's notice, and so that the time during which the said lamps should be lighted should not exceed the space of ten progressive months in any one year: and that the said lamps should be lighted by the defendant, or by some person or persons under his direction, at or immediately preceding sunset in the evening, and be kept and continued to burn until day-light in the morning, during such ten progressive months in the year as the said local board or their successors should [819] think proper to order and direct: and that he the defendant would, at his own expense, find and provide a proper and experienced person or persons to light and extinguish, and to clean and attend to, the said lamps during the said term: and that the said lamp-posts should always remain and be of cast-iron and of the best description, and that any additional lamp-posts, if any should be required by the said local board, should be put and placed at such distance from each other, and in such situation in the said streets, roads, and other open places within the said district as the said local board and their successors should think proper to order and direct; and that the said lamps and burners, and all and singular the appurtenances connected therewith, should be of the best quality and workmanship; and that he the defendant should and would, during the continuance of that agreement, bear, pay, and defray all costs, charges, and expenses whatsoever of or concerning the preparing of or manufacturing the gas and gas-works with which the said pipes and lamps should be so supplied as aforesaid, and also all costs, charges, and expenses of or concerning the painting, glazing, lighting, extinguishing, cleaning, keeping in repair, and breakage of the said lamps, lamp-posts, burners, and fittings, or of or concerning any matter or thing connected with or belonging to the said gas-pipes or gas-works, or the said painting or glazing, or otherwise howsoever concerning the lighting of the said district,—it being the true intent and meaning of that agreement, and of the said parties thereto, that the said local board and their successors were not to be at any further or other expense of or concerning the said lighting as aforesaid than the yearly sums by them covenanted to be paid as hereinafter mentioned; and also that he the defendant would cause a good and sufficient pressure to be maintained [820] and kept on at the said gas-works by night as well as by day during the continuance of that agreement: That, in consideration of the premises, the said William Parker, Ambrose Frederick Proctor, Martin Hadsley Gosselin, Thomas Cobham, and Joseph Clenck the younger, did thereby, on behalf of the said local board, covenant with the defendant that the said local board should and would during the said term of three years pay or cause to be paid unto the defendant for lighting the said district with gas in manner aforesaid, and for abiding by, executing, keeping, and performing all and every the covenants, clauses, and agreements thereinbefore mentioned and set forth, to be on his part and behalf done and performed, the several sums of money next hereinafter mentioned, by half-yearly payments, in equal moieties, at Christmas and Michaelmas, or within twenty-one days next after either of the said last-mentioned days on which the same should be demanded, that is to say, for and during the first year of the said term, the sum of 338*l.*, for and during the second year of the said term the sum of 343*l.* 4*s.*, and for and during the third year of the said term the sum of 348*l.* 8*s.*, subject in each of the said several years to a proportionate deduction from the said several sums of money for such period during which the said lamps should not be lighted at the times and in the manner therein mentioned and specified: Provided always, and it was thereby expressly declared and agreed by and between the said parties thereto, that, in case the said local board or their successors should be minded or desirous, at any time during the said term of three years, to increase the number of lamps in the

said district, and should signify such their desire to the said defendant in writing or otherwise by the clerk, that then the defendant should within one calendar month after such signification [821] re-open such parts of the said streets, roads, and open places in the said district as might be requisite for the purpose of laying down or affixing any branch-service or other pipe or pipes to the mains already laid down, or which might thereafter be laid down, or for the erection of any lamp-posts, or otherwise, upon being paid the further yearly sums following, that is to say, the sum of 3*l.* 5*s.* in the first year of the said term, the sum of 3*l.* 6*s.* in the second year of the said term, and the sum of 3*l.* 7*s.* in the third year of the said term, in the proportions and at the times before specified, for each and every additional bats-wing light, he the defendant making good and levelling in manner aforesaid the streets and other places that should have been so broken up for the purpose last aforesaid: Provided always, and it was thereby declared and agreed, that the defendant, notwithstanding the proviso lastly thereinbefore contained, should not be bound or in any manner compelled to lay down any main, or affix any branch service or other pipe, or erect any lamp-post, beyond the then limits of the district of the said local board, unless the same should be the subject of a special agreement between the defendant and the said local board or their successors: and it was thereby further declared and agreed that that contract or agreement should be mutually taken and considered to be for the term of three years, to commence and be computed from the 24th of June then last past; and for the true and faithful performance, observance, and fulfilment of that agreement, and of the covenants and stipulations therein contained, the said parties thereto did mutually bind themselves and himself in the penal sum of 100*l.* of lawful money of Great Britain, to be recovered against the party aggressing or neglecting to fulfil the said agreement, as liquidated damages, in any of Her [822] Majesty's courts of record at Westminster: Averment, that, although, before the commencement of this suit, all conditions had been performed and all things done by the said William Parker Ambrose, Frederick Proctor, Martin Hadsley Gassell, Thomas Cobham, and Joseph Clenck the younger, on behalf of the said local board, that were by the said deed and articles of agreement on their part and the part of the said local board stipulated and provided to be done and performed, and although all times had elapsed, and all things happened, and all payments had been made to entitle them on the said behalf to the due and perfect performance by the defendant of all his said covenants: Breach, that the defendant had not performed the same, but, on the contrary thereof, had transgressed and neglected to fulfil the said agreement, and had not during the said term well and sufficiently lighted and caused to be lighted with the best made gas one hundred and four full batswing lights: and that the defendant did not light with the best made gas each and every of the said one hundred and four lamps for ten months in each and every year during the said term of three years, omitting three nights each full moon during six of the said ten months, and five nights each full moon during the other four of the said ten months, as the said local board directed: and that the said lamps were not lighted by the defendant, or by any person under his direction, at or immediately preceding sunset in the evening, and kept and continued to burn until day light in the morning, during such ten progressive months in the year as the said board or their successors thought proper to order and direct: and that the defendant did not nor would at his own expense find and provide a proper and experienced person or persons to light and extinguish and to cleanse and attend to the said lamps during the said term, but, on the contrary thereof, allowed the same to remain unlighted and [823] in a dirty and unclean state and condition: and that the defendant did not nor would cause a good and sufficient pressure to be maintained and kept on at the said gas-works by night as well as by day during the continuance of the said agreement: Claim, 100*l.*

To this declaration the defendant demurred, the ground of demurrer stated in the margin being, "that the covenant declared on, being entered into with William Parker and four other persons personally, is not one on which the plaintiff as clerk to the local board of health for the district of Ware, in the county of Hertford, can sue." Joinder.

G. W. Harrison, in support of the demurrer (*a*). The action is not well founded.

(*a*) The points marked for argument on the part of the defendant were as follows:—
"That the covenant declared on, being entered into with William Parker and

It is not based upon a contract with the local board of Ware, but with certain persons named; therefore it is not a contract in respect of which the clerk to the local board is entitled to sue. The clause of the Public Health Act, 1848 (11 & 12 Vict. c. 63), which prescribes the mode of contracting, is the 85th, which enacts "that the local board of health may enter into all such contracts as may be necessary for carrying this act into execution; and every such contract whereof the value or amount shall exceed 10l. shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local [824] board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district), sealed with the common seal, and shall specify the work, materials, matters, and things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall fix and specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed; and every contract so entered into, and duly executed by the other parties thereto, shall be binding on the local board by whom the same is executed, and their successors, and upon all other parties thereto, and their executors, administrators, successors, or assigns, to all intents and purposes: Provided always, that the said local board may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty be mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such local board may seem proper: Provided also, that, before contracting for the execution of any works under the provisions of this act, the said local board shall obtain from the surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise: Provided also, that, before any contract of the value or amount of 100l. or upwards is entered into by the said local board ten days' public notice at the least shall be given expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and the [825] said local board shall require and take sufficient security for the due performance of the same." The clause enabling the clerk to sue and be sued is the 138th, which enacts, "that the local board of health of any non-corporate district may sue and be sued in the name of the clerk for the time being for or concerning any contract, matter, or thing whatsoever relating to any property, works, or things vested or to become vested in them by reason of the provisions of this act, or relating to any matter or thing whatsoever entered into or done, or intended to be entered into or done by them under the provisions of this act; and in any action of ejectment brought or prosecuted by such local board, it shall be sufficient to lay the demise in the name of the said clerk; and in proceedings by or on the part of such local board against any person for stealing or wilfully injuring or otherwise improperly dealing with any property, works, or things belonging to them or under their management, it shall be sufficient to state generally that the property or thing in respect of which the proceeding is instituted is the property of the said clerk: and all legal proceedings by, on the part of, or against such local board, under this act, may be preferred, instituted, and carried on in his name; and no proceedings whatever shall abate or be discontinued by the death, resignation, or removal of the clerk, or by reason of any change or vacancy in such local board by death, resignation, or otherwise," &c. The contract here is by the five persons named, "for themselves, their heirs, executors, and administrators,"—words which would be idle if it were a contract by the local board. [Byles, J. It is not under their seals. The word "heirs" at all events must be rejected.] The defendant contracts with the individuals. The general averment of performance of conditions precedent is consistent only with this view. [Willes, J. Is not this point settled by the case of *Wills v. Sutherland*,

four other persons personally, is not one on which the plaintiff, as clerk to the local board of health for the district of Ware, in the county of Hertford, can sue:

"That the local board of health of the district of Ware is not either party or privy to the covenants declared on:

"And that the said deed is not entered into or executed in compliance with the 85th section of the Public Health Act, 1848."

4 [826] Exch. 211 (in error, *Sutherland v. Wills*, 5 Exch. 715)?] The words of the act there were different from those of the statute now under consideration, and the contract was made with the company. [Willes, J. *Chapman v. Milvain*, 5 Exch. 61, is in accordance with *Wills v. Sutherland*. Williams, J. Is not this a proceeding on behalf of the local board?] It is submitted it is not. The parties named have chosen to contract in their own names, and they ought to have sued. Coleridge, J., in delivering the judgment of the Exchequer Chamber in *McKinnon v. Penson*, 9 Exch. 609 (affirming the judgment of the court of Exchequer in 8 Exch. 319), says: "The usual and proper operation of clauses such as that under consideration (*a*), is not to give new rights of action, or create new liabilities, but only to substitute more convenient parties for those who would otherwise be liable or might have been sued, either by common law or by statute." And that was adopted in this court in *Kendall v. King*, 17 C. B. 483. [Byles, J. What particular provision of s. 85 is it that you suggest has not been complied with? The five persons named say they contract "for and on behalf of the local board." They sign, and the local board seal.] If this is a contract within the 85th section it is not contended that the requisites have not been sufficiently complied with! but it is submitted that a contract in this form is not a contract in respect of which the 138th section enables the local board to sue in the name of their clerk.

Hopwood, contra (*b*). This action is properly brought [827] in the name of the clerk to the local board, pursuant to the provision in s. 138. The case is not to be distinguished in principle from *Wills v. Sutherland*, 4 Exch. 211, *Chapman v. Milvain*, 5 Exch. 61, *Smith v. Goldsworthy*, 4 Q. B. 430, and *Skinner v. Lambert*, 5 Scott, N. R. 197, 4 M. & G. 477, 2 Dowl. N. S. 132. [He was stopped by the court.]

Harrison, in reply. In the event of a breach of the contract on the part of the five persons named therein, the defendant could not have sued the local board: he must have proceeded against the persons named only. The words "for or on behalf of" are not found in the 138th section. The board can only sue or be sued in the name of their clerk, where the contract is made directly with them,—where the local board itself is a contracting party.

WILLIAMS, J. I am of opinion that our judgment must be in favour of the plaintiff. It is unnecessary to give any opinion as to whether or not this contract can be considered as a contract entered into by the local board in conformity with the 85th section of the Public Health Act, 1848. There are some formal difficulties which might perhaps be urged. But it is quite clear that this is a contract entered into with the five with whom the covenants are made on the behalf of the local board; and the contract relates to a thing which is to be done under the provisions of the act. [828] It is objected on the part of the defendant, that the action should have been brought by the covenantees, and not by the local board, because they are not contracting parties. This is an objection which is so far removed from the merits of the case that we should be most reluctant to give effect to it, and would resort to any possible construction which should tend to defeat the action, and to extricate us from that difficulty. I am of opinion that we may find such extrication in the 138th section of the statute. According to the cases of *Wills v. Sutherland*, 4 Exch. 211, *Chapman v. Milvain*, 5 Exch. 61, and other authorities, the language of that section warrants us in saying that the statute justifies, and indeed renders it imperative on the local board to bring the action in the name of their clerk; for, it enacts, "that the local board of health of any non-corporate district may sue and be sued in the name of the clerk for the time being for or concerning any contract, matter, or thing whatsoever relating to any property, works, or things vested or to become vested in them by reason of the provisions of this act, or relating to any matter or thing

(a) The 4th section of the General Highway Act, 13 G. 3, c. 78.

(b) The points marked for argument on the part of the plaintiff were as follows:

"That, under the provisions of the statutes in the declaration referred to, the board of health is party or privy to the covenants declared on:

"That, under the same statutes, the plaintiff is entitled to sue as clerk for the time being to the said board, for the breaches declared upon, and that the declaration is in law sufficient for that purpose:

"And that the said deed is substantially in compliance with the 85th section of the Public Health Act, 1848."

whatsoever entered into or done, or intended to be entered into or done by them under the provisions of this act." The contract here sued upon is a contract relating to a matter or thing entered into by the local board under the provisions of the act. Mr. Harrison says that the words "entered into by the board" must be construed to mean entered into by and in the name of the local board, and not by any individual members on behalf of the board. But I do not find anything in the act to warrant so narrow a construction.

WILLES, J. I entirely agree in the opinion expressed by my Brother Williams.

BYLES, J. I also am of opinion that the plaintiff is [829] entitled to judgment. I abstain from giving any opinion upon the 85th section: but I do not feel the least doubt upon the 138th section. The object of that section was, to obviate any difficulties which might otherwise have arisen from the changes by death or otherwise which necessarily arise in a fluctuating body: and it ought so to be read as to suppress the mischief and advance the remedy. The first words of the section are, that "the local board of health of any non-corporate district may sue and be sued in the name of the clerk for the time being for or concerning any contract, matter, or thing whatsoever relating to any property, works, or things vested or to become vested in them by reason of the provisions of this act, or relating to any matter or thing whatsoever entered into or done, or intended to be entered into or done by them under the provisions of this act." Looking at this contract, the first thing to be done by the local board is, to permit the contractors to take up the streets, &c.: the next is, that they are to pay the money. It is impossible not to see that the whole contract relates to matters and things to be done by them. I also agree that these words may be brought within the latter part of the section. In the first part the legislature deals with actions: but the words "all legal proceedings" in the latter part, are large enough to embrace actions: the provision at the end, that no proceedings shall abate by death or removal of the clerk, clearly applies to actions. We therefore do not in the least strain the words of the section, when we read "all legal proceedings" as comprehending actions. But, whether we do so or not, the construction of the first part of the section is much aided by the light which is thrown upon it by the latter part. I entertain no doubt whatever that the proper plaintiff is suing here.

[830] KEATING, J. I entirely agree with the rest of the court that the plaintiff in this case is entitled to our judgment. It is clear that the contract declared on is a contract which is within at least the earlier part of s. 138. Upon the face of it, it is a contract which purports to be made by the five members of the local board who are named "for and on behalf of the board." The important acts to be done under it are to be done, and could only be done, by the local board. The five individuals named, no doubt, covenant "for themselves, their heirs, executors, and administrators:" but these words may be rejected, because, under the 140th section, the five who contract for the board could incur no personal liability from so doing. That section provides "that no matter or thing done or contract entered into by the local board of health, nor any matter or thing done by any superintending inspector, or any member of the said local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said local board, shall, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing this act, subject them or any of them personally to any action, liability, claim, or demand whatsoever; and any expense incurred by any such local board, member, officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of this act." It is clear that this is a contract in respect of which the clerk to the board might sue, under s. 138.

Judgment for the plaintiff.

[831] THORNHILL AND ANOTHER v. NEATS. June 22nd, 1860.

[S. C. 2 L. T. 539.]

To an action for work and labour, the defendant pleaded that the work was done under an agreement in writing whereby the plaintiffs agreed to build for him six houses, and completely finish and give up the premises to him on or before the

20th of March, 1859, under a penalty of 1l. for each house for each and every week the works should remain incomplete and possession withheld from the defendant after that date, the amount of the penalty to be paid out of the moneys which might become due to the plaintiffs under the agreement: that the houses remained incomplete and possession was withheld from the defendant for twelve weeks after and beyond the day stipulated, wherefore the defendant claimed to deduct 72l.—To this plea the plaintiffs replied that, after the making of the agreement in the plea mentioned, and before any of the alleged penalties had been incurred, it was mutually agreed that the plaintiffs should perform certain other work in and upon the said houses in addition to the work in the first agreement mentioned, such additional work to be done within a reasonable time; that the work under the second agreement was so mixed up with the work in the first agreement mentioned, being part and parcel thereof, that it became impossible to complete the work in the first agreement mentioned until the work under the second agreement was also completed, as the defendant at the time of making the last-mentioned agreement well knew; and that the plaintiffs had performed all the work under both agreements within a reasonable time:—Held, a good legal answer to the claim for penalties, on the ground of waiver.—*Semble*, per Byles, J., that the replication afforded a good equitable answer, on the ground that the performance of the original agreement had become impossible by the act of the defendant.

This was an action for money payable by the defendant to the plaintiffs for goods sold and delivered by the plaintiffs to the defendant, and for work done and materials provided by the plaintiffs for the defendant at his request, and for money paid by the plaintiffs for the defendant at his request, and for money found to be due from the defendant to the plaintiffs upon accounts stated between them: Claim, 1500l.

Fourth plea,—as of the sum of 72l., parcel of the money claimed for and in respect of work done and materials provided by the plaintiffs for the defendant,—that the greatest part of the work and materials in the declaration mentioned were done and provided under an agreement in writing dated the 8th of November, 1858, made between the defendant of the one part and the plaintiffs of the other part; by which agreement the plaintiffs agreed with the defendant to build, execute, and completely finish for him, fit for habitation, three houses entire, and to do every description of work required to be done to the three carcasses adjoining, and their appurtenances, so as to completely [832] finish them for the defendant in a good, substantial, and workmanlike manner, to the satisfaction of Mr. John Thomas, the defendant's surveyor, and to commence the works immediately on signing the contract, and completely finish and give up the premises on or before the 20th day of March, 1859, under a penalty of 1l. for each house for each and every week the works should remain incomplete and possession withheld from the defendant after that date; and by which agreement the defendant agreed with the plaintiffs, that, in consideration of the due performance of the said works, and on the certificate of the said John Thomas that the works were done to his satisfaction, to pay to the plaintiffs the sum of 1198l. 18s. 6d. in manner in the said agreement mentioned; and by the said agreement the amount of the penalty thereinbefore mentioned was to be paid out of the moneys due, or which might become due, to the plaintiffs under the agreement: That the greatest part of the plaintiffs' claim for work done and materials provided is for and in respect of the said work done and materials provided by the plaintiffs under the said agreement, and exceeds the sum of 72l. parcel, &c., and is claimed as due to them from the defendant under the said agreement: That the plaintiffs did not proceed with or build or execute the said works to the satisfaction of the said John Thomas, and that the plaintiffs did not completely finish or give up the said houses, works, and premises mentioned in the said agreement on or before the said 20th of March, 1859; but the whole of the said houses, works, and premises in the said agreement mentioned were delayed, and remained incomplete, and possession was withheld from the defendant for twelve weeks next after and beyond the said 20th of March, 1859, whereby the defendant, under and according to the said agreement, became and was and [833] is entitled to pay himself and to deduct, and does accordingly pay himself and deduct out of the moneys due and claimed to be due to the plaintiffs under the said agreement, the sum of 1l. per week for each of the said houses, for each and every week of the said twelve weeks the said work so remained incomplete

and possession withheld from the defendant after the said 20th day of March, 1859, amounting together to the sum of 72l.

Second replication to the fourth plea,—on equitable grounds,—that the defendant ought not to receive from the plaintiffs any of the said moneys so alleged to be forfeited, by way of penalties, as in the said plea mentioned, or deduct the amount of such alleged penalties out of any moneys payable by the defendant to the plaintiffs in respect of work done, labour performed, and materials provided under the said agreement in the said fourth plea mentioned, because they the plaintiffs said that, after the making of the said agreement, and before any of the said alleged penalties had been incurred, it was mutually agreed between the plaintiffs and the defendant that the plaintiffs should perform certain other work, and bestow other labour, and provide other materials in, upon, and for the said houses, in addition to the work, labour, and materials in the said first-mentioned agreement contained, upon certain other terms, that is to say, that the plaintiffs should perform the said work in that replication mentioned within a reasonable time for so doing in that behalf: That the said work in that replication mentioned was so mixed up with the said work upon the said premises in the said agreement mentioned, being part and parcel thereof, that it became impossible to complete the said works and premises in the said agreement mentioned until the said additional works in that replication mentioned were also completed, as the de-[834]-fendant, at the time of making the said agreement in the replication mentioned always well knew: That they the plaintiffs had performed all the terms of the said agreement in that replication mentioned on their part to be performed, and had completed the said works in the said agreement in that replication mentioned within a reasonable time, and also at same time completed the said works and premises in the said agreement in the said fourth plea mentioned, and forthwith gave up possession of the same to the defendant: And that, using all due and reasonable dispatch in that behalf, it was impossible to have completed the said works and premises mentioned in the said agreement in the said fourth plea mentioned in accordance with the terms and at the time in that agreement mentioned, in consequence and by reason of the premises therein mentioned: and that the defendant entered upon and took possession of, and then had the full benefit and enjoyment of, the said additional works in the replication mentioned, and the said works in the said fourth plea mentioned, the same being fully completed within the said reasonable time as aforesaid.

Third replication to the fourth plea, —that, before any breach of the said agreement in that plea mentioned, and before the plaintiffs had incurred or become subject or liable to any penalties for the non-completion of the said work in accordance therewith, it was mutually agreed by and between the plaintiffs and defendant, for good consideration in that behalf, that so much of the said agreement as related, to the completion and giving up and finishing of the said premises on or before the said 20th of March, 1859, under certain penalties if the same were not so given up and finished, should be, and the same was, rescinded.

[835] The defendant demurred to the second replication to the fourth plea, the ground stated in the margin being, “that the replication does not shew that the delay in the completion of the works mentioned in the agreement in the fourth plea, was the act of the defendant alone.” Joinder.

Kinglake, Serjt., in support of the demurrer (*a*). The [836] question is, whether

(*a*) The points marked for argument on the part of the defendant were as follows:—

“1. That, inasmuch as the agreement for the additional works makes no provision for rescinding or waiving the penalties in case the original works were not completely finished and given up by the time specified, the provision as to the penalties contained in the original agreement remained in force, and the penalties incurred by the admitted delay:

“2. That it will not be intended that the express provision contained in the original agreement as to the penalties was rescinded or rendered of no force merely because the plaintiffs afterwards undertook to perform additional works which they, appearing to be builders, must have known, or they were bound to have informed themselves, would interfere with or delay the completion of the original works beyond the specified time:

“3. That the absence of any provision in the agreement for the additional works in regard to the penalties, shews that the intention of the parties, particularly as

the replication to the fourth plea is a good equitable replication. The substance of it is, that the second agreement therein referred to rendered it impossible for the plaintiffs to complete the work contracted for by the first agreement within the time stipulated. That clearly is no answer to the plea. The plaintiffs are bound by their contract. The authorities upon this subject are all referred to in a recent case of *Brown v. The Royal Insurance Society*, 28 Law J., Q. B. 275. In an action on a policy of insurance against fire, which contained a condition by which the society reserved to itself the right of reinstatement in preference to the payment of claims, the defendants pleaded, that, having elected to reinstate the insured premises, they were proceeding with the reinstatement thereof, when, by order of the commissioners of sewers, lawfully acting in that behalf, the premises were taken down, as being in a dangerous condition, such condition not being caused by the fire; and that, if the said premises had not been so taken down, they (the defendants) would have proceeded with such reinstatement, and would have restored them to the condition they were in before the fire: and it was held, on demurrer, by Lord Campbell, Crompton, J., and Hill, J.,—Erle, J., dissenting,—that the plea was bad. Lord Campbell there said: “The society undertook what is lawful, and what continued to be lawful, and, whether they can or cannot do what they undertook to do, is quite immaterial: they must either do it or pay damages for not doing it. That was the doctrine laid down in *Paradine v. Jane*, and adopted by me in *Hall v. Wright*, 27 Law J., Q. B. 345, [837] which case is now before the Exchequer Chamber (a)¹, and to which doctrine I still adhere. If a party undertake to do what is lawful, and does not do it, it is no defence for him to say that he cannot do it, if the law has not rendered it unlawful for him to do it. Now, in this case, there is nothing unlawful: if it has become impossible, damages must be paid.” In *Paradine v. Jane*, Aleyn, 26, the rule is thus laid down:—“Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him: as, in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused: Dyer, 33 a., 1 Inst. 53 a., 283 a.; 12 H. 4, fo. 6. So of an escape: 4 Co. 84 b.; 33 H. 6, fo. 1. So, in 9 E. 3, fo. 16, a supersedeas was awarded to justices that they should not proceed in a cessavit upon a cesser during the war. But, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it: Dyer, 33 a.; 40 E. 3, fo. 6 h.” In Broom’s Maxims, 3rd edit. 222, it is said,—“The maxim ‘lex non cogit ad impossibilia, or, as it is also expressed, ‘Impotentia excusat legem,’ is intimately connected with that last considered (b), and must be understood in this qualified sense, that impotentia excuses when there is a necessary or invincible disability to perform the mandatory part of the law, or to forbear the prohibitory. The law itself, [838] and the administration of it, said Sir W. Scott (a)², with reference to an alleged infraction of the revenue laws, must yield to that to which every thing must bend.—to necessity: the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must

against the defendant, not appearing to be a builder, was, that the provision as to the penalties in the original agreement was to remain in force for the defendant’s protection:

“4. That the plaintiffs, who appear to be builders, if they had intended not to remain bound by the provision as to penalties by reason of the additional works, they were bound, when they engaged to perform such further works, to have informed the defendant that the performance of the same would necessarily, or would probably, delay the completion of the original works beyond the specified time:

“5. That it appears that the delay in the completion of the original works arose solely by reason of the plaintiffs’ own acts, agreement, and consent, and that the plaintiffs themselves were the sole cause of such delay:

“6. That it does not appear that the delay in the completion of the original works was caused by any act of the defendant alone.”

(a)¹ Reversed in the Exchequer Chamber, —see 29 Law J., Q. B. 43.

(b) Actus Dei nemini facit injuriam.

(a)² The Generous, 2 Dods. 323, 324.

adopt that general exception in the consideration of all particular cases. 'In the performance of that duty, it has three points to which its attention must be directed. In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect, for, there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature.' Again, at p. 224, it is said,—“If, however, a person by his own contract absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events: in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by nor within the control of the party.” The authorities cited for this are, *Hadley v. Clarke*, 8 T. R. 259, 267, *Atkinson v. Ritchie*, 10 East, 533, 534, *Marquis of Bute v. Thompson*, 13 M. & W. 487, *Hills v. Sughrue*, 15 M. & W. 253, *Jervis v. Tompkinson*, 13 Hurlst. & N. 195, 208, *Spence v. Chodwick*, 10 Q. B. 517, 528, and *Schilizzi v. Derry*, 4 Ellis & B. 873. *Spence v. Chodwick* is a distinct authority. In assumpsit by a shipper on a contract of [839] affreightment, the declaration stated that the plaintiff had shipped on board the defendant's ship, then in the bay of Gibraltar, and bound for London, calling at Cadiz, certain goods to be safely conveyed to London, and there delivered in good order, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats, &c., excepted, the plaintiff paying freight: alleging a promise by the defendant so to convey and deliver the cargo, saving the above exceptions, and a breach, that he failed to do so. The defendant pleaded that the ship in the course of her voyage called at Cadiz, and was then within the jurisdiction of the officers of customs there, and of a certain court of Spain, described as the tribunal of the subdelegation of the revenues of the province of Andalusia; that, while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers, against the will and without the default of the defendant, on a charge of suspicion of their being contraband according to the law of Spain, and were confiscated by a decree of the said court, upon the charge aforesaid: and it was held, on demurrer, that the plea disclosed no excuse within the express exceptions in the contract, that the decree of confiscation was in itself no answer, and that it did not appear by the plea to have been incurred through any fault of the plaintiff, and consequently that the plaintiff was entitled to judgment. Wightman, J., said: “There was no illegality in the contract itself; and the case comes within the principle recognized by Lord Ellenborough in *Atkinson v. Ritchie*,—‘The rule laid down in the case of *Paradine v. Jane* has often been recognized in courts of law as a sound one, i.e. that, when the party by his own contract creates a duty or charge upon [840] himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract:’ and he refers to several other cases where the same principle has been recognized. The defendant here was prevented by inevitable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency: he has not done so, and is without excuse.” *Jervis v. Tompkinson*, 1 Hurlst. & N. 195, is to the same effect. A court of equity will only interfere to stay proceedings on a contract where there has been a distinct alteration by some subsequent contract, or there has been some mutual mistake: and, to make a good equitable plea or replication, it must disclose matter in respect of which an absolute and unconditional or unqualified injunction would be granted: *Steele v. Haddock*, 10 Exch. 643; *Wood v. The Copper Miners in England*, 17 C. B. 561, 586. Nothing of that sort appears here. It is perfectly consistent with this replication, that the work under the first contract might, notwithstanding the second, have been performed within the time stipulated, if the plaintiffs had used a little extra exertion. And there is no allegation that they knew that the second agreement presented any impediment to the due performance of the first. That knowledge rested entirely with the plaintiffs.

Grant, contra (a). The second replication to the [841] fourth plea is good either

(a) The point marked for argument on the part of the plaintiff was as follows:—

“That the replication is good on equitable grounds, as shewing that the defendant

upon legal or equitable grounds. As an equitable replication, it may be sustained upon the well-known rule of equity, that, notwithstanding express stipulations in a contract, the parties may by their conduct waive them: *Kirk v. The Bromley Union*, 16 Law J., Ch. 114, 17 Law J., Ch. 127. The second contract here need not have been in writing. It is also a principle of equity, that time will be deemed of the essence of the contract in all cases where it can be collected from the terms of the contract that the parties intended that the time for its completion should be strictly adhered to: *Hypwell v. Knight*, 1 Y. & C. Exch. 401. Alderson, B.,—p. 418,—explains the circumstances under which Lord Eldon, in *Seton v. Slade*, 7 Ves. 265, held such a stipulation to have been waived. [Willes, J. These were cases of specific performance.] The second contract was, so far as concerned the time for its performance, a complete waiver of the first. [Williams, J. A builder contracts, under a penalty, to build a house by a given time. Afterwards the customer requires something additional, say, a verandah, which cannot be put up until after the expiration of the time named in the original contract, so that it is rendered impossible to finish the stuccoing of the outer wall. I can very well understand that that would afford a good excuse for the breach, provided it were shewn that all the rest of the work had been done within the stipulated time. But that is a very different case from the present.] Here, the work under the second is alleged to have been so mixed up with the work in the first agreement that it became impossible to complete the work in the first agreement mentioned until the additional work was also completed. [Williams, J. The plaintiffs should at all events shew that they had performed all the work under the first agreement that was not ren-dered impossible of performance by the second agreement.] Being mixed up, the whole was rendered impossible of performance. [Willes, J. Is it not consistent with this replication that there was some part of the work under the first agreement left uncompleted, which might have been completed notwithstanding the second agreement?] It is submitted not. [Williams, J. I do not think the replication discloses any equity. Willes, J. Suppose a builder contracts under a penalty to build and completely finish two houses within a given time, and No. 2 is not completed within the time: would it be any answer for him to say that he was prevented from completing it, because the customer had required an alteration in No. 1? To raise an equity, it should be shewn that the defendant has by the act of the plaintiff been prevented from completing the whole or any part thereof.] To entitle himself to the penalty under the first agreement, the defendant should shew that he has done nothing to waive it: *Carpenter v. Blaulford*, 8 B. & C. 575. At all events, the replication is good as a legal answer to the plea; and it is in no degree weakened as a legal replication by the addition of the words "on equitable grounds." [Willes, J. The case of *Holme v. Guppy*, 3 M. & W. 387, seems to be in your favour. There, the plaintiffs, on the 19th of April, 1836, entered into a written contract to build, for the sum of 1700l., a brewery for the defendants so far as regarded the carpenter's work, within the space of four months and a half next ensuing the date of the agreement; and, in default of completing the same within the time thereinbefore limited, to forfeit to the defendants 40l. per week for each week that the completion of the work should be delayed beyond the 31st of August,—the amount to be deducted from the 1700l., as liquidated damages. The plaintiffs did not begin the work for four weeks after the date of the agree-ment, in consequence of the defendants not being able to give them possession: they were afterwards delayed one week by the default of their own workmen, and four weeks by the default of the masons, &c., employed by the defendants: and the work was not completed till five weeks after the time limited. It was held that the defendants were not entitled to deduct from the 1700l. any sum in respect of the delay, either for the one or for the four weeks. "It is clear," said Parke, B., "that the plaintiffs were excused from performing the agreement contained in the original contract; and there is nothing to shew that they entered into a new contract by which to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large, and consequently they are

made a contract with the plaintiffs, and derived the benefit thereof, by which the work mentioned in the original contract was necessarily prevented from being completed within the time in the contract mentioned, as the defendant well knew."

not to forfeit anything for the delay."] That case shews that this replication is a good legal answer, on the ground of waiver.

Kinglake, Serjt., in reply. *Holme v. Guppy* was simply a case of waiver. Here, there is no allegation in the replication to shew that the defendant knew that the additional work required to be done under the second agreement would render it impossible for the plaintiffs to perform the contract contained in the first. Consequently there could be no waiver.

WILLIAMS, J. I am of opinion that the replication to the fourth plea is a good replication, and that the plaintiff is entitled to judgment on this demurrer. It is unnecessary to say whether the replication might be sustained as a good equitable replication. It is enough to say that some members of the court entertain grave doubts, on the ground that it does not shew that all that could be done towards the performance of the first agreement had been done by the plaintiffs. But we are [844] all agreed, that, on legal grounds, the replication is a good answer to the plea. The plea in substance states that the work was done and the materials provided under an agreement in writing by which the plaintiffs agreed with the defendant to build and completely finish certain houses for him fit for habitation by the 20th of March, 1859, under what is called a penalty of 1l. for each house for every week the work should remain incomplete and possession withheld from the defendant after that date; that the amount of the penalty was to be paid out of the moneys due or which might become due to the plaintiffs under the agreement; that the plaintiffs did not completely finish the houses on or before the 20th of March, but possession was withheld from the defendant for twelve weeks, and therefore the defendant claimed to deduct from the moneys due to the plaintiffs the sum of 72l. The replication denies that the penalty was ever incurred in point of fact or of law. It alleges, that, after the making of the agreement mentioned in the plea, and before any of the alleged penalties had been incurred, it was mutually agreed between the plaintiffs and the defendant that the plaintiffs should perform certain other work upon the houses in addition to the work in the first agreement contained, upon the terms that the plaintiffs should perform the last-mentioned work within a reasonable time; that the last-mentioned work was so mixed up with the work upon the premises in the first agreement mentioned, being part and parcel thereof, that it became impossible to complete the works in the first agreement mentioned until the additional works were also completed,—as the defendant at the time of making the second agreement mentioned always well knew; that the plaintiffs completed the work in the second agreement mentioned within a reasonable time, and also at the same time completed the works in the [845] first agreement mentioned, and forthwith gave up possession of the same to the defendant; and that, using all due and reasonable dispatch in that behalf, it was impossible to have completed the works in the first agreement mentioned in accordance with the terms and at the time in that agreement mentioned, in consequence and by reason of the premises in the declaration mentioned. In substance the allegation is, that the defendant, with knowledge that the new work rendered it impracticable to complete the work first contracted to be done within the time stipulated, makes an agreement that the new work shall be done, and that the plaintiffs shall do that work, not within the time fixed by the original contract, but within a reasonable time. It appears to me that the second agreement operated as a waiver of the stipulation as to time in the first agreement, and a consent that the performance of the work thereunder shall be postponed until after the lapse of the reasonable time provided for the performance of the work under the second agreement. This, as it seems to me, is nothing more or less than a waiver of the penalties, and affords a good answer to the fourth plea.

WILLES, J. I am of the same opinion. It struck me at one time that the replication was bad for not shewing that all the work had been done which could have been completed notwithstanding the subsequent agreement. I am now, however, satisfied that that is an erroneous view of the case. The 1l. per house per week for the default in performance of the work under the first agreement was clearly not a penalty, but a sum stipulated to be paid as a compensation to the defendant for the delay. It follows, that, when by agreement of the parties a portion of the work is not to be done within the stipulated time, the right to [846] compensation is waived. It appears to me that that is substantially what was decided in *Holme v. Guppy*, 8 B. & C. 575. I agree with my Brother Williams that this is a question of law, and not a question

of equity at all. *Ranger v. The Great Western Railway Company*, 5 House of Lords Cases, 72, and other cases in equity, shew that a question of liquidated damages is always dealt with as a common law question. Of course I except contracts under seal. Upon the ground, therefore, that the replication is a good legal answer to the plea, I am of opinion that the plaintiffs are entitled to our judgment.

BYLES, J. I also am of opinion that the replication is good. The original contract was not one which needed to be in writing; and it might be varied by parol: and it strikes me, that, though not completely rescinded by the second agreement, the original agreement is rescinded and altered so far as relates to the liquidated damages. By the original agreement, the work was to be completed by a time certain. Then comes another agreement under which further work is to be done to the houses, which further work both parties well knew could not be done within the time limited. It is agreed that the work under the old and that under the new agreement shall be done together, and the whole cannot be done within the time limited, and both parties knew it. It seems to follow as a necessary consequence from that that the so-called penal clause in the first agreement is rescinded or repealed by the subsequent parol agreement. I am not sure, upon the authorities which have been referred to, that this stipulation as to time was capable at law of being waived. If, however, there should be any unforeseen difficulty in law, the parties undoubtedly have a remedy in equity: and it seems to me that these plaintiffs have [847] come into court with clean hands. For these reasons, I am of opinion that this is a good replication at law: and, as far as I can see, I also think it is a good replication upon equitable grounds.

KEATING, J. I also, agreeing with my Lord and my Brother Willes, think the plaintiffs are entitled to judgment, on the ground that the replication affords a good legal answer to the plea. The defendant in his plea sets out an agreement under which he claims a certain penalty to have attached for the non-completion of work thereunder by a certain stipulated day. The answer set up by the plaintiffs in their replication is in substance this, that their failure to complete the work upon which the alleged penalty attached, was occasioned by a subsequent agreement which prevented, and which the defendant knew would prevent, the performance of the original contract by the day named. I think that is a good answer to the plea.

Judgment for the plaintiffs.

[848] DAWES v. HAWKINS. July 6th, 1860.

[8 C. 29 L. J. C. P. 343; 4 L. T. 288; 7 Jur. N. S. 262. Referred to, *Cubitt v. Mares*, 1873, L. R. 8 C. P. 716. Applied, *Neill v. Byrne*, 1878, 2 L. R. Ir. 289. Dictum applied, *Piggott v. Goldstraw*, 1901, 84 L. T. 96. Discussed, *Smith v. Walsen*, [1903] 2 L. R. 63.]

There can be no dedication of a way to the public for a limited time, certain or uncertain: if dedicated at all, it must be dedicated in perpetuity. Neither can the public, by non-user, release their rights. An ancient highway over a common or down was, without authority or interference from the owner of the soil, diverted by an adjoining proprietor, who substituted for it a new road, which was used by the public for more than twenty years. After the lapse of that period, the original road was reopened to the public, and the then owner of the soil over which the substituted road passed built a wall and planted trees across the road which had been so substituted. In an action against the defendant for pulling down the wall and cutting down the trees: Held, by Erle, C. J., and Byles, J., dissentiente, Williams, J., that the above facts afforded no reasonable evidence of a dedication of the substituted road to the public, the public user thereof being referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway, or suffers it to become foundrous.

This was an action of trespass for breaking and entering certain land of the plaintiff, situate in the parish of Whitwell, in the Isle of Wight, and near to a certain house and premises of the defendant called "The Hermitage," and pulling down, prostrating, and destroying a wall of the plaintiff, and cutting down, damaging,

and destroying the trees of the plaintiff then growing and being in and upon the said land.

The defendant pleaded,—first, not guilty,—secondly, that the land was not the plaintiff's land,—thirdly, that, before and at the said time when, &c., there was and of right ought to have been a certain common and public highway into, over, and along the said land of the plaintiff in which, &c., for all the liege subjects of our Lady the Queen to go, return, pass, and re-pass on foot and with horses and other cattle, at all times of the day, at their free will and pleasure: wherefore the defendant, being a liege subject of our Lady the Queen, and having occasion to use the said way, did, at the said time when, &c., enter into and upon the said land of the plaintiff, and along the said highway, then using the same as he lawfully might for the cause aforesaid; and because the said wall in the declaration mentioned had been wrongfully erected and was then standing in and across the said highway, and obstructed the same, and because the said trees were planted in and upon, and were then and there preventing the convenient use of, the said highway, the [849] defendant, in order to remove the said obstructions and to be enabled to pass and re-pass along the said highway, did necessarily pull down the said wall, and also remove the said trees from the said highway, doing no unnecessary damage thereby, &c.,—fourthly, a similar plea, alleging a right of way, and due notice given of removing the obstructions. Issue thereon.

The cause was tried before Martin, B., at the last Spring Assizes at Winchester. The facts which appeared in evidence were as follows:—There had from all time been a highway from Whitwell to Chale, in the Isle of Wight, passing over what was formerly a common or down belonging originally to Sir Richard Worsley, and afterwards to Baroness de Villars. About the year 1809 or 1810, one Michael Hoy, who was possessed of an adjoining property called the Hermitage, inclosed a part of the common, including a portion of the old road, by putting up a bank and planting trees across it, and setting out a new road: and the road as so diverted continued to be used by the public as the highway from Whitwell to Chale down to about the year 1828, no one appearing to have made any objection. In the year 1832, the Hermitage became the property of one Barlow Hoy, who made still further incroachments, forming a new road, which new road was used and adopted as a substitution for the old road from that time down to the year 1857.

In 1844, the plaintiff purchased certain land from the Baroness de Villars adjoining Michael Hoy's inclosure: and the trustees of Barlow Hoy at the same time purchased from the Baroness the land which had been so inclosed by Michael Hoy. In 1857, the defendant bought the Hermitage from the representatives of Barlow Hoy. The old road through this portion of the land, including the inclosure made by Michael Hoy, having been re-opened by the public, the defend[850]-ant received an allowance out of the purchase-money by way of compensation in respect thereof.

The trespass complained of was, the breaking down a wall which the plaintiff had built across the new road, and cutting down certain trees planted thereon.

On the part of the defendant, it was insisted that it was immaterial whether the old road had ever existed or not, as the public had by more than twenty years' user of the new way over the plaintiff's land gained an indefeasible right to the substituted way.

The learned Baron intimated an opinion, that, if for the convenience of the owner of the land a road was diverted, the public would have a right to use the substituted way so long as the old road remained closed; but that, if the public insisted upon the old road being re-opened, it would again become the true road, and the public right to use the substituted road would cease; for, that, otherwise, it would cast upon the parish the burthen of keeping in repair two highways: and he left it to the jury to say whether, from the evidence, they believed that the old road ran through the inclosure and plantations made by the Hoys, telling them, that, if they came to that conclusion, the consequence would be that there was no public way where the plaintiff's wall had been built, and that the defendant would be liable in trespass for pulling it down.

The jury returned a verdict for the plaintiff, damages 40s.

Edwards, in Easter term last, obtained a rule nisi for a new trial, on the ground of misdirection on the part of the learned judge, in telling the jury that two parallel public roads running to the same point could not exist together, as a parish could

not be compelled to repair both such roads : and in not leaving to the jury the [851] facts proved and necessary to enable them, as a matter of fact, to find whether the locus in quo was a highway or not (a).

Cause was shewn against the rule in Trinity Term last, by Montague Smith, Q. C., and Karlake : and Edwards, Carter, and Kingdon were heard in support of it. The following authorities were referred to :—

For the plaintiff, — *Absor v. French*, 2 Show. 28 ; *The King v. Flecknoor*, 1 Burr. 465 ; *The King v. Ward*, Cro. Car. 266 ; *Duncomb's case*, Cro. Car. 366 ; *Reignolds v. Edwards*, Willes, 282 ; *Taylor v. Whitehead*, Dougl. 745, 749 ; Hawk. P. C., c. 76, § 6, p. 697 ; Burn's Justice, Highways, II. ; Wellbeloved on Highways, 372 ; 2 Wms. Saund. 160, 161, n. (12).

For the defendant, — *Horne v. Willlake*, Yelverton, 141 ; *The King v. Ward*, Cro. Car. 266 ; *Doraston v. [852] Payne* (2 H. Bl. 527), 2 Smith's Leading Cases, 110, 115 ; *The King v. Lloyd*, 1 Campb. 260 ; *The Marquis of Stafford v. Compton*, 7 B. & C. 257 ; *The King v. Leake*, 5 B. & Ad. 469 ; *Poole v. Huskinson*, 11 M. & W. 827 ; *Roberts v. Hunt*, 15 Q. B. 17 ; *The Queen v. Petrie*, 4 Ellis & B. 737 ; Bac Abr. Highways, (D.).

Cur. adv. vult.

Byles, J., in the absence of the Lord Chief Justice, who was engaged at Guildhall, and of Mr. Justice Williams, who was attending the House of Lords, now proceeded to deliver their several judgments and his own.

ERLE, C. J. On this rule, the question was, whether there had been a misdirection at the trial. The issue was on a highway over the plaintiff's land. The existence of some highway was an admitted fact : but the dispute was, whether the line of that way was on the plaintiff's or the defendant's side of the boundary separating the lands of the parties. At the close of the evidence, the defendant's counsel contended that even if the line of the original way should be found to be on the defendant's land, still there was evidence upon which the jury might find that there was also an additional parallel way running over the plaintiff's land. The judge in substance directed the jury that there was no such evidence : and this was the alleged misdirection. The question, therefore, on the rule is, whether there was such evidence.

It was shewn that a highway for horses passed over a common which was the property of Lady Villars and those under whom she claimed till 1844. In that year she conveyed it in two portions, of which the northern has come to the defendant and the southern to the [853] plaintiff. When the common was open, the line of the way was very near the boundary between the two portions, and was found by the jury to have been on the defendant's side of that boundary.

Down to 1809, all the common was open : and, though the true line of way must be taken to have been as found by the jury, there was no obstacle to prevent persons using the way from the usual deviation according to inclination over a waste.

Between 1809 and 1813, Mr. Hoy, without lawful excuse as against the public, and without lawful right as against the owner of the soil, and without objection or notice (as far as appeared), inclosed a part of this common with a ditch and bank, and

(a) The rule was also moved on the ground of the improper rejection of evidence.

A map of the locus in quo was produced on the part of the plaintiff. The witness who produced it did not himself make it : but he stated that he knew the country well, and swore that it was a correct map. It was received.

On the part of the defendant, a map was also produced : but the learned judge, seeing the date of 1774 upon it, declined to receive it, — it not having been made for the purpose of the cause, though it was sworn that it had been altered for the purpose of the trial, and the counsel for the defendant proposed to strike out the date.

In refusing a rule upon this ground, Erle, C. J., said : "The admission of maps and plans is a part of the duty of the judge which requires to be exercised with the most scrupulous care. Notwithstanding the offer of the defendant's counsel to strike out the date of 1774, yet, if that took place in the presence of the jury, they could hardly avoid giving effect to it as an ancient map. No doubt, the map would be admissible if merely put before the jury as representing the surface of the country. I desire to lay down no rule of law upon this occasion. But I do not see sufficient ground for allowing the rule to go upon this point."

included within this inclosure the line of way for more than one hundred yards; and after this inclosure, down to 1832, persons using the way, and arriving at the inclosure, for the most part, deviated from the line of way a few yards to the south, and so passed along the outside of the inclosure, and returned to the line of way by turning a few yards towards the north at the other end; so that the deviation began at the obstruction, and was commensurate therewith. The line of this inclosure became afterwards the line of division between the plaintiff's and the defendant's land, and therefore the travellers who thus deviated passed over what has since become the plaintiff's land. This user of the line of deviation instead of the line of way continued only till 1832, when the whole common was planted, and a way was laid out further to the south, and altogether away from the place in question.

In 1857, the obstruction was removed, and the original line over the defendant's land was re-opened: and it remains to be seen whether, under these circumstances, there is any evidence that the line over the plaintiff's land has also become a highway, that is, [854] whether it was dedicated by the owner of the soil, and used by the public as a highway.

Express evidence of dedication by the owner there was none; and there seems to me to be no analogy to the case where the owner of the soil of a highway shuts it up, and sets out a substituted highway over his own land in lieu thereof, which may be express evidence of an intention to give the public some right, either absolute or qualified over the substituted way.

Then, was there any evidence of user, from which the jury might reasonably infer a dedication? The parties who passed intended to use the original highway, and probably deviated without knowing it. If they knew the true line, and deviated by reason of the obstruction, the user of the line of deviation over the adjoining land by reason of a wilful obstruction, is no more the user of a highway as of right than the user of a deviation over the adjoining land by reason of the highway being foundrous.

I know of no decision and no principle making a distinction between a road impassable by non-feasance, that is, neglect of repair, and a road impassable by misfeasance, that is, by a ditch and bank wilfully made. But, even if one deviation be a trespass, and the other be a justifiable act, still in neither case is it the user of a highway as of right; and, therefore, in neither case would the user alone of a line of deviation be evidence against the owner, of a dedication. If the user of a line of deviation is not the user of a highway, then the user of such deviation for twenty years would not alter the nature of the act; for, if the first traveller who preferred turning aside to beating down the bank and passing through it did not use a highway, neither did the second, or those that followed,—the number of passengers being for this purpose immaterial.

[855] According to this view, the judge was right in directing the jury that there was no reasonable evidence to support the defendant's contention. We have taken this to be the effect of the summing-up.

In the argument much stress was laid on some observations by the learned judge relating to the right of the public over the way of substitution where a highway has been stopped by the owner of the soil, and a way of substitution set out by him over his own land, and afterwards the original highway re-opened. We do not discuss those observations, nor the argument relating to them, as we consider the case to have been rightly disposed of by telling the jury that there was no reasonable evidence for them upon these facts of the way in question.

For these reasons I am of opinion that the rule should be discharged.

WILLIAMS, J. I regret that I cannot quite concur with my Lord in the judgment he has given in this case. I think there was some evidence of dedication of the way over the plaintiff's land used by the public during the time the old way was obstructed by the inclosure. That user lasted for nearly twenty years at least; and some of the witnesses described the deviation as having been a formed line of road. It is incontrovertible, that, if this uninterrupted enjoyment by the public had stood alone, it would have afforded some evidence from which the jury might have inferred an intention on the part of the owner of the soil, whoever he might be, to dedicate the way to the public. But, in the present case, it is said that no such intention can be inferred: because the user may be accounted for by the evidence that the adjoining way, which the public had a right to travel, had been wrongfully inclosed and obstructed, and that the de-[856]-viation was not a trespass, but only done in the

exercise of the public right of going on the adjacent ground, when a common highway has become impassable. It is remarkable that in the text-books that right is confined to cases where the highway is foundrous and out of repair: see 2 Saund. 160 b., note (12) to *Per v. Stoughton*, 1 Russell on Crimes, 3rd edit. 334; 2 Smith's Leading Cases, p. 119, notes to *Doraston v. Payne*. And on principle it may be doubted whether the burthen to which the adjacent soil is subjected, when the parish has been guilty of a non feausance in neglecting to keep the highway in repair, ought to be likewise inflicted because some wrongdoer has put an obstruction on the highway which may be abated as a nuisance by any one who has occasion to use the road; at all events, unless the obstruction be of such a nature that, practically, it cannot be abated, and so the road is in effect impassable. However, in the case of *Absor v. French*, which is very shortly and obscurely reported in 2 Show. 28, it seems to have been held a good plea to an action of trespass, that the plaintiff himself had stopped a highway so as the defendant could not pass, and therefore he went over the plaintiff's close, doing as little harm as he could. But, even supposing that the right exists, generally, of going on the adjacent soil when a highway is obstructed, still, if the owner of the soil for a great many years submits to such a burthen, instead of causing the obstruction to be removed, this would afford some evidence, I conceive, of his intention to dedicate the substituted road to the public.

It does not appear to have been distinctly shewn who was the owner of the soil during the time of the public use of the road in question,—whether it was the same person who obstructed the old highway, or the owner of the adjacent down. But the law is clear that, if there has been a public uninterrupted [857] user of a road for such a length of time as to satisfy the jury that the owner of the soil, whoever he might be, intended to dedicate it to the public, this is sufficient to prove the existence of a highway, though it cannot be ascertained who the owner of it has been during the time the road has been so used by the public: see *The Queen v. East Mark*, 11 Q. B. 877. If the soil over which the road passed in the present case belonged to the person who made the inclosure and thereby obstructed the old highway, I think it plain that he intended a dedication; because his wish must surely be deemed to have been that the inclosure should always continue, that the public should be deprived of the old road, and, in lieu thereof, have the substituted one. If the soil belonged to the owner of the down, Lady Villars, her acquiescence in the continuance of the inclosure which necessarily stopped the old highway, coupled with the uninterrupted continuance of the public user of the substituted road, afforded, I think, evidence which ought to have been laid before the jury of an intention on her part to dedicate.

The effect of this evidence was certainly much weakened by the circumstance that, after the substituted road had been used by the public for nearly twenty years up till 1832, the use of it was discontinued by reason of a new way having been laid out in a different direction. And if, having regard to all the circumstances of the case, the jury had thought fit to have negatived any intention to dedicate, I should have approved of their verdict. I therefore do not at all regret that my learned Brethren should have come to the conclusion that there ought to be no new trial in the case. At the same time, I think it is of such importance to adhere to what I conceive to be the law as to evidence of dedication of highways, that I have [858] thought it my duty to express my opinion, that, for the reasons above stated, there was some evidence of it in the present case. As it appears to the majority of the court, however, that the effect of the summing-up was to direct the jury that there was no reasonable evidence of that kind, and it likewise appears to them that this direction was right, the rule must be discharged; and I abstain, as my Lord has done, from expressing any opinion on the other points raised on the argument of the rule.

BYLES, J. I think the direction of the learned judge substantially correct. It amounts to this, that, at the time in question, that is to say, after the old road had been re-opened, the alleged new road did not exist. Indeed, I conceive that there was no reasonable evidence to be submitted to the jury that the alleged new road ever had existed. It is clear that there can be no dedication of a way to the public for a limited time, certain or uncertain. If dedicated at all, it must be dedicated in perpetuity.

It is also an established maxim, once a highway always a highway: for, the public cannot release their rights, and there is no extinctive presumption or pre-

scription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute.

The true question, therefore, seems to be this,—was there any reasonable evidence of a dedication of the alleged new way to the public by the owner of the soil?

I collect from the evidence that the material facts were these. The old road was an antient and undoubted highway, and was illegally stopped about the year 1813. The public in consequence deviated on to [859] the adjoining land, which was an open down. The deviation was over various parts of the down: but the principal track was nearly parallel with the old road. The ownership of the soil both of the old road and new tracks was at the time of the deviation in the same person. About the year 1832, the principal track, called at the trial the new road, was stopped by the occupier building a wall thereon. For the last twenty-eight years that track has never been used by the public as a road. But, about the year 1857, the old road was re-opened to the public.

The contention of the defendant throughout the trial had been that the principal track of deviation was no deviation at all, but was the true antient road. This contention the jury decided against him. But the learned counsel for the defendant in his summing-up to the jury at the close of the case for the first time raised the further point, that, the deviating track, even if not the antient road, had been dedicated to the public, and become a second highway, parallel to the old one.

The facts, however, as above stated, do not appear to me to amount to any reasonable evidence of a dedication to the public.

It was plain that the public had never used the deviating track, except when they were shut out from the true antient highway. The public user, therefore, was referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway: *Absor v. French*, 2 Show. 28. And it further appeared that the deviation was not confined to a single defined track, but was at least occasionally exercised widely over the down. It is difficult to suppose that the owner of the soil could have assented to so extensive a dedication as such an user would imply. Lastly, the deviating track [860] had been built up and been disused for twenty-eight years.

These facts seem to me very consistent with the exercise of a public right of deviation during the temporary obstruction of a road, but inconsistent with the permanent dedication to the public of a new way, whether parallel to the old road or straggling over the down,—the old road still continuing to exist in point of law.

But, assuming the facts to be as consistent with the defendant's hypothesis as with the plaintiff's hypothesis, yet there is still no balance of probability in favour of the defendant's hypothesis. And, if that be so, the burthen of proof lying on the defendant, there is no evidence to be left to the jury.

Lastly, even assuming some evidence of a new road to exist, yet it is at most such a mere scintilla of evidence, that, if the jury had found a verdict for the defendant upon it, the verdict would, I think, certainly have been set aside as against the weight of evidence. If so, there can be no new trial: see the observations of the court of Exchequer Chamber in *Avery v. Bowden*, 6 Ellis & B. 972.

For these reasons, I am of opinion that the rule for a new trial must be discharged. Rule discharged.

[861] IN THE EXCHEQUER CHAMBER.

TRINITY VACATION, 23 & 24 VICTORIA.

SANTOS v. ILLIDGE AND OTHERS. July 9th, 1860.

[S. C. 29 L. J. C. P. 348; 3 L. T. 155; 6 Jur. N. S. 348; 8 W. R. 705. See *Kaufman v. Gerson*, [1903] 2 K. B. 117; [1904] 1 K. B. 591.]

The defendants, British subjects resident and domiciled in Great Britain, being possessed of certain slaves in the Brazils, where the purchase and holding of slaves is lawful, contracted with the plaintiff a Brazilian subject domiciled in the Brazils, to sell them to him to be used and employed there. Some of the slaves had been purchased by the defendants in the Brazils after the passing of the 5 G. 4, c. 113.

but before the passing of the 6 & 7 Vict. c. 98, for the purpose of being employed and they were employed in the working of certain mines there of which the defendants were the proprietors: the rest of the slaves were the offspring of those first mentioned, and were in the possession of the defendants before the passing of the last-mentioned act:—Held, by Bramwell, B., Hill, J., Channell, B., and Blackburn, J.,—reversing the judgment of the court of Common Pleas,—that the contract might be enforced here, there being nothing in the statutes to prohibit a contract by a British subject for the sale of slaves, lawfully held by him in a foreign country where the possession and sale of slaves is lawful.—Held, by Pollock, C. B., and Wightman, J., that the contract was illegal and void,—the 5 G. 4, c. 113, prohibiting the buying or selling of slaves by British subjects everywhere, and there being nothing in the subsequent statute to remove that prohibition.

This was a writ of error upon a judgment of the court of Common Pleas in an action upon a contract for the sale by the defendants, British subjects, to the plaintiff, a Brazilian, of certain slaves in the Brazils

The declaration stated that the defendants, being the directors of an association or co-partnership established for carrying on mining operations within the dominions of the Emperor of Brazil, under the name and style of the Imperial Brazilian Mining Association, agreed in writing to sell to the plaintiff, who then agreed to purchase and take from them, certain slaves belonging to and in the possession of the said association or copartnership in the empire of Brazil, at and for the price or sum of 32,000*l.*, and to deliver the said slaves to the plaintiff in Brazil aforesaid on a certain day which elapsed before the breach hereinafter set forth: and that, although the plaintiff had done all things on his part, and all things had happened and been done, to entitle him to have the said slaves sold and de-[862]-livered to him according to the said agreement, and had paid to the defendants the sum of 1000*l.* as a deposit in part payment of the said price, yet the defendants had broken their agreement, and had wholly refused to sell or deliver, and had not delivered to the plaintiff the said slaves, or any of them, whereby the plaintiff had lost and been wholly deprived of the use and benefit of the said slaves, and of the said sum of 1000*l.*, and had been otherwise damnified.

The defendants pleaded, that the said association or co-partnership was and is an association or co-partnership consisting of the defendants and others, all of whom were and are British subjects, and resident and domiciled in Great Britain, and that the said agreement was made after the coming into operation and effect of an act of parliament made and passed in the session of parliament holden in the 6 & 7 Vict. (c. 98), intituled “An act for the more effectual suppression of the slave-trade,” and that the said agreement was and is illegal and void.

The plaintiff replied, that the said slaves so agreed to be sold and delivered by the defendants to the plaintiff were and are, as to some of them, slaves lawfully acquired and purchased by the said association or co-partnership in the said empire of Brazil before the coming into effect of the said act in the plea of the defendants mentioned, for the lawful purpose of being employed and used as slaves within the said empire of Brazil, and not otherwise, and, as to the residue of them, were and are respectively the children and offspring of the slaves so lawfully acquired and used and employed as aforesaid; and that the said slaves were, and each of them was, lawfully in the possession of the said association or co-partnership at the time of the coming into effect of the said act; and that the acquiring, purchasing, and holding of slaves within the [863] said empire of Brazil was and is, by the laws in force within the said empire, lawful and permitted; and that the plaintiff, at the time of the said agreement, was, and from thence hitherto has been and still is, a subject of the Emperor of Brazil, and domiciled within the said empire, and amenable to the laws thereof, and was not nor is a British subject or amenable to the laws and jurisdiction of this realm; and that the said slaves were so agreed to be sold and delivered for the bona fide purpose of their being used and employed by the plaintiff in the said empire of Brazil, and not elsewhere.

The defendants rejoined, that the said slaves in the replication mentioned to have been acquired and purchased by the said association and co-partnership, were acquired and purchased by them after the coming into operation of an act passed in the 5 G. 4

(c. 113), intituled "An act to amend and consolidate the laws relating to the abolition of the slave-trade."

To this rejoinder the defendants demurred,—the grounds of demurrer stated in the margin, being, "that the rejoinder confesses, without avoiding, the plaintiff's replication, inasmuch as by the act 5 G. 4, c. 113, the acquiring and purchasing of slaves by British subjects in a foreign state where slavery was not unlawful, for the purpose of being used and employed in such state, was not prohibited or made or declared to be an offence; and that, by force of the proviso in the 5th section of the 6 & 7 Vict. c. 98, the sale by British subjects of slaves lawfully acquired by them and in their lawful possession at the coming into operation of that act, and of the children of such slaves, to a subject of Brazil, not being a British subject, was and is lawful." Joinder in demurrer.

Upon the argument of this demurrer, the court of Common Pleas held that the contract for the sale of [864] these slaves under the circumstances stated in the pleadings was rendered illegal by the 5 G. 4, c. 113, and 6 & 7 Vict. c. 98, though such slaves were acquired and were in the possession of the sellers before the passing of that act: vide ante, vol. vi., p. 841.

The plaintiff thereupon sued out a writ of error, the grounds of error alleged, being, "that the construction put by the court of Common Pleas upon the words of the sections of the acts of parliament concerned and mentioned in the pleadings is contrary to the common meaning of such words, and contrary to the intention of the legislature; that the statute 5 G. 4, c. 113, does not make illegal the selling of slaves by British subjects in the jurisdiction of a foreign country where such sale is legal by the laws of such foreign country; that the statute of 6 & 7 Vict. c. 98, excepts from the operation of that act, and of the former act, the sale of the slaves such as are in the pleadings in this cause mentioned; that the contract for the sale of the slaves is good in law; and that the holding of them is not illegal."

The case was argued on the 4th of February last, before Pollock, C. B., Wightman, J., Bramwell, B., Hill, J., Channell, B., and Blackburn, J., by Bovill, Q. C. (with whom was Malcolm), for the plaintiff in error, and by Lush, Q. C. (with whom was the Common Serjeant), for the defendant in error.

The following cases and statutes were cited and commented upon:—

For the plaintiff in error,—*Le Louis*, 2 Dods. Adm. Rep. 210, 246, 252, *Hubbard v. Johnstone*, 3 Taunt. 177, 220, *The Queen v. Zulueta*, 1 Car. & K. 215, 5 G. 4, c. 113, 3 & 4 W. 4, c. 73, and 6 & 7 Vict. c. 98, ss. 5, 6.

For the defendants in error,—5 G. 4, c. 113, s. 2, and 6 & 7 Vict. c. 98, ss. 5, 6.

Cur adv. vult.

[865] WIGHTMAN, J. It appears upon the pleadings in this case that the defendants are British subjects resident and domiciled in Great Britain, and that they were and are the owners and possessed of certain slaves in the empire of Brazil, where purchasing and holding slaves is lawful, and that they contracted with the plaintiff, a Brazilian subject, and domiciled in Brazil, to sell and deliver such slaves to him, to be used and employed in Brazil, and not elsewhere. It also appears that some of the slaves were purchased by the defendants in Brazil after the passing of the 5 G. 4, c. 113, but before the passing of the 6 & 7 Vict. c. 98, for the purpose of their being employed there, and that they were employed there, and not elsewhere; and that the rest of the slaves were the children of those first mentioned, and were in the possession of the defendants before the passing of the last mentioned act.

The question is, whether the contract for the sale of the slaves by the defendants to the plaintiff is, under these circumstances, a valid contract in England, and which can be enforced there.

I am of opinion that it is not, and that the judgment of the court of Common Pleas should be affirmed.

Whatever may have been the case before the passing of the 5 G. 4, c. 113, the 2nd section of that statute enacts that it shall not be lawful, except in such cases as are thereafter mentioned, for any persons to deal or trade, purchase, sell, barter, or transfer, or to contract for the dealing or trading in, purchase, sale, barter, or transfer of, slaves. The present case does not fall within any of the exceptions mentioned in that statute; and the terms are so general as to apply to any contracts which may be sought to be enforced in the British dominions or to which British subjects are parties. The object of the statute appears to me to have been to prevent buying or selling

slaves by British [866] subjects everywhere. As the original purchase of the slaves by the defendants, and their possession and holding them under that purchase, were after the passing of that statute, it appears to me to be clear that the present action cannot be maintained, as the contract in this country by force of that statute, unless the subsequent statute of 6 & 7 Vict. c. 98, contains provisions which remove the objection. It is said, that, whatever may have been the construction which would have been put upon the statute of 5 G. 4, c. 113, had it stood alone, the 1st section of the 6 & 7 Vict. c. 98, shews that the legislature understood that the former statute applied only to contracts and dealings with respect to slaves in the British dominions. By that section it is enacted that all the provisions of the 5 G. 4, c. 113, and of that act, should be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or in any foreign country; and all the several matters and things prohibited by the 5 G. 4, c. 113, when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, shall be deemed offences against that act, and punished accordingly,—with a proviso that nothing in the 6 & 7 Vict. c. 98, contained should repeal or alter any of the provisions of the 5 G. 4, c. 113.

It was contended, for the plaintiff in error, that this amounted to a statutory declaration that the 5 G. 4, c. 113, did not until the passing of the 6 & 7 Vict. c. 98, extend to such a case as that now in question.

Upon this subject, I agree in opinion with the court below, that, although the 5 G. 4 is in terms so general as to include, and was intended to include, such cases as that in question, without the aid of any auxiliary statute, the enactment in the 6 & 7 Vict. may have [867] been intended to remove any doubt that might possibly have been raised upon the 5 G. 4, c. 113, by enacting in express terms that which was only included before in the general words of the statute. There are many instances of statutes containing enactments which are in affirmance of the common law, and not making a new law, though the statutes from their terms might be supposed to do so.

If I am right in thinking that the provisions of the 5 G. 4, c. 113, s. 2, included the case of a British subject purchasing slaves abroad after the passing of that act, in a country where the slave-trade was permitted, and that it was illegal so to do, though the slaves might not be removed from such foreign country, the 5th section of the 6 & 7 Vict. c. 98, relied upon by the plaintiff would be inapplicable; for, if the acquisition be unlawful, the holding by the person who unlawfully acquires can hardly be held lawful when questioned in an English court: and the 6th section only provides that nothing in that act shall be taken to subject any person to penalties for transferring or receiving any share in a joint-stock company in respect of any slaves, in their possession before the passing of that act, or for selling any slaves which were lawfully in his possession at the time of the passing of that act, or which came to him by operation of law. This section would only apply if the slaves were lawfully in the possession of the company at the time of the passing of the act, which I think they were not, for the reasons already given. I therefore think that the judgment of the court below should be affirmed.

The learned judge added that the Lord Chief Baron entirely coincided in his opinion.

BRAMWELL, B. The plaintiff in this case sues on a contract made with him, a Brazilian, to be performed [868] in the Brazils, and which the defendants can lawfully perform there. The defendants refuse to perform it, and give as a reason, one which would not be good there, nor probably in any other country than this, viz. that the performance of their contract there will be an offence against the laws here, and therefore it ought not to be enforced here.

No doubt, the conclusion is correct, if the premises are; but, with submission, the burthen of shewing that the premises are correct is on the defendants.

It is rather begging the question to say that trade in slaves by British subjects is, generally, illegal.

The question may be said to turn on the 6 & 7 Vict. c. 98. By the 1st section, the sale of slaves in foreign dominions by British subjects is prohibited. By section 5, however, it is permitted where the holding or taking of slaves is not prohibited by that or any other act of parliament.

Now, the mere holding is not prohibited by any act; but it is said that the purchase of slaves was prohibited by the 5 G. 4, c. 113, that what could not be law

fully purchased could not be lawfully held : that, as these slaves were purchased after the passing of the 5 G. 4, they cannot be lawfully held : and that, consequently, the holding, and so the sale of them, are prohibited. This makes it necessary to inquire whether the 5 G. 4, c. 113, prohibited the purchase of slaves by British subjects in the Brazils.

With great deference, I cannot help thinking it did not. No doubt, section 2 is general. "It shall not be lawful for any person to deal or trade in, or purchase, &c., slaves." There is in it no limitation to British subjects or British territory. But it is a rule, that legislation *prima facie* is limited to that which is within the jurisdiction of the legislating body. No great quantity of argument can be necessary to prove this. It is within the territory subject to the legis-[869]-lating body that it can enforce its enactments : it is within that territory that it is interested in what the law should be ; and obvious wrong might be done in construing enactments to apply out of that territory, arising from the fact that all legal rights, duties, and offences are legal creations. The laws of two countries might clash therefore.

No doubt the presumption is as I have stated. But that presumption may be rebutted : and it may be shewn that a law applies to things and territories out of the dominions, and (I think) to persons out of the allegiance, of the legislating body, if the enactment is to take effect when they come within it. But, the presumption being as I have stated, a law must be held to extend beyond its ordinary limits of place and person only so far as there is reason for so extending it. I have not been able to find much authority on this : but the following authorities may be referred to,—“The general run of laws enacted by the superior state are supposed to be calculated for its own internal government, and do not extend to its distant dependant countries : which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt that then they are bound by its laws : 1 Black. Com. 101 ; *Attorney-General v. Stewart*, 2 Meriv. 143.

Now, it is clear to me that this act of the 5 G. 4, c. 113, must be held to extend to places out of the dominions subject to the Crown. I cannot doubt that it was intended to apply to the coast of Africa, where the slave trade was carried on. But, was it intended [870] to apply to the territories, or rather the interior of the territories, of the King of Portugal ? Was it intended to apply to the state of Kentucky, in North America ? I think not.

It is to be observed the title of the act is, “to amend and consolidate the laws relating to the abolition of the slave-trade.” The recital is, “it is expedient to consolidate and amend the laws relating to slavery and the slave-trade.” The first section repeals all acts relating to the slave-trade, and the exportation and importation of slaves. Now, we all know that the slave-trade was the trade in slaves between the coast of Africa and the continent and islands of America : and the laws which are to be amended and consolidated, are the same as those repealed, viz. laws relating to the slave-trade and the importation and exportation of slaves. Then, when the different matters prohibited are examined, they will all be found to relate to a trade carried on by shipping. Thus, though the purchase of slaves, and the carrying away of slaves, are prohibited, the holding is not : though the importing, shipping of slaves, detaining of them in a ship, fitting out a ship, shipping goods for such purposes, commanding such ships, insuring such slaves, are prohibited, there is nothing that applies to land transport, or acts on land. Again, by section 3, the slaves are declared forfeited to His Majesty. Is it supposable that that forfeiture could be enforced under s. 22 against a British subject in a foreign court, say, for example, in a court in Carolina ?

The following penal sections down to and including s. 8, and ss. 10 and 11, are open to the same remarks : so are ss. 23 to 45. Section 49, no doubt, would include a foreign state ; but it would also apply to an unoccupied or uncivilized district. Section 9, which in terms applies only to British subjects, is limited to [871] places within the Admiralty jurisdiction. But, further, if this statute extended to British subjects in foreign states, it must have had an effect which certainly was not intended. Section 2 prohibits the sale and the transfer of slaves. What was the British subject to do ? Was he to continue to reside in the foreign country, a possessor of slaves ? He could neither sell nor give them away, as that would be transferring them. It cannot be said he could free them, that is not allowed anywhere : nor that he was to

abscond and leave them ; that might not be for their benefit. What was an executor to do ? Was he to be subject to actions for his testator's debts, under which the slaves might be taken in execution, while he was prohibited from selling them ? It is useless to say that the legislature had no concern for slaveholders, and left them to find their way out of these difficulties. It is not so. Slaveholding by British subjects in British territory continues ; and the purchase and sale of slaves, and their removal, were permitted within that territory under the regulations from ss. 13 to 21. It is impossible to say why the holding and sale of slaves in British territories being permitted to British subjects and others, and the holding by British subjects in foreign countries not being prohibited, nay the acquisition of them by gift being allowed, nevertheless the sale or gift by a British subject in a foreign state was made a felony. For this it seems to me no reason can be given.

If the provisions as to British territories are just, such a construction of the act of parliament would make its application to foreign territories retrospective and most unjust. I cannot help thinking, therefore, that the 5 G. 4, c. 113, if construed by itself, did not prohibit the purchase of slaves in the Brazils by [872] British subjects, the slaves being to be kept and used there. But the 6 & 7 Vict. c. 98, seems decisive.

It extends the 5 G. 4 to British subjects residing or being in foreign dominions. But this enactment, according to the argument, is unmeaning and inoperative : the law was so before. No doubt, the legislature may have made a mistake ; and, if the construction of the 5 G. 4 is clear, as contended for, they must be taken to have done so, and the 5 G. 4 still receives its proper construction as though the mistake had not been made. But it is a strong argument as to the meaning of the 5 G. 4, especially when it is borne in mind how able and zealous were the promoters of this legislation.

But I think the 5th section decisive. It permits the sale of slaves, where the holding is not unlawful. Now, the holding by a British subject of a slave in Brazil, purchased, or whose parent was purchased, by him before the 5 G. 4, c. 113, or which came to him by gift or legacy since, is certainly not prohibited. Such a slave may, therefore, by the 6 & 7 Vict. c. 98, s. 5, be sold by his owner. But, according to the defendants' argument he could not have been before that act passed. The result would be, that the 6 & 7 Vict. c. 98, removes a prohibition which existed before. This is impossible. It shews, therefore, that the 5 G. 4 did not prohibit the sale in the Brazils by a British subject of a slave there ; consequently that the 5 G. 4 does not apply to the Brazils, consequently that the purchase thereof was not forbidden, that the holding thereof is in no sense prohibited, nor consequently the sale.

The contract, therefore, was one which the defendants could lawfully enter into, and which must be enforced here.

[873] Further, I think that, if the 5 G. 4, c. 113, did prohibit the purchase of these slaves, the contract for their sale is lawful. The 6 & 7 Vict. c. 98, s. 5, permits the sale wherever the "holding" is not prohibited. Now, the holding of slaves by a British subject in the Brazils (as I have observed) is nowhere prohibited. But it is said that this holding was prohibited, because there can be no lawful holding where there was an unlawful acquisition. No doubt it is a strong thing to say a man could acquire a property by an act in itself a felony. But it is not a property which our laws deal with ; it is a Brazilian right the defendants are selling. It cannot be said that in fact the defendants do not hold these slaves. They do : and it is not in terms made unlawful by any law of this country.

I think the true construction of the 5th section is, to say it applies to cases where the holding is unlawful, whatever may be its origin. It would be strange that a man should be guilty of a felony in selling a slave, if it turned out the slave had been bought by him, and not guilty if it had been given him. If the legislature by 5 G. 4 meant to make the holding an offence, as well as the acquisition, they should have said so. If the matter arose in this country, it might be there would be no property ; but the holding would not be a separate offence.

BLACKBURN, J. In this case, the plaintiff sues on a contract by which the defendants sold to him certain slaves : breach, that they did not deliver them. The plea is, that the defendants are British subjects, and that the contract was made after the passing of the statute 6 & 7 Vict. c. 98. The replication is, that the slaves were some of them acquired and purchased by [874] the defendants in Brazil before the coming into operation of the 6 & 7 Vict. c. 98, and the others were their offspring ; that purchasing and holding slaves is lawful in Brazil ; and that the plaintiff is a Brazilian

subject. To this is a rejoinder, that the slaves alleged in the replication to have been purchased before the 6 & 7 Vict. c. 98, were purchased after the passing of the statute 5 G. 4, c. 113. There is a demurrer, by which it is, for the purposes of our decision, admitted that the slaves or their ancestors were purchased after the passing of the earlier act, and before the passing of the later one; and the other allegations on the record are to be taken as true. The question then arises, whether, under these circumstances, the contract can be enforced in a British court.

The court of Common Pleas have decided that it cannot. They held, and I quite agree with them so far, that, if the sale and delivery of slaves, under these circumstances, by a British subject, is by a British act of parliament prohibited,—which it certainly is if made a felony,—the contract is according to English law void; and that, though the other contracting party, being a foreigner, might lawfully enter into the contract, which is not forbidden by the laws of his own country, he cannot sue upon that contract in an English court.

They further held that the sale or transfer of slaves by a British subject under these circumstances is a felony; the reasoning by which they seek to establish this is chiefly directed to establish that the Consolidated Slave-trade Act (5 G. 4, c. 113) prohibited any purchase of slaves by a British subject, though in a foreign country. With great deference to them, it seems to me that the question on the construction of that act, need not be decided, as the decision of the present [875] case depends entirely on the construction of a few words in the 5th section of the 6 & 7 Vict. c. 98. That section in express terms enacts that, from and after that act came into operation (1st November, 1843), “all the provisions of the Consolidated Slave-Trade Act (5 G. 4, c. 113) shall be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or any foreign country: and all the several matters and things prohibited by the said Consolidated Slave-Trade Act, by this present act, when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, except only as is hereinafter excepted, shall be deemed and taken to be offences against the said several acts respectively.”

Amongst the matters and things prohibited by the Consolidated Slave-Trade Act, are, “to purchase, sell, barter, or transfer slaves; and these acts are not only prohibited, but the commission of them by a British subject in any place after the 1st of November, 1843, whatever might be the case before, is a felony, unless the case falls within one of the exceptions in the 6 & 7 Vict. c. 98. Those exceptions are contained in ss. 5 and 6. I agree with the court of Common Pleas, that, for the reasons they have stated, sect. 6 has no application to the present case: but, as it seems to me, the whole question in the cause depends on the true construction of sect. 5. That section enacts “That, in all cases in which the holding or taking of slaves shall not be prohibited by this or any other act of parliament, it shall be lawful to sell or transfer such slaves, anything in this or any other act contained, notwithstanding.”

If the present case falls within that enactment, the sale and transfer which the plaintiff seeks to enforce is lawful, even though it should have been prohibited [876] by a former act; if it does not fall within it, the sale and transfer is prohibited by the 6 & 7 Vict. c. 98. The only question, therefore, is, whether this is a case within the 6 & 7 Vict. c. 98, s. 5.

It is a case of a holding of slaves in Brazil by British subjects, the taking having been by a purchase by them after the passing of the 5 G. 4, c. 113, but before the passing of the 6 & 7 Vict. c. 98. The court below held, on the construction of the 5 G. 4, c. 113, that this taking was such that the British subject so purchasing has committed an act made a felony by the 5 G. 4, c. 113, and, of course, prohibited thereby. It seems to me that we need not inquire whether this is the true construction of the 5 G. 4, c. 113: for, assuming it to be so, it seems to me that still the judgment should be reversed.

Assuming the taking to have been prohibited by a British act, still the taking having been of property locally situated in a foreign country, in a manner lawful according to the laws of that country, I apprehend that the property actually passed by the sale, and vested in the purchasers, though they committed a felony according to our law by taking it. It would be otherwise if the transfer were by a British subject of personal property situated within the British dominions; for, the contract passing the property, being prohibited, would be held void, and so the property would

not vest; and it would be questionable how the case would have been, if it had been shewn that the vendor was a domiciled British subject, though the property was locally situated in Brazil. But, where, as we must take it to be here, a Brazilian vendor, in Brazil, transferred property locally situated in Brazil, I apprehend that though the vendees were British subjects the validity of the transfer must on [877] every principle of law depend upon the local law of Brazil, and not upon that of the country of the purchaser: see Story on the Conflict of Laws, c. ix., p. 308 (ed. 1835).

Then, is there any enactment in any British act of parliament prohibiting the holding of the slaves thus illegally but effectually taken? It would have been perfectly competent to the legislature to enact that no British subject should hold any property in slaves so taken; that he should immediately set them free: and that every continuance of holding them should be a fresh offence. But, after examining the Consolidated Slave-Trade Act, and the 6 & 7 Vict. c. 98, I cannot find that the legislature has so enacted in either of those acts: and, no other enactment being suggested, nor, as far as I know, existing, I am constrained to come to the conclusion that holding slaves under these circumstances is not prohibited.

The section in question enacts that, in cases in which the holding or taking shall not be prohibited, "the sale shall be legal." In order to support the judgment of the court of Common Pleas, it is necessary to change the place of the negative, and read those words as if the enactment were, that in cases in which the holding or taking is prohibited, the sale shall not be lawful.

The consequence of such a construction would be, to make those joining in such a sale guilty of felony. I must, in a statute of such a highly penal nature, see that the language of the legislature is such as clearly to make the thing done a crime, before I hold it to be such. It seems to me that the language not only does not clearly shew this, but, construed in its ordinary grammatical sense, shews the contrary: and certainly there is no absurdity or injustice in construing the act [878] as not making the sale under such circumstances a felony.

For these reasons, I think that the fulfilment of this contract would not be illegal, and that the judgment should be reversed.

My Brothers Channell and Hill authorise me to state that they agree in this judgment.

Judgment reversed.

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